



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/PT/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr. Herman von Hebel**

Date: **21 December 2012**

Original language: **English**

Classification: **Confidential**

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ON PROSECUTION APPLICATIONS FOR EXTENSION OF TIME TO
PROVIDE INSPECTION OF RULE 110(B) MATERIAL**

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Mr. Norman Farrell

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Counsel for Mr Mustafa Amine Badreddine:
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Counsel for Mr Hussein Hassan Oneissi:
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I. INTRODUCTION

1. The Pre-Trial Judge is seised of three applications by the Prosecution for an extension of time to disclose material specifically requested by defence counsel for Messrs Ayyash, Oneissi and Sabra (collectively, the "Defence"), pursuant to Rule 110(B) of the Rules of Procedure and Evidence (the "Rules"), and hereby issues his decision.

II. PROCEDURAL BACKGROUND

2. On 25 October 2012, the Pre-Trial Judge issued his decision ordering the establishment of a Working Plan pursuant to Rule 91(A) ("Working Plan Order").¹ Additionally, a regime governing disclosure of specific material requested pursuant to Rules 110(B) and 113 was devised specifically for these proceedings.² In particular, the regime relevant to Rule 110(B) requests ("Rule 110(B) Specific Disclosure Regime") preserved the primarily *inter partes* character of specific disclosure requests with judicial intervention justifiable only in exceptional circumstances.³

3. On 8 November 2012, the Pre-Trial Judge issued a decision on six motions by Defence Counsel for Mr. Sabra (the "Sabra Defence") requesting disclosure of numerous categories of specific material pursuant to Rules 110(B) and/or 113.⁴ The first four of those motions, were filed prior to the Working Plan Order and a determination was required. The Pre-Trial Judge granted the first four motions in part and, with the exception of a few invalid categories, held that the balance of the requests fell within the scope of Rule 110(B) rather than Rule 113.⁵ As such, the Pre-Trial Judge ordered the application of the Rule 110(B) Specific Disclosure Regime to the validly requested categories and ordered the Prosecution to

¹ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012, p. 15, paras (1)-(7).

² Working Plan Order, pp. 15-16.

³ The Rule 110(B) Specific Disclosure Regime, in its fullest terms, required the Prosecution to, within five working days of any request, either: (a) respond in writing, disclosing the material sought; or (b) respond in writing, explaining the Prosecution's reasons as to why the material being sought falls outside the Prosecution's disclosure obligations; or (c) respond in writing, specifying a date within a further 10 working days of that date on which the request for disclosure will be met. Further, only where exceptional circumstances justify it, may a Party seise the Pre-Trial Judge with a request to vary the foregoing time limits, in respect of a specific request for disclosure from the Defence.

⁴ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012 ("8 November Specific Disclosure Decision").

⁵ 8 November Specific Disclosure Decision, para. 37.

file a notice of compliance by 30 November 2012,⁶ effectively requiring any relevant material responding to the Sabra Defence's requests to be disclosed by that date at the latest. The fifth and sixth motions were filed after the Working Plan Order, and accordingly, the Pre-Trial Judge denied relief but directed the Sabra Defence to make its requests thereof directly to the Prosecution in accordance with the Rule 110(B) Specific Disclosure Regime if it so wished.⁷

4. On 20 November 2012, the Prosecution filed an application requesting an extension of time to disclose material in response to various outstanding Rule 110(B) requests by the Defence (the "First Application").⁸ Annex A to the First Application lists 24 categories of Rule 110(B) requests as pending, including two requests by Defence Counsel for Mr. Ayyash (the "Ayyash Defence"), one request by the Defence Counsel for Mr. Oneissi and 21 requests by the Sabra Defence.

5. On 29 November 2012, the Sabra Defence and the Ayyash Defence filed responses to the First Application (respectively, "Ayyash Response" and "First Sabra Response").⁹

6. On 29 and 30 November 2012, the Prosecution filed two additional applications requesting extensions of time to disclose material requested by the Sabra Defence pursuant to Rule 110(B) which remain outstanding (respectively, the "Second Application" and "Third Application").¹⁰

7. On 5 December 2012, the Sabra Defence filed a response to the Prosecution's Second and Third Applications ("Second Sabra Response").¹¹

⁶ 8 November Specific Disclosure Decision, pp. 19-20.

⁷ 8 November Specific Disclosure Decision, para. 62.

⁸ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Application for an Extension of Time to Provide Material Requested by the Defence Under Rule 110(B), Public with Confidential and *ex parte* Annex A, 20 November 2012.

⁹ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Response on Behalf of Mr. Ayyash to the "Prosecution Application for an Extension of Time to Provide Material Requested by the Defence Under Rule 110(B)", 29 November 2012; Sabra's Consolidated Response to Prosecution Motions Regarding Disclosure, Confidential, 29 November 2012.

¹⁰ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Application for an Extension of Time to Provide Material Requested by the Defence Under Rule 110(B), Confidential and *ex parte*, 29 November 2012 (the "Second Application"); Prosecution Application for an Extension of Time to Provide Material Requested by the Defence Under Rule 110(B), Public with Confidential and *ex parte* Annex A, 30 November 2012 (the "Third Application").

¹¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra's Consolidated Response to Prosecution Motions Regarding Disclosure, 5 December 2012.

III. SUBMISSIONS BY THE PARTIES

8. The Pre-Trial Judge recalls from the Working Plan Order that, where exceptional circumstances justify it, Parties are entitled to seize him with requests to vary the established time limits for disclosure in respect of specific requests from the Defence.¹²

A. Prosecution Submissions

9. The Prosecution informs the Pre-Trial Judge that a number of Rule 110(B) requests remain pending, despite having made partial disclosure of some of these requests.¹³ The Prosecution refers to, and adopts, submissions made in its filings prior to the Working Plan Order,¹⁴ where it estimated that it would need until 21 December 2012 to complete disclosure.¹⁵ The Prosecution maintains and reasserts those submissions adding that in most circumstances, the pending requests by the Defence are complex, touch on diverse evidence and are wide in scope.¹⁶ Responding to them requires a significant amount of time to research, collect, list, process, and disclose any relevant material.¹⁷ The process also includes checking and electronically processing files, and comparing located documents to material already disclosed under some other basis.¹⁸

10. For the foregoing reasons, the Prosecution claims it is “unable to meet any deadline imposed before 21 December 2012”.¹⁹ Accordingly, the Prosecution seeks an order that the Prosecution provide the Defence with the material it is entitled to by that date for all of the Defence’s pending requests,²⁰ save for one request by the Sabra Defence (“Request 131”) which the Prosecution seeks an extension of time to disclose by 8 January 2013.²¹

11. Notwithstanding this request for an extension of the deadline to 21 December 2012 however, the Prosecution has indicated in Annex A to the First Application that it is, in fact,

¹² Working Plan Order, para. 24(d).

¹³ First Application, para. 5; Second Application, para. 5; Third Application, para. 6.

¹⁴ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Notice regarding the Working Plan and Request to Extend Certain Deadlines, Confidential, 14 November 2012 with a Public Redacted version filed on 15 November 2012 (“Notice of 14 November 2012”), paras 50-52; Prosecution Supplemental Response to the Joint Defence Motion for Urgent Orders Regarding Trial Preparation, 10 October 2012 (“Supplemental Response of 10 October 2012”), paras 12-13; and Prosecution Response to the “Joint Defence Motion for Urgent Orders Regarding Trial Preparation”, 3 October 2012 (“Response of 3 October 2012”), paras 12-13.

¹⁵ Supplemental Response of 10 October 2012, para. 13.

¹⁶ First Application, para. 6; Second Application, para. 6; Third Application, para. 7.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ First Application, para. 5.

²⁰ First Application, para. 8; Second Application, para. 8, Third Application, para. 9.

²¹ Third Application, para. 9.

able to disclose certain pending categories of request by dates variously assessed as 3, 10 and 14 December 2012 for at least 12 of the 24 pending requests in that particular application.²²

B. Ayyash Response to First Application

12. The Ayyash Defence responds that it has no objection to the First Application.

13. Nevertheless, the Ayyash Defence submits that on 4 July 2012, it orally requested, *inter alia*, investigators' notes from the UNIIC files. The following day, at a Rule 91 working group meeting, the Prosecution undertook to review UNIIC investigators' notes to determine whether and to what extent they fell under any disclosure obligations.²³ The Ayyash Defence argues that this category of request must be properly understood as a Rule 110(B) request and, by way of relief, seeks orders that the Prosecution is to disclose this additional category of UNIIC investigators' notes by 21 December 2012.²⁴

C. Sabra Defence Responses to three Applications

14. The Sabra Defence opposes the First, Second and Third Applications. Firstly, the Sabra Defence notes that in some cases the requests date back several months and is aggrieved by the Prosecution's failure to treat its requests as a matter of priority.²⁵ Secondly, the Sabra Defence submits that the Prosecution's broad "generic excuses" do not amount to demonstrating good cause justifying an extension.²⁶ Thirdly, the Sabra Defence asserts that the Prosecution's delays are adversely affecting its ability to prepare for trial effectively.²⁷ Finally, the Sabra Defence submits that the Prosecution has the obligation to adequately justify and motivate its requests for an extension of time, which it has not fulfilled.²⁸

15. With respect to the First Application, the Sabra Defence proposes, in the alternative, a staggered disclosure process requiring the Prosecution to disclose material in relation to five of the Sabra Defence's requests by 3 December 2012, with the balance to be disclosed by

²² First Application, Annex A. The Prosecution informs that it is able to provide disclosure by 3 December 2012 – Sabra Defence, Items 14, 18 and 19; by 10 December 2012 – Oneissi Defence, Item 1; Sabra Defence, Items 3, 4, 5, 6, 7 and 17; and by 14 December 2012 – Sabra Defence, Items 1 and 13.

²³ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Transcript of Rule 91(D) and (E) Meeting (Closed Session), Confidential, 5 July 2012, pp. 5-7.

²⁴ Ayyash Response, paras 2-3.

²⁵ First Sabra Response, para. 4; Second Sabra Response, para. 3.

²⁶ First Sabra Response, para. 5; Second Sabra Response, para. 5.

²⁷ First Sabra Response, para. 6; Second Sabra Response, para. 9.

²⁸ Second Sabra Response, para. 10.

14 December 2012.²⁹ For the Second and Third Applications, the Sabra Defence asks that the Pre-Trial Judge deny both applications in their entirety and order the Prosecution to provide a “detailed chronology of each step it has undertaken to comply with each Rule 110(B) request”.³⁰

IV. DISCUSSION

A. Prosecution’s Application for Extension of Time

16. The Pre-Trial Judge recalls that the establishment of the Specific Disclosure Regime and the 30 November 2012 deadline for the disclosure of the Sabra Defence’s numerous Rule 110(B) requests took into consideration the Prosecution’s previous submissions and requests for disclosure material to be provided by 21 December 2012.³¹ Fairness to the accused is a major consideration in imposing disclosure deadlines on the Prosecution. The Pre-Trial Judge is mindful to ensure the Defence are afforded sufficient time to prepare for trial. The most immediate obligation for the Defence under the Working Plan is the filing of the Defence’s pre-trial briefs by 9 January 2013.³² Unless and until the Pre-Trial Judge is seised of a motion with detailed submissions on the perceived or actual prejudice to the Defence in fulfilling its obligations under the Working Plan together with reasonable alternative proposals to ameliorate such prejudice,³³ all Parties and participants, including the Prosecution, must be held, as far as possible, to the temporal framework of the Working Plan.

17. In establishing his previous deadlines, the Pre-Trial Judge also took into account the fact that many of the pending Sabra Defence requests date from as early as 9 March 2012, in one instance, with a further eight categories of pending requests dating from June or July 2012, prior to the Pre-Trial Judge fixing the date for the start of trial proceedings on 25 March 2013. The remainder of the Defence’s requests, with one exception, were made during September or October 2012, and pre-date the Working Plan Order.

18. The Pre-Trial Judge also notes from the Prosecution’s other concurrent and pending applications for extensions of time that one reason for the delays on Rule 110(B) and 113 disclosures was, in part, the Prosecution’s prioritisation of Rule 91 disclosures in connection

²⁹ First Sabra Response, para. 8.

³⁰ Second Sabra Response, para. 12.

³¹ Supplemental Response of 10 October 2012, para. 13.

³² Working Plan Order, p. 15, sub-para. (7).

³³ See, STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Official Transcript of Status Conference, 27 November 2012, p. 71, lines 6-10.

with the filing of its pre-trial brief on 15 November 2012.³⁴ Furthermore, whatever criticisms could be levelled at the Prosecution's varying promptness and attention in dealing with earlier Rule 110(B) requests, the initiation and implementation of the Working Plan and the Specific Disclosure Regime seeks to ensure that disclosures to the Defence are provided as thoroughly and promptly as possible. The filing of the Prosecution's pre-trial brief and the associated disclosures is a significant step in the Working Plan and sudden shifts in the prioritisation of finite and limited resources in priorities are unavoidable to some extent. Having now filed its pre-trial brief, the Prosecution confirms it is in a position to shift and dedicate its finite resources to its Rule 110(B) and 113 disclosure obligations.³⁵

19. The Pre-Trial Judge accepts that, in the circumstances, the breadth and volume of valid Rule 110(B) requests, and those by the Sabra Defence in particular, justifies some extension of time to the Prosecution to enable it to discharge its disclosure obligations. This takes into account the need for the Prosecution to conduct resource-intensive searches required for numerous video, audio and picture files, Arabic-language and handwritten documents – all which appear to preclude Optical Character Recognition (“OCR”) searches by keywords as submitted by the Prosecution.³⁶

20. In light of the above, the Pre-Trial Judge grants an extension of time for disclosure of pending Rule 110(B) requests in all three of the Prosecution's Applications by 21 December 2012. Moreover, the Pre-Trial Judge finds that the Prosecution has provided a satisfactory justification as to why it requires the additional time beyond 21 December 2012 of 8 January 2013 for Request 131 in the Third Application.³⁷

21. The Pre-Trial Judge takes note of the fact that the Prosecution has already fulfilled its disclosure obligations with respect to several of these Rule 110(B) requests. He further notes that, on 20 December 2012, the Prosecution confirmed its intention to meet the 21 December 2012 deadline. In the event that there are any pending requests past this deadline, considering the relatively short time frame and the number of requests involved, the Pre-Trial Judge sets the 8 January 2013 as the final deadline for all Parties and all pending requests.

³⁴ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Response to Fifth Request of the Fourth Sabra Motion and Prosecution Request for Extension of Time to Disclose Applicable Material, 21 November 2012, Confidential, para. 8.

³⁵ *Ibid.*

³⁶ Notice of 14 November 2012, para 50, adopted by reference in First Application, para. 3; Second Application, para. 3 and Third Application, para. 4.

³⁷ Annex A to Third Application.

B. Ayyash Defence's Request for Ordering Disclosure

22. The Pre-Trial Judge is not formally seized of a request by the Ayyash Defence in accordance with the Rule 110(B) Specific Disclosure Regime. Recalling that procedure, the Pre-Trial Judge reiterates that disclosure requests by the Defence remains primarily an *inter partes* procedure, with judicial intervention warranted only in "exceptional circumstances".³⁸ Furthermore, when the Pre-Trial Judge is properly seized of such a motion, the Defence must specifically address the elements of Rule 110(B). The onus remains on the Defence to demonstrate to a *prima facie* standard that the material sought is in the custody and control of the Prosecution, that it is material to the preparation of the defence, or is intended for use by the Prosecution as evidence at trial or was obtained from or belonged to the accused and is described with sufficient specificity.³⁹ None of these matters have been satisfactorily addressed by the Ayyash Defence in its Response. In any event, the Pre-Trial Judge emphasises that the purpose of responses to motions and applications is not to raise fresh requests for relief, which should be properly brought in separate and discrete motions or applications.

³⁸ Working Plan Order, Disposition, pp. 15-16

³⁹ ICTR, *Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, para. 13; ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, Case No IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 9.

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Article 18(2) of the Statute and Rules 77(A) and 110(B) of the Rules,

GRANTS the First Application, the Second Application, and the Third Application;

TAKES NOTE of the intention of the Prosecution to respond to the Defence's Rule 110(B) requests itemised in Annex A of the First Application, Annex A of the Second Application, and Annex A of the Third Application by disclosing any relevant material sought, and/or stating in writing why certain material sought falls outside the Prosecution's disclosure obligations, by 21 December 2012;

ORDERS the Prosecution to respond to Request 131, and if necessary to all other pending requests pursuant to this decision, by 8 January 2013 at the latest;

ORDERS the Prosecution to file a notice of compliance with this order on 8 January 2013 at the latest; and

DENIES all other requests by the Ayyash Defence and the Sabra Defence.

Done in Arabic, English and French, the English version being authoritative.

Leidschendam, 21 December 2012



Daniel Fransen
Pre-Trial Judge

