



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: 8 February 2013
Original language: English
Classification: Public

THE PROSECUTOR

v.

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

**ORDER ON THE DEFENCE REQUEST TO COMPEL DISCLOSURE
OF THE LEBANESE INVESTIGATIVE CASE FILES**

Office of the Prosecutor:
Mr. Norman Farrell

Counsel for Mr. Salim Jamil Ayyash:
Mr. Eugene O'Sullivan

Legal Representative of Victims:
Mr. Peter Haynes

Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz

Counsel for Mr. Hussein Hassan Oneissi:
Mr. Vincent Courcelle-Labrousse

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young



I. Introduction

1. By way of this order, the Pre-Trial Judge decides upon the 6 December 2012 request (the "Request")¹ by Counsel for Mr. Oneissi (the "Oneissi Defence"), joined in all respects by the respective Counsel for Mr. Ayyash, Mr. Badreddine, and Mr. Sabra (collectively, the "Defence"), to receive the entirety of the Lebanese case files, as compiled by the Lebanese Investigative Judges in the case dealing with the attack against Prime Minister Rafiq Hariri and others (the "Lebanese Case File" and the "Hariri case").

II. Procedural background

2. On 6 December 2012, the Oneissi Defence filed the Request pursuant to Rule 110(B) of the Rules of Procedure and Evidence (the "Rules"), asking the Pre-Trial Judge to order the Prosecution to disclose to the Defence the entirety of the Lebanese Case File in the form that it was received.²

3. On 10 December 2012, Counsel for Mr. Ayyash³ and Counsel for Mr. Badreddine⁴ joined the Request. Additionally, on 11 December 2012, Counsel for Mr. Sabra⁵ joined the Request.

4. On 19 December 2012, the Prosecution filed its response, asking that the Pre-Trial Judge dismiss the Request (the "Response").⁶

5. On 29 January 2013, the Oneissi Defence submitted a supplementary filing reiterating the initial disclosure request and adding that the method of disclosure ought to be *via* Legal Workflow (the "Supplementary Filing").⁷ The Oneissi Defence further requested that the

¹ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Requête de la Défense de M Hussein Hassan Oneissi visant à obtenir les dossiers des juges d'instruction libanais*, 6 December 2012.

² *Id*, para. 30.

³ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Ayyash Joinder in "*Requête de la Défense de M Hussein Hassan Oneissi visant à obtenir les dossiers des juges d'instruction libanais*", 10 December 2012.

⁴ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Adjonction de la Défense de M. Mustafa Amine Badreddine à la Requête de la Défense de M Hussein Hassan Oneissi visant à obtenir les dossiers des juges d'instruction libanais*, 10 December 2012.

⁵ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Sabra Joinder in "*Requête de la Défense de M Hussein Hassan Oneissi visant à obtenir les dossiers des juges d'instruction libanais*", 11 December 2012.

⁶ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Response to the Defence Request for an Order to Compel Disclosure of the Lebanese Investigative Case Files, 19 December 2012.

⁷ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, *Requête supplétive à la Requête de la Défense de M Hussein Hassan Oneissi aux fins d'obtenir les dossiers des juges d'instruction libanais*, confidential, 29 January 2013 with a public redacted version of the same date.

Pre-Trial Judge take note that the Prosecution's disclosure to date of parts the Lebanese Case File was conducted in a disorganised, inefficient and incomprehensible manner, rendering it insufficient and unacceptable.⁸

a. The Request

6. The Defence submits two main arguments in support of the Request, the first relating to a restrictive interpretation of Rule 111,⁹ and the second dealing with the rights of the accused under Lebanese criminal procedure.¹⁰

7. The Defence reads Rule 111 as creating a disclosure exemption limited to internal documents produced by the Prosecution or by the United Nations International Independent Investigation Commission ("UNIIC").¹¹ As such, the Defence argues that any documents produced by the Lebanese Investigative Judges cannot fall within the ambit of this rule.¹²

8. Furthermore, should the Lebanese Case File contain any UNIIC documents, the Defence submits that they should be disclosed¹³ despite the 19 July 2011 decision by the Appeals Chamber in the *El Sayed* case ("Appeals Chamber Decision"),¹⁴ which specifies three categories of UNIIC documents as being exempt from disclosure under Rule 111.¹⁵ The Defence argues that the context of the present case is distinguishable from that of the *El Sayed* case. Firstly, the four accused in the current proceedings are procedurally distinct from Mr. El Sayed, who was not charged by the Tribunal. Secondly, the Appeals Chamber Decision relied on case law where the accused were present, whereas the *in absentia* nature of the present proceedings renders access to documents essential.¹⁶

⁸ *Id*, para. 26.

⁹ Rule 111 provides: "Reports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure or notification under the Rules. For purposes of the Prosecutor, this includes reports, memoranda, or other internal documents prepared by the UNIIC or its assistants or representatives in connection with its investigative work."

¹⁰ Request, para. 1.

¹¹ *Id*, para. 14.

¹² *Id*, para. 16.

¹³ The Defence distinguishes between UNIIC documents dated prior to 16 June 2005, arguing that these documents must be disclosed because they were created before the UNIIC became fully operational. *Id*, para. 19.

¹⁴ STL, *In the matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011.

¹⁵ *Id*, paras 92-96; See also Request para. 20, listing the three categories as: i) correspondence between the UNIIC and the Lebanese authorities, ii) internal memoranda of the UNIIC, and iii) investigators' notes.

¹⁶ Request, paras 20-21.

9. Finally, the Defence submits that the Lebanese Code of Criminal Procedure allows the accused access to the information collected by judges or police in relation to the charges laid against them.¹⁷ As Lebanese citizens, the accused before the Tribunal cannot be deprived of rights that they are entitled to under their national jurisdiction.¹⁸

b. The Response

10. The Prosecution submits that the Request is unnecessary¹⁹ since the Prosecution intends to disclose the “relevant”²⁰ documents, and that the Rules do not provide for the relief requested.²¹ The Prosecution argues that Rule 110(B), upon which the Request relies, provides for “inspection” of documents material to the preparation of the Defence, not “disclosure” thereof.²² In addition, the Prosecution submits that it is incumbent upon the Defence to establish the relevance of the specific documents sought within the Lebanese Case File, as opposed to relying on a “blanket request”.²³

11. Moreover, the Prosecution contends that the Defence arguments in relation to Rule 111 are without merit, that the rule applies in the present case and effectively bars disclosure of certain material found in the Lebanese Case File.²⁴ In accordance with the holding of the Appeals Chamber Decision, the Prosecution submits that “internal UNIIIC material, even as possessed by the Lebanese authorities and as contained in the Lebanese case files, is not subject to disclosure under Rule 111.”²⁵

12. Finally, the Prosecution responds to the Defence arguments relating to Lebanese criminal procedure by stating that they are inapposite and recalling that “domestic and international legal regimes are distinct, and provide different mechanisms to ensure the fundamental rights of the accused.”²⁶

¹⁷ *Id.*, para. 22.

¹⁸ *Id.*, para. 23.

¹⁹ Response, para. 12.

²⁰ *Id.*, para. 2.

²¹ *Id.*, paras 13-16.

²² *Id.*, para. 13.

²³ *Id.*, para. 16.

²⁴ *Id.*, paras 17-22.

²⁵ *Id.*, para. 19.

²⁶ *Id.*, para. 20.

III. Discussion

a. The Supplementary filing

13. The Pre-Trial Judge notes that the time period allotted for filing a response to the Supplementary Filing has not elapsed and he will therefore, in this decision, only rule on the Request.

b. Defence access to the entirety of the Lebanese Case File

14. The Pre-Trial Judge notes that the legal characterisation of the Lebanese Case File will determine whether the Defence should be granted access to it. In order to properly categorise its nature, the Pre-Trial Judge considers it necessary to recall the procedure by which the Lebanese Case File was transferred to the Prosecution:

- on 1 March 2009, the Tribunal began its operations and the Prosecutor assumed office. On 27 March 2009, upon request of the Prosecutor, the Pre-Trial Judge directed the Lebanese authorities seized of the Hariri case to defer to the Tribunal's competence and to thereby hand over to the Prosecution the results of the investigations, a copy of the relevant court records, and other probative material (the "Order of 27 March 2009");²⁷

- on 7 April 2009, in execution of the Order of 27 March 2009, the Lebanese authorities agreed to provide the Tribunal with the Lebanese Case File;²⁸

- on 10 April 2009, the Pre-Trial Judge received the Lebanese Case File at the Tribunal and immediately consigned it to the Office of the Prosecution ("OTP").

15. The Pre-Trial Judge notes that the transfer to the Prosecution of investigations and other material relevant for the Hariri case is in accordance with Article 4(2) of the Statute and Rule 17(A). The Prosecution is therefore expected to be in possession of material produced by Lebanese investigative authorities who dealt with the Hariri case prior to the Tribunal being bestowed exclusive jurisdiction over the matter. The Pre-Trial Judge therefore

²⁷ STL, CH/PTJ/2009/01, Order Directing the Lebanese Judicial Authority Seized with the Case of the Attack Against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, 27 March 2009, para 19.

²⁸ See Judicial Council of Lebanon, *Conseil Judiciaire 2005/No 3/Juge d'Instruction Judiciaire, « A l'Attention du Juge de la Mise en Etat Auprès du Tribunal Spécial Pour Le Liban M Daniel Fransen », 7 April 2009* ("Judicial Council of Lebanon Decision").

considers it reasonable that the Defence seek access to these documents by requesting them directly from the Prosecution.

16. Despite the Prosecution's submission that the Lebanese Case File is a collection of large evidentiary holdings and not a distinct "dossier",²⁹ the Pre-Trial Judge finds that the material contained therein can nevertheless be categorised as the file or "dossier" received from the Lebanese authorities following a deferral order. Indeed, in a 15 April 2009 letter to the Pre-Trial Judge, the Prosecution notes that it received 253 files from the Lebanese authorities on 10 April 2009, in response to the Order of 27 March 2009. He adds that the Lebanese Case File included an envelope containing a copy of detailed lists of the content of the 253 files,³⁰ thereby serving as an index to the entire dossier.

17. In contrast to the Prosecution's file, the Lebanese Case File is essentially an investigative file consisting of material gathered and recorded by Lebanese Investigative Judges in establishing the truth,³¹ and thereby proving the guilt or innocence of the accused. As such, the material it contains would fall under the disclosure regimes of Rules 110 and/or 113. The Pre-Trial Judge therefore finds that the Defence has a right to access all the documents and material consisting of the Lebanese Case File, as received by the Tribunal on 10 April 2009.

18. The Pre-Trial Judge agrees with the Prosecution that the Defence must establish that the documents sought, pursuant to Rule 110(B), are material for the preparation of its case. However, in the present case, the Pre-Trial Judge finds its relevance evident since the Lebanese Case File contains the product of the investigations carried out by Lebanese authorities with respect to the Hariri case.

19. Finally, the Pre-Trial Judge notes that the Prosecution agrees that it must disclose or make available for inspection any "relevant documents" contained in the Lebanese Case File that fall within the scope of Rules 110(B) and/or 113.³² Indeed, the Prosecution has already sent the Defence a spreadsheet listing these "relevant documents" and providing a brief

²⁹ Response, para. 10.

³⁰ Letter from Prosecutor D A Bellemare to Pre-Trial Judge, *Transmis au Juge de la mise en état du Tribunal spécial pour le Liban*, 15 April 2009, para. 2: « une enveloppe contenant, selon les mêmes autorités libanaises, une copie "de toutes les listes détaillées du contenu des 253 dossiers" ».

³¹ See Article 61 of Lebanese New Code of Criminal Procedure.

³² Response, para. 8.

summary of their content.³³ Therefore, the matter in dispute between the Parties is exclusively with respect to disclosure of documents that the Prosecution considered irrelevant and therefore not needing to be disclosed under Rules 110 and/or 113.

20. The Pre-Trial Judge takes note of the Prosecution having already disclosed much of the material contained in the Lebanese Case File, and hereby orders that all the remaining material be disclosed. Accordingly, the Prosecution should also update the spreadsheet it sent the Defence to include the pertinent information (evidence record number, title, brief summary) for all the documents contained in the Lebanese Case File.

c. Application of Rule 111 to the Lebanese Case File

21. The Pre-Trial Judge disagrees with the Defence submission that the present case should be distinguished from the *El Sayed* case because the four accused in the former case have been charged by the Tribunal and are therefore procedurally distinct from Mr. El Sayed. The Pre-Trial Judge recalls that Rule 111 specifically creates an exception to the accused's general right to access relevant information in preparing his defence. Indeed, Rule 111 aims to protect information related to the internal preparation of a case³⁴ in order to, *inter alia*, enable the Prosecution and the UNIIC to effectively conduct investigations while still being observant of the rights of the accused.

22. The Pre-Trial Judge also disagrees with the Defence argument that the *in absentia* nature of the current proceedings makes it essential for the Defence to have access to documents, and therefore Rule 111 should not apply. The Pre-Trial Judge recalls that access to information is also of primordial importance in cases where the accused are present, as evidenced by the importance placed on disclosure. Indeed, Rule 111 is unaffected by the presence or absence of the accused since the basis justifying its application relates to maintaining the confidentiality of internal work product gathered by the Parties in the preparation of their respective cases.

23. As noted in the Appeals Chamber Decision, the Pre-Trial Judge recalls that Rule 111 excludes from disclosure "internal documents" prepared either by a Party or by the UNIIC.³⁵

³³ *Ibid.*

³⁴ Appeals Chamber Decision, para. 81, citing ICTY, *Blagojević et al.*, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose Its Notes from Plea Discussions with the Accused Nikolić and Request for an Expedited Open Session Hearing, IT-02-60-T, 13 June 2003, at p. 6.

³⁵ Appeals Chamber Decision, para. 77.

Therefore, the first criterion for exclusion is that the documents in question be “internal documents”.³⁶

24. The Pre-Trial Judge further recalls that whether documents are characterised as internal will depend not only on the “content of the documents in question, their function and purpose, as well as their source or author”,³⁷ but also on whether there has been outside interference. For instance, a note made by a member of the Prosecution will lose its privileged status if it is put to a witness³⁸ or if it is disclosed to a party outside the OTP.³⁹ Similarly, as stated by the Appeals Chamber, correspondence sent to counsel for Mr. El Sayed or operative documents addressed to external actors cannot be classified as “internal documents” because they are not “purely *internal*”.⁴⁰

25. Indeed, the purpose of Rule 111 “is predominantly to allow uninhibited discussion among those representing one Party when considering what decisions to make. [...] The major focus of Rule 111 material is on *opinion*.”⁴¹ This discussion is not commonly included in a court file, which is expected to be transmitted to all the Parties.

26. The Lebanese Case File was compiled by Investigative Judges and contains “the results of the investigation and a copy of the court’s records regarding the *Hariri case*”⁴². As such, the Lebanese Case File is to be considered as an indivisible file which contains the information submitted for review to the Lebanese Investigative Judges dealing with the Hariri case, and which could be accessed by the Parties.

27. The Pre-Trial Judge therefore finds that, unless the Lebanese Investigative Judges compiling the file inadvertently included confidential material, none of the documents contained in the Lebanese Case File are protected under Rule 111.

³⁶ Otherwise known as “internal work product”. *Id.*, para 79.

³⁷ Appeals Chamber Decision, para. 72; ICC. *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Public Redacted Version of Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure, 9 April 2010, para. 35.

³⁸ ICTR, *The Prosecutor v. Niyitegeka*, Case No ICTR-96-14-A, Appeals Judgment, 9 July 2004, para. 34.

³⁹ ICTR, *The Prosecutor v. Karemera*, Case No ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents, 30 September 2009, para.10.

⁴⁰ Appeals Chamber Decision, para 108 [emphasis in original]

⁴¹ *Id.*, para 100 [emphasis in original]

⁴² Order of 27 March 2009, Disposition [emphasis in original]. See also Judicial Council of Lebanon Decision, para. 2 of Disposition: « copie de tous les éléments de l'instruction ainsi qu'une copie du dossier de même que tous les documents et objets saisis ».

d. Inspection versus Disclosure of the Lebanese Case File

28. The Pre-Trial Judge takes note of the Prosecution's position that Rule 110(B) provides for "inspection", not "disclosure".⁴³ However, the Pre-Trial Judge emphasises that a liberal understanding of "disclosure" encompasses both providing copies of documents and permitting their inspection. In this case, to disclose the Lebanese Case File through inspection would be impractical and contrary to common sense, notably when considering the volume of file and the fact that most documents are in Arabic.

29. Furthermore, the Pre-Trial Judge has already found that the Lebanese Case File, as compiled by the Lebanese Investigative Judges, should be treated as an integral, indivisible whole, and it should therefore be disclosed as such. The updated version of the Prosecution's spreadsheet listing all the material found within the Lebanese Case File can serve as an index for disclosure purposes.

⁴³ Response, para. 13.

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 77(A), 89(B) and 110(B)

GRANTS the Request; and

ORDERS the Prosecution to disclose to the Defence the entirety of the Lebanese Case File as it was received by the Tribunal, save for any confidential material that may have been inadvertently included in the file by the Lebanese Investigative Judges, along with an index of all the material contained therein.

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

Leidschendam, 8 February 2013



Daniel Fransen
Pre-Trial Judge

