



THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/PT/PTJ**
The Pre-Trial Judge: **Mr Daniel Fransen**
The Registrar: **Mr Herman von Hebel**
Date: **11 February 2013**
Original language: **French**
Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION ON THE DEFENCE REQUEST SEEKING TO OBTAIN THE
COOPERATION OF LEBANON**

Office of the Prosecutor:

Mr Norman Farrell

Legal Representative of Victims:

Mr Peter Haynes

The Lebanese Authorities:

President of the Court of Cassation
of Lebanon

Counsel for Mr Salim Jamil Ayyash:

Mr Eugene O'Sullivan

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. The subject of the decision

1. By way of this decision, the Pre-Trial Judge rules on the motion of Counsel for the defence for Mr Sabra of 27 September 2012 seeking an order to the Lebanese authorities to cooperate with them (respectively the “Motion” and the “Sabra Defence”) in accordance with Rule 20 (A) of the Rules of Procedure and Evidence (the “Rules”).

II. Procedural background

2. Between March and September 2012, the Sabra Defence sent several letters to the Lebanese authorities seeking to obtain documents believed to be in their possession and which the Defence considers relevant for the defence of Mr Sabra.

3. On 27 September 2012, the Sabra Defence requested that the Pre-Trial Judge order the Lebanese authorities to cooperate with the Tribunal by replying to its letters.¹ That same day, Counsel for Messrs. Ayyash, Badreddine and Oneissi joined the Motion.²

4. On 3 October 2012, following a directive from the Pre-Trial Judge of 2 October 2012,³ the Registrar sent a letter to the Public Prosecutor at the Court of Cassation of Lebanon inviting him to reply to the Motion.

5. On 5 October 2012, the Legal Representative of Victims submitted his observations with regard to the Motion.⁴

6. On 8 October 2012, the Defence Office and the Prosecution submitted observations regarding the Motion (respectively the “Defence Office Observations” and the “Prosecution Observations”).⁵

¹ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Motion Seeking the Cooperation of Lebanon, 27 September 2012, with confidential and *ex parte* annexes

² STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Ayyash Joinder in “Motion Seeking the Cooperation of Lebanon”, 27 September 2012; *Jonction de la Défense de M Badreddine à la requête de la Défense de M Sabra aux fins d’obtenir la coopération du Liban*, 27 September 2012; *Jonction de la Défense de M Oneissi à la requête de la Défense de M Sabra aux fins d’obtenir la coopération du Liban*, 27 September 2012.

³ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Scheduling Directive from the Pre-Trial Judge, 2 October 2012.

⁴ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Response of the Legal Representative of Victims to Sabra Defence Motion Seeking the Cooperation of Lebanon, 5 October 2012.

⁵ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Response to Sabra Defence Motion Seeking the Cooperation of Lebanon, 8 October 2012; *Observations du Bureau de la Défense relatives à la coopération du Liban*, 8 October 2012.

7. On 6 November 2012, the Public Prosecutor at the Court of Cassation of Lebanon replied to the Registrar's letter of 3 October 2012. He pointed out that he himself was not authorised to reply to the Motion, adding that it was the President of the Court of Cassation of Lebanon alone who had jurisdiction in this matter.⁶

8. On 14 November 2012, the Registrar sent a letter to the Public Prosecutor at the Court of Cassation of Lebanon informing him that, in his opinion, he did indeed have jurisdiction to effect service of the notification of the Pre-Trial Judge's Directive of 2 October 2012 and the accompanying Motion to the competent Lebanese authorities.⁷

9. On 19 December 2012, the Lebanese authorities replied to the Motion (the "Reply").⁸

III. The arguments of the Parties

10. In support of the Motion, the Sabra Defence cites the following principal arguments:⁹

- a) the Lebanese authorities have never provided the documents requested by the Sabra Defence despite numerous requests for cooperation having been sent to them;
- b) the requested documents are vital for the preparation of the defence and to ensure the fairness of the proceedings; they are all the more vital as, within the context of *in absentia* proceedings, Counsel for the Defence do not receive any instructions from the accused;
- c) the requested documents should be in the possession of the Lebanese authorities and easily accessible; they have not moreover indicated that they were unable to provide such documents or that the requests for cooperation sent to them were too vague or unclear for them to be able to respond to them; they simply claimed that the information required did not exist or was outside of their competence;

⁶ STL, *The Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Letter from the Public Prosecutor at the Court of Cassation to the Registrar of the Special Tribunal for Lebanon, confidential, 6 November 2012.

⁷ STL, *The Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Letter from the Registrar to the Prosecutor General, confidential, 14 November 2012.

⁸ STL, *The Prosecutor v Ayyash et al*, Case No STL-11-01/PT/PTJ, Letter from the Public Prosecutor at the Court of Cassation to the Pre-Trial Judge of the Special Tribunal for Lebanon, confidential, 19 December 2012, with in attachment, Letter from the Director of Litigation at the Ministry of Justice to the Public Prosecutor at the Court of Cassation, confidential, 18 December 2012

⁹ Motion, paras 16 to 38

- d) by contrast, the Lebanese authorities did indeed cooperate with the Prosecution which has moreover expressed its satisfaction with them;
- e) the Lebanese authorities should conduct thoroughly all the necessary searches in order to reply to the Defence requests; should they not do this, the Pre-Trial Judge should order them to specifically identify: (i) the organs and/or persons instructed to conduct the requested searches; and (ii) what efforts were made by those organs and/or persons to identify the requested documents;
- f) three categories of documents were the subject of the requests on the part of the Sabra Defence: (i) one relating to the jurisdiction and legality of the Tribunal, to Mr Sabra and to the crime of criminal association; (ii) one relating to the investigations conducted by the Lebanese authorities and the United Nations International Independent Investigation Commission (the "Investigation Commission"); and (iii) one regarding telecommunications information (relating to mobile phones, data records and telephone networks);
- g) other requests sent to the Lebanese authorities likewise did not receive a reply; and
- h) as a consequence, the Pre-Trial Judge should order the Lebanese authorities to: (i) search for, identify and provide the documents sought; (ii) keep an updated detailed log of all the efforts made to identify and disclose the requested documents to the Defence; and (iii) comply with the Pre-Trial Judge's order within a time limit of four weeks.
11. In support of the Reply, the Lebanese authorities put forward the following principal arguments:¹⁰
- a) with regard to the request for information pertaining to the last known address of Mr Sabra and to whether he is still alive, a reply was sent to the Head of Defence Office on 28 November 2012; that reply included a Family Status Extract for Mr Sabra together with a letter stating that, according to official documents, it would appear that he was not deceased;

¹⁰ Reply, paras 2 to 7.

- b) with regard to the request for information contained in the letter of the Sabra Defence No. S02/12-001 of 6 March 2012 pertaining to the records of discussions relating to the Statute of the Tribunal and, in particular, to *in absentia* trials, that request must be sent to the United Nations, and not to the Lebanese authorities;
 - c) with regard to requests for information pertaining to the file of the Investigation Commission and that compiled by the Lebanese authorities, those files were transferred to the Tribunal and are no longer in the possession of the Lebanese authorities;
 - d) with regard to certain requests for information which are a matter for the Ministry of Telecommunications, the Sabra Defence was informed that those requests were sent to the Ministry for execution; the fact that no replies have been forthcoming is not due to a lack of cooperation on the part of Lebanon, but to the time required to examine them given their complex nature;
 - e) with regard to requests pertaining to the family and friends of Mr Abu Adass, they were transferred to the competent Ministries of Defence and the Interior;
 - f) in general, the Lebanese authorities reject the argument that they have not cooperated; they consider that, in fact, they have cooperated fully in all matters that fall under their jurisdiction, whilst pointing out however that they are not bound to provide advice to the Defence nor to receive instructions from anyone.
12. In support of its observations rejecting the Motion, the Prosecution puts forward the following principal arguments:¹¹
- a) the Ayyash Defence joined the Motion without having specifically indicated that it had itself sent requests for cooperation to Lebanon; however, according to Rule 20 of the Rules, orders for cooperation should relate to specific requests; the joinder of the Ayyash Defence is therefore not justified;
 - b) the Defence request regarding the searches that the Lebanese authorities should undertake in connection with the crime of “illicit association” – as enshrined in the Lebanese Criminal Code – is not justified insofar as those authorities are not obliged to carry out research on behalf of Counsel for the Defence nor to provide them with legal advice; those authorities are only obliged to give them the requested information that is

¹¹ Prosecution Observations, paras 3 to 14

in their possession or under their control; in any event, the Sabra Defence can find information relating to that offence by itself undertaking the necessary research;

- c) with regard to the request to the Lebanese authorities for the archives of the Investigation Commission, these are now in the possession of the Prosecutor; in addition, in the *Matter of El Sayed*, the Pre-Trial Judge and the Appeals Chamber have recognised that the file of the Investigation Commission and that of the Lebanese investigation are under the exclusive jurisdiction of the Tribunal; the Appeals Chambers also held that the Investigation Commission and the Lebanese jurisdictions conducted their investigations in conjunction and that internal documents relating to the investigation should not be disclosed; also the Defence cannot circumvent those restrictions by attempting to obtain the said documents directly from the Lebanese authorities; it is incumbent upon the Prosecutor alone to determine whether or not they should be disclosed and, where appropriate, incumbent upon the Defence to send requests to him in this respect.

13. In support of its observations, the Defence Office points out that, firstly, the requests for an extension of the deadline, which could be requested by the Defence teams in order to prepare their case in view of the time required by the Lebanese authorities to respond to the questions put, should be granted; and, secondly, in cooperation with the Defence, the Lebanese authorities should be invited to bear in mind the deadlines set by the Pre-Trial Judge.¹²

14. The Legal Representative of Victims did not take a position on the Motion.

IV. Statement of reasons

15. The Pre-Trial Judge first of all wishes to state that before issuing a coercive order regarding cooperation to the competent authorities of a State, he must ensure that the Defence requests are effectively requests for assistance falling within the competence of the requested State. If they are, according to prevailing international case law, he must then verify that: (i) the Defence has identified with sufficient precision the requested documents; (ii) those documents are relevant to the case at hand; (iii) the Defence has given the State authorities sufficient time

¹² Defence Office Observations, p. 2.

within which to reply to the requests; and (iv) the Defence has not imposed overly heavy obligations on that State.¹³

16. The Pre-Trial Judge notes, first of all, that there is no evidence that the Lebanese authorities have, in general, refused to cooperate with the Defence. In this respect, he notes that those authorities have confirmed that they disclosed certain information requested by the Sabra Defence to the Head of Defence Office¹⁴ and sent certain requests for cooperation to the competent Ministries of Defence, the Interior and Telecommunications so that they could examine and reply to them.¹⁵

17. Furthermore, the Pre-Trial Judge notes that the Lebanese authorities considered that it was not incumbent upon them to carry out searches and research on behalf of the Defence¹⁶ nor to disclose to it information contained in the investigation file prepared by the Lebanese judicial authorities and the Investigation Commission insofar as, according to them, those materials have been transferred to the Tribunal.¹⁷

18. With regard to the first argument, the Pre-Trial Judge considers that the assistance that can be requested of the Lebanese authorities pursuant to Article 15 of the Agreement between the United Nations and Lebanon annexed to Security Council resolution 1757 (2007) (the "Agreement") requires those authorities to provide any documents or information in their possession and that the Defence could not reasonably through its own means procure for itself.¹⁸ Providing research or legal advice to the Defence is not part of that obligation of assistance.

19. With regard to the second argument, the Pre-Trial Judge notes that the question of access to the materials in the file compiled by the Lebanese judicial authorities and transferred after their relinquishment of jurisdiction to the Tribunal in April 2009 was determined by way of the

¹³ See in particular: ICTY, *The Prosecutor v Milutinović et al.*, Case No IT-05-87-AR108bis 2, Decision on Request of the United States of America for Review, 12 May 2006, paras 14-15; ICTY, *The Prosecutor v Blaškić et al.*, Case No IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para 32; ICTY, *The Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-AR108bis, Decision on the Request of the Republic of Croatia for Review of a Binding Order, 9 September 1999, paras 38-39.

¹⁴ Reply, para. 2.

¹⁵ *Id.*, paras 5 and 6.

¹⁶ *Id.*, para. 7.

¹⁷ *Id.*, para. 4.

¹⁸ See para 15 above.

order of 8 February 2013.¹⁹ He invites, consequently, the Defence to refer to it. With regard to the documents collected by the Investigation Commission which are apparently not in the Lebanese investigative file, it is for the Defence to apply to the Prosecutor – now the sole custodian of those documents – to obtain copies of documents that have not been transmitted to it, in compliance with Rules 110, 111 and 115 to 118 of the Rules. Lastly, the Pre-Trial Judge finds that the Defence has failed to show why internal documents of Lebanon dealing with the negotiation process of the Agreement and the Statute would have any direct bearing on the case. Indeed, issues regarding the Tribunal's legality and jurisdiction, as well as the opening of proceedings *in absentia*, were determined by the Appeals Chamber²⁰ and the crime of criminal association is not mentioned in the indictment issued against the Accused. On this subject, the Pre-Trial Judge draws attention to the fact that, in any event, the applicable law is determined by the Statute and that it is incumbent upon the Tribunal judges to rule on the issues that the definition of crimes and modes of responsibility subject to their jurisdiction might give rise to.

20. Lastly, with regard to the various remaining Defence requests, aside from those dealt with in paragraphs 18 and 19 above, the Pre-Trial Judge refers to Article 15 (2) of the Agreement which provides that “[t]he Government shall comply without undue delay with any request for assistance by the Special Tribunal for Lebanon or an order issued by the Chambers [...]”. To guarantee that that obligation is met and to ensure that the proceedings are not unjustifiably delayed, the Pre-Trial Judge invites the Lebanese authorities to reply effectively and specifically to those requests within 30 calendar days from the notification of this decision at the latest. If the Lebanese authorities are unable to fulfill these Defence requests in the specified time limit, the Pre-Trial Judge invites them to inform him thereof as soon as possible – and within 15 calendar days from the notification of this decision at the latest – explaining to him the reasons why it is not possible and proposing a precise timetable within which they intend to effectively reply to the requests.

21. The Pre-Trial Judge wishes to point out that the full and complete cooperation of the Lebanese authorities – which is moreover enshrined in Article 15 of the Agreement – is essential so as to ensure that the proceedings are conducted fairly and expeditiously and to respect the

¹⁹ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Order on the Defence Request to Compel Disclosure of the Lebanese Investigative Case Files, 8 February 2013.

²⁰ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012; STL, *The Prosecutor v. Ayyash et al*, No. STL-11-01/PT/AC/AR126.1, Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision (corrected version), 1 November 2012.

deadlines that have been set. He notes, in this respect, that the time required by the Lebanese authorities to reply to the various requests of the Parties – including the Defence – is a factor to be taken into consideration when organising the preparation of the case and, in particular, setting the date for the start of trial, in accordance with Rule 91 (C) of the Rules. Therefore, if the Lebanese authorities fail to provide in good time the information or documents that are essential for the preparation of the Defence, this should be borne in mind when setting deadlines relating to the obligations imposed on said authorities.

V. Disposition

FOR THESE REASONS,

Pursuant to Article 15 of the Agreement and Rule 20 (A) of the Rules,

THE PRE-TRIAL JUDGE,

INVITES the Lebanese authorities to reply effectively and specifically to the various remaining requests of the Defence; and to do so within the time limits set out in paragraphs 15 to 21 above, within 30 calendar days from the notification of this decision at the latest;

INVITES the Lebanese authorities, should they be unable to meet the Defence requests within the specified deadline, to inform the Pre-Trial Judge thereof as soon as possible, and within 15 calendar days from the notification of this decision at the latest, explaining to him the reasons why it is not possible and proposing a precise timetable within which they intend to effectively reply to the requests; and

ORDERS the Registrar to notify the President of the Court of Cassation of Lebanon of this decision without delay.

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

Leidschendam, 11 February 2013

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[signature]

Daniel Fransen
Pre-Trial Judge

