

**THE PRE-TRIAL JUDGE**

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

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

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

Date: **8 April 2013**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

**DECISION ON THE PROSECUTION REQUEST FOR CERTIFICATION FOR
LEAVE TO APPEAL THE ORDER TO COMPEL DISCLOSURE OF THE
LEBANESE CASE FILES**

Office of the Prosecutor:
Mr. Norman Farrell

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Mr. Peter Haynes

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

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



I. Introduction

1. By way of this decision, the Pre-Trial Judge denies the Prosecution certification request filed on 19 February 2013 (the “Certification Request”)¹ for leave to appeal the disclosure order rendered by the Pre-Trial Judge on 8 February 2013 (the “Disclosure Order”).²

II. Procedural Background

2. On 6 December 2012, Counsel for Mr. Hussein Hassan Oneissi (the “Oneissi Defence”) filed a motion requesting disclosure of the entirety of the Lebanese investigative case files (the “Lebanese Case File”), as compiled by the Lebanese Investigative Judges in the case dealing with the attack against Prime Minister Rafiq Hariri and others (the “Disclosure Request”).³

3. On 10 and 11 December 2012, the respective Counsel for Mr. Salim Jamil Ayyash,⁴ Mr. Mustafa Amine Badreddine (the “Badreddine Defence”),⁵ and Mr. Assad Hassan Sabra (the “Sabra Defence”)⁶ joined the Disclosure Request in all respects.

4. On 19 December 2012, the Prosecution filed its response, asking that the Pre-Trial Judge dismiss the Request (the “Disclosure Response”).⁷

5. On 29 January 2013, the Oneissi Defence submitted a supplementary filing in relation to the Disclosure Request (the “Supplementary Filing”).⁸

¹ STL, *The Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Request for Certification for Leave to Appeal the Order on the Defence Request to Compel Disclosure of the Lebanese Investigative Case Files, 19 February 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

² Order of the Defence Request to Compel Disclosure of the Lebanese Investigative Case Files, 8 February 2013.

³ *Requête de la Défense de M Hussein Hassan Oneissi visant à obtenir les dossiers des juges d’instruction libanais*, Public with Confidential Annexes A and B, 6 December 2012.

⁴ 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.

⁵ *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.

⁶ 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.

⁷ Prosecution Response to the Defence Request for an Order to Compel Disclosure of the Lebanese Investigative Case Files, Public with Confidential Annex A, 19 December 2012.

⁸ *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.

6. On 8 February 2013, the Pre-Trial Judge rendered the Disclosure Order, deciding on the Disclosure Request without ruling on the Supplementary Filing, as the time period for filing a response to the Supplementary Filing had not yet elapsed. The Pre-Trial Judge ordered the Prosecution to disclose to the Defence the entirety of the Lebanese Case File, along with an index thereof.⁹

7. On 19 February 2013, the Prosecution filed the Certification Request.

8. On 27 February 2013, the Sabra Defence and the Oneissi Defence each filed a response to the Certification Request, asking the Pre-Trial Judge to deny leave to appeal the Disclosure Order (respectively, the “Sabra Response”¹⁰ and the “Oneissi Response”¹¹). The Badreddine Defence joined the Oneissi Response.¹²

III. Submissions

A. The Certification Request

9. The Prosecution submits that the Pre-Trial Judge wrongfully ordered disclosure of the entirety of the Lebanese Case File on the grounds that the documents were gathered by Lebanese judges in the course of investigations in relation to the attack against Prime Minister Rafiq Hariri and others (the “Hariri case”).¹³ According to the Prosecution, neither the identity of the authorities gathering the Lebanese Case File, nor the purpose for which it was gathered, is determinative of whether the file’s documents are “subject to disclosure.”¹⁴ The Prosecution provides examples of “administrative documents” contained in the Lebanese Case File — such as orders summoning witnesses — that it believes need not be disclosed because they are “of no relevance to the guilt or innocence of the Accused”.¹⁵

10. The Prosecution claims that the Disclosure Order expands its disclosure obligations “on the basis of criteria that fall outside [the] disclosure regime [established under the Rules],

⁹ Disclosure Order, para. 13 and Disposition.

¹⁰ Sabra Response to Prosecution Request for Certification for Leave to Appeal the Order on the Defence Request to Compel Disclosure of the Lebanese Investigative Case Files, 27 February 2013.

¹¹ *Réponse de la Défense de M Hassan Oneissi à la « Request for Certification for Leave to Appeal the Order on the Defence Request to Compel Disclosure of the Lebanese Investigative Files », Confidential, 27 February 2013, with a Public Redacted Version dated 28 February 2013.*

¹² *Adjonction de la Défense de M Mustafa Amine Badreddine à la Réponse de la Défense de M Hussein Hassan Oneissi à la « Request for Certification for Leave to Appeal the Order on the Defence Request to Compel Disclosure of the Lebanese Investigative Files », 27 February 2013.*

¹³ Certification Request, para. 2.

¹⁴ *Id.*, para. 9.

¹⁵ *Id.*, para. 10.

and will divert Prosecution resources from other pressing disclosure obligations and work for preparation for trial.”¹⁶ Consequently, the Prosecution considers that the Disclosure Order “involves an issue which significantly affects the fairness and expeditiousness of the proceedings.”¹⁷ In addition, the Prosecution submits that the Disclosure Order “improperly equates inspection under Rule 110(B) with disclosure.”¹⁸

11. The Prosecution therefore seeks an immediate resolution of the matter by the Appeals Chamber to clarify its obligations under Rule 110(B) of the Rules of Procedure and Evidence (the “Rules”) and to affirm that Rule 110(B) requires inspection as opposed to disclosure.¹⁹

B. The Sabra Response

12. The Sabra Defence submits that the Certification Request fails to fulfil the criteria under Rule 126(C) and should therefore be dismissed.²⁰ The Sabra Defence argues that there are three prongs to the test for granting certification: (a) the identification of an issue, (b) the demonstration of the effect of this issue on proceedings; and (c) proof as to how the immediate resolution of that issue by the Appeals Chamber would advance proceedings.²¹

13. According to the Sabra Defence, the Prosecution has failed to demonstrate that the issue for which it seeks leave to appeal was “essential for the Pre-Trial Judge in reaching his conclusions.”²² Instead, the identity of the authorities gathering the Lebanese Case File and the purpose for which it was gathered were merely “relevant factors” for the Pre-Trial Judge in determining that the file in its entirety falls under Rule 110(B).²³

14. Finally, the Sabra Defence argues that while the Certification Request is “clothed as an appealable issue”, the Prosecution’s true motive is to “narrow the scope of Rule 110(B).”²⁴ This rule requires disclosure of evidence that is “material for the preparation of the defence”, which is broader in scope than evidence that is “probative of the guilt or innocence [of the accused].”²⁵ The Sabra Defence refutes the examples provided by the Prosecution of

¹⁶ *Id.*, para. 4, *see also* paras 13-14.

¹⁷ *Id.*, paras 4, 13.

¹⁸ *Id.*, para. 3.

¹⁹ *Id.*, paras 5, 14.

²⁰ Sabra Response, para. 1.

²¹ *Id.*, para. 2.

²² *Id.*, para. 3 [emphasis in original].

²³ *Id.*, para. 5.

²⁴ *Id.*, para. 6.

²⁵ *Ibid*

allegedly irrelevant documents contained within the Lebanese Case File, and claims that the information they contain is material for the preparation of the defence “in that it demonstrates alternative theories followed by the Lebanese authorities and the procedural propriety of the investigation as a whole”.²⁶

C. The Oneissi Response

15. The Oneissi Defence recalls that the Appeals Chamber has held that Rule 126(C) establishes a high threshold, and that granting certification for leave to appeal is the exception.²⁷ It further recalls that the fact that a question is one of general interest or likely to arise in future proceedings does not suffice to justify granting leave for certification.²⁸

16. The Oneissi Defence submits that the Certification Request is limited to contesting the Disclosure Order without addressing the criteria established under Rule 126(C).²⁹ The Prosecution’s arguments in relation to the Pre-Trial Judge’s interpretation of Rule 110(B) and the resulting increased disclosure workload are understood by the Oneissi Defence as mere disagreements or divergences in the interpretation of the rule, which does not amount to an issue that is subject to appeal.³⁰

17. According to the Oneissi Defence, the Disclosure Order does not compromise the fair and expeditious conduct of the proceedings; rather, it helps to guarantee it.³¹ The Oneissi Defence argues that the Prosecution is attempting in vain to elevate the concrete application of Rule 110(B) in relation to the Lebanese Case File to a question of principle.³²

IV. Discussion

A. The Applicable Law

18. The Pre-Trial Judge recalls that certification to appeal is an exceptional measure which may only be granted if the following two cumulative requirements are satisfied: (a) the impugned decision involves an issue that would significantly affect the fair and expeditious

²⁶ *Ibid*

²⁷ Oneissi Response, para. 8.

²⁸ *Id.*, para. 9.

²⁹ *Id.*, para. 10.

³⁰ *Id.*, para. 12.

³¹ *Id.*, para. 13.

³² *Ibid*

conduct of the proceedings or the outcome of the trial; and (b) immediate resolution by the Appeals Chamber may materially advance the proceedings.³³

19. The Appeals Chamber has specified that “these requirements are strict and a Chamber must take great care in assessing them.”³⁴ In granting certification, a Judge or Chamber is “required to explain which precise issue would be significant enough in its view to warrant immediate resolution by the Appeals Chamber”,³⁵ while bearing in mind that “[m]ost issues, even when significant, may be resolved at the end of the case.”³⁶ The determination of whether certification should be granted does not consider “the correctness of the decision for which certification is sought”.³⁷ Furthermore, a request for certification is not an opportunity for a Party to express its disagreement with the impugned decision.³⁸

20. Therefore, unless the Party seeking certification can demonstrate that both of the requirements under Rule 126(C) are satisfied, certification will be denied, “even when an important point of law is raised” in the request.³⁹ However, where a Judge or Chamber “is satisfied that the issue in question is both a significant issue and one that warrants immediate resolution by the Appeals Chamber, it must certify the decision for appeal with respect to that issue.”⁴⁰

21. The Pre-Trial Judge recalls that in order to grant certification he must first ascertain “the existence of the precise issue that *would significantly* affect the fair and expeditious

³³ Rule 126(C); *See also* STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.1, *Corrected Version of Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial In Absentia Decision*, 1 November 2012 (“*In Absentia Decision*”), paras 8, 9; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.2, *Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr. Badreddine Alleging the Absence of Authority of Prosecutor*, 13 November 2012 (“*Absence of Authority Decision*”), paras 11, 13. *See also* International Criminal Tribunal for Rwanda (“ICTR”), *Prosecutor v. Uwinkindi*, Case No. ICTR-01-75-PT, *Decision on Defence Application for Certification to Appeal Decision on Preliminary Motion Alleging Defects in the Form of the Amended Indictment*, 28 March 2011 (“*Uwinkindi Decision*”), para. 3.

³⁴ *Absence of Authority Decision*, para. 15.

³⁵ *In Absentia Decision*, para. 11.

³⁶ *Absence of Authority Decision*, para. 14.

³⁷ *Absence of Authority Decision*, para. 13; *See also* *Uwinkindi Decision*, para. 4; International Criminal Tribunal for the former Yugoslavia (“ICTY”), *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, *Decision on Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65ter Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92ter*, 15 March 2012, (“*Haradinaj Decision*”), para. 9.

³⁸ *Haradinaj Decision*, para. 9; ICTY, *Prosecutor v. Milošević*, Case No. Case No. IT-02-54-T, *Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding*, 20 June 2005 (“*Milošević Decision*”), para. 3.

³⁹ ICTY, *Prosecutor v. Halilović*, *Decision on Prosecution Request for Certification for Interlocutory Appeal of ‘Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment’*, 12 January 2005 (“*Milošević Decision*”), para. 4.

⁴⁰ *Absence of Authority Decision*, para. 12.

conduct of the proceedings or the outcome of the trial.”⁴¹ If such an issue is identified, the Pre-Trial Judge must then ascertain that it is one “for which an *immediate* resolution by the Appeals Chamber through an interlocutory appeal may advance the proceedings.”⁴²

B. Whether the issue involved would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

22. The Prosecution argues that the Disclosure Order “expanded” its disclosure obligations “on the basis of criteria that fall outside this disclosure regime”,⁴³ thereby creating an “additional disclosure burden” which “will divert Prosecution resources from other pressing disclosure obligations and other work necessary for preparation for trial.”⁴⁴

23. The Pre-Trial Judge finds that the Disclosure Order did not expand the Prosecution’s disclosure obligations, and disclosure of the entirety of the Lebanese Case File is not an issue that significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial for the following reasons.

24. The concerns raised by the Prosecution in relation to its own workload and resources are in effect a direct result of its disclosure obligations under the Rules, given that the Lebanese Case File is to be treated “as an integral, indivisible whole”⁴⁵ that is subject to disclosure. Additionally, the Pre-Trial Judge finds the Prosecution’s concerns even less compelling in light of the fact that the Lebanese Case File has been in its possession since April 2009.⁴⁶ Moreover, when placed in perspective, the scale of the material subject to the Disclosure Order⁴⁷ is not excessive when compared to the number of documents disclosed through the Prosecution’s general disclosure regime.

25. The Pre-Trial Judge notes the Prosecution’s arguments that relevance for disclosure purposes is not determined by the identity of the authorities gathering documents, nor the purpose for which they were gathered, but rather “by consideration of their contents and the source of the information contained therein.”⁴⁸ However, the Pre-Trial Judge recalls that the

⁴¹ Absence of Authority Decision, para. 13 [emphasis in original].

⁴² *Id.*, para. 14 [emphasis in original].

⁴³ Certification Request, para. 4, *see also* paras 13-14.

⁴⁴ *Id.*, para. 13.

⁴⁵ Disclosure Order, paras 29, 26.

⁴⁶ *Id.*, para. 14.

⁴⁷ *See* Certification Request, para. 10.

⁴⁸ *Id.*, para. 9.

contents of the Lebanese Case File were found to be disclosable because they are “the product of the investigations carried out by Lebanese authorities with respect to the Hariri case”,⁴⁹ which is *prima facie* material to the preparation of the defence of those accused in said case.⁵⁰ As a result, the entire Lebanese Case File — to be treated as a single, indivisible dossier — is subject to disclosure.

26. As for the Prosecution’s submission that “[t]he plain language of Rule 110(B)” requires making documents available for inspection, as opposed to disclosing them,⁵¹ the Pre-Trial Judge reminds the Parties that other international tribunals have underscored the dangers of a “literal interpretation of the Rules that read narrowly the rights and obligations of the parties, particularly where such interpretations compromise these requirements of fairness and expedition.”⁵²

27. The Pre-Trial Judge finds that the Prosecution’s literal interpretation of Rule 110(B) exaggerates the distinction between disclosure and inspection and unreasonably narrows the scope of inspection, especially when considering that the heading of Rule 110 is “Disclosure by the Prosecutor” and that it falls within section 7 of the Rules, entitled “Disclosure”. Furthermore, the Pre-Trial Judge reminds the Prosecution that permitting the inspection of materials in its custody or control pursuant to Rule 110(B) comprises the obligation to provide the Defence with copies of those materials which it requests “during or immediately after inspection”.⁵³

28. Finally, the Pre-Trial Judge notes that although making materials available for inspection under Rule 110(B) does not require disclosing them *per se*, it is clear that one way in which documents can be made available for inspection is via disclosure.⁵⁴ Indeed, the Pre-Trial Judge has on other occasions ordered the Prosecution to disclose material to the

⁴⁹ Disclosure Order, para. 18.

⁵⁰ The Pre-Trial Judge notes that the other two Rule 110(B) requirements, namely that the material (a) be identified with sufficient specificity and (b) be *prima facie* in the Prosecutor’s custody or control, were obvious and undisputed with respect to the Lebanese Case File.

⁵¹ Certification Request, para. 12.

⁵² ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39, Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65ter, 66(B) and 67(C), 1 August 2001 (“Krajišnik Decision”), para. 9.

⁵³ International Criminal Court (“ICC”), *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, paras 113-114, referring to the single judge’s finding that the Prosecution’s obligation “to permit the Defence to inspect” is two-fold.

⁵⁴ See e.g. ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Motion for Additional Time to Prepare Cross-Examination of Momčilo Mandić, 2 July 2010, para. 7; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings, 10 May 2011, paras 4, 9, 21.

Defence pursuant to Rule 110(B).⁵⁵ Even the disclosure working plan established by the Pre-Trial Judge acknowledges that material requested pursuant to Rule 110(B) can be disclosed.⁵⁶

29. On this note, the Pre-Trial Judge emphasises that the decision on languages rendered on 16 September 2011⁵⁷ makes no reference to Rule 110(B) as the Prosecution is not required to translate the material disclosed pursuant to this rule, unless ordered otherwise by the Pre-Trial Judge or Chamber.⁵⁸ Consequently, contrary to the Prosecution's submissions, the Disclosure Order did not impose an "additional burden" on the Language Services Section ("LSS") nor did it "expand [the] burden [of translation] to include the Lebanese case file as a result of the order to disclose".⁵⁹ Unlike the materials disclosed under Rules 110(A) and 113, those made available for inspection under Rule 110(B) — be it by way of disclosure or other means — shall not be automatically translated. Therefore, the translation issue has no impact on the fairness and expeditiousness of the proceedings.

30. Recalling that he must "decide whether the issue or issues in question have the significance required under Rule 126(C)", the Pre-Trial Judge finds that the Prosecution's request to have the Appeals Chamber affirm that Rule 110(B) requires inspection as opposed to disclosure is without merit and should therefore not be granted.⁶⁰

C. Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

31. Having found that first of the two cumulative requirements of Rule 126(C) has not been met, there is no need for the Pre-Trial Judge to consider the second requirement of that Rule. A request for certification to appeal a decision may only be granted if both of the requirements of Rule 126(C) are satisfied.

32. The Pre-Trial Judge therefore denies the Certification Request.

⁵⁵ See e.g. Decision on Sabra Defence's Eighth Motion for Disclosure – Documents Signed or Prepared by a Lebanese Law Enforcement Official, Confidential, 11 March 2013; Decision on the Sabra Defence's Fifth Request of the Fourth Motion for Disclosure, Confidential, 21 December 2012.

⁵⁶ Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012, para. 24.

⁵⁷ Decision on Languages in the Case of *Ayyash et al.*, 16 September 2011.

⁵⁸ *Id.*, paras 51-56. Only material subject to disclosure pursuant to Rules 110(A) and 113 must be provided in English and Arabic.

⁵⁹ Certification Request, para. 12.

⁶⁰ Absence of Authority Decision, para. 13.

V. **Disposition**

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO 126(C) of the Rules,

DENIES the Certification Request.

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

Leidschendam, 8 April 2013



Daniel Fransen
Pre-Trial Judge

