



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 Fransén**

The Registrar: **Mr. Daryl Mundis, Acting Registrar**

Date: **6 June 2013**

Original language: **English**

Classification: **Public**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

DECISION ON SABRA'S NINTH MOTION FOR DISCLOSURE – REQUESTS FOR ASSISTANCE

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I. INTRODUCTION

1. In this decision, the Pre-Trial Judge rules on a motion by counsel for Mr. Assad Hassan Sabra (the “Sabra Defence”) seeking disclosure of the Prosecution’s “requests for assistance” (“RFA” or “RFAs”) addressed to competent authorities in the course of investigations and the relevant responses thereto.

II. PROCEDURAL BACKGROUND

2. On 21 February 2013, the Sabra Defence filed Sabra’s Ninth Motion for an Order for Disclosure – Requests for Assistance (the “Motion”).¹

3. On 14 March 2013, the Prosecution filed its response to the Motion (the “Response”).²

III. SUBMISSIONS

A. Sabra Defence Submissions

4. Pursuant to Rule 110(B) of the Rules of Procedure and Evidence (the “Rules”), the Sabra Defence seeks disclosure of the Prosecution’s RFAs addressed to various competent authorities to obtain certain documents and any responses thereto (collectively, the “Requested Documents”). In particular, the Sabra Defence seeks RFAs and responses concerning “potential alternative perpetrators of the explosion which resulted in the death of Rafik Hariri”.³

5. Noting the legal requirements for disclosure under Rule 110(B), the Sabra Defence submits first that it has specifically identified the documents sought which “relate to clear and concrete subjects in relation to which the Prosecution has already disclosed material”.⁴

6. Second, the Sabra Defence contends that a reasonable inference can be drawn that the documents are in the Prosecution’s custody or control, since any RFAs would have been drafted by the Prosecution itself and preserved in accordance with Rule 64. Moreover, the

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra’s Ninth Motion for an Order for Disclosure – Requests for Assistance, with Confidential Annexes A and B, 21 February 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

² Prosecution’s Response to Sabra’s Ninth Motion for an Order for Disclosure – Requests for Assistance, 14 March 2013.

³ Motion, paras 3 and 4 and Annex A.

⁴ Motion, para. 10.

Sabra Defence suggests that the onus is on the Prosecution to deny possession at the time of the request, which it has failed to do.⁵

7. Third, the Sabra Defence claims that the Requested Documents are material to the preparation of the defence, noting the broad interpretation of the concept of materiality in the jurisprudence.⁶ Specifically, the Sabra Defence explains that it wishes to pursue lines of enquiry based on indications that alternative perpetrators may have been involved in, or responsible for, the attack that killed Mr. Hariri.⁷

8. The Sabra Defence also contends that a number of further factors support the granting of the Motion. These include: the lengthy Prosecution investigations dating back to 2005, by both the United Nations International Independent Investigation Commission and the Office of the Prosecutor, where lines of inquiry in relation to potential suspects other than the accused in these proceedings were allegedly pursued before being abandoned; the inability to obtain instructions from clients in the context of the *in absentia* nature of the proceedings in this case; difficulties in obtaining the cooperation of Lebanese authorities to disclose the Requested Documents; and the obligation on the Prosecution to assist in establishing the truth pursuant to Rule 55(C) (collectively, the “Additional Factors”).⁸

B. Prosecution Submissions

9. The Prosecution objects to the Motion in its entirety and requests its dismissal. The Prosecution draws a distinction between the nature of “real evidence” of a fact itself which may be disclosable, subject to the requirements of Rule 110(B) being met, as opposed to “administrative documents reflecting investigative steps” taken by the Prosecution leading to the attainment of that real evidence which do not trigger any similar obligation under Rule 110(B).⁹ The Prosecution also opposes the Motion on the basis that the Sabra Defence has failed to satisfy the legal requirements of Rule 110(B).

⁵ *Id.*, para. 12.

⁶ *Id.*, para. 14.

⁷ *Id.*, para. 16.

⁸ *Id.*, para. 17.

⁹ Response, paras 8 and 13.

IV. DISCUSSION

10. The applicable law in relation to Rule 110(B) disclosures has been considered in detail in numerous previous decisions by the Pre-Trial Judge.¹⁰ Essentially, the Defence bears the burden of demonstrating that the documents requested pursuant to this Rule are: (a) identified with sufficient specificity; (b) *prima facie* material to the preparation of the defence; and (c) *prima facie* in the Prosecutor's custody or control.¹¹ The onus remains at all times on the Defence to meet each of the three aforementioned requirements. A favourable inference cannot be drawn from the Prosecution's silence on issues such as the materiality of a disclosure request,¹² or possession of the Requested Documents,¹³ in correspondence between these Parties prior to the Motion.

11. The Pre-Trial Judge considers that according to the formulation of Rule 110(B) the three criteria of specificity, materiality and possession are cumulative requirements, and that all of the three criteria must be met in order for it to come into effect. This reading is consistent with the prevailing jurisprudence of other international courts and tribunals¹⁴ with the exception of the authority cited by the Sabra Defence.¹⁵

12. The Pre-Trial Judge finds that the Requested Documents are not disclosable on two grounds. First, Rule 110(B) concerns "any books, documents, photographs and tangible objects in the Prosecutor's custody or control" and is clear inasmuch as it provides for

¹⁰ Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012; Decision on the Sabra Defence's Fifth Request of the Fourth Motion for Disclosure, Confidential, 21 December 2012 ("Decision of 21 December 2012), with a public redacted version filed on 28 May 2013; Decision on Sabra's Seventh Motion for Disclosure, 24 May 2013; Decision on Sabra Defence's Eighth Motion for Disclosure – Documents Signed or Prepared by a Lebanese Law Enforcement Official, Confidential, 11 March 2013.

¹¹ Decision of 21 December 2012, paras 9-10.

¹² Motion, para. 15.

¹³ *Id*, para. 12.

¹⁴ See, e.g., ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012 (the "8 February 2012 *Karadžić* Decision"), para. 8. The test, through the use of the conjunction "and" (as opposed to the disjunctive "or") has consistently been stated cumulatively: ICTR, *Prosecutor v. Édouard Karemera, Mathieu Ngrumpatse, 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; ICTR, *Prosecutor v. Édouard Karemera, Mathieu Ngrumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para. 12; ICTR, *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 (the "25 September 2006 *Bagosora* Decision"), paras 9-10.

¹⁵ Motion, para. 7 and fn. 7 citing ICTR, *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-98-21-T, Decision on Arsène Shalom Ntahobali's Motion for Disclosure of Documents (Rules 66, 68 and 73 of the Rules), 31 January 2006, para. 22.

disclosure by the Prosecution of evidentiary materials, not mere assertions of a state of facts.¹⁶

13. In the form in which the Motion has been framed, the disclosure request is limited solely to RFAs and the relevant responses thereto, excluding any actual documents accompanying a response. In prior correspondence from the Sabra Defence to the Prosecution seeking documents related to specific allegations (which are irrelevant for the purposes of this Motion),¹⁷ the Sabra Defence made the following additional request which forms the subject of the present dispute: “If any of these requested documents are not in your possession, please disclose to us any requests by you to obtain these documents submitted to the competent authorities as well as any responses received by you to these requests”.¹⁸

14. In the circumstances, the Pre-Trial Judge considers that the Requested Documents, would, by their nature, constitute mere “assertions of a state of facts” which are not disclosable. By contrast, any evidentiary material enclosed under cover of a response to an RFA constitutes primary documentary evidence which is capable of being characterised as “real evidence” as it is capable of evidencing a fact itself. Consequently, these documents may trigger the Prosecution’s disclosure obligations. The Prosecutions dealings with other entities by way of issuing an RFA are otherwise administrative or investigative steps which are, by their nature, not generally subject to disclosure.

15. The second ground where the Motion fails is the Sabra Defence’s deficiency in demonstrating, *prima facie*, that the Requested Documents are material to the preparation of its case for trial. The Pre-Trial Judge recalls that while Rule 110(B) facilitates the right of the accused to adequately prepare its case for trial, it does not permit the Defence unfettered,

¹⁶ In reference to the ICTR’s equivalent of Rule 110(B), two Judges of the ICTR Appeals Chamber declared that “The words ‘inspect any books, documents, photographs and tangible objects in his custody or control’ [in the applicable Rule governing disclosure] refer, in their collocation, to what in legal literature is regarded as real evidence. That is to say, the reference is to material considered not as an assertion of a state of facts but as itself a fact, such as a ledger, a voucher, a title deed, a summons, a receipt, a cheque, etc.” ICTR, Case No. ICTR-96-3-A, *Prosecutor v. Georges Anderson Nderumbumwe Rutaganda*, Decision (“Prosecution’s Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions”); Declaration of President Jorda and Judge Shahabuddeen, 28 June 2002 (the “*Rutaganda* Decision Declaration”), para. 6.

¹⁷ These documents include telephone numbers, interview records, investigators’ notes taken by Lebanese authorities of other terrorist suspects.

¹⁸ Motion, para. 2 and Annex A, para. 8.

unconditional and unhindered access to trawl through the Prosecution files on a speculative “fishing expedition” in the hope of finding potential material in support of its case.¹⁹

16. Some allowance may be made for the Defence where it cannot be expected to know in all cases “the precise nature of all the documents that should be available”.²⁰ Notwithstanding this allowance, the Defence must be able to demonstrate that the Requested Documents meet a minimum threshold of materiality. To meet this minimum threshold of materiality, the Requested Documents must have “more than ... [an] abstract logical relationship to the issues”,²¹ be “significantly helpful to an understanding of important inculpatory or exculpatory evidence”,²² or bear “a strong indication that ... it will ‘play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal’”.²³

17. Moreover, while materiality to the preparation of the Defence case for trial has been interpreted broadly in the jurisprudence of other international courts and tribunals, a mere assertion of materiality is insufficient to confer this quality on the Requested Documents. This criterion of materiality must be assessed on the basis of a *prima facie* demonstration of how the actual or real, rather than potential, evidence impacts on the Defence’s preparations. While any RFA or responses thereto may well be potentially material to the Sabra Defence’s preparations, this does not entitle the Sabra Defence to access them on demand without a more detailed explanation of how it will assist their preparations.

18. Prosecutorial discretion as to the selection of which suspects should be charged on what evidence is broad, and based on various considerations when assessing the available evidence. The Motion does not indicate how the materials sought are relevant to the innocence or guilt of Mr. Sabra or how they relate to the credibility of a witness whom the Prosecution intends to call at trial. Rather, the Sabra Defence merely asserts that “[w]ithin the material disclosed so far by the Prosecution, the Defence has identified a range of documents

¹⁹ Decision of 21 December 2012, para. 12. See also, 8 February 2012 *Karadžić* Decision, para. 8; ICTY, *Prosecutor v. Radoslav Brđanin and Momir Talić*, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para. 7; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”, 29 July 2011, para. 21.

²⁰ 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 (the “*Delalić* Decision”), para. 8 quoting *United States v. Liquid Sugars, Inc & Mooney*, 158 F.R.D. 466 (U.S. Dist. Ct. E.D. Cal. 1994).

²¹ *Id.*, para. 7.

²² *Ibid.*

²³ *Ibid.*

which arguably demonstrate that alternative perpetrators may have been involved in, or responsible for, the explosion resulting in the death of Rafik Hariri²⁴, without identifying or referencing that material or explaining how access to such unidentified material would assist the Sabra Defence in their preparations. Provisions such as Rule 110(B) do not serve to create a broad affirmative obligation on the Prosecution to disclose any and all documents which the Defence feels may be relevant.²⁵

19. In the present case, the Pre-Trial Judge is not satisfied that it has been demonstrated, *prima facie*, that the Requested Documents are material to the Sabra Defence's preparations for trial. Accordingly, in the absence of anything more than mere assertion, the Motion is denied.

20. Finally, the Pre-Trial Judge considers that the Additional Factors are extraneous and have no bearing on the operation of Rule 110(B).

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rule 110(B) of the Rules,

DENIES the Motion.

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

Leidschendam, 6 June 2013.



Daniel Fransen
Pre-Trial Judge



²⁴ Motion, para. 16.

²⁵ 25 September 2006 *Bagosora* Decision, para. 10.