



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. Daryl Mundis**

Date: **13 September 2013**

Original language: **English**

Classification: **Public**

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

**DECISION ON SABRA DEFENCE REQUEST FOR CERTIFICATION TO APPEAL
THE DECISION ON SABRA'S TENTH AND ELEVENTH DISCLOSURE MOTIONS**

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



I. INTRODUCTION

1. The Pre-Trial Judge hereby grants, with the modifications explained in this decision, the request by Counsel for Mr. Assad Hassan Sabra (respectively the “Request”¹ and the “Sabra Defence”) for certification to Appeal the “Decision on Sabra’s Tenth and Eleventh Motions for Disclosure” dated 14 August 2013 (the “Impugned Decision”).²

II. PROCEDURAL BACKGROUND

2. On 14 August 2013, the Pre-Trial Judge rendered the Impugned Decision.

3. On 21 August 2013, the Sabra Defence filed the Request.

4. On 4 September 2013, the Prosecution filed a response, arguing that the Request should be denied (the “Response”).³

III. SUBMISSIONS

A. The Request

5. The Sabra Defence submits that the Impugned Decision involves a set of issues which meet the requirements for certification of Rule 126(C) of the Rules of Procedure and Evidence (the “Rules”).⁴ It proceeds by enumerating six issues: three issues in relation to Rules 111 and 113(A),⁵ and three issues in relation Rule 110(A)(ii).⁶

6. The Sabra Defence argues that the Pre-Trial Judge committed errors in his interpretation of the relationship between Rules 111 and 113(A) and requests certification to appeal the Impugned Decision on the following points:

(1) whether the application of Rule 111 requires an initial assessment that the requested material is exculpatory under Rule 113(A);

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Request for Certification to Appeal the Decision on Sabra’s Tenth and Eleventh Motions for Disclosure, 21 August 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

² Decision on Sabra’s Tenth and Eleventh Motions for Disclosure, 14 August 2013.

³ Prosecution Response to Sabra Defence Request for Certification to Appeal the Decision on Sabra’s Tenth and Eleventh Motions for Disclosure, 4 September 2013.

⁴ Request, para. 8.

⁵ *Id.*, paras 9-17.

⁶ *Id.*, paras 18-24.

(2) whether the jurisprudence developed by the Appeals Chamber in *El Sayed* in relation to Rule 111 (the “*El Sayed* Jurisprudence”) is directly applicable to the present case; and

(3) if the *El Sayed* Jurisprudence is applicable, whether the *El Sayed* criteria for disclosure under Rules 111 and 113(A) were properly applied in the Impugned Decision.

7. In relation to “the interpretation of the scope of disclosure obligations pursuant to Rule 110(A)(ii)”,⁷ the Sabra Defence submits that the Impugned Decision adopts an “overly narrow interpretation” in assessing what constitutes a statement,⁸ in determining the relevance of a document,⁹ and in extending the reasoning of the Pre-Trial Judge’s decision on disclosure in relation to experts (the “Experts Decision”)¹⁰ to all witnesses.¹¹ Specifically, the Sabra Defence seeks certification to appeal the Impugned Decision on the following points:

(4) whether the Impugned Decision applied the correct interpretation of “statement” pursuant to Rule 110(A)(ii);

(5) whether the scope of the proposed testimony of a Prosecution witness affects the scope of the corresponding Rule 110(A)(ii) disclosure obligations; and

(6) whether the Experts Decision should be applied to all Rule 110 disclosure for Prosecution witnesses.

8. The Sabra Defence claims that the aforementioned six issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial since they “will significantly impact on the disclosure the Defence is expecting” thereby affecting “the Defence ability to adequately prepare its case.”¹² Additionally, these issues require an immediate resolution by the Appeals Chamber, as clarifications on these points would allow disclosure to proceed on a “sound legal footing”,¹³ thereby materially advancing the proceedings.

⁷ *Id.*, para. 18.

⁸ *Id.*, para. 19.

⁹ *Id.*, para. 21.

¹⁰ Decision on Sabra’s Seventh Motion for Disclosure – Experts, 24 May 2013.

¹¹ Request, paras 23-24.

¹² *Id.*, para. 26.

¹³ *Id.*, para. 34.

B. The Response

9. The Prosecution opposes the Request, claiming that it fails to meet the test for certification under Rule 126(C) and instead merely reflects the Sabra Defence's disagreement with the Impugned Decision.¹⁴ The Prosecution submits that the Sabra Defence's arguments in relation to Rules 111 and 113(A) are based on a misreading of both "Rule 111 and of the jurisprudence of the Appeals Chamber in the *El Sayed* matter"¹⁵ and of the Impugned Decision.¹⁶ Similarly, the Prosecution submits that the arguments put forth by the Sabra Defence in relation to Rule 110(A)(ii) "merely express [its] disagreement with the Impugned Decision."¹⁷ Accordingly, the Prosecution claims that "[t]here is no need for an immediate resolution by the Appeals Chamber of issues that challenge the correctness of the Impugned Decision and are based on [a] misreading of the Impugned Decision."¹⁸

IV. APPLICABLE LAW

10. Pursuant to Rule 126(C), a Judge or Chamber may grant certification to appeal a decision if (a) it involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁹

11. The Appeals Chamber has specified that these two requirements are cumulative, strict, "and a Chamber must take great care in assessing them."²⁰ Certification to appeal is an exceptional measure since "[m]ost issues, even when significant, may be resolved at the end of the case".²¹ Furthermore, in determining whether certification should be granted, a Judge

¹⁴ Response, para. 2.

¹⁵ *Id.*, para. 6.

¹⁶ *Id.*, paras 7-8, 10.

¹⁷ *Id.*, para. 14.

¹⁸ *Ibid.*

¹⁹ Rule 126(C) of the Rules. *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* 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.

²⁰ *Absence of Authority Decision*, para. 15.

²¹ *Absence of Authority Decision*, para. 14.

or Chamber will not consider the correctness of the Impugned Decision.²² In that respect, a motion for certification that merely expresses disagreement with the reasoning or findings of the Impugned Decision does not fulfil the requirements of Rule 126(C).²³

12. 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”.²⁴

V. DISCUSSION

A. Preliminary matter

13. The Pre-Trial Judge notes that the Request indicates a word count of 4,383 words, which is over 40 percent in excess of the permitted word limit. Article 5(1)(i) of the Practice Direction on Filing of Documents before the Special Tribunal for Lebanon (the “Practice Direction”) deals specifically with requests for certification to appeal, and responses thereto, specifying that neither may exceed 3,000 words.

14. The Pre-Trial Judge notes that the Sabra Defence did not seek leave in advance to exceed the word limit and failed to provide an explanation as to the exceptional circumstances that may have justified the oversized filing.²⁵

15. The Pre-Trial Judge could reject the Request on this basis alone. However, he will exceptionally accept the Request as filed in light of the fact that the issues concerned need to be addressed prior to trial and because rejecting the Request only to have it refilled within the word limit would delay proceedings. He nevertheless reminds the Parties that they must comply with the Practice Direction in the future. Notably, having read the Request, the Pre-Trial Judge is of the opinion that it could have easily been reduced to meet the word limit while maintaining its substantive arguments.

²² Absence of Authority Decision, para. 13; *See also* Uwinkindi Decision, para. 4; 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.

²³ 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.

²⁴ *In Absentia* Decision, para. 11.

²⁵ Article 5(3) of the Practice Direction; *Prosecutor v. Ayyash et al.*, Case STL-11-01/PT/AC/AR90.2, Order by Judge Rapporteur on Appeal Brief by Counsel for Mr. Oneissi and Prosecutor’s Response Brief, 19 July 2013, para. 3.

B. The Motion

16. While noting that merely expressing disagreement with the Impugned Decision does not fulfil the requirements of Rule 126(C), the Pre-Trial Judge emphasises that the Request includes submissions as to why the immediate resolution of the six issues raised by the Sabra Defence would have a significant effect on the fair and expeditious conduct of proceedings,²⁶ and would materially advance proceedings.²⁷

17. The Pre-Trial Judge finds that the circumstances of the present case are such that unresolved concerns relating to disclosure would have a significant impact on the conduct of proceedings given that motions for disclosure are recurrent and often voluminous. Matters relating to disclosure impact the Defence's capacity to prepare for trial, especially with respect to the cross-examination of witnesses, thereby affecting the rights of the accused. Specifically, the issues identified in the Request affect a broad range and significant number of documents. The Pre-Trial Judge therefore finds that the Request meets the first requirement of Rule 126(C).

18. With respect to the second requirement of Rule 126(C), the Pre-Trial Judge emphasises the frequency with which these disclosure issues arise and their potential for creating uncertainty and constant disputes, which delay proceedings. He therefore finds that an immediate resolution by the Appeals Chamber is warranted.

19. Having found that both requirements of Rule 126(C) are met, the Pre-Trial Judge grants the Sabra Defence certification to appeal the Impugned Decision. However, in identifying the precise issues that warrant immediate resolution by the Appeals Chamber, he observes that the issues outlined in the Response do not always accurately reflect the reasoning of the Impugned Decision and/or lack precision.

20. Notably, with respect to issue (3), the Sabra Defence erroneously claims that the Pre-Trial Judge did not issue a ruling on whether Item 6 is subject to disclosure pursuant to Rule 113(A).²⁸ He therefore dismisses the arguments found at paragraph 16 of the Request in relation to this issue and limits the scope of the appeal to whether, in applying the *El Sayed* Jurisprudence, the Pre-Trial Judge erred in not ordering that the requested documents be

²⁶ Request, paras 26-31.

²⁷ *Id.*, paras 32-34.

²⁸ Request, para. 16. This ruling was issued in paragraphs 32-37 of the Impugned Decision.

disclosed to him “in order to allow him to assess the nature of the documents”, as this “would have been the only way for him to ascertain that Rules 113(A) and 111 had been applied in the correct manner.”²⁹

21. The Pre-Trial Judge must also clarify issue (5) as the wording used in the Request is unclear. In the Impugned Decision, having determined that Item 6 does not fall under the category of “witness statement” pursuant to Rule 110(A)(ii), the Pre-Trial Judge found that its relevance was also not established for the purposes of assessing the witness’ credibility since its subject-matter was unrelated to the witness’ proposed testimony.³⁰ On this point, the Sabra Defence questions whether the Pre-Trial Judge erred in “fail[ing] to recognise that the testing of the credibility of a witness is *per se* unrelated to his proposed testimony.” The Pre-Trial Judge has accordingly rephrased issue (5) for clarity purposes.

22. Finally, with respect to issue (6), the Pre-Trial Judge limits the appeal to the concerned section of the Experts Decision, which states: “[t]he Pre-Trial Judge does not consider that internal Prosecution work product relating to the final report of internal Prosecution staff loses the protection conferred by Rule 111 merely by the person being included in the Rule 91 witness list.”³¹ The Impugned Decision extends this reasoning to the “internal chain of custody witnesses”, as referred to by the Prosecution, because “they are internal Prosecution or former [United Nations International Independent Investigation Commission] UNIIIC staff.”³² The Sabra Defence erroneously stated that the Impugned Decision extended the scope of the Experts Decision to “all Prosecution witnesses”³³ and the Pre-Trial Judge has therefore rephrased issue (6) as well.

23. As rephrased by the Pre-Trial Judge, the six issues from the Request subject to appeal are the following:

- (1) whether the application of Rule 111 requires an initial assessment that the requested material is exculpatory under Rule 113(A);
- (2) whether the *El Sayed* Jurisprudence is applicable to the present case;

²⁹ Request, para. 15.

³⁰ Impugned Decision, para. 42.

³¹ Experts Decision, para. 52.

³² Impugned Decision, para. 43.

³³ Request, para. 24.

- (3) if the *El Sayed* Jurisprudence is applicable to the present case, whether the Impugned Decision applied it properly, as explained at paragraph 20 of this decision;
- (4) whether the Impugned Decision applied the correct interpretation of “statement” pursuant to Rule 110(A)(ii);
- (5) in determining disclosure obligations pursuant to Rule 110(A)(ii), whether the relevance of a document for the purposes of testing the credibility of a witness is affected by the scope of the witness’ proposed testimony; and
- (6) whether the reasoning of the Experts Decision specified in paragraph 22 of this decision can be extended to internal chain of custody witnesses, insofar as they are internal Prosecution or former UNIIC staff.

VI. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rule 126(C) of the Rules,

GRANTS the Request;

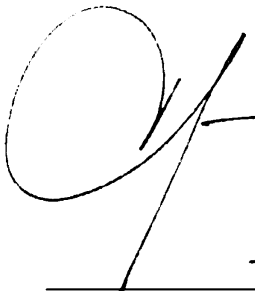
CERTIFIES the Impugned Decision for appeal in relation to the six issues raised in the Request, as rephrased in paragraph 23 of this decision; and

DISMISSES the Response.

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

Leidschendam, 13 September 2013




Daniel Franssen
Pre-Trial Judge

