

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

Case No: STL-11-01/PT/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 17 December 2013

Original language: English

Classification: Public

PROSECUTOR

v.

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

DECISION ON DEFENCE MOTION TO STAY THE PROCEEDINGS

Office of the Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan
Mr Emile Aoun

Defence Office:
Mr François Roux

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
Mr John Jones

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes
Mr Mohammad F. Mattar
Ms Nada Abdelsater-Abusamra

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

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaél Mettraux



INTRODUCTION

1. Counsel for the Accused, Mr. Assad Hassan Sabra, sought a stay of the proceedings based on Lebanon's alleged failure to cooperate with the Defence by not providing information they had requested. Counsel for Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, and Mr. Assad Hassan Oneissi joined the application.
2. Originally seeking a stay of the transfer of the case file to the Trial Chamber and a conditional stay of the case to prevent it proceeding to trial, counsel for Mr. Sabra subsequently decided to seek a conditional stay now and to suspend trial proceedings immediately following the conclusion of the first stage of the Prosecution's case at trial. Counsel for Mr. Sabra, however, have neither shown that the essential preconditions for a fair trial are missing nor that there is insufficient indication that the issue will be resolved during the trial process. Counsel for the other three Accused have simply failed to provide any link between counsel for Mr. Sabra's motion and the trial of those they represent. The Trial Chamber will therefore not grant the orders sought; it will not conditionally stay the proceedings now and suspend the trial proceedings at some point in the trial. Nor will it suspend this decision to some future date.

BACKGROUND

3. In 2012 and 2013 counsel for Mr. Sabra sent 119 requests for assistance to Lebanon seeking specific information that they state is relevant to their preparations for trial. Between 2 February 2013 and 28 August 2013, they filed five motions before the Pre-Trial Judge seeking orders directed to Lebanon to cooperate with the Special Tribunal in respect of these requests for assistance to 'search, identify and provide material' that they say is 'materially relevant' to their preparations for trial.¹ The orders were sought under Rule 20 (A) of the Rules of Procedure and Evidence, headed 'Non-compliance by Lebanon with a Tribunal Request or Order'. The five motions were unresolved

¹ STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/PT/PTJ, Second Motion Seeking the Cooperation of Lebanon – telecommunications information, 4 February 2013; Third Motion Seeking the Cooperation of Lebanon – terrorist groups, 4 April 2013; Fourth Motion Seeking the Cooperation of Lebanon – Information on Mr. Sabra, 4 April 2013; Fifth Motion Seeking the Cooperation of Lebanon, 28 August 2013; and Sixth Motion Seeking the Cooperation of Lebanon, 28 August 2013.

when the Pre-Trial Judge transferred the case file to the Trial Chamber on 25 October 2013.

4. On 11 October 2013, counsel for Mr. Sabra filed a ‘Motion for stay of proceedings due to Lebanon’s failure to cooperate with the Defence’. Counsel requested the Pre-Trial Judge to conditionally stay the proceedings until the Lebanese authorities fully complied with their numerous requests for assistance. They claimed that the motion satisfied the requirements of the case-law of international criminal law in warranting a stay of proceedings. The motion, they stated, was not premature because of the consistent pattern of Lebanon’s non-cooperation.²
5. Counsel for the other three Accused filed motions stating that they were joining the motion seeking the stay of proceedings.³ On 25 October 2013, the Trial Chamber was seised with the case file and with it the motion for stay of proceedings, the three joinder motions, five cooperation motions from counsel for Mr. Sabra, and one cooperation motion from counsel for Mr. Badreddine.⁴
6. The Prosecution opposed the motion, arguing that it failed to meet the requirements for the threshold for a stay of proceedings. The Trial Chamber should address as a minimum several factors, including whether the material sought is properly identified, actually exists, is exculpatory and the Defence has been unable to obtain it, by for example, asking the Prosecution if it has it. Moreover, given the relatively early stage of the proceedings, it was premature to conclude that a fair trial is not possible and that there is no prospect that any alleged unfairness cannot be addressed later in the proceedings. The Prosecution also argued that the joinder motions of counsel for the other three Accused, Mr. Ayyash, Mr. Badreddine and Mr. Oneissi, should be dismissed outright since they failed to meet their burden of properly substantiating a request for stay of proceedings. The Prosecution further stated that it had disclosed to

² Sabra Defence Motion for Stay of Proceedings due to Lebanon’s failure to Cooperate with the Defence, 11 October 2013.

³ Badreddine Defence Joinder to ‘Sabra Defence Motion for Stay of Proceedings Due to Lebanon’s Failure to Cooperate with the Defence’, 11 October 2013; Ayyash Defence Joinder to ‘Sabra Defence Motion for Stay of Proceedings Due to Lebanon’s Failure to Cooperate with the Defence’, 16 October 2013; The Defence for Hussein Hassan Oneissi Joinder to ‘Sabra Defence Motion for Stay of Proceedings Due to Lebanon’s Failure to Cooperate with the Defence’, 16 October 2013.

⁴ Requête de la Défense de M. Badreddine aux fins d’obtenir la coopération du Liban, 24 octobre 2013.

counsel for Mr. Sabra some information requested from the Lebanese authorities.⁵ Counsel for Mr. Sabra acknowledged in a reply that some of the disclosed information related to the cooperation requests.⁶

Requests for cooperation directed to Lebanon

7. As the basis of this motion for stay is the alleged failure of Lebanon to cooperate, the Trial Chamber simultaneously attempted to resolve whether these Defence contentions were correct. Counsel for Mr. Sabra had sent 119 requests for assistance to Lebanon in 2012 and 2013. The Trial Chamber was initially unable to untangle from the five Defence motions for orders directed to Lebanon exactly what was outstanding, and why. Faced with this situation, the Trial Chamber, on 20 November 2013, sought clarifications from the counsel for Mr. Sabra as to what material was outstanding.⁷ Having received a non-responsive answer from counsel for Mr. Sabra, the Trial Chamber made a further order for particulars on 29 November 2013.⁸ After viewing their further submissions, received on 3 December 2013 and annexing a 246-page table,⁹ the Trial Chamber, on 16 December 2013, issued orders dismissing the application for an order directed to Lebanon in respect of 26 of the requests for assistance, and sought further clarification from the Prosecution in respect of some of the remaining requests for assistance as to whether it held any of the material sought by the Defence.¹⁰
8. The Trial Chamber also directed counsel for Mr. Sabra, after they have ascertained exactly what is still outstanding and cannot be obtained from the Prosecution, to file proposed draft orders to Lebanon specifying in a precise, detailed and accurate manner what information the Defence seeks. After receiving these proposed orders the Trial Chamber will evaluate whether the requests for assistance relate to ‘relevant

⁵ STL-11-01/PT/TC, Prosecution Response to Sabra motion for stay of proceedings, 28 October 2013.

⁶ Sabra Defence reply to ‘Prosecution response to Sabra motion for stay of proceedings’ with confidential Annex A, 13 November 2013.

⁷ Order requesting further clarifications, 20 November 2013.

⁸ Further order to counsel for Assad Hassan Sabra in relation to requests for State cooperation, 29 November 2013.

⁹ Reply to “Prosecution Response to Sabra Defence ‘Further Clarifications Regarding Sabra Defence Motion for Stay of Proceedings’”, 3 December 2013, *confidential*, with *confidential and ex parte* Annex D.

¹⁰ Orders relating to five Defence motions for orders directed to Lebanon on State cooperation, 16 December 2013.

documents required for the investigation’ as specified in Article 15 of the Agreement between the United Nations and Lebanon on the establishment of a Special Tribunal, annexed to United Nations Security Council Resolution 1757 (2007) and, hence, whether orders can be directed to Lebanon. It follows that the Trial Chamber is not yet in a position to issue orders compelling Lebanon to cooperate with the Special Tribunal in respect of the Defence’s requests for assistance.

APPLICABLE LAW

9. The Special Tribunal’s Statute and Rules do not refer to the power to order a stay of proceedings. The Appeals Chamber has held that although staying proceedings is not explicitly specified in the Tribunal’s legal framework it could exercise its inherent jurisdiction to make such an order.¹¹

10. The power to stay the proceedings is discretionary and involves ‘an exercise of judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence’.¹² A Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached.¹³

11. The Trial Chamber has surveyed the case law of the international criminal courts and tribunals and has found the following principles to be applicable to the situation in the Defence motion, namely, those of access to evidence and allegations concerning alleged state non-cooperation.

¹¹ *In the Matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order regarding Jurisdiction and Standing, 10 November 2010, para. 46. See also ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the Defence Request for a Temporary Stay of Proceedings, Trial Chamber IV, 26 October 2012, paras 74, 78; *Prosecutor v. Barayagwiza*, Appeals Chamber Decision, 3 November 1999, para. 75; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, paras 24, 29, 35.

¹² ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 28.

¹³ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, para. 84. See also *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the Defence Request for a Temporary Stay of Proceedings, Trial Chamber, 26 October 2012, para. 86.

12. The International Criminal Court's Appeals Chamber has held that a stay of the proceedings is a 'drastic remedy', necessary only if (i) the essential preconditions of a fair trial are missing, and (ii) there is no sufficient indication that this will be resolved during the trial process. It would run contrary to the responsibility of trial judges to relieve unfairness as part of the trial process if a stay of proceedings was used as a remedy every time a claim was made of frustration of access to information or facilities needed for trial preparation.¹⁴
13. The unfairness to the accused may be of such a nature that – at least theoretically – a fair trial might become possible at a later stage because of a change in the situation that led to the stay. Under such circumstances, 'a conditional stay of the proceedings may be the appropriate remedy'.¹⁵ Conversely, the impossibility of receiving a fair trial means that at the outset it is clear that the essential preconditions of a fair trial are missing, and insufficient indication exists that this will be resolved during the trial process. In those circumstances the proceedings should be stayed.¹⁶
14. In situations involving unavailable evidence, while the evidence should relate to the 'heart of the case', its absence does not have to have 'a decisive impact' on the outcome of the case. Whether the impact may be decisive is contingent upon the entirety of the available evidence and the proceedings. Before trial, where no evidence has been submitted, requiring the defence to prove 'a decisive impact' on the outcome

¹⁴ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 76. See also *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the Defence Request for a Temporary Stay of Proceedings, Trial Chamber, 26 October 2012, paras 79-80; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, para. 55.

¹⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, paras 81-82. See also *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the Defence Request for a Temporary Stay of Proceedings, Trial Chamber, 26 October 2012, paras 84-85.

¹⁶ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 76. See also *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the Defence Request for a Temporary Stay of Proceedings, Trial Chamber, 26 October 2012, paras 79-80.

of the case would be too onerous. However, the defence will not have ‘properly substantiated’ its request if the unavailable evidence is not identified with sufficient specificity.¹⁷

15. In its order on state cooperation of 16 December 2013, the Trial Chamber decided that ‘to issue an order under Rule 20 (A) the Trial Chamber must be satisfied that;

- the requests for information or cooperation comply with procedure in Rules 16 (B) and (C),
- the Head of Defence Office has determined that the requests are not frivolous or vexatious,
- the requests relate to relevant documents required for the investigation,
- the documents are both relevant *and* required for the investigation, and
- the Lebanese authorities have not, without undue delay, satisfactorily complied with the requests.

Moreover, in applying the international case law, the Trial Chamber should be satisfied that;

- the request identifies as much as possible specific documents rather than broad categories of documents,
- reasonable efforts have been made to explore possible alternatives short of an order under Rule 20 (A),
- a reasonable effort has been made to persuade Lebanon to voluntarily provide the requested information, and
- the request cannot be unduly onerous on Lebanon.’

¹⁷ ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the Defence Request for a Temporary Stay of Proceedings, Trial Chamber, 26 October 2012, paras 90-93; ICTR, *Prosecutor v. Nahimana et al.*, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003, paras 11-13.

DISCUSSION

16. A permanent stay of proceedings is the ultimate step a court may take to control the conduct of proceedings on an indictment. A conditional stay of proceedings, while falling short of a permanent stay, is an extreme remedy – in some cases a conditional stay could be tantamount to a permanent stay. International case law has set clear parameters for ordering a stay and a court may thus only grant such a remedy if satisfied of the strict pre-conditions for taking this measure, this ‘drastic remedy’. The main issue for determination here is whether the Sabra motion to stay the proceedings satisfies these requirements.
17. The motion is based upon Lebanon’s alleged non-cooperation with Defence requests for assistance. But the threshold for issuing an order against Lebanon for non-compliance with a request for assistance is lower than that for an order staying the proceedings.
18. An order may be issued to compel Lebanon to provide the requested assistance if it has failed to provide to the Prosecution or Defence ‘relevant documents required for the investigation’. An order for a stay of proceedings, on the other hand, requires that the essential preconditions for a fair trial are missing and that there is insufficient indication that the issue will be resolved during the trial process. Thus, an order under Rule 20 (A) does not of itself result in another staying the proceedings. More is needed. But moreover, the Trial Chamber will not order a conditional stay of the proceedings based on alleged non-cooperation without first issuing an order under Rule 20 (A) compelling cooperation.

Orders sought by counsel for Mr. Sabra

19. It appears from the request for relief filed by counsel for Mr. Sabra that several possible orders are asked for. Counsel initially sought to;

(i) ‘**ORDER** that the proceedings be conditionally stayed with regular review of the situation, until Lebanon fully and effectively complies with its obligation to facilitate all of the requests for assistance sought by the Defence’.

20. On 13 November 2013, they modified it to add,

‘and,

(ii) **SUSPEND** trial proceedings, pending resolution, including at the appellate stage, of the Motion for Stay immediately following the close of the first section of the Prosecution’s case as specified in the Pre-Trial Conference dated 29 October 2013 including, the filing of any Prosecution requests for admission of evidence under Rules 155, 156 and 158 that relate to any subject areas outside of this first section’.

21. The last portion of this addition – that of suspending the mere *filing* of Prosecution requests for the admission of evidence – strikes at the heart of the efficient administration of justice. The Trial Chamber will not consider making such an extreme order at this point of the proceedings. The Defence have the statutory right to respond to any Prosecution motion to admit witness statements into evidence. The Trial Chamber is not going to order the Prosecution not to file any or all such motions.

22. Concerning the substantial request for relief, there are several possible interpretations of what is sought in the two combined orders. One is ordering a conditional stay *now* – while simultaneously allowing the trial to continue – but then suspending the trial at some later point. Under this scenario the order would take effect upon the non-happening of a future event, that is, of Lebanon not providing the material the Defence seeks. A conditional stay of proceedings would be ordered now, but it would only come into effect if Lebanon did not provide the documents sought by the end of the first part of the Prosecution’s case.

23. On a second interpretation, the Trial Chamber would order a conditional stay of proceedings *not now but only after* the conclusion of the first phase of the Prosecution’s case, as outlined at the pre-trial conference, and only if the Defence did not have the documents it seeks. The Trial Chamber, at some point *in the future*,

would make the order. It would then take effect by conditionally staying the proceedings by suspending the trial. The order and the stay would occur at the same time but at some point in the future. By contrast, the first possibility is to make an order to stay now, but making its coming into effect conditional upon something not happening. The two scenarios would require different orders.

24. Whichever is the correct reading – of whether the order is sought to be made now or later – it appears that Defence counsel are asking the Trial Chamber to conditionally stay the proceedings by suspending the trial at some indeterminate point in the future. This would be conditional upon some future event not happening.
25. Defence counsel, however, have pursued this novel procedural route without being able to say what the situation will be at the point when they want the order to take effect – that is, at the close of the first part of the Prosecution case. Either course thus presents obvious procedural problems. Making an order staying the proceedings, either *now or in the future*, but making the stay – or suspension of the trial, as it is termed – conditional upon something *not happening* some months into the future, cannot work procedurally.
26. Defence counsel cannot foretell what will happen in the coming months. They cannot predict the result of any order issued under Rule 20 (A). And because they cannot, they have necessarily failed to show either (i) how the essential preconditions for a fair trial are missing now, or (ii) insufficient indication that the issue will be resolved during the trial process. There is simply no indication that the issue will not be resolved at the point when they want the order (combined with the suspension of the trial) to take effect. At the moment it is no more than speculative. Moreover, it is still unclear in respect of some requests for assistance exactly which information sought from Lebanon is outstanding, and if any is outstanding, how its absence would affect the conduct of the trial.
27. So even if the Trial Chamber does issue orders under Rule 20 (A) compelling Lebanon to cooperate with the Special Tribunal by providing documents to the Defence, resolution of the issue of staying the proceedings is dependent upon (a) receiving a

response or non-response from Lebanon, and then, if any material sought is still outstanding, (b) evaluating the effect of this missing material on the fairness of the trial. Clarifying these fundamental points is an obligatory precondition to making – much less deciding – an application for a stay of proceedings based upon alleged State non-cooperation. The Trial Chamber is not yet in a position to determine either of these issues. The motion to stay the proceedings – of asking the Trial Chamber to take the ‘drastic remedy’ of halting proceedings on the amended indictment at some future point – is therefore premature and is accordingly dismissed.

Joinder motions of counsel for Mr. Ayyash, Mr. Badreddine and Mr. Oneissi

28. The amended indictment alleges criminality against four different Accused. Proceedings could be stayed on an indictment in relation to only one or more of the four; an application by one Accused for a stay of proceedings does not necessarily automatically apply to every other Accused charged in the same indictment. A stay could be limited to distinct charges on an indictment, or individual Accused, or a combination of these. Each Accused bears an onus of establishing the factors required before the Trial Chamber will impose a stay of proceedings; merely joining the motion of a co-accused to stay the proceedings cannot of itself discharge the onus to establish that proceedings on the indictment should be stayed.

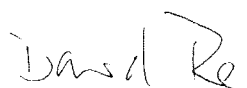
29. Counsel for Mr. Ayyash and Mr. Oneissi stated no more in their one-paragraph motions of joinder than they were joining the application. Counsel for Mr. Badreddine went slightly further by stating that they had joined several cooperation motions filed by the Sabra Defence in 2012 and also that their own request for assistance to Lebanon, sent 24 May 2013 and annexed to their joinder, remained outstanding. This fact, of itself, and without any argument at all as to how the absence of the information sought affects in any way the conduct of the trial, leads nowhere.

30. Moreover, they did not join the amended order for relief filed by counsel for Mr. Sabra on 13 November 2013 and thus seek relief different to that originally sought in the motion filed on 11 October 2013. They are therefore seeking an immediate conditional stay of proceedings while it appears that counsel for Mr. Sabra are now seeking a

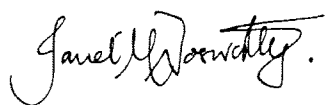
suspension of the trial at a later date. The Trial Chamber agrees with the Prosecution that these three motions should be summarily dismissed for failing to substantiate how or why the proceedings on the amended indictment should be stayed.

THE TRIAL CHAMBER,

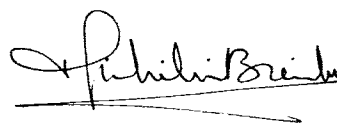
DISMISSES the motion to stay the proceedings and its joinder motions.



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

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

Dated 17 December 2013,
Leidschendam,
The Netherlands

