

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: 24 December 2013

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

Corrected Version of
**“ORDERS RELATING TO FIVE DEFENCE MOTIONS FOR ORDERS
TO LEBANON ON STATE COOPERATION” of 16 December 2013**

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INTRODUCTION

1. The Trial Chamber must decide five motions filed by counsel for the Accused, Mr. Assad Hassan Sabra, asking for orders to Lebanon to ‘search, identify and provide material’ that they say is ‘materially relevant’ to their preparations for trial.
2. Between 4 February 2013 and 28 August 2013, counsel filed five motions before the Pre-Trial Judge seeking these orders in respect of 119 requests for assistance that had been sent to the Government of Lebanon in 2012 and 2013.¹ As of 28 November 2013, 118 remain. Each motion submitted that the Defence had not received satisfactory responses from Lebanon. The five motions were unresolved when the Pre-Trial Judge transferred the case file to the Trial Chamber on 25 October 2013.
3. The requests for assistance fall into five categories. The second Defence motion concerns telecommunications information. The third relates to identifying terrorist groups allegedly operating in Lebanon, the fourth seeks specific information about Mr. Sabra. The fifth motion – which is *ex parte* to the Prosecution – seeks information relating to a specific telephone number, while the sixth, also *ex parte*, requests specific information relating to Lebanese officials.
4. Counsel for Mr. Sabra, on 11 October 2013, filed a motion seeking a conditional stay of the proceedings based upon the non-resolution of these five motions.² The stay motion is the subject of a separate decision, but its determination is interlinked with these five motions for cooperation.
5. To resolve whether the motions correctly submit that Lebanon has not cooperated with the Special Tribunal, the Trial Chamber attempted to ascertain exactly what information Defence counsel has sought from Lebanon has not been received. On 20 November 2013, the Trial Chamber ordered counsel for Mr. Sabra to clarify exactly what material sought from Lebanon was outstanding.³ The Prosecution responded⁴ and Defence counsel replied, however, the

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; Sixth Motion Seeking the Cooperation of Lebanon, 28 August 2013. Another motion, titled ‘the First Motion’, or STL-11-01/PT/PTJ, Motion seeking the Cooperation of Lebanon, was filed on 28 September 2012, and resolved on 11 February 2013, STL-11-01/PT/PTJ, Decision on the Defence Request Seeking to obtain the cooperation of Lebanon.

² STL-11-01/PT/PTJ, Public redacted version of Sabra Defence Motion for Stay of Proceedings due to Lebanon’s failure to Cooperate with the Defence, 11 October 2013.

³ STL-11-01/PT/TC, Order requesting further clarifications, 20 November 2013.

Defence filing was so imprecise that the Trial Chamber issued a further order, on 29 November 2013, seeking further specificity from counsel for Mr. Sabra.⁵ They responded by filing a 246-page table listing and assessing the outstanding material according to the categories identified in the five motions.⁶

APPLICABLE LAW AND ANALYSIS

6. To make the orders sought against Lebanon, the Trial Chamber must be satisfied of a number of preconditions. These can be found in the Special Tribunal's constituent documents, its Rules of Procedure and Evidence, and possibly also in international case law interpreting similar provisions in the Statutes and Rules of Procedure and Evidence of other international courts and tribunals.
7. 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) made pursuant to Chapter VII of the Charter of the United Nations, states,

The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.

8. Rule 16 (B) of the Special Tribunal's Rules applies to both Prosecution and Defence requests for assistance to Lebanon (referring only to the Prosecutor but applying equally to the Defence by virtue of Rule 16 (C)). It states,

Where it appears to the Prosecutor that, for the purposes of investigations concerning the Hariri Attack or any other attack that may fall within the Tribunal's jurisdiction under Article 1 of the Statute, it is necessary to question witnesses, search premises, seize documents and other potential evidence, or undertake any other investigative measure in Lebanon, the Prosecutor may request the Lebanese authorities to conduct such measures or request permission to have his staff conduct such measures themselves, or a combination thereof.

⁴ Prosecution Response to Sabra Defence Further Clarification Regarding Sabra Defence Motion for Stay of Proceedings and its Annex B, 28 November 2013.

⁵ Further order to counsel for Assad Hassan Sabra in relation to request for state cooperation, 29 November 2013.

⁶ 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.

9. Rule 16 (C) provides that such a request can be made by the Head of the Defence Office, at the request of the Defence, unless he or she considers the request to be frivolous or vexatious. Rule 20 (A) provides that when the Lebanese authorities receive such a request, they shall provide the requested assistance without undue delay. If they fail to comply with the request, a Party may seek an order from the Pre-Trial Judge or a Chamber to the Lebanese authorities to compel the requested assistance. Rule 20 (C) states that ‘Where the Lebanese authorities fail, within thirty days of notification of an order under paragraphs (A) and (B), to comply with it, the Pre-Trial Judge or a Chamber, as appropriate, may make a finding to that effect’.
10. Article 4 (1) of the Memorandum of understanding between Lebanon and the Defence Office⁷ specifies that, before submitting a request under Rule 16 (C) to the Lebanese authorities, the Head of Defence Office must determine that the request is not frivolous or vexatious. It does not require the Head of the Defence Office to determine if they are ‘relevant documents required for the investigation’.
11. The following principles from the case law of the international criminal courts and tribunals may also be applicable to situations where Defence counsel seek cooperation orders directed to States. Like the Special Tribunal, the International Criminal Tribunal for the former Yugoslavia was established by a UN Security Council Resolution under Chapter VII of the UN Charter. Its Appeals Chamber has held that before issuing such an order, a Chamber must verify that: (i) the request for the production of documents identifies specific documents and not broad categories of documents; (ii) the requested documents must be ‘relevant to any matter in issue’ and ‘necessary for a fair determination of that matter’; (iii) the applicant must show that a reasonable effort has been made to persuade the State to voluntarily provide the requested information; and (iv) the request cannot be unduly onerous upon the State.⁸ ‘Necessary’ means that ‘it obliges the applicant to show that the requested materials, if they are produced, are necessary for a fair determination of a matter at trial’.⁹ The International Criminal Court, a treaty-based court with a Statute that specifies State cooperation matters in some detail, has held that a Chamber may issue

⁷ Memorandum of understanding between the Government of the Lebanese Republic and the Defence Office on the modalities of their cooperation, signed 28 July 2010.

⁸ ICTY, *Prosecutor v. Milutinović*, IT-05-87-AR108bis.2, Decision on request of the United States of America for Review, 12 May 2006, paras 14-15. See also *Prosecutor v. Kordić and Čerkez*, 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; *Prosecutor v. Tihomir Blaškić*, IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 1997, 29 October 1997, para. 32; *Prosecutor v. Karadžić*, IT-05-5-18-T, Decision on Accused’s Fifth Motion for Binding Order (United States of America), 22 August 2012, para. 7.

⁹ ICTY, *Prosecutor v. Milutinović*, IT-05-87-AR108bis.2, Decision on request of the United States of America for Review, 12 May 2006, para. 23. The Pre-Trial Judge applied these principles in his Decision on the Defence request seeking to obtain the cooperation of Lebanon, STL-11-01/PT/PTJ, 11 February 2013, para. 15.

a cooperation order to a State when the requirements of (i) specificity, (ii) relevance and (iii) necessity are met.¹⁰

12. Article 15 of the Agreement between the United Nations and Lebanon provides a lesser standard for seeking cooperation with Lebanon – specifying ‘relevant documents required for the investigation’ – than that required for example by Rule 54 *bis* of the ICTY’s Rules of Procedure and Evidence. Rule 54 *bis*, headed ‘Orders directed to States for the Production of Documents’, requires that the documents be identified, that the Party requesting the order against a State ‘indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for the fair determination of that matter’, and explain the steps already taken by the applicant to secure the State’s assistance. This imposes on a Party seeking an order against a State before an ICTY chamber a higher standard than is required under the Agreement between the United Nations and Lebanon.
13. This difference in applicable standards is probably explained by the more general nature of Article 29 of the Statute of the ICTY, headed ‘Co-operation and judicial assistance’ – directed to and binding on all UN member States. Article 15 of the Agreement between the United Nations and Lebanon which, although part of a Chapter VII Security Council Resolution, is nonetheless an agreement between the United Nations and an individual member State. However, in interpreting the phrase ‘relevant documents required for the investigation’ the Trial Chamber believes that some of the principles derived from the international case law are also applicable to the Special Tribunal.
14. Before making an order under Rule 20 (A), some objectivity is needed in determining whether something is a ‘relevant document[s] required for the investigation’. Although the Head of the Defence Office screens requests for assistance to ensure that they are not frivolous or vexatious, he is not required to determine whether the information is [a] ‘relevant document[s] required for the investigation’. A request for assistance could thus pass the threshold of not being frivolous or vexatious but, objectively, not concern ‘relevant documents required for the investigation’. In the Trial Chamber’s view, a Party must establish to the Trial Chamber’s satisfaction how the documents are both relevant *and* required for the investigation.

¹⁰ ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’, Trial Chamber IV, 1 July 2011, paras 16-17.

15. The Trial Chamber also believes that, consistent with the principles of international case law, a Party seeking an order should identify as much as possible the specific documents sought rather than broad categories of documents, that a reasonable effort has been made to persuade Lebanon to voluntarily provide the requested information, and that the request cannot be unduly onerous.

16. Thus to issue an order under Rule 20 (A) the Trial Chamber must be satisfied that;

- the requests for information or cooperation comply with the 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.

17. 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.

DETERMINATION

18. Defence counsel have taken a very broad approach to this issue by seeking, in five separate motions, general orders directed to Lebanon in respect of *all* 119 requests for assistance. The motions seek general orders against a State, but without specifying precisely what material is outstanding or unavailable to them by other possible alternatives, such as from the Prosecution. The 246-page table filed on 3 December 2013 exposes a methodological flaw as it is still unclear

what information is outstanding, or cannot be obtained from the Prosecution, in respect of many of these requests. An order directed to a State to cooperate must clearly specify what material is sought. The Trial Chamber cannot make an order directed to a State if it lacks this precision.

19. Moreover, as a fundamental principle of litigation, a Party seeking a coercive order against a State should provide a Chamber with at least some form of draft order specifying precisely what the State should do – in the same manner that a prosecutor or investigator would provide a draft order for, say, issuing a warrant of arrest or a search warrant. The five motions do not do this.
20. The Trial Chamber, in its two orders seeking clarification of 20 and 29 November 2013, asked for the specificity needed to formulate such an order, if justified. The 246-page table filed in response (as Annex D to the Defence Reply) is divided into six columns headed, ‘category of requests’, ‘response from Lebanese authorities’, ‘requests that have not been addressed by Lebanese authorities’, ‘ERNs (evidence record numbers) provided by the Office of the Prosecutor’, ‘summary of content’, and ‘outstanding requests’.
21. The Trial Chamber has analysed the table by dividing it into three categories that overlap across the five motions, namely, (i) where the motions lack such specificity that those portions of them should be dismissed, (ii) where it is unclear whether the Prosecution holds the information sought by the Defence and further clarification is required, and (iii) where it *may* be appropriate to issue an order directed to Lebanon to cooperate.

(i) 29 requests for assistance lacking specificity

22. For 29 of the 119 requests for assistance covered by the five motions, the final column of the 246-page table – which should specify exactly what is missing, as per the Trial Chamber’s two orders – simply states, ‘Request has been partially met but is not a complete record’ (or similar). The Trial Chamber does not know what this means, and after having already issued two orders seeking the necessary precision to consider making the orders sought, will not issue a further order for clarification. The Defence has not specified with the necessary precision what it lacks. The Trial Chamber therefore dismisses any request to make an order directed to Lebanon in respect of these 29 requests for assistance. These are listed in category (i) in the attached table.

(ii) 14 requests for assistance where the information provided by the Prosecution is unclear

23. The Lebanese response to some of the 119 Defence requests for assistance is that Lebanon has provided the information to the Prosecution. Cooperation is thus required of the Prosecution to

establish what further information sought by the Defence is actually in Prosecution hands. Resolving this would satisfy one of the preconditions specified above to making an order, namely, 'that reasonable efforts have been made to explore possible alternatives, short of an order under Rule 20 (A)' for obtaining the information sought.

24. The Prosecution responded to the Trial Chamber's order of 20 November 2013 by filing a lengthy list of ERNs.¹¹ This list, however, is cumbersome, lacks specificity, is meaningless to the Trial Chamber, and is unhelpful to the Defence. The second column of the table attached to this decision lists by Defence request for assistance number those requests in which the information provided by the Prosecution – and according to the Defence's evaluation and the Trial Chamber's preliminary assessment – is unclear, incomplete or inaccurate.
25. To illustrate, re request no. 55, in respect of some telecommunications call data records that are presumably in the Prosecution's possession, the Prosecution has provided to the Defence a list of ERNs. The Defence response in the column 'Summary of content' is 'Data incomplete...data for MTC missing'. Similarly in relation to request no. 60, for call data records of a particular cell-tower in Beirut, to which the Prosecution provided a range of ERNs, the Defence responded that 'Data not retrievable/inaccurate' with an explanation of why.
26. The Prosecution is therefore ordered to provide the necessary clarifications sought by the Defence – as set out in the column 'summary of content' – and, if appropriate, to disclose to the Defence the further information in its possession. Fourteen of the Defence requests for assistance fall within this category.

(iii) 75 requests for assistance where an order directed to Lebanon may be appropriate

27. The remaining category concerns the 75¹² requests for assistance where, on present information, it may be appropriate to direct an order to Lebanon to cooperate with the Special Tribunal, as it appears to the Trial Chamber that Lebanon has not provided Defence counsel with the material it seeks.
28. However, before determining whether the subject matter of the requests is reasonably required for the Defence investigations, and thus that an order may be made, the Trial Chamber needs to ascertain whether the Prosecution possesses any further material sought. The Trial Chamber will

¹¹ Prosecution Response to Sabra Defence 'Further Clarifications Regarding Sabra Defence Motion for Stay of Proceedings', with Annex B, 28 November 2013.

¹² On 18 November 2013, Lebanon provided the information sought in request for assistance no. 118.

therefore order the Prosecution to inform the Defence whether it has this material. If the Prosecution has the material, unless it makes a specific application to the Trial Chamber not to disclose the material, it must be disclosed without delay.

29. Six requests for assistance, numbers 107 to 110 and 117 and 119, however, are *ex parte* to the Prosecution. The 246-page table also contains *ex parte* information relating to the sixth Defence motion.¹³ To facilitate the Prosecution's compliance with this order, the Trial Chamber invites the Defence to provide this information, including the relevant requests for assistance, to the Prosecution.

Proposed draft orders directed to Lebanon

30. When the matters in (ii) and (iii) above are clarified, counsel for Mr. Sabra should file the proposed draft orders that they seek the Trial Chamber to direct to Lebanon in respect of any outstanding requests for assistance. The proposed orders must specify in a precise, detailed and accurate manner exactly what information the Defence seeks. The draft orders should be filed with the Trial Chamber as soon as it is clear what can be the subject of any order. Any Prosecution response to the proposed orders should be filed within three days of their filing.

Information that is electronically unretrievable

31. Defence counsel submitted that some information disclosed by the Prosecution cannot be electronically retrieved. The Prosecution should take the necessary measures, in coordination with Defence counsel, to facilitate the retrieval of the items specified in the table attached to this decision.

Confidentiality of filings

32. The Trial Chamber reiterates the importance of the filings in this case being public. Counsel for Mr. Sabra are ordered to file a publicly redacted version of Annex D to their reply of 3 December 2013 (the 246-page table). Any other confidential filings relating to the five Defence motions should also be refiled in a publicly redacted form as soon as practicable.

¹³ 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.

DISPOSITION**THE TRIAL CHAMBER,**

DISMISSES the applications by Defence counsel to issue orders to Lebanon in respect of the 29 requests for assistance referred to in the five motions, listed in category (i) of the attached table;

ORDERS the Prosecution to provide to counsel for Mr. Sabra, by 19 December 2013, all necessary clarifications for the 14 requests for assistance listed in category (ii) of the table and, if appropriate, to disclose all information in its possession;

ORDERS the Prosecution to confirm, by 19 December 2013, whether it possesses any further relevant information requested by counsel for Mr. Sabra for the 75 requests for assistance in category (iii) in the table, and unless the Prosecution applies to the Trial Chamber for non-disclosure order, to disclose to the Defence, without delay, any such material in its possession;

ORDERS counsel for Mr. Sabra to draft and file any proposed orders they seek directed to Lebanon to cooperate with the Special Tribunal in respect of any information outstanding from their requests for assistance;

ORDERS the Prosecution to file any response to draft proposed orders within three days of their filing;

ORDERS the Prosecution by 18 December 2013 to take the necessary measures in coordination with counsel for Mr. Sabra to facilitate the retrieval of the material marked as 'non-retrievable' in the table in Annex D to their Reply, filed 3 December 2013;

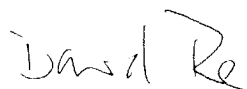
ORDERS counsel for Mr. Sabra to file a public redacted version of Annex D to the Sabra Defence Reply; and

DIRECTS the Registrar to notify the relevant Lebanese authorities of this decision.

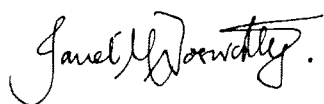
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,
The Netherlands

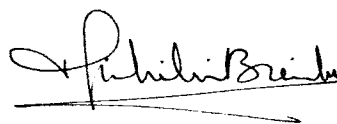
24 December 2013



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

TABLE OF 119 DEFENCE REQUESTS FOR ASSISTANCE

The numbers in the table correspond to each of 119 requests for assistance addressed by counsel for Mr. Sabra to Lebanon between 13 August 2012 and 10 May 2013 which are referred to in five motions.

Second Motion Seeking the Cooperation of Lebanon – Telecommunications Information 4 February 2013		
Category (i):	Category (ii):	Category (iii):
29 requests for assistance	14 requests for assistance	75 requests for assistance
Lacking specificity as to whether the request for assistance has been answered	Unclear, incomplete or inaccurate information provided by the Prosecution in relation to whether it has the information in the request for assistance	Requests for assistance that may be included in an order to Lebanon to cooperate with the Special Tribunal
15, ¹ 21, 22, ¹ 23, 73 to 81, 89, 91 to 95	37, 55, 60, ¹ 61, 62, 63, ¹ 64, ¹ 67, 83, 84, 96	1 to 14, 16 to 20, 24 to 27, 28, ^{2 3} 29 to 31, 32, ² 33, 34, ² 35, ² 36, ² 38 to 54, 56, ² 57, ² 58, ² 59, ² 65, ² 66, ² 68, 69, ² 70, ² 71, ² 72, ² 82, 85 to 87, 88, ² 90
¹ Data marked as ‘non-retrievable’ on ‘Z-drive’ (the Prosecution’s discrete disclosure drive) and or in ‘Legal Workflow’ (the Tribunal’s legal document management system). ² The last column of Annex D of the Sabra Defence Reply of 3 December 2013 describes the material outstanding. ³ The last column of request 28 mistakenly refers to Alfa instead of MTC and Alfa.		

Third Motion Seeking the Cooperation of Lebanon – Terrorist Groups 4 April 2013		
<p>Category (i):</p> <p>29 requests for assistance</p> <p>Lacking specificity as to whether the request for assistance has been answered</p>	<p>Category (ii):</p> <p>14 requests for assistance</p> <p>Unclear, incomplete or inaccurate information provided by the Prosecution in relation to whether it has the information in the request for assistance</p>	<p>Category (iii):</p> <p>75 requests for assistance</p> <p>Requests for assistance that may be included in an order to Lebanon to cooperate with the Special Tribunal</p>
97, 98, 100, 101	102, 103	99

Fourth Motion Seeking the Cooperation of Lebanon – Information on Mr. Sabra 4 April 2013		
<p>Category (i):</p> <p>29 requests for assistance</p> <p>Lacking specificity as to whether the request for assistance has been answered</p>	<p>Category (ii):</p> <p>14 requests for assistance</p> <p>Unclear, incomplete or inaccurate information provided by the Prosecution in relation to whether it has the information in the request for assistance</p>	<p>Category (iii):</p> <p>75 requests for assistance</p> <p>Requests for assistance that may be included in an order to Lebanon to cooperate with the Special Tribunal</p>
	106	104 105 ²
<p>² The last column of Annex D of the Sabra Defence Reply of 3 December 2013 describes the material outstanding.</p>		

**Fifth Motion Seeking the Cooperation of Lebanon
28 August 2013**

Category (i):	Category (ii):	Category (iii):
29 requests for assistance Lacking specificity as to whether the request for assistance has been answered	14 requests for assistance Unclear, incomplete or inaccurate information provided by the Prosecution in relation to whether it has the information in the request for assistance	75 requests for assistance Requests for assistance that may be included in an order to Lebanon to cooperate with the Special Tribunal
111 to 116		107 to 110

**Sixth Motion Seeking the Cooperation of Lebanon
28 August 2013⁴**

Category (i):	Category (ii):	Category (iii):
29 requests for assistance Lacking specificity as to whether the request for assistance has been answered	14 requests for assistance Unclear, incomplete or inaccurate information provided by the Prosecution in relation to whether it has the information in the request for assistance	75 requests for assistance Requests for assistance that may be included in an order to Lebanon to cooperate with the Special Tribunal
		117, 119

⁴ Lebanon provided the material sought in request no. 118 to counsel for Mr. Sabra on 18 November 2013.

