

**THE TRIAL CHAMBER**

**Case No.:** STL-11-01/T/TC

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

**Registrar:** Mr. Daryl Mundis

**Date:** 27 January 2014

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

**DECISION ON REQUEST FOR CERTIFICATION TO APPEAL ORDERS  
CONCERNING FIVE DEFENCE MOTIONS ON STATE COOPERATION****Office of the Prosecutor:**

Mr Norman Farrell  
Mr Graeme Cameron  
Mr Alexander Milne

**Victims' Legal Representative:**

Mr Peter Haynes  
Mr Mohammad F. Mattar  
Ms Nada Abdelsater-Abusamra

**Counsel for Mr Salim Jamil Ayyash:**

Mr Eugene O'Sullivan  
Mr Emile Aoun  
Mr Thomas Hannis

**Counsel for Mr Mustafa Amine Badreddine:**

Mr Antoine Korkmaz  
Mr John Jones  
Mr Iain Edwards

**Counsel for Mr Hussein Hassan Oneissi:**

Mr Vincent Courcelle-Labrousse  
Mr Yasser Hassan  
Mr Philippe Larochelle

**Counsel for Mr Assad Hassan Sabra:**

Mr David Young  
Mr Guénaél Mettraux  
Mr Geoffrey Roberts



## INTRODUCTION

1. Counsel for Mr. Assad Hassan Sabra had sought orders from the Trial Chamber under Rule 20 (A) of the Rules of Procedure and Evidence, ‘Non-compliance by Lebanon with a Tribunal Request or Order’, directing Lebanon to cooperate with the Special Tribunal in respect of 118 requests for assistance sent by Defence counsel to the Lebanese authorities in 2012 and 2013.

2. On 16 December 2013, the Trial Chamber issued its decision, ‘Orders Relating to Five Defence Motions for Orders to Lebanon on State Cooperation’.<sup>1</sup> In this decision, the Trial Chamber directed counsel for Mr. Sabra to file draft orders for 89 requests once they had clarified whether the Prosecution had any of the material that they had sought from Lebanon. Twenty-nine other requests were dismissed for lacking ‘specificity as to whether the request for assistance has been answered’. Counsel for Mr. Sabra now seek to certify for appeal two issues related to the order dismissing the 29 requests.<sup>2</sup> Separately, and on the same day, they sought reconsideration of the decision.<sup>3</sup> This motion is now withdrawn.<sup>4</sup>

3. It is important to highlight that the order dismissing the 29 unclear requests did not decide the issue on the merits; rather, the order resulted from the motion’s lack of clarity in defining the orders that Defence counsel sought against Lebanon.<sup>5</sup> And in orders before dismissing the 29 requests, the Trial Chamber had directed counsel to restate their requests in an ‘uncomplicated and comprehensible form’.<sup>6</sup> Counsel’s failure to do this resulted in the dismissal of the 29 requests—but this did not prevent Defence counsel from filing renewed but coherent applications.

4. On 13 January 2013, after receiving this application for certification and the motion seeking reconsideration, the Trial Chamber convened a meeting with counsel for Mr. Sabra and the Prosecution under Rule 53. During the meeting the Trial Chamber explained these matters to counsel

---

<sup>1</sup> STL, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, STL-11-01/PT/TC, Corrected Version of ‘Orders Relating to Five Defence Motions for Orders to Lebanon on State Cooperation’ of 16 December 2013, 24 December 2013.

<sup>2</sup> STL-11-01/PT/TC, Defence Request for Leave to Appeal the ‘Orders Relating to Five Defence Motions for Orders to Lebanon on State Cooperation’, 24 December 2013.

<sup>3</sup> STL-11-01/PT/TC, Defence Request for Leave to File a Motion for Reconsideration of the ‘Orders Relating to Five Defence Motions for Orders to Lebanon on State Cooperation’, 24 December 2013, Confidential.

<sup>4</sup> STL-11-01/T/TC, Motion for Order for Cooperation Addressed to the Lebanese Authorities and Withdrawal of Request for Reconsideration, 17 January 2010, Confidential.

<sup>5</sup> See Decision, para. 22, Disposition. See further STL-11-01/PT/TC, Reply to ‘Prosecution Response to Sabra Defence ‘Further Clarifications Regarding Sabra Defence Motion for Stay of Proceedings’’, 3 December 2013, Confidential, Confidential and *Ex Parte* Annex D, requests 15, 21, 23, 73, 74, 75, 76, 77, 78, 79, 80, 81, 89, 91, 92, 93, 94, 95, 97, 98, 100, 101. Where counsel made even some reasonable efforts at specificity, the Trial Chamber did not reject their requests as insufficiently specific: e.g. requests 28, 32, 34, 35, 36, 37, 56, 57, 58, 59, 65, 66, 69, 70, 71, 72, 88, 105.

<sup>6</sup> STL-11-01/PT/TC, Further Order to Counsel for Assad Hassan Sabra in Relation to Requests for State Cooperation, 29 November 2013, Disposition. See also Decision, paras 5, 22.

for Mr. Sabra,<sup>7</sup> who confirmed that they now pursue only 10 of the 29 requests that were dismissed for their lack of specificity in having ‘not specified with the necessary precision what it lacks’.<sup>8</sup> This limits the impact of any appeal to just 10 out of the 118 original requests for orders against Lebanon. Counsel also undertook to withdraw their first ground of appeal.<sup>9</sup>

5. Following this meeting, counsel then filed fresh applications for orders under Rule 20 (A) in respect of 10 of the 29 requests dismissed for lacking specificity, and for one additional request.<sup>10</sup> They also filed draft orders regarding 47 requests for which they felt ready to proceed.<sup>11</sup> In summary, of the 29 requests dismissed by the Trial Chamber; 10 are now re-filed and 19 abandoned; of the 89 requests for which counsel were invited to file draft orders, counsel have thus far acted in respect of 47. In total, therefore, 57 requests are now awaiting orders from the Trial Chamber.

6. The Trial Chamber has made efforts to expeditiously resolve the situation. Yet despite this procedural history—and the undertaking to withdraw their first ground of appeal—counsel have persisted with their application to appeal. Most critically, counsel have now also *re-filed the ten requests that they are simultaneously seeking to appeal*. This is procedurally irregular, and would render the appeal pointless unless some real error of law, falling within Rule 126 (C), required correction by the Appeals Chamber.

7. This application for certification—in respect of the 10 proposed orders—alleges that the Trial Chamber erred in law, and poses two questions for appeal, namely:

- whether the Trial Chamber is legally correct in requiring that requests for assistance must identify specific documents rather than broad categories of documents, and
- whether the Trial Chamber is legally correct in its determination that it can only issue an order under Rule 20(A) once all reasonable efforts have been made to explore possible alternatives.<sup>12</sup>

---

<sup>7</sup> Minutes of a meeting between the Prosecution, counsel for Mr. Sabra, and the Trial Chamber, held pursuant to Rule 53, 13 January 2014, pp. 4-5.

<sup>8</sup> Decision, para. 22; Minutes of 13 January 2014, p. 2.

<sup>9</sup> Minutes of 13 January 2014, p. 6.

<sup>10</sup> Motion for Order for Cooperation Addressed to the Lebanese Authorities and Withdrawal of Request for Reconsideration, 17 January 2014, Confidential, paras 20, 23 (concerning a request which counsel had previously inadvertently submitted was no longer required).

<sup>11</sup> STL-11-01/PT/TC, Sabra Defence Proposed Draft Orders for Cooperation, 13 January 2014. The Trial Chamber notes that counsel elected to file only 47 of the 89 relevant draft orders, and only provides valid reasons for delay with respect to a further six.

<sup>12</sup> Defence Request for Leave to Appeal the ‘Orders Relating to Five Defence Motions for Orders to Lebanon on State Cooperation’, 24 December 2013, para. 4.

8. The Prosecution opposed the application, arguing that it is ‘based on mischaracterizations of the criteria established by the Trial Chamber’.<sup>13</sup>

## DISCUSSION

### *The applicable law*

9. Rule 126 (C), ‘Motions Requiring Certification’, permits a Chamber to certify a decision for interlocutory appeal:

[...] if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

10. The ‘strict’ standard that the Trial Chamber must apply in considering motions for certification requires not only a ‘clear and precise identification of the issues’ in the challenged decision<sup>14</sup> but, above all, an *accurate* one. Neither the Appeals Chamber nor the Trial Chamber will ‘tolerate the filing of appeals’—or motions seeking certification to appeal—‘that lack any serious legal or factual basis’.<sup>15</sup> Such applications may be considered frivolous.<sup>16</sup>

*First alleged error of law: the alleged requirement to identify ‘specific documents rather than broad categories of documents’ for the purpose of Rule 20 (A)*

11. In its decision, the Trial Chamber listed the international legal principles applicable in interpreting Rule 20 (A).<sup>17</sup> At paragraph 17, it held that, before issuing an order to Lebanon, it should be satisfied (*italics added*) that:

the request identifies, *as much as possible*, specific documents rather than broad categories of documents.

12. Counsel for Mr. Sabra, however, have sought to certify the decision for appeal by omitting the words ‘*as much as possible*’ and claiming that the Trial Chamber had held that requests for

---

<sup>13</sup> Prosecution Response to Sabra Defence Request for Leave to Appeal the ‘Orders Relating to Five Defence Motions for Orders to Lebanon on State Cooperation’, 8 January 2014, para. 2.

<sup>14</sup> STL-11-01/PT/AC/AR126.5, Decision on Appeal by Counsel for Mr. Sabra against Pre-Trial Judge’s ‘Decision on Sabra’s Tenth and Eleventh Motions for Disclosure’, 6 November 2013, para. 7.

<sup>15</sup> Cf. 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 the Prosecutor, 13 November 2012, paras 13, 22.

<sup>16</sup> See Rule 126 (G); STL-11-01/PT/AC, Decision on Application by Counsel for Messrs Badreddine and Oneissi against President’s Order on Composition of the Trial Chamber of 10 September 2013, 25 October 2013, para. 17.

<sup>17</sup> Decision, paras 12-13.

assistance had to identify ‘specific documents rather than broad categories of documents’, and that it requires ‘the Defence to identify specific documents requested of the Lebanese authorities’.<sup>18</sup>

13. But the decision does not say this.

14. Rather, it states—and twice—that ‘a Party seeking an order’ under Rule 20 (A) ‘should identify *as much as possible* the specific documents sought rather than broad categories of documents’.<sup>19</sup> It does not say what counsel for Mr. Sabra assert—in omitting the qualifying words ‘as much as possible’ from their framed appeal question.

15. Moreover, counsel for Mr. Sabra have maintained these arguments before the Trial Chamber despite: the plain text of the decision; referring in their application to the necessity of having ‘*clearly defined* categories of information and documentary evidence’;<sup>20</sup> relying upon the statement of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, cited by the Trial Chamber in its decision, stating that requests for categories of documents are not prohibited provided that they are ‘defined with sufficient clarity to enable ready identification’;<sup>21</sup> having previously acknowledged at least seven times the obligation of ‘sufficient specificity’;<sup>22</sup> being informed by the Trial Chamber that the decision did not say what they were asserting;<sup>23</sup> and acknowledging the Trial Chamber’s explanation and undertaking to withdraw both this ground of appeal<sup>24</sup> and the motion for reconsideration.<sup>25</sup>

16. An alleged error of law or fact can only affect the fair and expeditious conduct of the proceedings or the outcome of the trial under Rule 126 (C) if it is not manifestly ill-founded. This application, however, is just that.

---

<sup>18</sup> Certification Request, para. 6. *See also* paras 1 (i), 4 (i), 9.

<sup>19</sup> Decision, para. 16 (emphasis added). *See also* para. 17.

<sup>20</sup> Certification Request, para. 8 (emphasis added). The single ICC Trial Chamber authority cited by counsel for Mr. Sabra is not inconsistent: *see* ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Public Redacted Version of the Decision on the Third Defence Application Pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, para. 6.

<sup>21</sup> *Compare* Certification Request, para. 6, fn. 5, with Decision, para. 11, fn. 8 (citing, among others, ICTY, *Prosecutor v. Milutinović*, IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006, para. 15).

<sup>22</sup> *E.g.* Motion Seeking the Cooperation of Lebanon, 27 September 2012, para. 13; Second Motion Seeking the Cooperation of Lebanon—Telecommunications Information, 4 February 2013, para. 23; Third Motion Seeking the Cooperation of Lebanon—Terrorist Groups, 4 April 2013, para. 12; Fourth Motion Seeking the Cooperation of Lebanon—Information on Mr. Sabra, 4 April 2013, para. 8; Fifth Motion Seeking the Cooperation of Lebanon, 28 August 2013, para. 5; Sixth Motion Seeking the Cooperation of Lebanon, 28 August 2013, para. 8; Public Redacted Version of Sabra Defence Motion for Stay of Proceedings Due to Lebanon’s Failure to Cooperate with the Defence, 11 October 2013, para. 18.

<sup>23</sup> Minutes of 13 January 2014, p. 3.

<sup>24</sup> Minutes of 13 January 2014, p. 6.

<sup>25</sup> Minutes of 13 January 2014, p. 6.

*Second alleged error of law: the requirement of ‘all reasonable efforts’ to explore possible alternatives to a request under Rule 20 (A)*

17. In the first alleged error of law, counsel for Mr. Sabra misquoted the Trial Chamber’s decision. In the second—although almost accurately quoting the decision<sup>26</sup>—they read into the decision something that is not there. At paragraph 17 of its decision, in applying a relevant principle of international criminal law case-law applicable to Rule 20 (A), the Trial Chamber held that, before issuing an order to Lebanon, it should be satisfied (*italics added*) that:

*reasonable efforts* have been made *to explore possible alternatives* short of an order under Rule 20 (A).

It did not say, as counsel for Mr. Sabra assert, ‘once *all* reasonable efforts have been made to explore possible alternatives’.<sup>27</sup>

18. Counsel argue that this ruling significantly affects the fairness of the proceedings by creating an inequality between the Parties, requiring the Defence to ‘go through’ the Prosecution to investigate. This prejudices the Defence by impeding their access to information and requiring them to indicate their lines of enquiry to the Prosecution, thereby creating a ‘grave and unfair imbalance between the parties insofar as concerns their ability to seek and obtain relevant information’.<sup>28</sup> And, internationally, ‘there is no relevant practice’ supporting a requirement of this kind for the purpose of Rule 20 (A).<sup>29</sup>

19. The Trial Chamber’s decision on this point, however, simply reflects the ‘general principles of international criminal law and procedure’ that Rule 3 (A) requires the Trial Chamber to apply in interpreting the Rules of Procedure and Evidence; these are referenced at footnote 8 of the decision. The case-law, as interpreted and applied by the Trial Chamber, requires a Party to satisfy a Chamber that it has made the efforts that are reasonable in the circumstances of each individual Rule 20 (A) application.<sup>30</sup> This, however, does not mandate any *particular* course of action—although a Party may need to explain why it has not followed one that is apparently open to it.

20. But critically for the appeal question, the decision neither states nor implies that Defence counsel must ‘go through’ the Prosecution to investigate before seeking an order under Rule 20 (A).

<sup>26</sup> Certification Request, paras 1, 4, 22.

<sup>27</sup> Certification Request, paras 4, 22 (*emphasis added*). *Compare* Decision, paras 17, 23.

<sup>28</sup> Certification Request, paras 13-15.

<sup>29</sup> Certification Request, para. 12.

<sup>30</sup> See ICTY, *Milutinović* Decision, para. 25.

The decision in fact does the opposite of what this appeal ground suggests. In respect of the six applications for orders sought *ex parte* the Prosecution the Trial Chamber *invited*, and not ordered, ‘the Defence to provide this information, including the relevant requests for assistance, to the Prosecution’.<sup>31</sup> It was only where the Prosecution already knew what the Defence was seeking—in respect of 14 applications for orders where it was unclear to the Trial Chamber whether the Prosecution had the material—that the Trial Chamber *ordered the Prosecution* to provide what it had to the Defence.<sup>32</sup> The decision thus has no unintended consequences of unfairness to the Defence. It was actually intended to assist and expedite Defence preparations according to Article 16 (4) (b) of the Statute of the Special Tribunal.

21. Moreover, at the meeting held on 13 January 2014, counsel for Mr. Sabra conceded that the decision did not expressly state that they had a duty to ‘go through’ the Prosecution.<sup>33</sup> The Trial Chamber informed counsel that they could seek clarification, if necessary, yet they have continued to attempt to appeal it.

22. Further, the Defence has now re-filed applications for *all* the orders they seek—including for ten of the 29 that were dismissed. Effectively, there is nothing left to appeal. And finally, the point that they wish to appeal actually formed no part of the Trial Chamber’s decision to dismiss 29 of the requests. They were dismissed solely because they were vague and imprecise; their dismissal had no connection with any alleged requirement that the Defence must first go through the Prosecution.

23. In reality, the arguments supporting the second alleged error of alleged unfairness resulting from having to inform the Prosecution of potential Defence lines of enquiry, could be raised on a case-by-case basis in making applications under Rule 20 (A). They do not arise from the challenged decision, either as a matter of general principle or of practice. That being so, the second appeal question cannot fall within the test in Rule 126 (C) in affecting ‘the fair and expeditious conduct of the proceedings or the outcome of the trial’. Therefore it cannot be certified for appeal under Rule 126 (C).

---

<sup>31</sup> Decision, para. 29. *See also* Reconsideration Motion, fn.13 (distinguishing between requests ‘re-classified as confidential as per the Trial Chamber’s invitation to the Defence’ and requests which ‘remain *ex parte* [...] due to the nature of the content therein’).

<sup>32</sup> Decision, para. 26, Disposition.

<sup>33</sup> Counsel for Mr. Sabra conceded that the decision did not contain ‘a requirement that the Defence first had to ask the Prosecution or exhaust efforts with the Prosecution to obtain material before they were in a position to seek an Order from the Trial Chamber’, Minutes of 13 January 2014, p.6. Counsel seem to mistake the factual disposition of the Trial Chamber’s decision, ordering the Prosecution to inform the Defence if it possessed the relevant material sought from Lebanon and to make any necessary disclosure, as a legal requirement. This is wrong. The decision turned on its facts. Counsel appear to have accepted the disposition on the facts, and to be concerned only with what they misconstrue as a point of general principle: Minutes of 13 January 2014, pp. 6-9.

**CONCLUSION**

24. Both questions posed for appeal, founded on the Trial Chamber's alleged error, stem from a misreading of the decision. Motions for certification must be confined to clear and precise issues of law or fact arising from the challenged decision. This one was not. The application fails to raise any issue that significantly affects the fair and expeditious conduct of the proceedings, and is therefore accordingly dismissed.

**DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

**DISMISSES** the request for certification.

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

Dated 27 January 2014  
Leidschendam  
The Netherlands

*David Re*

Judge David Re, Presiding

*Janet Nosworthy*

Judge Janet Nosworthy

*Micheline Braidy*

Judge Micheline Braidy

