



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: **Mr Daniel Fransen**

The Registrar: **Mr Daryl Mundis**

Date: **25 February 2014**

Original language: **French**

Classification: **Public**

THE PROSECUTOR

v.

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

**PUBLIC REDACTED VERSION OF THE “DECISION ON THE REQUEST
OF 28 MAY 2013 OF THE DEFENCE FOR MR HUSSEIN HASSAN ONEISSI
FOR AN ORDER COMPELLING THE PROSECUTOR TO DISCLOSE
DOCUMENTS” DATED 13 AUGUST 2013**

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:
Mr Vincent Courcelle-Labrousse

Counsel for Mr Assad Hassan Sabra:
Mr David Young



I. Introduction

1. By way of this decision, the Pre-Trial Judge rules on the request of 28 May 2013 of the Defence for Mr Hussein Hassan Oneissi for an order compelling the Prosecutor to disclose to it certain documents (respectively the “Request” and the “Defence”),¹ to which the Prosecution responded on 12 June 2013 (the “Response”).²

II. The arguments of the Parties

2. The Defence states that, in accordance with Rule 113 of the Rules of Procedure and Evidence (the “Rules”), the Prosecutor disclosed to it an investigator’s note dated 2 August 2010 entitled in English [REDACTED] and bearing the ERN 60173898-60173920 (the “Note”).³ According to the Note, [REDACTED]. The Note also indicates [REDACTED].⁴ The Note indicates, lastly, that such a request would effectively be generated in order to obtain the aforementioned list.⁵

3. The Defence notes that, on 12 February 2013, it asked the Prosecutor whether that request for assistance had effectively been generated and if it had received a response. It also states that it requested the Prosecutor, pursuant to Rule 113 of the Rules, to provide: (i) a copy of that request for assistance; (ii) the documents attesting that the request had been sent; (iii) any response that it received; and (iv) any information or document in the Prosecution’s possession concerning the individuals who worked as [REDACTED] in the aforementioned places.⁶ The Defence claims that the Prosecutor responded on 19 February 2013 stating that it had disclosed all documents pursuant to Rule 110 of the Rules and, in particular: (i) the list of staff members employed by [REDACTED] for the period from January 2004 to June 2005; and (ii) the list of staff members of the [REDACTED] for the same period.⁷

¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, The Defence for Hussein Hassan Oneissi Request for an Order Compelling the Prosecutor to Disclose Material Related to [REDACTED], confidential, 28 May 2013.

² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Response to the Oneissi Defence’s Request for an Order Compelling the Prosecutor to Disclose Material Related to [REDACTED], confidential, 12 June 2013.

³ Request, para. 2.

⁴ *Id.*, para. 3.

⁵ *Ibid.*

⁶ *Id.*, para. 4.

⁷ *Id.*, para. 5. Although the Defence did not explicitly specify it in its Request, for the purposes of this decision, it is the Pre-Trial Judge’s understanding that the [REDACTED]. See paragraph 2 hereinabove.

4. The Defence submits that, on 5 March 2013, it addressed a supplementary request to the Prosecutor in order to obtain: (i) explanations as to why the Prosecutor had unilaterally re-characterized the legal basis of the request for the disclosure of the aforementioned documents by basing it on Rule 110 (B) of the Rules and not on Rule 113; (ii) the assurance that the Prosecutor had disclosed to it all the information relating to the persons working at [REDACTED]; and (iii) the disclosure of any document or information concerning the investigative steps that had been taken by the Prosecution or by the Lebanese authorities in relation to the individuals who worked at [REDACTED].⁸ The Defence states that, on 8 March 2013, the Prosecutor responded to it that: (i) it had not unilaterally re-characterized the Defence Request; (ii) the Note should have been disclosed under Rule 110 (B) of the Rules and not under Rule 113; (iii) all the documents requested had indeed been disclosed; and (iv) it should not be required to undertake investigative steps on behalf of the Defence.⁹

5. Following this exchange between the Parties, the Defence submits that:

- i) the Prosecutor could not unilaterally re-characterize the Note insofar as it contains potentially exculpatory information, notably, that taken from a witness statement disclosed under Rule 113 of the Rules. Furthermore, that re-characterization is prejudicial to the Defence in that, under that provision, the Prosecutor is obliged to disclose not only documents, but also objects and, in accordance with the case law of the Appeals Chamber, he may also be required to disclose internal documents;¹⁰
- ii) the Prosecutor should disclose to it any document or information in his possession relating to the individuals named [REDACTED] who worked at or near [REDACTED].¹¹ In this respect, the Defence points out why its request for disclosure meets the criteria required for the application of Rule 113 of the Rules: it is sufficiently particular and seeks to obtain information which is *prima facie* in the Prosecutor's possession, or actual knowledge and which is potentially exculpatory;¹² and
- iii) the Prosecutor should disclose to it an index of all the documents in his possession relating to the individuals named [REDACTED]; this would allow the Defence to

⁸ *Id.*, para. 6.

⁹ *Id.*, para. 7.

¹⁰ *Id.*, paras 13-22.

¹¹ *Id.*, para. 23.

¹² *Id.*, paras 23-32.

verify whether the documents identified by the Prosecutor as not being subject to disclosure should effectively not be disclosed.¹³

6. The Prosecution requests that the Pre-Trial Judge dismiss the Request on the grounds notably that:

- i) it is not required to justify why it characterized a document to be disclosed in a certain way;¹⁴
- ii) the Note should be disclosed under Rule 110 (B) of the Rules as, according to the Prosecution, it does not contain exculpatory materials;¹⁵
- iii) whether or not the disclosure of the Note falls under Rule 110 (B) or Rule 113 of the Rules is theoretical insofar as the Note has actually been disclosed to the Defence;¹⁶
- iv) the scope of application of Rule 110 (B) and Rule 113 of the Rules is the same: they both require the disclosure of all documents or objects in the possession of the Prosecutor;¹⁷
- v) Rule 113 of the Rules does not oblige the Prosecutor to disclose all his reports, memoranda or other internal documents;¹⁸
- vi) the Appeals Chamber of the Tribunal held that the provisions of Rule 111 of the Rules are an exception to the Prosecution's general disclosure obligation and, in particular, to that under Rule 113 of the Rules;¹⁹

¹³ *Id.*, paras 33-35.

¹⁴ Response, para. 7.

¹⁵ *Ibid.*

¹⁶ *Id.*, para. 8.

¹⁷ *Id.*, para. 10.

¹⁸ *Id.*, para. 11.

¹⁹ *Id.*, para. 12.

- vii) as stated in the Prosecution's letter of 8 March 2013, all the information or documents in its possession relating to the individuals named [REDACTED] who worked [REDACTED] have been disclosed to the Defence; the Defence therefore has in its possession all that information including exculpatory material;²⁰ and
- viii) the Prosecution is not required to conduct investigations on behalf of the Defence; as was stated by the Pre-Trial Judge, the Prosecution does not have a duty to undertake investigations or perform analyses with regard to documents or information that are not in its possession or not actually known to it and cannot therefore be required to prepare an index for the Defence.²¹

III. Statement of reasons

7. Rule 110 (B) of the Rules provides that the Defence must be able to inspect “[...] any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused”. As he had previously pointed out, the Pre-Trial Judge recalls that “[...] a liberal understanding of ‘disclosure’ encompasses both providing copies of documents and permitting their inspection.”²² Furthermore, Rule 113 imposes no restrictions as to the type of documents to be disclosed, provided that they may “reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor’s evidence”.

8. Furthermore, according to the decision of the Appeals Chamber of 19 July 2011 rendered in the *El Sayed* matter, the Prosecution may be required to provide to the Defence, under certain conditions and, in particular, if they concern exculpatory material, rapports, memoranda or internal documents protected by Rule 111 of the Rules (the “Decision of 19 July 2011”).²³ Indeed, according to the Appeals Chamber:

²⁰ *Id.*, para. 17.

²¹ *Id.*, para. 18.

²² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order on the Defence Request to Compel Disclosure of the Lebanese Investigative Case, 8 February 2013, para. 28.

²³ STL, *In the Matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011, paras 100-102.

“There is however the possibility that Rule 111 discussion will be expressed (i) in such a categorical manner; (ii) by a decision maker; (iii) in such circumstances as to suggest that what occurs ‘in-house’ is properly to be categorized as admission of *fact*. At that point the Rule 111 shield disappears and is replaced by the Rule 113 obligation (subject of course to its limitations laid down in Rules 116 to 118).”²⁴

9. In a decision of 28 March 2013, the Appeals Chamber furthermore specified in this regard that any exception to the principle of the non-disclosure of internal documents should be interpreted narrowly so as to ensure that the exchange of ideas and discussions within the Office of the Prosecutor or within the Defence teams might take place freely (the “Decision of 28 March 2013”).²⁵

10. Lastly, as he pointed out in a decision of 8 November 2012, the Pre-Trial Judge considers that the Prosecution “[...] is not obliged to undertake investigations, perform analyses, or create work products which are not in its custody or control, possession or actually known to it.”²⁶ Furthermore, “neither Rules 110 (B) nor 113 extend to permitting the Defence to seek orders compelling the Prosecution to generate new lists, tables, or any other type of document which organises or identifies specific documents in the disclosed material.”²⁷

11. In the case in point, the Pre-Trial Judge observes that the Note has been transmitted to the Defence. He notes, in addition, that the Prosecution claimed that after having undertaken all the necessary enquiries, it disclosed to the Defence all documents or information in its possession or knowledge concerning the individuals who worked as [REDACTED], which is across the road from [REDACTED],²⁸ and that it has no other material to disclose.

²⁴ *Id.*, para. 102.

²⁵ STL, *In the Matter of El Sayed*, Case No. CH/AC/2013/01, Decision on Appeal by the Prosecutor against Pre-Trial Judge’s Decision of 11 January 2013, confidential and *ex parte*, 28 March 2013, para. 28, with a public redacted version dated the same day.

²⁶ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Sabra Defence’s First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012 (the “Decision of 8 November 2012”), para. 31.

²⁷ *Ibid.*

²⁸ [REDACTED]

12. Furthermore, the Pre-Trial Judge considers that, in accordance with the Decision of 8 November 2012, the Prosecution is not required to produce an index of all the documents mentioned in the Request.²⁹

13. Notwithstanding the question as to whether or not the documents concerned fall under the scope of application of Rule 113 of the Rules, the Pre-Trial Judge recalls that, according to the Decision of 8 November 2012:

“A wide margin of discretion is afforded to the Prosecutor in the performance of its important duty to disclose exculpatory information, and the Prosecutor is otherwise presumed to be acting in good faith in complying with this duty. International criminal jurisprudence is clear that in the absence of proof by the Defence that the Prosecution has abused its discretionary judgement in violation of its obligations, the presumption that the Prosecutor is acting in good faith will preclude judicial intervention”.³⁰

14. The Pre-Trial Judge finds that the Request is consequently without foundation.

15. However, insofar as the Response does not clearly establish whether the criteria set out in the Decision of 19 July 2011 and in the Decision of 28 March 2013 have effectively been taken into account, the Pre-Trial Judge recalls that the Appeals Chamber established an exception to the non-disclosure of reports, memoranda or other internal documents mentioned in Rule 111 of the Rules which, in its opinion, must be disclosed if there is “(i) unambiguous acceptance; (ii) by a decision maker; (iii) which is fairly to be characterized as a decision as to relevant guilt or innocence [...]”³¹ “[...] unless there is a basis other than Rule 111 to withhold it.”³² If, in this case, the Prosecution has failed to take account of those criteria, it must do so and, where appropriate, disclose to the Defence the relevant materials and information.

16. Lastly, pursuant to Rule 96 (B) of the Rules, the Pre-Trial Judge determines that this decision must remain confidential insofar as it relies on evidence which is itself confidential.

²⁹ Decision of 8 November 2012, para. 31.

³⁰ *Id.*, para. 28. Footnote omitted.

³¹ Decision of 19 July 2011, para. 105.

³² *Id.*, para. 115.

IV. Disposition

FOR THESE REASONS,

Pursuant to Rules 77 (A), 96 (B), 111 and 113 of the Rules,

THE PRE-TRIAL JUDGE,

DECLARES the Request without foundation; and

ORDERS that this decision remain confidential.

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

Leidschendam, 25 February 2014

[stamp]

[signature]

Daniel Fransen
Pre-Trial Judge

