



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: 31 March 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
 MUSTAFA AMINE BADREDDINE
 HASSAN HABIB MERHI
 HUSSEIN HASSAN ONEISSI
 ASSAD HASSAN SABRA

DECISION GRANTING CERTIFICATION OF A DECISION OF THE PRE-TRIAL JUDGE ON THE ONEISSI DEFENCE'S REQUEST FOR DISCLOSURE REGARDING A COMPUTER

Office of the Prosecutor:

Mr. Norman Farrell, Mr. Graeme Cameron
 & Mr. Alexander Milne

Victims' Legal Representatives:

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. Hassan Habib Merhi:

Mr. Mohamed Aouini, Ms. Dorothee Le Fraper
 du Hellen & Mr. Jad Khalil

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. On 24 October 2013, the Pre-Trial Judge dismissed a motion filed by counsel for Mr. Hussein Hassan Oneissi asking for an order that the Prosecution disclose some documents found on the computer of Mr. Ahmed Abu Adass.¹ The amended indictment alleges that Mr. Abu Adass made a ‘false claim of responsibility’ for the assassination of the former Lebanese Prime Minister Mr. Rafik Hariri on 14 February 2005.²
2. The day after making his decision, on 25 October 2013, the Pre-Trial Judge transferred the case file to the Trial Chamber.³ Five days later, on 30 October 2013, Defence counsel requested the Pre-Trial Judge to reconsider his decision under Rule 140 of the Special Tribunal’s Rules of Procedure and Evidence or, alternatively, to certify it for appeal under Rule 126.⁴ On 16 January 2014, the Pre-Trial Judge dismissed the motion for reconsideration or certification holding that he no longer had jurisdiction but that the Trial Chamber could certify or vary his decision.⁵
3. Defence counsel, on 24 January 2014, filed a motion requesting the Trial Chamber to reconsider the Pre-Trial Judge’s decision or certify it for appeal.⁶ The Prosecution opposed both reconsideration and certification.⁷ The Presiding Judge of the Trial Chamber, on 11 March 2014, denied leave to reconsider the decision, holding that the Trial Chamber lacked competence.⁸ This leaves for decision the motion to certify for interlocutory appeal the Pre-Trial Judge’s decision.

CERTIFYING A DECISION FOR APPEAL

4. Rule 126 (C), ‘Motions Requiring Certification’, requires the Trial Chamber to certify a decision for interlocutory appeal:

¹ STL, *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra*, STL-11-01/PT/PTJ, Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer, 24 October 2013, in respect of ‘Requête de la Défense de Mr. Oneissi en communication de documents relatives à l’ordinateur d’Abou Adass et aux fins de raccourcir les délais prescrits par le Règlement (Articles 8(A), 9(A), 110(B) et 113 du Règlement)’, 6 August 2013.

² STL-11-01/PT/PTJ, Amended Indictment, 21 June 2013, paras 3, 5, 23, 44, 48, 64, 66, 68.

³ STL-11-01/PT/PTJ, The Pre-Trial Judge’s Report Prepared Pursuant to Rule 95 (A) of the Rules of Procedure and Evidence, 25 October 2013.

⁴ STL-11-01/PT/PTJ, Demande de réexamen et de certification aux fins d’appel de la « Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer », 30 October 2013.

⁵ STL-11-01/PT/PTJ, Decision on the Request by Counsel for Mr. Oneissi for Reconsideration or Certification of the “Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer”, 16 January 2014.

⁶ STL-11-01/T/TC, Demande de réexamen et de certification aux fins d’appel de la « Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer », 24 January 2014.

⁷ STL-11-01/T/TC, Prosecution Response to “Demande de réexamen et de certification aux fins d’appel de la “Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer”, 10 February 2014.

⁸ STL-11-01/T/TC, Decision Denying Leave to Reconsider a Decision of the Pre-Trial Judge Re Disclosure Regarding a Computer, 11 March 2014.

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.

The Appeals Chamber has held that Rule 126 (C) ‘requires 1) a clear and precise identification of the issues in the Impugned Decision that 2) “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”’.⁹ The ‘parties applying for certification to appeal a decision must take care to ensure that they specify the appealable issues in that decision.’¹⁰ Similarly, the Trial Chamber has held that 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 but, above all, an *accurate* one’.¹¹

DISCUSSION

5. In dismissing Defence counsel’s motion for disclosure, the Pre-Trial Judge found that the Prosecution had adhered to the requirements of the working plan he had established under Rule 91 (A)—specifying the obligations of the Parties and timetables for these meetings—and that judicial determination was not required.¹² The Pre-Trial Judge also found that the Prosecution has a broad discretion and is presumed to be acting in good faith where it declines to disclose documents under Rule 111.¹³ Rule 111 provides that reports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure or notification under the Rules. The Pre-Trial Judge found that the Defence had not established that the Prosecution had abused its discretion and was not acting in good faith.¹⁴

6. Defence counsel have requested the Trial Chamber to certify paragraphs 31 to 38 of the Pre-Trial Judge’s Decision, stating that ‘the Pre-Trial Judge conferred on the Prosecution the authority to use its discretionary judgement to refuse disclosure of any material that it considers as falling within the scope of Rule 111’.¹⁵ They further submit that the ‘matter of the legal regime of Rule 111, its

⁹ 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 *citing* STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals Against Trial Chamber’s “Decision on Alleged Defects in the Form of the Amended Indictment”, 5 August 2013, para. 7.

¹⁰ Alleged defects appeal decision, para. 11.

¹¹ STL-11-01/T/TC, Decision on Request for Certification to Appeal Orders Concerning Five Defence Motions on State Cooperation, 27 January 2014, para. 10.

¹² Pre-Trial Judge decision, para. 30.

¹³ Pre-Trial Judge decision, para. 37.

¹⁴ Pre-Trial Judge decision, para. 38.

¹⁵ Certification request, para. 31.

interpretation and scope directly affect both the fairness and the expeditiousness of the proceedings'.¹⁶

7. The Prosecution submitted that the motion should be rejected on procedural grounds because it was filed out of time—after the expiration of the seven days allowed in Rule 126 (D).¹⁷ This submission is rejected; Defence counsel filed their motion for certification before the Pre-Trial Judge on 30 October 2013, six days after the decision. The motion was filed before the Trial Chamber on 24 January 2013, eight days after the Pre-Trial Judge's decision dismissing the motion for reconsideration or certification.

8. The Trial Chamber may certify for appeal a decision of the Pre-Trial Judge made before the transfer of the case-file¹⁸ where 'an injustice could occur if the Trial Chamber could not certify decisions for appeal in circumstances where the Pre-Trial Judge himself lacked jurisdiction to certify his own decision for appeal'.¹⁹ The Trial Chamber would not be able to certify such a decision for appeal if the seven day time limit were strictly enforced.²⁰ This would cause an injustice to an aggrieved party by denying them the right to seek an interlocutory appeal.

9. The Prosecution also submitted that the motion did not satisfy the test in Rule 126 (C), arguing that it amounted to 'a mere disagreement' with the decision 'and the disclosure regime established under the Rules'.²¹

10. The motion has not identified, as required, a certifiable issue. Defence counsel have simply asked the Trial Chamber 'TO CERTIFY paragraphs 31 to 38 of the Pre-Trial Judge's decision.' That is not a proper request for certification. It identifies no issue or question of law for certification, much less clearly and precisely,²² and, normally the Trial Chamber would dismiss the motion on that basis alone. The Presiding Judge in his decision observed that simply 'listing eight paragraphs of a

¹⁶ Certification request, para. 32.

¹⁷ Prosecution response, para. 14.

¹⁸ STL-11-01/PT/TC, Decision on the Prosecution's Request for Leave to Appeal the Pre-Trial Judge's Decision of 25 October 2013 Re SMS Messages, 11 December 2013.

¹⁹ Reconsideration decision, para. 21.

²⁰ Also, the Trial Chamber may, *proprio motu* or on good cause being shown by motion, recognize as validly done any act carried out after the expiration of a time so prescribed on such terms, if any, as is thought just, whether or not that time has already expired pursuant to Rule 9 (A) (i).

²¹ Prosecution response, para. 15.

²² Alleged defects appeal decision, para. 10; STL-11-01/PT/AC/AR126.1, Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 11.

decision cannot meet the minimum standard required in a Party seeking to certify a decision for an interlocutory appeal'.²³

11. However, within these eight identified paragraphs, the Trial Chamber has identified an issue that falls within the test in Rule 126 (C). Where, as here, the party requesting certification fails to identify any specific issues, 'it ultimately, falls to the Trial Chamber to pinpoint those issues, if any, that in its view would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and whether these issues require immediate resolution by the Appeals Chamber'.²⁴

12. The Defence complained that the Prosecution refused to disclose some material related to the computer of Mr. Abu Adass, which they submit should have been disclosed under Rules 110 (B) and 113.²⁵ The Pre-Trial Judge, however, found that the Prosecution adhered to the requirements of the working plan, and that judicial determination was not required.

13. The basis of the Pre-Trial Judge's decision of 24 October 2013 appears to be paragraph 30, where he held, 'From the submissions of the Parties, it appears that the Prosecution has adhered to the requirements of the working plan, and that judicial determination is not required'. From this, it appears that the Pre-Trial Judge found that adherence to the working plan was sufficient for him not to intervene and to determine the matter judicially. If this is correct, the issue would fall within the test in Rule 126 (C) in that it would significantly affect the fair and expeditious conduct of the proceedings. Further, as the trial has commenced and the issue is unresolved, its immediate resolution by the Appeals Chamber is necessary. As it relates to possible disclosure of material to the Defence that could be used at trial this is not a matter that should await a post-judgement appeal for resolution.

14. So, despite Defence counsel not clearly identifying any precise issue for certification for appeal the Trial Chamber has identified the following issue,

Did the Pre-Trial Judge err by misconstruing a disclosure request by Defence counsel in circumstances involving an alleged breach of the Prosecutor's disclosure obligations under Rules 111 and 113 of the Rules of Procedure and Evidence, by finding that 'it appears that the Prosecution has adhered to the requirements of the Working Plan, and that judicial determination is not required'?

²³ Reconsideration decision, para. 19.

²⁴ Alleged defects appeal decision, para. 10; Trial *in absentia* appeal decision, para. 11.

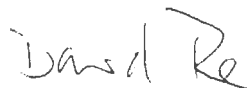
²⁵ Disclosure request.

DISPOSITION**FOR THESE REASONS,****THE TRIAL CHAMBER****CERTIFIES** the following issue for appeal:

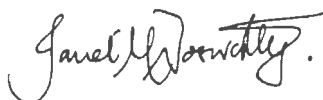
Did the Pre-Trial Judge err by misconstruing a disclosure request by Defence counsel in circumstances involving an alleged breach of the Prosecutor's disclosure obligations under Rules 111 and 113 of the Rules of Procedure and Evidence, by finding that 'it appears that the Prosecution has adhered to the requirements of the Working Plan, and that judicial determination is not required'?

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

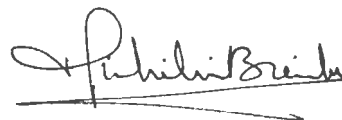
Leidschendam,
The Netherlands
31 March 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

