

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, Registrar

Date: 27 March 2015

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THE PROSECUTOR

v.

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

DECISION ON UPDATED REQUEST FOR A FINDING OF NON-COMPLIANCE**Office of the Prosecutor:**

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Defence Office:

Mr François Roux

**Legal Representatives of
Participating Victims:**

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

**The Government of the Lebanese
Republic****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 Khalil Jad

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



BACKGROUND AND PROCEDURAL HISTORY

1. The Defence of the Accused, Mr Assad Hassan Sabra, requested the Trial Chamber to make a finding that the Government of Lebanon has not complied with the Trial Chamber's orders to cooperate with the Special Tribunal. On 8 January 2015, they filed a motion under Rule 20 (C) of the Special Tribunal's Rules of Procedure and Evidence, one version *ex parte* the Prosecution, asking the Trial Chamber to find that the Government of Lebanon had not complied with several of its orders under Rule 20 (A), seeking an order to the Lebanese Government to obtain and provide information to counsel for Mr Sabra.¹ The Prosecution filed a response to the redacted version of the motion,² to which Defence counsel subsequently replied.³ The Trial Chamber heard oral submissions on 19 and 20 March 2015.⁴

Trial Chamber's decision of 31 January 2014

2. In a decision of 31 January 2014, the Trial Chamber—acting pursuant to Article 15 (1) of the Annex to United Nations Security Council resolution 1757 (2007), and Rule 20 (A)—ordered the Government of Lebanon to cooperate with the Special Tribunal by providing certain information to the Defence of Mr Sabra.⁵ The orders related to 11 requests for assistance that they had sent to the Government of Lebanon through the Head of the Special Tribunal's Defence Office pursuant to the 'Memorandum of Understanding between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation'.

Trial Chamber's decision of 31 March 2014

3. On 31 March 2014, the Trial Chamber issued four further orders to the Lebanese Government to cooperate with the Special Tribunal. These related to 32 requests for assistance that counsel for Mr

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1810, Updated Request for a Finding of Non-Compliance, 8 January 2015, Confidential and *ex parte*. A confidential version, F1811, (redacted version of F1810) Updated Request for a Finding of Non-compliance, was filed the same day, as was a public redacted version of F1810.

² F1824, Prosecution Response to the Sabra Defence's Updated Request for Finding of Non-Compliance, Confidential and *ex parte*, 22 January 2015. A redacted confidential version has been filed.

³ F1830, Sabra Defence Reply Regarding its Updated Request for a Finding of Non-Compliance, 28 January 2015, Confidential. A public redacted version has been filed.

⁴ Transcript of 19 March 2015, pp 51 – 98; Transcript of 20 March 2015, pp 59 – 76.

⁵ F1379, Decision on Second and Fifth Motions by Counsel for Assad Hassan Sabra and Two Orders to Lebanon to Cooperate with the Tribunal, 31 January 2014.

Sabra had previously sent to the Government of Lebanon, through the Head of the Special Tribunal's Defence Office.⁶ The fourth order was *ex parte* the Prosecution.⁷

Trial Chamber's interim decision of 12 May 2014

4. On 14 April 2014, counsel for Mr Sabra filed a motion under Rule 20 (C) asking the Trial Chamber to find that the Government of Lebanon had not complied with some of the Trial Chamber's orders of 31 January 2014.⁸ In an interim decision, on 12 May 2014, the Trial Chamber noted that some responses to those orders had been received, but it also expressed its concerns that attempts to comply with one order were 'at best partial'.⁹ The Trial Chamber deferred its final determination of the motion because, although it was not yet satisfied that Lebanon had clearly failed to comply with the Trial Chamber's orders, it wished to monitor its compliance.¹⁰

Sabra Defence motion, 12 June 2014—subsequently withdrawn

5. On 5 May 2014, the Lebanese Minister of Justice returned the Trial Chamber's orders of 31 March 2014 (relating to the 32 outstanding requests for assistance) to the Special Tribunal's Registrar, without enforcing them.¹¹ Due to an internal Registry administrative oversight, this was not communicated to the Trial Chamber and the Defence Office until 13 June 2014.¹² Meanwhile, on 12 June 2014, counsel for Mr Sabra had filed another motion asking the Trial Chamber to find that the Lebanese Government had not complied with the Trial Chamber's orders of 31 March 2014.¹³ This motion was filed because the Defence had received no response to the 32 requests for assistance dealt with in the Trial Chamber's orders of 31 March 2014.¹⁴

⁶ F1471, Further Decision on Motions under Rule 20 (A) by Counsel for Assad Hassan Sabra and Four Orders to Lebanon to Cooperate with the Tribunal, 31 March 2014.

⁷ Further decision, paras 12 and 17.

⁸ F1495, Consolidated Request for Finding of Non-Compliance, Public with Confidential and *Ex Parte* annex, 14 April 2014. This motion was filed following the withdrawal on 14 April 2014 of both F1449, Request for Finding of Non-Compliance, which had been filed on 13 March 2014, and F1451, Notification to "Request for Finding of Non-Compliance", which had been filed on 19 March 2014.

⁹ Transcript of 12 May 2014, p. 6 (status conference).

¹⁰ Transcript of 12 May 2014, pp 6 – 7 (status conference).

¹¹ F1590, Clarification regarding Orders to Lebanon to Cooperate with the Special Tribunal, 23 June 2014, paras 5 – 7.

¹² Clarification, para. 5.

¹³ F1570, Second Request for Finding of Non-Compliance, 12 June 2014.

¹⁴ Second request, para. 7.

Trial Chamber's clarification decision of 23 June 2014

6. On 23 June 2014, the Trial Chamber issued a clarifying decision carefully distinguishing the orders in its decisions of 31 January and 31 March 2014 from requests for assistance sent to the Lebanese Government through the Defence Office's Memorandum of Understanding. This clarification decision noted that the Lebanese Government had returned the orders under a misunderstanding and explained that the Trial Chamber's two sets of orders must be enforced by the Lebanese Government, pursuant to Rule 20 (A) and Article 15 (1) of the Annex to United Nations (UN) Security Council resolution 1757.¹⁵ As a result, on 1 July 2014, Defence counsel withdrew their motion on 12 June 2014.¹⁶

SUBMISSIONS

Defence submissions

7. The Defence submissions explain that the Trial Chamber's orders relate to 43 requests for assistance sent to the Lebanese Government. The motion details the Lebanese Government's responses to the orders, the documents that Defence counsel have received, deficiencies in some responses and which of the requests for assistance have been met. The motion notes that between 11 July and 11 September 2014, the Defence received material on eleven different dates from the Lebanese Government.¹⁷

8. The Trial Chamber's extended deadline for cooperation by the Government of Lebanon was 8 September 2014, yet, according to Defence counsel, 27 requests for assistance remain outstanding.

9. Counsel for Mr Sabra submit, consequently, that the Lebanese Government has not complied with some of the Trial Chamber's orders, stating that there 'are a significant number of glaring omissions in the level of cooperation received from the Lebanese authorities which make it manifestly clear that the Government of the Lebanese Republic is objectively failing to comply with judicial orders of the Tribunal'.¹⁸ They therefore ask the Trial Chamber to:

¹⁵ Clarification, para. 12.

¹⁶ F1605, Notification of Withdrawal of "Second Request for Finding of Non-Compliance", 1 July 2014.

¹⁷ Updated request, para. 13.

¹⁸ Updated request, para. 33.

- (i) find that the Government of Lebanon has not complied with specific orders of the Trial Chamber;
- (ii) inform the President of the Special Tribunal of this finding so that she may engage in consultations with the Government of Lebanon to obtain the required cooperation; and
- (iii) request bi-weekly updates from the Government of Lebanon as to the status of the outstanding requests, detailing the steps taken to comply.¹⁹

Requests for assistance – annex A to Trial Chamber’s orders of 31 January 2014

10. The schedule to annex A to the Trial Chamber’s orders of 31 January 2014 is *ex parte* the Legal Representative of Victims, and relates to requests for assistance sent to the Lebanese Government seeking telecommunications information. Counsel for Mr Sabra consider that the Lebanese Government has complied with four of the requests for assistance in the schedule to annex A to the Trial Chamber’s orders of 31 January 2014.²⁰ While the Lebanese Government has responded to the remaining requests for assistance, the Defence submits that three responses require further action by the Lebanese Government, and that the fourth was incomplete.²¹

Requests for assistance – annex B to Trial Chamber’s orders of 31 January 2014

11. The schedule to annex B to the Trial Chamber’s orders of 31 January 2014 is also *ex parte* the Legal Representative of Victims, and relates to requests for assistance to the Lebanese Government on investigatory information in respect of a Lebanese mobile telephone referred to in the consolidated indictment²² and the Prosecution’s pre-trial brief²³ as ‘Purple 018’, namely 3419018. The Defence motion submits that the Lebanese Government has not responded to any of the three requests for assistance listed in the schedule.²⁴ The Lebanese Government, however, has responded to a separate request regarding similar information in relation to the same telephone.

¹⁹ Updated request, para. 70.

²⁰ Updated request, para. 32.

²¹ Updated request, paras 34-36, Annex A.

²² F1444, Consolidated indictment, 7 March 2014, para. 15 (e).

²³ STL-11-01/PT/TC, F1077, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, Redacted Version of the Prosecution’s Updated Pre-Trial Brief, dated 23 August 2013, 31 October 2013, para. 31.

²⁴ Updated request, para. 37 and Annex A.

Requests for assistance – annex A to Trial Chamber’s orders of 31 March 2014

12. The schedule to annex A to the Trial Chamber’s orders of 31 March 2014 is likewise *ex parte* the Legal Representative of Victims, and relates to requests for assistance to the Lebanese Government on telecommunications information. Counsel for Mr Sabra agree that the Lebanese Government has complied with six of the ten requests for assistance in the schedule.²⁵ Although the Lebanese Government has responded to the remaining four requests for assistance, the Defence submits those responses are insufficient, as they simply reiterate previous replies.²⁶

Requests for assistance – annex B to Trial Chamber’s orders of 31 March 2014

13. The schedule to annex B to the Trial Chamber’s orders of 31 March 2014 is *ex parte* the Legal Representative of Victims, and also relates to requests for assistance to the Lebanese Government seeking telecommunications information. Defence counsel state the Lebanese Government has not responded to the three requests for assistance in that schedule.²⁷

Requests for assistance – annex C to Trial Chamber’s orders of 31 March 2014

14. The schedule to annex C to the Trial Chamber’s orders of 31 March 2014 is *ex parte* the Legal Representative of Victims, and relates to 16 requests for assistance to the Lebanese Government on a number of issues—a mobile telephone referred to by the Prosecution as ‘Purple 018’, telecommunications information, terrorist groups, and personal details regarding Mr Sabra and his associates.²⁸ Counsel for Mr Sabra consider that the Lebanese Government has complied with four of these.²⁹ While the Lebanese Government has responded to eleven of the remaining twelve requests for assistance, Defence counsel submit that the responses are unsatisfactory,³⁰ either because they do not include replies from some relevant government departments or private companies,³¹ or because the full request remains unanswered.³²

²⁵ Updated request, para. 32.

²⁶ Updated request, paras 38 – 39 and Annex A.

²⁷ Updated request, para. 40 and Annex A

²⁸ Updated request, para. 41.

²⁹ Updated request, para. 32.

³⁰ Updated request, para. 42.

³¹ Updated request, paras 43 – 48.

³² Updated request, paras 49 – 51.

Requests for assistance – annex D to Trial Chamber’s orders of 31 March 2014

15. The schedule to annex D to the Trial Chamber’s orders of 31 March 2014 is *ex parte* the Prosecution and the Legal Representative of Victims, and relates to three requests for assistance sent to the Lebanese Government asking for telecommunications and general investigatory information. Defence counsel agree that the Lebanese Government has complied with two of the three requests for assistance listed in the schedule.³³ According to Defence counsel, although the Lebanese Government has responded to the remaining request for assistance, it is incomplete as it does not include replies from relevant government bodies.³⁴

General Defence submissions

16. Defence counsel submit that the Lebanese Government’s lack of response to certain requests for assistance is indicative of its continued failure to assist the Defence and to comply with the Trial Chamber’s orders.³⁵ Receiving some material does not negate this.³⁶

17. The Defence and the Trial Chamber, it is submitted, have now exhausted all available recourse, and, relying upon a decision of the International Criminal Court (ICC) in *Kenyatta*, the Defence submits that it is insufficient for ‘the Lebanese Government to act as a post box in which it merely sends out the requests in the vain hope that the responses will be adequate’.³⁷ As a consequence, a number of the Defence’s telecommunication-related investigations have been placed on hold for over two years or remain incomplete, pending receipt of material from Lebanon.³⁸ The lack of satisfactory responses or further explanation has caused serious prejudice, particularly in relation to the telecommunication evidence soon to be led by the Prosecution.³⁹ This risks frustrating the course of Defence investigations, and jeopardises the fairness and expeditiousness of the proceedings.⁴⁰

³³ Updated request, para. 32.

³⁴ Updated request, para. 53.

³⁵ Updated request, para. 55.

³⁶ Updated request, para. 56.

³⁷ Updated request, paras 58 – 59, referring to ICC, *Prosecutor v Uhuru Muigai Kenyatta*, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87 (7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 March 2014, para. 48.

³⁸ Updated request, para. 61.

³⁹ Updated request, para. 60.

⁴⁰ Updated request, para. 62.

18. Relying upon an International Criminal Tribunal for the Former Yugoslavia (ICTY) decision in *Milutinović*, Defence counsel submit that the onus is on the Lebanese Government to ensure that the ‘individual requests for assistance are sent to all relevant department[s] and agencies, in particular where the request itself explicitly directs the request to a specific authority’.⁴¹ And, referring to an ICC pre-trial decision in December 2014, in *Gaddafi*, counsel submitted that ‘a finding of non-compliance only requires an objective failure to comply’, meaning that it was ‘irrespective of the Lebanese Government’s underlying reasons or motives’.⁴² A finding of non-compliance and referral to the Special Tribunal’s President, at this stage, is therefore appropriate. They seek the orders referred to in paragraph 9 above.

Prosecution’s response

19. The Prosecution filed two responses, one of which was partly *ex parte* all Defence counsel, the Legal Representative for Victims, and the Defence Office. The *ex parte* and redacted part of the response refers to a decision of the Trial Chamber, dated 2 November 2011, relating to Lebanon’s co-operation with the Special Tribunal.⁴³ The Prosecution subsequently conceded that it had erroneously filed the response *ex parte*, as the Trial Chamber decision had already been classified *inter-partes* by a later decision. The response has now been filed *inter-partes*.⁴⁴

20. The Prosecution submitted, generally, that a process of cooperation between the Sabra Defence and the Lebanese Government is now underway, and that the Government of Lebanon has responded to almost all requests for assistance.⁴⁵ Consequently, the Trial Chamber should consider the efforts of

⁴¹ Updated request, para. 58, referring to *Prosecutor v Milutinović et al.*, IT-05-87-PT, Decision on Sreten Lukić’s Amended Rule 54 *bis* Application, 29 September 2006, para. 9.

⁴² Updated request, para. 63, referring to *Prosecutor v Saif Al-Islam Gaddafi*, Decision on the non-compliance by Libya with requests for cooperation by the Court referring the matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014, para. 33.

⁴³ STL-11-01/I/TC, F0066, Confidential, Decision on the Confidential and *ex parte* Prosecution’s Request for a Judicial Finding that the Lebanese Authorities Have Failed to Comply with the Arrest Warrants pursuant to Rule 20 (C), 2 November 2011.

⁴⁴ Transcript of 17 March 2015, p. 34, referring to F1588, Decision on the Prosecution Motion to Reclassify Two Decisions, 20 June 2014 (which contains a limited redaction to one paragraph). The Trial Chamber ordered the Prosecution’s *ex parte* response to be reclassified as *inter-partes*.

⁴⁵ Prosecution Response, para. 2.

the Lebanese Government to comply with all aspects of the orders of 31 January 2014 and 31 March 2014, rather than just those relied upon by the Sabra Defence.⁴⁶

21. Where the Lebanese Government has responded, an assertion by the Defence that the response is inadequate does not by itself demonstrate non-compliance,⁴⁷ but rather demonstrates at least an attempt to comply.⁴⁸ Further, a finding of non-compliance would require a factual determination that the Lebanese Government's compliance was inadequate; this does not seem possible based on the information before the Trial Chamber,⁴⁹ because 'such a finding cannot be made on the basis that the Sabra Defence asked for more information or material than was provided'.⁵⁰

22. The Trial Chamber must first find that the further information or material exists, and is in the hands of the Lebanese Government.⁵¹ To illustrate, in relation to the responses to three specific requests for assistance,⁵² Defence counsel submitted that the relevant telecommunications company had responded, saying that the information was unavailable, and that 'the employees that may help to find such data had left the company'. However, although the Defence had the names of these employees, it submitted that neither the Lebanese Government nor the company had conducted any follow-up.⁵³ The Defence had not articulated what further steps it would have expected the Lebanese authorities to have taken in these circumstances nor have Defence counsel cited any legal authority supporting that failing to conduct such additional steps means that there has been a non-compliance with the cooperation orders.⁵⁴

23. The Prosecution cannot comment upon the accuracy of the response, however, the passage of time and the absence of other information regarding record keeping could explain why no other

⁴⁶ Prosecution Response, para. 13.

⁴⁷ Prosecution Response, para. 15 (regarding the Trial Chamber's Orders of 31 January 2014, Annex A).

⁴⁸ Prosecution Response, para. 16 (regarding the Trial Chamber's Orders of 31 January 2014, Annex A).

⁴⁹ Prosecution Response, para. 18 (regarding the Trial Chamber's Orders of 31 January 2014, Annex A), paras 21 – 27 (regarding the Trial Chamber's Orders of 31 January 2014, Annex B), para. 29 (regarding the Trial Chamber's Orders of 31 March 2014, Annex A), paras 33 – 35 (regarding the Trial Chamber's Orders of 31 March 2014, Annex C). The Prosecution states (in para. 37) that it is unable to make submissions regarding Annexes B and D of the Trial Chamber's Orders of 31 March 2014. Annex D relates to the fourth order which was made *ex parte* the Prosecution.

⁵⁰ Prosecution response, para. 35.

⁵¹ Prosecution response, para. 35.

⁵² From Trial Chamber's Orders of 31 January 2014, Annex A, requests 40(84), 42(86) and 44(90).

⁵³ Updated request, para. 35.

⁵⁴ Prosecution Response, para. 19.

answer was possible. To find non-compliance, the Trial Chamber must first factually determine that the response was inadequate.⁵⁵

24. Further, the Defence has provided no legal authority supporting any submission that the Lebanese Government has some obligation to engage in ‘quality control’ on the responses received from ‘source providers’.⁵⁶ Similarly, the Defence submitted that certain responses to requests for assistance—in circumstances where a company had merely reiterated its earlier responses, but without additional comment—were insufficient.⁵⁷ However, the Trial Chamber had made no finding of non-compliance; and to do so, it would first have to find that the company possessed, and did not provide, the necessary additional information.⁵⁸ Moreover, any claim of prejudice, from alleged non-compliance is speculative. The only issue before the Trial Chamber is of compliance with its orders, not unfairness resulting from purported non-compliance.⁵⁹

25. The standard for finding non-compliance is not objective; the Trial Chamber’s and Pre-Trial Judge’s decisions have held that Lebanon should be heard before such a finding is made.⁶⁰ Moreover, the ICC case of *Gaddafi* is distinguishable because, in that case, the Court’s orders obliged Libya to surrender an Accused—already long detained by the Libyan authorities—to the Court and to return seized documents to his lawyers.⁶¹

26. Further, the Prosecution was unaware of any finding of non-compliance in circumstances where a party had argued that a response to a Tribunal’s orders was argued to be inadequate or incomplete. Coercive or punitive measures are used on an exceptional basis and cooperative processes are favoured wherever possible—and, referring to the International Criminal Tribunal for Rwanda (ICTR) case of *Nahimana*—‘as a matter of policy and in order to foster good relations with States’.⁶²

⁵⁵ Prosecution response, para. 18.

⁵⁶ Prosecution response, para. 19.

⁵⁷ Updated request, paras 38 – 39.

⁵⁸ Prosecution response, paras 28 – 29.

⁵⁹ Prosecution Response, paras 38 – 39.

⁶⁰ Prosecution Response, para. 6, referring to STL-11-01/I/PTJ, F0099, Decision on Prosecution’s Confidential and *ex parte* Request for a Judicial Finding that the Lebanese Authorities Have Failed to Comply with the Arrest Warrants pursuant to Rule 20 (C) of the Rules, 22 December 2011; and Transcript of 12 May 2014, pp 3 – 7 (status conference).

⁶¹ Prosecution Response, para. 8.

⁶² Prosecution Response, para. 9, referring to ICTR, *Prosecutor v Nahimana*, ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana’, 5 June 2003, para. 10.

The ICTY case of *Milutinović* was also distinguishable because there the ICTY could reasonably have determined that Serbia's response, in the circumstances, was inadequate.⁶³

27. Finally, a finding by the Trial Chamber that the Government of Lebanon had not complied with its orders, at this stage, would only result in consultations between the President and the Government of Lebanon, under Rule 20 (C). Those consultations may obviate the need for the bi-weekly reporting sought by the Defence,⁶⁴ therefore reporting should not be ordered at this time.⁶⁵ And, if the Trial Chamber does not dismiss the updated request, the Lebanese Government should be given an opportunity to be heard.⁶⁶

Defence reply

28. In their reply, counsel for Mr Sabra sought an order requesting reclassification as *inter-partes* the documents referred to the Prosecution's redacted response. This has been dealt with in paragraph 19 above and is now moot. Defence counsel disputed that the Trial Chamber should allow the Lebanese Government an opportunity to be heard.⁶⁷

29. Counsel argued that the Special Tribunal's statutory framework does not require that a State be heard before a finding can be made that the State has not complied with orders, whereas, for example, Regulation 109 (3) of the ICC's Regulations of the Court has such a requirement.⁶⁸ Further, while agreeing that a finding of non-compliance is a serious matter, Rule 20 (C) has a two-step

⁶³ Prosecution Response, para. 10. This decision concerned an order to the Republic of Serbia to produce documents, before non-compliance could be asserted. The Lukić Defence had asked the Serbian authorities for certain information, at least in part, pertaining to criminal charges against Serbians, Albanians and others. The Serbian authorities forwarded the request only to their Military Intelligence Agency, which responded that it did not have the requested information. The Trial Chamber noted that the information sought by the Lukić Defence was likely to be in the possession of other entities, such as the Ministry of Justice and that the request had not been limited to the Military Intelligence Agency. Noting the extensive efforts of the Lukić Defence to obtain voluntary cooperation, the Trial Chamber ordered Serbia to produce the requested documents. ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Sreten Lukić's Amended Rule 54 *bis* Application, 29 September 2009, para. 9.

⁶⁴ Updated request, paras 67 and 70; see para. 9 above.

⁶⁵ Prosecution Response, para. 42.

⁶⁶ Prosecution Response, para. 20 (regarding the Trial Chamber's Orders of 31 January 2014, Annex A); para. 27 (regarding the Trial Chamber's Orders of 31 January 2014, Annex B); para. 30 (regarding the Trial Chamber's Orders of 31 March 2014, Annex A); and para. 36 (regarding the Trial Chamber's Orders of 31 March 2014, Annex C). Regarding the Trial Chamber's Orders of 31 March 2014, Annexes B and D, see para. 37, where it is submitted only that if the Trial Chamber was not minded to dismiss the Updated request, that it should allow the Lebanese Government to be heard on the issue. *See also*, transcript of 12 May 2014, pp 3 – 7 (status conference).

⁶⁷ Sabra reply, paras 2 and 19.

⁶⁸ Sabra reply, para. 7.

process, and the most serious consequences do not arise at the first step, which only involves consultation between the Special Tribunal's President and the Lebanese Government.⁶⁹ The obligation to hear a State is for the Special Tribunal's President alone, following, not before, a finding of non-compliance.⁷⁰ The consultation suggested by the Prosecution would 'further delay a process that has already taken years and which has negatively affected the Defence ability to prepare'.⁷¹ The Trial Chamber has already given the Lebanese Government ample time and opportunity to be heard, as it had notice that its compliance would be carefully monitored.⁷²

DISCUSSION

30. As a preliminary matter, the Trial Chamber agrees with the Prosecution's submission that it should confine its determination to whether the Lebanese Government has complied with its orders, rather than dealing with any prejudice that may flow from a finding of non-compliance. To consider the issue of prejudice, the Trial Chamber should first make a finding of non-compliance. The issue for determination is therefore whether Lebanon has failed to comply with the Trial Chamber's orders issued on 31 January and 31 March 2014, and if so, should the Trial Chamber make a finding of non-compliance. This also involves deciding whether the relevant legal standard for making such a finding simply requires, as is argued by Defence counsel, an objective non-compliance. A finding of non-compliance would trigger the consultation mechanism between the President of the Special Tribunal and the 'Lebanese authorities' envisaged in Rule 20 (C) and therefore possibly a referral to the UN Security Council.

31. The Trial Chamber has also already decided that it will not make such an order without first allowing the Lebanese Government to make submissions.⁷³

The relevant legal principles

32. The Special Tribunal's Rules specify a four-step process in circumstances of an alleged non-compliance; the first is a finding of non-compliance by a Chamber while the second requires the

⁶⁹ Sabra reply, paras 9 – 11.

⁷⁰ Sabra reply, paras 10 – 12.

⁷¹ Sabra reply, para. 13.

⁷² Sabra reply, paras 14 – 16.

⁷³ Transcript of 12 May 2014, pp 6 – 7 ('The Trial Chamber will not, at this stage, make such a finding. And if it were considering making such an order, it would first seek to hear submissions from the Lebanese government').

President to consult the Lebanese authorities. Third, a Chamber must then be of the view that a satisfactory response is still unforthcoming within a reasonable timeframe, and fourth—and only then—the President has a duty to refer it to the UN Security Council. This is set out in Rule 20 (C), which provides:

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. The President shall engage in consultations with the relevant Lebanese authorities with a view to obtaining the required cooperation. If, in the view of the Pre-Trial Judge or a Chamber, after consultation with the President, a satisfactory response has still not been provided within a reasonable timeframe, the President *shall* make a judicial finding to that effect and *refer* the matter to the Security Council for consideration and further action, as the Council deems appropriate. (italics added)

33. Rule 20 (C) plainly provides—by using ‘may’ instead of ‘shall’—that the Chamber’s decision under the Rule is discretionary. Defence counsel, however, in their submissions, and relying upon the case-law of the ICC, have argued that the Chamber’s decision is ‘objective’. It is somewhat unclear, however, what this actually means.

34. The cooperation and compliance regimes of other international courts and tribunals differ in some technical details. Although a failure to cooperate may ultimately also lead to a referral to the Security Council—or, in the case of the ICC, also or alternatively to its Assembly of States Parties—they are similar in principle to the Special Tribunal’s, but with variations in the intermediate steps. For example, the ICTY’s Rules of Procedure and Evidence skip the second and third steps in the Special Tribunal’s Rule 20 (C) of further consultations before the President *shall* make a report to the Security Council.⁷⁴ The ICTR’s equivalent is almost identical.⁷⁵ The Special Court for Sierra Leone

⁷⁴ Rule 7 *bis* (A) provides, ‘where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge *may* advise the President, who *shall* report the matter to the Security Council’. (italics added) The ICTY Statute was annexed to Security Council Resolution 827 of 1993 passed under Chapter VII of the Charter of the United Nations, thereby obligating all member states to comply with the Resolution, including Article 29 of the Statute.

Article 29 provides ‘1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(SCSL), like the Special Tribunal for Lebanon, and the ICTY and ICTR—created pursuant to a Security Council resolution passed under Chapter VII of the Charter of the United Nations—has a similar agreement between the UN and a Government and a similar Rule to the ICTR's.⁷⁶ Article 87 (7) of the ICC's Rome Statute—under the heading 'Requests for cooperation: general provisions'—is closer to the Special Tribunal's in the first step, and provides:

where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court *may* make a finding to that effect *and refer* the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council. (italics added)

35. To summarise: for a finding of non-compliance, both the Special Tribunal's Rules and the ICC's Rome Statute provide that the Chamber *may* make such a finding after a failure to comply with an order; whereas those of the ICTY, ICTR and SCSL provide that a Chamber *may* advise the President if it *is* satisfied that non-compliance has occurred. Thus the Special Tribunal and ICC's statutory instruments specify that the finding is discretionary. While those of the other three are silent on this, their case-law holds that such a decision is discretionary.⁷⁷

The standard for making a finding of non-compliance – objective or non-objective?

36. The Defence motion—citing to a single unsourced paragraph in the ICC Pre-Trial decision in *Gaddafi*—argues that the Trial Chamber should adopt 'an objective standard' in deciding whether Lebanon had failed to comply with the Trial Chamber's orders of 31 January and 31 March 2014. No

(a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal'.

⁷⁵ Rule 7 *bis* providing relevantly, 'where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Chamber or Judge, the Chamber or Judge may request the President to report the matter to the Security Council'.

⁷⁶ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002. The SCSL's Rules of Procedure and Evidence Rule 8 is in similar terms to the ICTY and ICTR's Rule 7 *bis* (A), providing relevantly: 'where a Chamber or a Judge *is satisfied* that the Government of Sierra Leone has failed to comply with a request made in relation to any proceedings before that Chamber or Judge, the Chamber or Judge *may* refer the matter to the President to take appropriate action'. (italics added)

⁷⁷ For example, the ICTY's Rules 54 and 54 *bis* authorize Chambers to issue orders to States to produce documents, and its Appeals Chamber has held that it such a decision is discretionary, meaning that it 'will not conduct a *de novo* review' of such a decision; see *Prosecutor v. Milutinović et al.*, IT-05-87-AR108*bis*.2 Decision on Request of the United States of America for Review, 12 May 2006, para. 6.

contrary sources were cited. In oral submissions on 19 March 2015, counsel for Mr Sabra elaborated on this argument by submitting that, whereas the decision of what to do about non-compliance is subjective, the finding of non-compliance is purely objective. The Trial Chamber may only make the objective determination of non-compliance, while the subjective decision rests with the President,⁷⁸ as opposed to other international tribunals where the same judicial organ does both.⁷⁹

37. However, when questioned on the meaning of the word ‘may’ in Rule 20 (C), counsel accepted that it allows the Trial Chamber to give the State more time.⁸⁰ In this respect, the submission on this point appears to be self-contradictory; having an objective standard *simpliciter* is incompatible with having a discretion allowing a State more time.

38. Counsel for Mr Sabra attempted to further clarify this position by submitting that it was not that the Trial Chamber has no discretion under Rule 20 (C), but rather ‘the discretion of the Chamber ... is only a discretion as to whether or not to make a finding to that effect. It doesn’t affect the preliminary question of the test to be applied for the Chamber to satisfy itself whether or not there had been non-compliance’.⁸¹ This, however, reduced the submission supporting an objective standard to the point where counsel effectively conceded that the Trial Chamber has a discretion in deciding whether to make a formal finding of non-compliance. In other words, the standard for making the determination of non-compliance may have a subjective element, or one of reasonableness.

39. At the conclusion of the oral arguments, the Sabra Defence position appeared to have contracted to arguing that some objective non-compliance necessarily precedes a formal finding of non-compliance. But this is self-evident; an objective failure—in the strict sense of not having done something—must necessarily precede a finding of non-compliance. And this does not mean that a finding of non-compliance should be based solely on an objective failure.

⁷⁸ See, e.g., Transcript of 19 March 2014, p. 61 (‘Rule 20 (C)...distribute[s] the competence and the responsibility of those two issues, the responsibility of making a finding of non-compliance and the responsibility of what to do about it, to two different judicial authorities. The first question goes to ... the Trial Chamber...; the second question, the question of relief and potentially the transfer of the matter to the Security Council goes to the President’).

⁷⁹ Transcript of 19 March 2015, pp 59 – 62, 71 – 74 and 79.

⁸⁰ Transcript of 19 March 2015, pp 79 – 80.

⁸¹ Transcript of 20 March 2015, pp 75 – 76.

40. Counsel for Mr Mustafa Amine Badreddine, on invitation of the Trial Chamber, in oral submissions on 19 March 2015, also argued that the test was, firstly, objective, but then conceded that this step would be followed by ‘an examination of whether there is any excuse, justification, [or] any motives for the non-compliance, and that’s clearly a subjective test’.⁸²

41. This can only mean the test is partly subjective or has an element of reasonableness. But counsel then attempted to reconcile the two competing standards by submitting that ‘you can have an objective test and yet there be a discretion because the Trial Chamber could decide, yes, there’s been non-compliance but we’re not going to make that finding for the moment for whatever reason’.⁸³

42. In every other international decision that the Trial Chamber can find—including those cited by Defence counsel in their oral submissions in support of their argued objective standard⁸⁴—the relevant Court or Tribunal has either determined otherwise, or decided the issue consistently with having used a standard that includes a determination of reasonableness.

43. This includes the *Gaddafi* decision itself where the ICC Pre-Trial Chamber held, at paragraph 33, that a finding of non-compliance under Article 87 (7) ‘only requires an objective failure to comply, regardless of the State’s underlying motives...’⁸⁵ The *Gaddafi* decision, however, is

⁸² Transcript of 19 March 2015, p. 87. Submissions by Mr John R. W. D. Jones, who is also assigned lead counsel for Mr Saif Al-Islam Gaddafi at the ICC, and who had submitted the Defence submissions leading to the ICC Pre-Trial’s decision in *Gaddafi*.

⁸³ Transcript of 19 March 2015, p. 89.

⁸⁴ Transcript of 19 March 2015, pp 67 – 84, citing ICTR, *Prosecutor v. Callixite Nzabonimana*, ICTR-98-44D-PT, Décision sur la requête urgente de Callixite Nzabonimana demandant à la Chambre d’ordonner à la France coopération et assistance, 2 July 2009; ICTR, *Prosecutor v. Callixite Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana’s Motion Asking the Chamber to Request the President to Report the Matter of France’s Refusal to Cooperate to the Security Council, 19 October 2009; ICTR, *Prosecutor v. Callixite Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana’s Motion for a Stay of Proceedings; Reconsideration and/or Certification of Decision rendered on 29 October 2009; and Reconsideration and/or Certification of the Decision rendered on 30 October 2009, 13 November 2009; ICTR, *Prosecutor v. Callixite Nzabonimana*, ICTR-98-44D-T, Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France’s Cooperation with the Tribunal, 4 March 2010. Counsel for Mr Sabra also submitted that *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, dated 25 May 2010, employed an objective standard. The Trial Chamber, having attempted to comprehend the indecipherable wording of the decision, cannot see how it supports the Defence’s position in any meaningful way.

⁸⁵ Updated request, para. 63, referring to *Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014, para. 33.

footnoted only to a filing by the Defence of Mr. Saif Al-Islam Gaddafi,⁸⁶ which itself only sources Article 12 of the International Law Commission's (ILC) 2001 Draft Articles on State Responsibility.⁸⁷

44. The decision itself does not cite these Draft Articles, nor any case-law or commentary on Article 12. That article provides, '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation regardless of its origin or character.' And while the United Nations Commentaries to the Draft Articles⁸⁸ suggest that the standard for determining a State's non-compliance may be objective,⁸⁹ the ILC's 2001 Report states about Article 12:⁹⁰

But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

45. Interpretation, obviously, depends upon the circumstances. And, it may be more nuanced than suggested by either paragraph 33 of the *Gaddafi* decision, or the Sabra Defence submissions.⁹¹

⁸⁶ But without providing any commentary or authority that for particular interpretation; ICC-01/11-01/11-533, Gaddafi Defence Response to "Libyan Application for extension of time related to the Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'", 5 June 2014, para. 89.

⁸⁷ Responsibility of States for Internationally Wrongful Acts, 2001, Annex to General Assembly resolution 56/83 of 12 December 2001, corrected by document A/56/49 (Vol. I)/Corr. 4.

⁸⁸ Article 2 of the Draft Article, Elements of an internationally wrongful act of a State, 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.' The commentary reads, 'A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention'; *Report of the International Law Commission*, United Nations, New York, 2001, General Assembly, A/56/10, p. 73.

⁸⁹ See *Brownlie's Principles of Public International Law*, eighth edition, Crawford, James, Oxford, 2012, at pp. 556, 559, footnoted at p. 559 to two international arbitration cases. Citing to international arbitration cases, on 'objective responsibility' Judge Crawford writes, 'The practice of states and the jurisprudence both of arbitral tribunals and the International Court [of Justice] have followed the theory of objective responsibility as a general principle (which may be modified or excluded in certain cases)'. And, on the issue of motive, 'Indeed, the principle of objective responsibility dictates the irrelevance of intention to harm as a condition of responsibility. Yet general propositions of this sort should not lead to the conclusion that intention plays no role. For example, the existence of a deliberate intent to injure may have an effect on remoteness of damage as well as helping to establish the breach of duty'.

⁹⁰ *Report of the International Law Commission*, United Nations, New York, 2001, General Assembly, A/56/10, p. 124.

⁹¹ For example, see *Report of the International Law Commission*, United Nations, New York, 2001, General Assembly, A/56/10, pp 69-70, about Article 2: 'Whether there has been a breach of a rule may depend upon the intention or

46. The Prosecution, in its oral arguments of 19 and 20 March 2014, urged the Trial Chamber to examine what the *Gaddafi* decision actually did, rather than what it said.⁹² This is what the Trial Chamber has done.

47. An objective standard, as opposed to one of strict liability, normally includes an assessment of the reasonableness of the actions under scrutiny. The *Gaddafi* decision, however, on one hand, holds that it is applying an ‘objective’ standard, but then, on the other, appears to interpret Article 87 (7) according to strict liability principles. *Gaddafi* states that the standard for determining non-compliance only ‘requires an objective failure to comply’ but paradoxically then states that this is ‘regardless of the State’s underlying motives’, and further, that Article 87 (7) is ‘value-neutral’. This appears to remove from the test any assessment of the reasonableness of a State’s action, thereby applying a test of strict liability to Article 87 (7). Ultimately this may come down to a matter of terminology in using the words ‘objective failure to comply’ instead of ‘strict liability’. But there is a large legal difference between using an objective standard, under which reasonableness may be assessed, and strict liability test, in which it is not. This is a crucial distinction in assessing the actions of a State.

48. The *Gaddafi* decision’s finding at paragraph 33 actually seems to contradict the Pre-Trial Chamber’s actions and decisions in the protracted proceedings preceding its finding that Libya had failed to comply with the Court’s orders, and other parts of the decision. For example, at paragraph 12, the Chamber explained that five months earlier, it had allowed Libya to ‘submit, at a later time, any relevant information to both the implementation of the duty to surrender Saif Al-Islam Gaddafi and the political and security situation in the country’. And, further, at paragraph 23, it held that ‘a determination on whether to make a finding of non-compliance and decide to refer the matter to the Security Council is discretionary in nature and is part of the broader consideration of the most

knowledge of relevant State organs or agents and in that sense may be “subjective”. For example article II of the Genocide Convention [...]. In other cases, the standard for breach of an obligation may be “objective” in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules in the given case’.

⁹² Transcript of 19 March 2015, pp 91– 94; Transcript of 20 March 2015, p. 65.

effective modality to ensure that the Court's cooperation requests are implemented'. These two paragraphs contradict the finding in paragraph 33 that a finding of non-compliance is 'value-neutral'.

49. Further, the *Gaddafi* findings related to the failure to surrender a person who was in the custody of the Libyan authorities—although not necessarily that of the Libyan Government—and to return specified documents that were in the hands of those same authorities.⁹³ Those facts were uncontested and it was evident that the Libyan Government had, in this sense at least, objectively failed to comply with the Court's two requests for cooperation. By contrast, here, the Trial Chamber has not found that the information which is the subject of the supposedly outstanding requests for assistance either (a) exists or (b) is in the Lebanese Government's possession. On this basis alone—despite the internal inconsistency in *Gaddafi*—that decision is distinguishable.

50. The *Gaddafi* decision is also at odds with the decision in *Kenyatta*, issued a week earlier, which held that:

...even where it has been determined that a State has failed to comply with a request for cooperation and that this failure has prevented the Court from exercising its functions under the Statute, the Chamber has to consider whether making a finding pursuant to Article 87 (7) of the Statute is appropriate in the circumstances.

and

In determining that a State has failed to comply with a request for cooperation under the first part of Article 87 (7) of the Statute, the Chamber considers that a certain restraint is appropriate

51. In an earlier decision, the *Kenyatta* Trial Chamber, although not mentioning any standard for determining non-compliance, issued orders to 'direct' the Prosecution and the Government of the Republic of Kenya to 'engage in cooperation', and emphasised that 'this process should be carried out in good faith and it is expected that timely and meaningful efforts will be made on an *inter partes*

⁹³ Prosecution response, para. 8.

basis to resolve any difficulties which may arise during the course of the cooperation'.⁹⁴ This is also consistent with the ICTY and ICTR's case-law.⁹⁵

52. Finally, as a matter of statutory interpretation under Rule 3,⁹⁶ the Trial Chamber, before examining external sources, must first look to the Special Tribunal's statutory instruments. Rule 20 (C), on its face, in specifying that the decision is discretionary, provides for a non-objective standard of determination.

53. From this, the Trial Chamber concludes that an objective standard—even including an assessment of reasonableness—*may* suffice for determining a finding of non-compliance against a State. However, such a failure *of itself* does not mandate a finding of non-compliance. Whether a failure *simpliciter* suffices will thus depend upon the circumstances. For example, a complete and repeated failure to respond without any explanation may justify a finding on those grounds. That, however, is not the case here. The Trial Chamber therefore declines to follow paragraph 33 of the decision in *Gaddafi*.

54. In view of this analysis, the Trial Chamber reiterates the importance of not selectively citing case-law in submissions. To assist the Trial Chamber to make an informed decision, the Parties should cite the relevant case-law both for and against the proposition argued, bearing in mind the

⁹⁴ *Kenyatta*, Decision of 31 March 2014, paras 100 – 101 and p. 46 (disposition).

⁹⁵ For example, the ICTY Appeals Chamber has held, in relation to its Prosecutor's allegation that the Republic of Croatia had not complied with an order of the Tribunal, that it 'must be satisfied that the State has clearly failed to comply with the order or request', and that to make a finding, the Tribunal must act on 'all the principles and rules of judicial propriety' to 'scrutinise[] the behaviour of a certain State in order to establish formally whether or not that state has breached its international obligation'; *Prosecutor v Tihomir Blaškić*, IT-95-14-AR108 bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 35. ICTR, *Prosecutor v. Callixite Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion Asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperate to the Security Council, 19 October 2009, para. 18 (calling the resort to a referral to the Security Council a remedy of last resort); ICTR, *Prosecutor v. Callixite Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for a Stay of Proceedings; Reconsideration and/or Certification of Decision rendered on 29 October 2009; and Reconsideration and/or Certification of the Decision rendered on 30 October 2009, 13 November 2009, paras 39 – 40; ICTR, *Prosecutor v. Callixite Nzabonimana*, ICTR-98-44D-T, Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France's Cooperation with the Tribunal, 4 March 2010, para. 31.

⁹⁶ Rule 3 (A): 'The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights, (iii) the general principles of international criminal law and procedure, and, as appropriate (iv) the Lebanese Code of Criminal Procedure.'

entirety of the reasoning in the decision, and then submit why the Trial Chamber should prefer one over any other.

55. The following principles emerge from the international case law—including that of the Special Tribunal:

- compliance is a continuing process;⁹⁷
- a presumption exists of good faith on the part of States in cooperating with the relevant international court or tribunal;⁹⁸
- making a finding of non-compliance against a State is discretionary;⁹⁹
- a certain restraint is appropriate in making findings of non-compliance;¹⁰⁰
- a court must act on all the principles and rules of judicial propriety to scrutinise the behaviour of a State to establish formally whether it has breached its international obligation to cooperate;¹⁰¹
- where there is some compliance and explanation for any non-execution of a request for assistance or an order for cooperation, it may be necessary to rebut a presumption of good faith;¹⁰² and
- a State should be heard before a Chamber makes a finding of non-compliance.¹⁰³

⁹⁷ *Kenyatta*, Decision of 3 December 2014, para. 40. *See also*, *Gaddafi*, Decision of 10 December 2014, para. 23 ('...a determination on whether to make a finding of non-compliance and decide to refer the matter to the Security Council is discretionary in nature and is part of the broader consideration of the most effective modality to ensure that the Court's cooperation requests are implemented').

⁹⁸ *Kenyatta*, Decision of 3 December 2014, para. 40. *See also*, *Nzabonimana*, Decision of 19 October 2009, para. 18 ('...the Trial Chamber is not prepared at this stage to conclude that [France's] failure to fully comply ... is deliberate, *in bad faith*, or is intended to impede the fair and expeditious conduct of the proceedings' (italics added)).

⁹⁹ *Nzabonimana*, Decision of 19 October 2009, para. 18; *Nzabonimana*, Decision of 4 March 2010, para. 30; *Kenyatta*, Decision of 3 December 2014, paras 39 – 40; *Gaddafi*, Decision of 10 December 2014, para. 23.

¹⁰⁰ *Blaškić*, Decision of 29 October 1997, para. 31 (endorsing the use of cooperative processes before resort to mandatory compliance); *Kenyatta*, Decision of 3 December 2014, para. 39.

¹⁰¹ *Blaškić*, Decision of 29 October 1997, para. 35; *Kenyatta*, Decision of 3 December 2014, para. 39.

¹⁰² *Kenyatta*, Decision of 3 December 2014, para. 40.

¹⁰³ STL-11-01/I/TC, F0066, Confidential, Decision on the confidential and *ex parte* Prosecution's request for a judicial finding that the Lebanese authorities have failed to comply with the arrest warrants pursuant to Rule 20 (C), 2 November 2011, para. 10; *Gaddafi*, Decision of 10 December 2014, para. 24. *See Kenyatta*, Decision of 3 December 2014, para. 40.

56. In determining whether the Government of Lebanon has failed to comply with its orders, the Trial Chamber will use these principles.

Has the Government of Lebanon complied with the Trial Chamber's orders?

57. In its orders of 31 January and 31 March 2014, the Trial Chamber ordered the Government of Lebanon to comply with 43 Defence requests for assistance. Counsel for Mr Sabra consider that 16 have been complied with to their satisfaction.¹⁰⁴ On their assessment, they have received no response to seven requests for assistance, and the Lebanese Government has replied to another 20, although, according to the Defence, in an incomplete or otherwise unsatisfactory manner.

58. These 27 seven requests for assistance may be classified in the following six (overlapping) categories:

- (i) Four requests for assistance in relation to Lebanese telephone number 3419018, supposedly without reply or inadequate reply;¹⁰⁵
- (ii) Five requests for assistance in relation to a named person where replies have been received, but the Defence submits that further materials should have been provided,¹⁰⁶ and one in relation to the same person to which the Lebanese Government has not responded;¹⁰⁷
- (iii) One request for assistance in relation to 'terrorist groups' where there was a response from a Government body, and the Defence considers other bodies should also have replied;¹⁰⁸
- (iv) Eight requests for assistance where the replies do not include a response from a Lebanese Ministry specified by the Defence, and which the Defence considers should be included;¹⁰⁹

¹⁰⁴ Updated request, para. 32.

¹⁰⁵ Requests (1) 108, (2) 109 and (3) 110 in the schedule to annex B to the orders of 31 January 2014, and request 107 from the schedule to annex C of the orders of 31 March 2014.

¹⁰⁶ Requests 111 – 115 in the schedule to annex C to the orders of 31 March 2014.

¹⁰⁷ Request 116 in the schedule to annex C to the orders of 31 March 2014.

¹⁰⁸ Request 99 in the schedule to annex C to the orders of 31 March 2014.

¹⁰⁹ Request 30 (41) in the schedule to annex A to the orders of 31 January 2014. Requests 114, 115, 64, 66, 70 and 71 in the schedule to annex C to the orders of 31 March 2014. Request 117 in the schedule to annex D to the orders of 31 March 2014.

- (v) Three requests for assistance made in relation to a telecommunications company, where there has been no reply,¹¹⁰ and six where the replies received do not include a response from the same company, where the Defence considers they should have responded;¹¹¹
- (vi) Three requests for assistance where a different company replied that it does not have the information requested,¹¹² and four requests for assistance where the company replied by referring to previous responses to earlier requests for assistance, without providing any further information, despite the different phrasing of the earlier requests for assistance.¹¹³

59. The Trial Chamber's overall evaluation is that the Lebanese Government's responses are considerable, and that the 'continuing process' of compliance is advanced, although not yet complete. But despite this progress, some concerns remain. For example, the Trial Chamber noted on 12 May 2014 that there had been no reply in relation to any of the three requests for assistance in the schedule to annex B to the orders of 31 January 2014, relating to Lebanese telephone number 3419018.¹¹⁴ The situation regarding both the lack of responses to these three requests for assistance, and the concerns of the Trial Chamber, therefore remains unchanged. The Lebanese Government, however, responded to a separate request for similar information about that telephone number. Any conflict between the non-response to one request for assistance and a response to a similar one thus needs to be resolved. However, the Trial Chamber is unable, at this stage, without any further information from the Lebanese government, to make a qualitative assessment of the alleged non-compliance.

60. The situation regarding other matters is not clear cut. For example, Defence counsel previously acknowledged that the company specified in paragraph 58 (v) above, has provided responses to numerous other requests for assistance.¹¹⁵ Further, the relevant Ministry, referred to in paragraph 58 (iv), actively obtained the relevant telecommunications information from other companies.¹¹⁶ And while Defence counsel are not satisfied with some responses from the telecommunications company

¹¹⁰ Requests 4, 15 and 23 in the schedule to annex B to the orders of 31 March 2014.

¹¹¹ Requests 112, 114, 115, 70, 71 in the schedule to annex C to the orders of 31 March 2014.

¹¹² Requests 40 (84), 42 (86) and 44 (90) in the schedule to annex A to the orders of 31 January 2014.

¹¹³ Requests 16, 23, 47 and 63 in the schedule to annex A to the orders of 31 March 2014.

¹¹⁴ Transcript of 12 May 2014, p. 6.

¹¹⁵ Consolidated request, Annex A.

¹¹⁶ Updated request, para. 45.

mentioned in paragraph 58 (vi), they acknowledge that this organisation has provided satisfactory responses to other requests for assistance.¹¹⁷

61. In the totality of the circumstance, the Trial Chamber therefore still considers it premature to find, as sought by Defence counsel, that the Lebanese Government has failed to assist the Defence and comply with the Trial Chamber's orders.¹¹⁸ However, the issue of possible non-compliance has to be resolved in a timely manner. The Trial Chamber will accordingly allow the Government of Lebanon a further period of 21 days from its receipt of this decision, in Arabic, to finalise its responses to any outstanding Defence requests for assistance the subject of this motion. These deficiencies—as alleged by Defence counsel—are set out in the annexes to this decision.

62. Annex I is a straightforward list, based on the Defence submissions, of possible deficiencies in relation to the responses (or lack of), to each request for assistance in the schedules to the annexes to the orders of 31 January and 31 March 2014.

63. To assist the Government of Lebanon to identify any particular difficulties in finalising the process of compliance, annex II contains the same information as annex I, but is organised in themes similar to those identified in paragraph 58 above. The alleged deficiencies are listed by organisation or topic, or whether it is claimed the Lebanese Government has not responded. Annex III contains information about request 117, which was contained in the schedule to annex D to the Trial Chamber's orders of 31 March 2014 and is *ex parte* the Prosecution.

64. The orders and schedules annexed to the Trial Chamber's orders of 31 January and 31 March 2014 are definitive of the outstanding requests for assistance *as of those dates*, but the Trial Chamber hopes that the annexes to this decision will assist the Government of Lebanon to finalise this process as soon as possible.

65. The Trial Chamber understands that, in some cases, the Lebanese Government may neither possess the information sought, nor be able to obtain it. However, in this respect, the Trial Chamber reminds the Government of Lebanon that it should—if it cannot provide any of the information in the Defence requests for assistance listed in the annexes to this decision—simply specify this in its

¹¹⁷ Consolidated request, Annex A. Updated request, para 32 and Annex A.

¹¹⁸ Updated request, para. 55.

response to the relevant request for assistance. It is insufficient for the Special Tribunal's purposes—as set out in Article 15 (1) of the Annex to United Nations Security Council resolution 1757 (2007)—not to respond. The Trial Chamber directs the Government of Lebanon to respond to each of the requests listed in the annex with an explanation as to whether it can comply with the request for assistance, and if not, to explain why not.

66. The Trial Chamber therefore expects that shortly, at the end of this process, the Lebanese Government will provide definitive responses to each of the requests for assistance—from the relevant companies, Government Agencies, Departments and Ministries. Defence counsel will then know whether they will receive all of the information they have sought.

CONCLUSION

67. The Trial Chamber has determined that the decision whether there has been non-compliance is discretionary, the standard for determining this is not necessarily objective and the Trial Chamber may examine the reasons for the non-compliance. Having done so, the Trial Chamber is not yet convinced that it should make the finding of non-compliance the motion seeks. Rather, at this stage it is satisfied that the most appropriate manner of progressing this is for the Registrar to write to the Government of Lebanon, enclosing this decision and its annexes, and annexing copies of the Trial Chamber's orders of 31 January and 31 March 2014.

68. The Government of Lebanon must respond to the Defence Office within 21 days of receiving this decision in Arabic. The Registrar should inform Defence counsel of the date of service of these documents on the Lebanese Government; counsel for Mr Sabra should provide the Trial Chamber with a progress update two weeks after the date of service and an update every two weeks thereafter.

69. The fourth order of the Trial Chamber's orders of 31 March 2014 is *ex parte* the Prosecution.¹¹⁹ Those concerned with its implementation must take all necessary measures to ensure its confidential status.¹²⁰ All orders are *ex parte* the Legal Representatives of Participating Victims.

¹¹⁹ Dealt with in Annex D to the Further decision.

¹²⁰ Further decision, paras 12, 17 and 36; Clarification, paras 13 – 15.

Orders to Lebanon in respect of requests for assistance of counsel for Mr Mustafa Amine Badreddine

70. On a related matter, while not the subject of this motion, the Trial Chamber—at the request of counsel for Mr Mustafa Amine Badreddine—issued orders for cooperation on 13 January and 30 May 2014 to the Government of Lebanon.¹²¹ If counsel for Mr Badreddine believe that the Lebanese Government has not responded satisfactorily to any request for assistance the subject of those orders, they should immediately notify the Registrar to enable him to communicate this to the Lebanese Government when notifying this decision.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

INSTRUCTS the Registrar to immediately notify the Government of the Lebanese Republic of this decision, and to annex to it;

- (1) Decision on Second and Fifth Motions by counsel for Assad Hassan Sabra and Two Orders to Lebanon to Cooperate with the Tribunal of 31 January 2014,
- (2) Further Decision on Motions Under Rule 20 (A) by counsel for Assad Hassan Sabra and Four Orders to Lebanon to Cooperate with the Tribunal of 31 March 2014,
- (3) Updated Request for a Finding of Non-Compliance, dated 8 January 2015,
- (4) Prosecution Response to the Sabra Defence's Updated Request for a Finding of Non-Compliance, dated 22 January 2015, and
- (5) Sabra Defence Reply Regarding its Updated Request for a Finding of Non-Compliance, dated 28 January 2015;

¹²¹ STL-11-01/PT/TC, F1316, Decision on Motion filed by Counsel for Mr Badreddine and Order to Lebanon to Cooperate with the Special Tribunal, 13 January 2014; STL-11-01/T/TC, F1552, Second decision on Badreddine Defence Motion for Order to Lebanon to Cooperate with the Special Tribunal and Orders to Lebanon, 30 May 2014.

EXTENDS the date for enforcement by Lebanon of these orders to 21 days from the date of notification of this decision, in Arabic, of the outstanding Defence requests for assistance—as set out in annexes I, II and III to this decision;

DIRECTS the Government of Lebanon to respond to each of the requests listed in the annexes with an explanation as to whether it can comply with the request for assistance, and if not, to explain why not; and

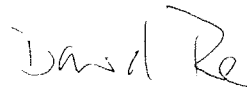
INSTRUCTS counsel for Mr Assad Hassan Sabra to provide the Trial Chamber, within two weeks of the Government of Lebanon receiving these documents in Arabic, with an update as to any progress and an update every two weeks thereafter.

AND WITH REGARD TO MUSTAFA AMINE BADREDDINE, the Trial Chamber:

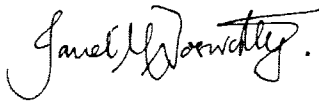
INVITES counsel for Mr Badreddine to immediately inform the Registrar of any request for assistance the subject of either the Trial Chamber’s Decision on Motion filed by counsel for Mr Badreddine and Order to Lebanon to Cooperate with the Special Tribunal of 13 January 2014, or the Trial Chamber’s Second Decision on Badreddine Defence Motion for Order to Lebanon to Cooperate with the Special Tribunal and Orders to Lebanon of 30 May 2014, to which counsel for Mr Badreddine believe that they have not received a satisfactory response from the Lebanese Government.

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

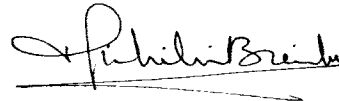
Leidschendam,
The Netherlands
27 March 2015



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

