SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

Case No.:	**STL-11-01/T/TC**
Before:	**Judge David Re, Presiding Judge**
Registrar:	**Mr. Daryl Mundis**
Date:	**11 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 DENYING LEAVE TO RECONSIDER A DECISION OF THE PRE-TRIAL JUDGE RE DISCLOSURE REGARDING A COMPUTER

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INTRODUCTION

1. This decision reaffirms that one Chamber of the Special Tribunal cannot reconsider the decision of another under Rule 140 of the Special Tribunal's Rules of Procedure and Evidence. That Rule states,

> A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice.

2. The Pre-Trial Judge, on 24 October 2013, dismissed a motion filed on 6 August 2013 by counsel for Mr. Hussein Hassan Oneissi seeking the disclosure of some material from the Prosecution.[1] Six days later, on 30 October 2013, defence counsel moved the Pre-Trial Judge to reconsider his decision pursuant to Rule 140 or to certify it for appeal under Rule 126.[2] Some time later, on 16 January 2014, the Pre-Trial Judge dismissed the application, deciding that he no longer had the jurisdiction, but stating that the Trial Chamber could vary or modify his decisions.[3]

3. Defence counsel have now sought the same remedy from the Trial Chamber, namely, a reconsideration of the decision or its certification for appeal; the Prosecution opposes both.[4]

LEGAL PRINCIPLES FOR RECONSIDERING OR VARYING DECISIONS

4. Reconsidering a decision should not be confused with varying a decision. Here, the Defence is asking the Trial Chamber to reconsider paragraphs 27 to 30 of the Pre-Trial Judge's decision, which led to his dismissing the motion. The Trial Chamber, however, has already held that it cannot reconsider a decision of the Pre-Trial Judge.

5. The background to this is that almost simultaneously with his decision of 24 October 2013, the Pre-Trial Judge, on 25 October 2013, forwarded to the Trial Chamber—with the transfer of the

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[1] STL-11-01/PT/PTJ, *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, 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 dedocuments relatifs à l'ordinateur d'Abou Adass etaux 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, 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.

[3] 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 ('Pre-Trial Judge Decision of 16 January 2014').

[4] 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 ; and 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.

case file under Rule 95—twelve motions awaiting his decision.[5] One of these was an application filed by counsel for Mr. Assad Hassan Sabra on 21 October 2013, also under Rule 140, to reconsider one of the Pre-Trial Judge's decisions.[6]

6. Ten days later, in a decision of 31 October 2013, the Trial Chamber dismissed that application on the basis that it could not reconsider a decision of the Pre-Trial Chamber. Relying upon the precedent of international criminal law case-law, the Trial Chamber held,

> Rule 140 appears only to contemplate a Chamber reconsidering its own decision. Decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda on the power of a chamber to reconsider decisions are consistent with this interpretation. The Trial Chamber is likewise not of the view that this Rule permits it to reconsider the decision of another chamber, here the Pre-Trial Judge's.[7]

7. But contrary to this decision, and without referring to it or the international criminal law case-law on whether one chamber can reconsider the decision of another, the Pre-Trial Judge subsequently held—and in relation to reconsideration or certification—that:

> there may be circumstances when a Chamber could review or modify decisions made by other judges or chambers in the course of proceedings. Such could be the case at this Tribunal, given that the Statute and Rules structurally provide for two distinct phases and a transfer of jurisdiction from one chamber to another during the normal progression of a given case. To this end, the Pre-Trial Judge also observes that the Trial Chamber has already pronounced on motions requesting the certification of a Pre-Trial Judge decision, and varying the protective orders of witnesses that were previously established by the Pre-Trial Judge.[8]

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[5] 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.

[6] STL-11-01/PT/PTJ, Request for Reconsideration of the Decision on Sabra Motion for Effective Compliance with the Prosecution's Disclosure Obligations and Further Request for Effective Disclosure of Scanned Documents', 21 October 2013.

[7] STL-11-01/PT/TC, Orders for Trial Preparation Following the Pre-Trial Conference of 29 October 2013, 31 October 2013, para. 8. At footnote 6, the Trial Chamber's decision further cites, for example, '*Prosecutor v. Stanislav Galić*, IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *Prosecutor v. Vojislav Šešelj*, IT-03-67-AR72.1, Decision on Motion for Reconsideration of the 'Decision on the Interlocutory Appeal Concerning Jurisdiction' Dated 31 August 2004, 15 June 2006, para. 9; *Prosecutor v. Pavle Strugar*, IT-01-42-Misc.1, Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007, paras 23-25. See also, *Prosecutor v. Jadranko Prlić*, IT-04-74-T, Decision on the Stojić Defence Request for Reconsideration, 4 November 2008, p. 2; *Prosecutor v. Théoneste Bagosora*, ICTR-98-41-I, Decision on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction, 28 March 2002, para. 21.'

[8] Pre-Trial Judge Decision of 16 January 2014, para. 15. At footnote 20, the Pre-Trial Judge's decision further cites 'ICTR, *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-I, Decision on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 Motion December 2001 and for a Declaration of Lack of Jurisdiction, 28 March 2002, para. 20. "The Chamber that is seised with a particular case is empowered to make

8. The Pre-Trial Judge found support for this view in two Trial Chamber decisions—of the ICTR in *Bagosora*, and the International Criminal Court in *Banda and Jerbo*. However, the paragraph of the *Bagosora* decision on which he relies (paragraph 20) is relevant to one chamber '*varying or rescinding* orders made by other judges or chambers' rather than reconsidering a decision. The next paragraph of that decision under the heading '*Reconsideration*'—to which the Trial Chamber referred in its own prior decision—states that '[t]he Chamber also possesses an inherent discretionary power to revisit its *own previous decisions'* (italics added).

9. The *Banda and Jerbo* decision, moreover, is about a Trial Chamber varying protective measures for witnesses and document redaction orders made by another chamber, rather than one chamber reconsidering another's decision. This decision was taken pursuant to Regulation 42 (3) of the ICC's Regulations of the Court which provides that 'any application to vary a protective measure shall first be made to the Chamber which issued the order, unless it is no longer seised of the proceedings in which the protective measure was ordered'. There, because the Pre-Trial Chamber was no longer seised of the case, the application had to be made before the ICC Trial Chamber. The question was of jurisdiction to vary protective measures originally taken by the ICC's Pre-Trial Chamber I rather than to reconsider that Pre-Trial Chamber's decision. The situation in *Banda and Jerbo* is actually analogous to the Special Tribunal's Rule 130 (B) which provides that the Rules governing proceedings before the Pre-Trial Judge (with three exceptions) apply *mutatis mutandis* to proceedings before the Trial Chamber after the submission of the case file under Rule 95.

10. A later ICC Appeals Chamber case has followed the case-law of the ICTR and ICTY and held on the question of reconsideration that (italics added),

> A Chamber may reconsider its *own* decision if a new fact is discovered that was unknown to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.[9]

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decisions relating to it. In some circumstances this will require varying or rescinding orders made by other judges or chambers. The determination as to when such action is necessary or appropriate lies with the Chamber that is making the decision." See also, ICC, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the Prosecution's Applications for Lifting Redactions on Material Relating to Witnesses 307 and 484 Pursuant to Regulation 42 of the Regulations of the Court, 12 September 2012, para. 7; Decision on the "Prosecution's Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to Rule 81(4) of the Rules of Procedure and Evidence", 13 July 2012, para. 7'

[9] *See* ICC, *Situation in Kenya*, ICC-01/09 OA 2, Motion of Mr David Nyekorach Matsanga for Reconsideration on Request for Disqualification of the Prosecution in the Investigation against Mr David Nyekorach-Matsanga dated 11 July 2012, 23 March 2013, paras 14-15 (also citing ICTR case-law).

11. With due respect to the Pre-Trial Judge—in circumstances where the defence motion sought reconsideration—his decision appears to mix two principles, namely, that of one chamber varying or rescinding the orders of another chamber, with that of another chamber reconsidering for itself the decision on its merits.

12. The two are quite distinct. Reconsideration involves a review of the decision, on its merits, to avoid injustice to a party that 'at a minimum involves prejudice'.[10] It requires the judge or chamber to revisit the original decision and to reassess its reasoning with the aim of avoiding injustice by arriving at a different result.

13. A variation, on the other hand, involves merely changing or varying the terms or conditions of an existing decision, usually as a result of an alteration in circumstances or the emergence of a new fact. It does not necessarily require a reassessment of the reasoning in the decision. A variation could of course be tantamount to a reconsideration by producing what is effectively a substitution of the original decision of another chamber. It is difficult, however, to conceive of how a decision dismissing something—in other words, a negative decision—could be varied, as the Pre-Trial Judge's decision seems to suggest, rather than reconsidered. While there may sometimes be a fine line between the two, a variation does not involve the same assessments as reconsidering the decision itself. A variation, for instance, could simply change a filing deadline or alter protective measures put in place by an earlier decision. But here, the decision in question denied the relief sought.

14. The original defence motion of 6 August 2013 sought an order requiring the Prosecution to disclose 'the documents and information in its custody or control relating to a computer that belonged to Abu Adass'.[11] The Pre-Trial Judge's decision—for which reconsideration is now sought—dismissed the motion in its entirety. The defence motion of 30 October 2013 sought a reconsideration of that decision, or its certification for appeal—but not its variation. And indeed, there is nothing that another chamber could vary. If the Trial Chamber rescinded the decision, the result would be overturning the decision rather than substituting another more favourable to the Defence; the application would have to be made anew. The Defence motion seeks a full reconsideration on its merits of paragraphs 27 to 30 of the Pre-Trial Judge's decision. The Trial Chamber, however, lacks the power to do this.

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[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. 19; STL-11-01/PT/AC/R176*bis*, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, 18 July 2012, para. 24.

[11] *See* Requête de la Défense de Mr. Oneissi en communication de documents relatifs 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), para. 1.

15. The Trial Chamber may of course vary the orders of other chambers, including protective measures, redactions of documents, dates and deadlines, and conditions of provisional release, etc. Moreover, decisions of the Pre-Trial Chamber on issues of case management, including disclosure, do not bind the Trial Chamber. The Trial Chamber may therefore consider a new motion for disclosure of the information sought by Defence counsel—but it cannot reconsider on its merits, under Rule 130 (B), the Pre-Trial Judge's own decision.

DECISION

Leave for reconsideration

16. The Presiding Judge of the Trial Chamber must grant leave to reconsider a decision before the Trial Chamber can examine the application for reconsideration. Rule 140 does not elaborate on what is meant by avoiding injustice or the grounds upon which leave to reconsider may be given, and has been interpreted by the Special Tribunal's Pre-Trial Judge, Trial Chamber, and Appeals Chamber.

17. The role of the Presiding Judge is to perform a *prima facie* examination of the request to ensure that it may 'be admitted in terms of procedure' and that it is not manifestly ill-founded,[12] including 'a filtering function to prevent the filing of unwarranted requests'.[13] The request 'must be duly reasoned' and 'reconsideration may only be granted if the application is not manifestly unfounded, frivolous or aims at circumventing the Rules'.[14] The Presiding Judge acts 'as a filter to screen applications to ensure that they contain the procedural and legal justifications necessary to allow the Trial Chamber to decide an application for reconsideration on its merits'.[15]

18. Here, however, for the reasons explained in its decision of 31 October 2013 and reaffirmed above, the Trial Chamber lacks the power to reconsider certain paragraphs of the Pre-Trial Judge's decision of 24 October 2013. The decision cannot be varied—in the sense of, say, a variation of the terms of an order for provisional release—because the decision *dismissed* the motion. For this reason, leave to reconsider the decision must be denied.

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[12] *See* STL-11-01/PT/TC, Décision refusant à la Défense de M. Badreddine l'autorisation de déposer une requête en réexamen, 2 July 2013, para. 11; Decision Authorising the Ayyash Defence and the Sabra Defence to File a Request for Reconsideration, 22 May 2012, para. 6; Decision Authorising the Badreddine Defence and the Oneissi Defence to File a Request for Reconsideration, 15 May 2012, para. 10.
[13] STL-11-01/PT/AC, Decision on Request by Defence for Messrs Badreddine and Oneissi for Authorization to Seek Reconsideration of the Appeals Chamber's Decision of 25 October 2013, 13 November 2013, para. 4.
[14] Pre-Trial Judge's Order, paras 30-31.
[15] STL-11-01/T/TC, Reasons for Decision Granting Leave to Reconsider Deadline for Motions Concerning Evidentiary Decisions Issued before Joinder, 7 March 2014, para. 7 (decision of the Presiding Judge).

Observations on the request for certification to appeal the Pre-Trial Judge's decision of 24 October 2013

19. Certification for appeal under Rule 126 has a different legal test to reconsideration under Rule 140; the two are not analogous. The request for certification to appeal is described merely as relating to paragraphs 31 to 38 of the decision. Although this is a matter for the full Trial Chamber to determine, I observe that the motion does not articulate, as required by the Appeals Chamber decision,[16] any clear legal question for certification to appeal. Simply listing eight paragraphs of a decision cannot meet the minimum standard required in a Party seeking to certify a decision for an interlocutory appeal.

20. The subject matter of this application may therefore be more appropriately brought before the Trial Chamber in a fresh application. Taking that route would allow the Trial Chamber to consider the matter afresh, given that seven months has passed since the motion was filed in August 2013, and then, if necessary, to grant certification to appeal a Trial Chamber decision.

21. I also add that the Trial Chamber has implicitly—by previously not rejecting such a motion—decided that it has the power to certify for appeal a decision of the Pre-Trial Judge issued before the transfer of the case-file.[17] The Pre-Trial Judge correctly noted this. 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 decisions for appeal. This would deny an aggrieved party the possibility of seeking an interlocutory appeal.

DISPOSITION

FOR THESE REASONS, the motion seeking leave to reconsider the Pre-Trial Judge's decision of 24 October 2014 is dismissed.

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

11 March 2014

[16] 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, paras 10-11, *especially* para. 11: 'In the future, parties applying for certification to appeal a decision must take care to ensure that they specify the appealable issues in that decision.'
[17] 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.

The Netherlands

David Re

Judge David Re, Presiding