



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case No: **STL-13-04/I/PTJ**

Pre-Trial Judge: **Judge Daniel Fransen**

Registrar: **Mr Daryl Mundis**

Date: **23 December 2013**

Original language: **French**

Classification: **Public**

THE PROSECUTOR
v.
HASSAN HABIB MERHI

**ORDER ON THE PROSECUTION REQUEST OF 18 DECEMBER 2013
FOR AN ORDER OF NON-DISCLOSURE OF INFORMATION**

Counsel:
Mr Mohammed Aouini

Office of the Prosecutor:
Mr Norman Farrell

Defence Office:
Mr François Roux



I. Purpose of the order

1. With this Order, the Pre-Trial Judge grants the Prosecution Request of 18 December 2013 seeking to prevent the disclosure to the public by the future counsel appointed to represent Hassan Habib Merhi (the “Accused”) and the other Defence teams (collectively the “Defence”) of any material to be disclosed by the Prosecution (the “Request”).¹

II. Procedural background

2. On 31 July 2013, the Pre-Trial Judge rendered a Decision relating to the examination of the Indictment of 5 June 2013 issued against the Accused (the “Decision Relating to the Indictment of 5 June 2013”).²

3. On 18 December 2013, the Prosecution filed the Request.

4. On 20 December 2013, the Trial Chamber rendered a decision relating to the opening of *in absentia* proceedings against the Accused.³

5. On 20 December 2013, the Head of the Defence Office assigned counsel to represent the rights and interests of the Accused.⁴ He also made oral submissions to the Pre-Trial Judge regarding the Request, emphasizing the fact that all the measures sought for the Defence must also apply *mutatis mutandis* to the Prosecutor and to the Legal Representative of the Victims Participating in the Proceedings (“VPP”).

III. The Request

6. The Prosecution requests, in anticipation of the imminent assignment of Defence Counsel in the event that the Trial Chamber decides to initiate proceedings *in absentia* against the Accused, that the non-dissemination measures adopted in the case of *Ayyash et al.* be extended to the *Merhi* case. Moreover, the Prosecution requests that the Pre-Trial Judge rule that those measures shall apply to all future disclosures, consistent with the interests of

¹ STL, *The Prosecutor v. Mehri*, Case No. STL-13-04/I/PTJ, Prosecution Request for an Order of Non-Disclosure to the Public of Confidential Information in the Mehri Case, 18 December 2013.

² STL, *The Prosecutor v. Hassan Habib Merhi*, Case No. STL-13-04/I/PTJ, Redacted Version of the “Decision Relating to the Examination of the Indictment of 5 June 2013 issued against Mr Hassan Habib Merhi” dated 31 July 2013, 11 October 2013.

³ STL, *The Prosecutor v. Mehri*, Case No. STL-13-04/I/PTJ, Decision to Hold Trial *in Absentia*, 20 December 2013.

⁴ STL, *The Prosecutor v. Mehri*, Case No. STL-13-04/I/PTJ, Assignment of a Counsel for the *in absentia* Proceedings Held Pursuant to Rule 106 of the Rules, 20 December 2013.

justice, the protection and privacy of victims and witnesses, and the protection of the evidence and the integrity of the investigation.⁵

7. Indeed, the Prosecution recalls that in the case of *Ayyash et al.*, with two decisions rendered respectively on 25 May 2012 (the “Decision of 25 May 2012”)⁶ and 14 June 2012 (the “Decision of 14 June 2012”)⁷, the Pre-Trial Judge ordered, firstly, the non-disclosure to the public by the Defence of material disclosed by the Prosecution, recalling the obligation incumbent on the Defence in this regard and, secondly, the extension of the protective measures set out in the Decision of 25 May 2012 to all the material disclosed “by the Parties and by the Victims’ Legal Representative in the context of the ongoing proceedings.”⁸

8. Furthermore, the Pre-Trial Judge considered that the dissemination of information that identified protected witnesses or otherwise divulges information classified as confidential was in violation of the Decision of 25 May 2012. The Prosecution submits that the same reasons which justified these measures in the *Ayyash et al.*⁹ case should thus apply in the case of *Merhi*.¹⁰

9. The Prosecution also states that, in the *Merhi* case, when examining the Indictment against the Accused, the Pre-Trial Judge ruled that respect for the integrity of the ongoing investigation and procedure and also witness protection justified maintaining the confidentiality of the material submitted in support of the indictment.¹¹

10. The Prosecution recalls that Rule 133 of the Rules empowers the Tribunal to take measures for the protection of victims and witnesses. The Prosecution recalls finally that, in the Decision of 25 May 2012, the Pre-Trial Judge held that “Rule 60 *bis* of the Rules applies,

⁵ Request, paras. 2 and 3.

⁶ *Id.* para. 5; STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision Relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012, 25 May 2012.

⁷ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision authorising the withdrawal of the Prosecution Application of 21 December 2011 and the Modification of the Application of 15 March 2012 Requesting Protective Measures for Witnesses, 14 June 2012

⁸ Decision of 14 June 2012, para. 9.

⁹ Request, para. 6; STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request for an order of Non-Disclosure, 2 May 2012, para. 18. In the request, the Prosecution articulates the following reasons: the general security situation in Lebanon, issues pertaining to the protection of witnesses who cooperate with the Tribunal, and those associated with the integrity of the criminal proceedings and the risk of obstructions to the on-going investigations and proceedings.

¹⁰ Request, para. 5.

¹¹ Request, para. 6; STL, *The Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, Public Redacted Version of the “Decision Relating to the Examination of the Indictment of 5 June 2013 Issued Against Mr Hassan Habib Merhi” dated 31 July 2013, para. 80.

in particular, to any violation of the obligations laid down in this Decision”.¹² He also held that: (i) pursuant to paragraph 5 of the Code of Professional Conduct for Counsel appearing before the Tribunal (the “Code for Counsel”) a counsel has a duty to protect the confidentiality of evidence in the proceedings as well as information relating to witnesses and their whereabouts during and at the conclusion of the proceedings; and (ii) pursuant to Article 8 (E) of the Code of Professional Conduct for Defence Counsel appearing before the Special Tribunal for Lebanon (the “Code of Conduct for the Defence”), a defence counsel assigned within the context of *in absentia* proceedings shall not have any contact with the accused.

11. For these reasons, the Prosecution submits that the material which will be disclosed in the *Merhi* case, including supporting material to the indictment against the Accused, must remain confidential in order to protect victims and witnesses and the integrity of the evidence gathered for both the *Ayyash et al.* and *Merhi* cases. The requested Order should therefore contribute to further preserve the confidentiality of that material.¹³

IV. Statement of reasons

A. Introductory comments

1. Legal basis for the Request

12. The Pre-Trial Judge notes that the Request is based, inter alia, on Rule 133 of the Rules. In his Decision of 25 May 2012, the Pre-Trial Judge recalled that the Rule in question:

“ – and, in particular, paragraph (C) (i) of that provision – concerns the non-dissemination of information to third parties. That paragraph deals in fact with “measures to prevent disclosure (sic) to the public or the media of the identity or whereabouts of a victim or witness, or of persons related to or associated with [...] (b) non-disclosure to the public of any records identifying the victim or the witness [...]”.¹⁴

13. As a result, since the Request is admissible, it is for the Pre-Trial Judge to examine whether the measures sought are well-founded in light of the provisions of the aforementioned Rule.

¹² Request, para. 7; Decision of 25 May 2012, p. 24.

¹³ Request, para. 4.

¹⁴ Decision of 25 May 2012, para. 12.

2. Application in the *Merhi* case of measures similar to those ordered in the *Ayyash et al.* case

14. As the Prosecution emphasized in the Request, the Decision relating to the Indictment of 5 June 2013 stated that, in accordance with Rule 74 of the Rules, there are grounds for the material accompanying the indictment to remain confidential “in order to ensure the integrity of the judicial procedure and in particular ensure that the search and, where appropriate, apprehension [of Mr Merhi] is carried out effectively. The confidentiality should likewise assist in “ensuring the protection of the witnesses concerned by not revealing their identity and in safeguarding the ongoing investigation by not disclosing the techniques that have been employed and the information that has been gathered.”¹⁵

15. These grounds are identical to those set out in the Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra.¹⁶

16. The Pre-Trial Judge reiterates that in the present case there are reasons, similar to those in the case of *Ayyash et al.*, which justify the non-disclosure of confidential information. They include in particular issues involving the protection of witnesses cooperating with the Tribunal, the integrity of the criminal proceedings, and the risk of obstruction during the investigation and the proceedings.

B. Examination of the measures sought in the Request

1. Reminder of the definition of the notion of “material” and “public” in the Request

17. The Pre-Trial Judge recalls that, as stated in his Decision of 25 May 2012, the notion of “material” to which the Prosecution refers in the Request, refers to the material “attached to the Indictment in accordance with Rule 68 (E) of the Rules and there is no need to define it differently”.¹⁷ As for the notion of “public”, there is no need to define it for the purpose in

¹⁵ Request para. 6; Decision Relating to the Indictment of 5 June 2013, para. 80.

¹⁶ Public redacted version of the “Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra”, 28 June 2011, para. 101.

¹⁷ Request, para. 1; Decision of 25 May 2012, para. 19.

hand, but that it is appropriate that these terms be referred to in their commonly accepted sense.¹⁸

2. The Head of Defence Office maintaining a list of the teams (paragraph 9 (a) of the Request)

18. The Prosecution calls on the Pre-Trial Judge to order the Head of Defence Office, upon assignment of Counsel for the Accused, to draw up an up-to-date list of the members of his team.

19. Pursuant to Articles 13 (1) of the Statute and Rules 57 (D) (i) and 59 (B) of the Rules, the Head of Defence Office draws up a list of Defence Counsel. Good administration of justice requires that the Head of Defence Office also be informed of the composition of the Defence team and hold a list of past and present members of this team.

20. As a result, the Head of Defence Office is responsible for drawing up and updating a list of Defence Counsel and of the members of their teams.

3. Prohibition of disclosure of the identity of witnesses to third parties (paragraph 9 (b) of the Request)

21. The Prosecution is seeking an order informing the Defence that it may not, either directly or indirectly, disseminate to the public any of the material or information included therein, including any statement of witnesses and their identity, and that of any groups of witnesses provided to them by the Prosecution, except as reasonably necessary to allow them to prepare for and participate in the proceedings and present a defence, or as such material may become public in the course of public proceedings.

22. Paragraph 5 of the Code of Counsel provides that Counsel shall “preserve professional confidentiality of client communications and protect the confidentiality of evidence and proceedings identified as such by the Tribunal” and that “unless otherwise provided by the relevant Chamber, Counsel may only disclose confidential evidence to others who are ethically or contractually bound to protect its confidentiality and only when necessary for investigations or case preparation”.

¹⁸ Request, para. 1; Decision of 25 May 2012, para. 20.

23. Consequently, the Prosecution's request relating to the obligation of non-disclosure to the public of material disclosed by the Prosecution to the Defence and of information relating to witnesses provided by the Prosecution is covered by paragraph 5 of the Code for Counsel.

24. The Pre-Trial Judge points out that this obligation applies to the Defence, to the VPP, and to the Prosecution.

4. Non-disclosure to third parties of information on the whereabouts of witnesses and potential witnesses identified by the Prosecution and on ways of contacting them (paragraph 9(c), (d) and (e) of the Request)

25. The Prosecution calls on the Pre-Trial Judge to impose three obligations on the Defence regarding the protection of witnesses or potential witnesses it has identified as follows:

- a) the non-disclosure of information on the whereabouts of witnesses or potential witnesses except as reasonably necessary to allow the Defence to prepare and participate in the proceedings and present a defence, or if such material becomes public;¹⁹
- b) The obligation for any member of the Defence team to present themselves as such during their contacts with Prosecution witnesses or potential witnesses;²⁰ and
- c) The obligation for the purposes of making contact with a Prosecution witness or potential witness facing a specific risk for the Defence to give written notice to the Prosecution and to obtain permission from the witness through the Victims and Witnesses Unit (the "VWU").²¹

26. With regard to the request under point (a) in the foregoing, the Pre-Trial Judge is of the view that there is no need to draw a distinction between witnesses and potential witnesses at this stage in the proceedings, since any person approached as a witness could appear before the Tribunal. The Pre-Trial Judge recalls and considers that information on the whereabouts of witnesses identified by the Prosecution is protected by the non-disclosure obligation set out in paragraph 5 of the Code for Counsel.

¹⁹ Request, para. 9(c)

²⁰ Request, para. 9(d)

²¹ Request, para. 9(e)

27. Regarding the request set out in point (b) in the foregoing and regarding the obligation for the Defence to present itself as such during its contacts with witnesses identified by the Prosecution, the Pre-Trial Judge considers that the measure is well-founded and in line with current case law.²²

28. Finally, regarding the request set out in point (c) of the foregoing regarding the obligation for the Defence to give prior written notice to the Prosecution of the intention to make contact with a witness identified by the Prosecution and to obtain permission from the witness through the VWU, the Pre-Trial Judge is of the view that this is justified for witnesses who are subject to a specific risk.²³

29. The Pre-Trial Judge is of the view that, in order to enable the Defence to meet the obligations set out in the foregoing, the Prosecution should provide it, at the earliest opportunity, with a list of witnesses indicating those which are subject to a specific risk. Failing this, the Defence will not be properly informed. This list will need to be updated on a regular basis.

5. The obligations incumbent on the Defence regarding the dissemination to third parties to the proceedings of material disclosed by the Prosecution on grounds of necessity (paragraph 9 (f) of the Request)

30. The Prosecution maintains that when the Defence wishes, on grounds of necessity, to disseminate to third parties to the proceedings material disclosed to it, the Defence must inform the third parties in question of the requirement not to disseminate or copy that material and that they shall return it to the Defence after use and inform them of the penalties which any breach of these rules may entail pursuant to Rule 60 *bis* of the Rules.

31. The Pre-Trial Judge notes that Rule 60 *bis* of the Rules which deals with contempt and obstruction of justice has a broad scope and covers “those who knowingly and wilfully

²² International Criminal Tribunal for the Former Yugoslavia (“ICTY”), *The Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Prosecution’s Motions for Protective Measures for Victims and Witnesses, 6 June 2005, Disposition para. 7; ICTY, *The Prosecutor v. Stojan Župljanin*, Case No. IT 99-36/2-PT, Decision on Prosecution’s Motions for Protective Measures for Victims and Witnesses, 30 July 2008, Disposition para. 7.

²³ International Criminal Tribunal for Rwanda (“ICTR”), *The Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-2000-55C-PT, Decision on Prosecutor’s Second Motion for Protective Measures for the Victims and Witnesses to Crimes Alleged in the Indictment, 3 September 2010, p. 5, sub-paragraph vi); ICTR, *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-I, Interim Order on Protective Measures for Prosecution Witnesses, 13 February 2009, p. 3 and 4, measure i).

interfere with its administration of justice”. This interpretation is in line with current case law.²⁴ As a result, the Pre-Trial Judge considers that it is appropriate to recall the existence of this rule, which applies to all participants in the proceedings and third parties thereto.

32. He is also of the view that this obligation shall apply *mutatis mutandis* to the Prosecutor and to the Legal Representative of VPP.

6. The Defence to maintain a log listing all material disseminated, the date on which it was transmitted, and information about recipients (paragraph 9 (g) of the Request

33. The Prosecution is seeking an order from the Pre-Trial Judge for the Defence to maintain a log listing all material and information disseminated to third parties, their identity, the identification of the material and the date on which it was transmitted to third parties and returned to the Defence.

34. The Pre-Trial Judge considers that it is legitimate for both the Parties and the Legal Representative of the VPP to be in a position to determine to whom the material has been disseminated. This measure derives from good administration of justice. In particular, it may prove useful in the event of a dispute involving the non-authorised dissemination of such material. As a result, the Parties and the Legal Representative of the VPP should establish an internal mechanism which allows the recipient of material which has been disseminated to be identified. In this regard, maintaining a log which lists the material, the identity of the third party to whom the material has been disclosed, and the date on which it was transmitted and returned, seems to be the most appropriate option.²⁵

35. However, it is probably not possible to impose such an obligation for “information” which does not take the form of documents, as this would have an excessive impact on the workload of the Parties and of the Legal Representative of the VPP.

²⁴ ICTY *The Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Prosecution’s Motions for Protective Measures for Victims and Witnesses, 6 June 2005, para. 28; ICTY, *The Prosecutor v. Stojan Župljanin*, Case No. IT 99-36/2-PT, Decision on Prosecution’s Motions for Protective Measures for Victims and Witnesses, 30 July 2008, Disposition, p. 7.

²⁵ Such a list should only be produced following a decision by a judge.

7. Prohibition on third parties disseminating protected information, unless the material or information becomes public (paragraph 9 (h) of the Request)

36. The Prosecutor calls on the Pre-Trial Judge for the public, and the media in particular, to be prohibited from disseminating any material of which it has knowledge or information contained therein which is subject to protective measures, unless such material or information were to become public during public proceedings.

37. The Pre-Trial Judge observes that this measure is not provided for by the texts in force at the Tribunal. However, this measure, which is intended to strengthen the status of information which has been recognised as warranting specific protection, is well-founded and reasonable. It is, moreover, in line with current international case law.²⁶ Therefore, the measure sought is granted.

38. This measure shall apply *mutatis mutandis* to all participants in the proceedings vis-à-vis supporting material to the indictment issued against the Accused and material which has been disclosed by the Defence and the Legal Representative of the VPP.

8. The obligation for any person leaving the Defence team to return to the Lead Counsel all material relating to the case (paragraph 9 (i) of the Request)

39. The Prosecution is requesting all members of the Defence team withdrawing from or leaving the team to return to the Lead Counsel all material relating to the case.

40. The Pre-Trial Judge is of the view that the obligations imposed by paragraph 5 of the Code for Counsel and Rule 60 *bis* (A) (iii) of the Rules on contempt and obstruction of justice are sufficient to address the concerns of the Prosecution. In this regard, the Pre-Trial Judge recalls that the provisions of Rule 60 *bis* of the Rules apply to any person, including those who are or have been members of a Defence team.

41. The Pre-Trial Judge emphasizes that obligations of a similar nature shall apply to the Prosecution and to the Legal Representative of the VPP.

²⁶ ICTY, *The Prosecutor v. Ljube Boškoski, Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution's Motion seeking further protective measures for victims and witnesses with confidential annexes A and B', 17 August 2005, Disposition para. 1; ICTY, *The Prosecutor v. Ljube Boškoski, Johan Tarčulovski*, Case No. IT-04-82-A, Order issuing a public redacted version of the 'Decision on Boškoski motion for urgent orders regarding disclosure of confidential material' of 22 December 2009, 14 May 2010, para. 21.

9. Final remarks

42. The Pre-Trial Judge recalls that the measures authorised are not intended to – and under no circumstances should – obstruct the work of the Defence or its freedom to conduct investigations in order to prepare adequately the defence of the interests of the Accused.

43. Nonetheless, the Pre-Trial Judge is of the view that in the interests of clarity and information, in particular vis-à-vis third parties to the proceedings, it is appropriate to render a decision which reiterates and recalls in a concise manner the obligations of the parties regarding the confidentiality of elements of the proceedings of which they have knowledge and which are, for the most part, disseminated through various texts and rules applicable to the proceedings before the Tribunal.

FOR THESE REASONS,

Pursuant to Rules 74 (A), 77 (A) and 133 of the Rules,

THE PRE-TRIAL JUDGE,

DECLARES the Request admissible and well-founded;

RECALLS Article 8 (E) of the Code of Conduct for Defence Counsel, which provides that a Defence Counsel assigned in the context of *in absentia* proceedings shall not have any contact with the Accused;

ORDERS the Head of Defence Office to draw up and maintain an up-to-date list of Defence Counsel and members of their teams;

RECALLS paragraph 5 of the Code of Counsel, which provides that Counsel shall preserve the confidentiality of evidence and proceedings and information about witnesses and their whereabouts during and at the conclusion of the proceedings;

ORDERS the Defence to present itself as such in its contacts with witnesses identified by the Prosecution;

ORDERS the Defence, if it wishes to make contact with one of the at risk witnesses identified by the Prosecution to give notice to the Prosecution and to the VWU, which will arrange the contact after establishing to its satisfaction that the witness agrees to this;

ORDERS the Prosecution to provide the Defence as soon as possible with a list of witnesses, identifying those who are at risk, which will need to be updated regularly;

ORDERS the Defence, when it discloses procedural evidence, to inform any third parties to the proceedings of the prohibition on disseminating and reproducing this material and that it must be returned to the Defence after use and also to inform them of the penalties incurred in the event of any violation of these rules;

ORDERS the Defence to create and maintain a log listing procedural evidence disseminated to third parties which includes details of the material, the identity of the third party, and the date on which the material is disseminated to the third party and returned to the Defence;

ORDERS all third parties to the proceedings not to disseminate procedural evidence of which they may have knowledge or any information contained therein which is subject to protective measures, unless this material or information becomes public during public proceedings;

ORDERS any person leaving his or her post within the Defence to return to the Lead Counsel all material relating to the case;

STATES that the protective measures authorised shall apply *mutatis mutandis* to the Prosecution and to the Legal Representative of the VPP; and

RECALLS that Rule 60 *bis* of the Rules applies in particular to any violation of the obligations imposed in this Decision.

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

Leidschendam, 23 December 2013

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[signature]

Daniel Fransen
Pre-Trial Judge

Number of words: 4377 [French original]

