



THE TRIAL CHAMBER

Case No.: STL-11-01/PT/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge

Registrar: Mr. Daryl Mundis

Date: 13 January 2014

Original language: English

Classification: Public with Confidential and Ex Parte Annex

THE PROSECUTOR

v.

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

DECISION ON MOTION FILED BY COUNSEL FOR MR. BADREDDINE AND ORDER TO LEBANON TO COOPERATE WITH THE SPECIAL TRIBUNAL

Office of the Prosecutor:
Mr. Norman Farrell

Counsel for Mr. Salim Jamil Ayyash:
Mr. Eugene O'Sullivan
Mr. Emile Aoun

Victims' Legal Representative:
Mr. Peter Haynes

Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz
Mr. John Jones

Defence Office:
Mr François Roux

Counsel for Mr. Hussein Hassan Oneissi:
Mr. Vincent Courcelle-Labrousse
Mr. Yasser Hassan

**The Government of the Lebanese
Republic**

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young
Mr. Guénaél Mettraux



INTRODUCTION AND BACKGROUND

1. Counsel for the Accused, Mr. Mustafa Amine Badreddine, seek an order compelling Lebanon to cooperate with the Special Tribunal. On 24 October 2013, they filed an *ex parte* and confidential motion before the Pre-Trial Judge¹ seeking an order for cooperation directed to the Lebanese authorities under Article 15 (1) of the Agreement between the United Nations and the Government of Lebanon annexed to Security Council Resolution 1757 (2007) – made pursuant to Chapter VII of the Charter of the United Nations – and Rule 20 (A) of the Rules of Procedure and Evidence. The motion was transferred to the Trial Chamber with the transmission of the case file on 25 October 2013.
2. The motion relates to a request for assistance² initially sent on 24 May 2013 by counsel for Mr. Badreddine to the Director of the Litigation of the Lebanese Ministry of Justice. The request was transmitted through the Special Tribunal's Defence Office, as provided for in Rule 16 (C), and in Article 4 of the Memorandum of Understanding between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, made on 28 July 2010. The memorandum, entered into between the Head of the Defence Office and the Lebanese Minister of Justice on behalf of the Lebanese Government, requires the Defence Office to convey such requests to the Director of Litigation of the Lebanese Ministry of Justice. He also nominates the First President of the Court of Cassation as the Liaison Judge for assistance for coercive order.
3. The request for assistance sought from the Lebanese Ministry of Telecommunications specifically identified telephonic and telecommunications data related to telephone numbers allegedly connected with the death of the former Lebanese Prime Minister, Mr. Rafik Hariri, in February 2005. The requested information is of the Lebanese cell records of specific mobile telephone calls showing the end cell, meaning the last cell through which the mobile telephone call was conveyed before its termination. Counsel argue that the information requested is material and essential to properly investigate and prepare their case, and that the required information is in the possession and custody of the Lebanese authorities and is thus accessible to the Government of Lebanon.

¹ STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/PT/PTJ, Requête de la Défense de M. Badreddine aux fins d'obtenir la coopération du Liban, 24 October 2013. A public redacted version was also filed.

² Annexe A, Urgent Request for Assistance to the Minister of Telecommunications - ALFA and MTC End Cell Data, 24 May 2013.

4. On 15 November 2013, the Trial Chamber's Presiding Judge instructed the Registrar to write to the Lebanese Government, through the Director of Litigation of the Ministry of Justice and the First President of the Court of Cassation, requesting the cooperation specified in the Defence's initial request for assistance, by Friday 6 December 2013. The letter was to further specify that if the Lebanese Government determined that it cannot or should not comply with the Defence request, it must – through the Registrar – inform the Trial Chamber of this, including any grounds or legal basis for any non-compliance, by Wednesday 27 November 2013.³
5. The Registrar, on 19 November 2013, wrote as instructed to the First President of the Court of Cassation and the Director of the Litigation of the Ministry of Justice. The response received, however, does not address the substance of the request for assistance.
6. On 27 November 2013, the First President responded by writing to the Registrar, but through the President of the Special Tribunal, informing him that he does not represent the Lebanese Government 'and cannot provide any clarifications or give answers on its behalf in accordance with the principle of the separation of powers which governs both the executive and the judiciary'. He added, however, that in his limited role under the memorandum of understanding as the 'liaison judge', he had forwarded all previous requests for assistance – sent to him by the Pre-Trial Judge – to the relevant authorities for execution, including the Public Prosecutor of the Court of Cassation.⁴
7. It is unclear from this correspondence whether the First President referred the request for assistance, conveyed to him on 19 November 2013, to the relevant authorities. The Trial Chamber has therefore not received any information relating to whether the Lebanese Government is able or unable to comply with this request for assistance.
8. On 7 January 2014, counsel for Mr. Badreddine filed observations before the Trial Chamber reiterating their request for an order directed to the Lebanese Government, and annexing correspondence with the Prosecution in 2012 and 2013 on the subject matter of their request.⁵ The correspondence reveals that the Prosecution does not have the information requested by

³ Instruction to the Registrar regarding 'Requête de la Défense de M. Badreddine aux fins d'obtenir la coopération du Liban', 15 November 2013.

⁴ Letter from the First President of the Court of Cassation: Reply to the letter dated 19 November 2013, No. 138/2013, 27 November 2013.

⁵ Observations de la Défense de M. Badreddine relatives à la réponse des autorités libanaises aux instructions du Juge Président de la Chambre de première instance, 7 January 2014.

Defence counsel. They also filed, as requested by the Trial Chamber in a meeting with counsel that same day, a proposed draft order directed to Lebanon.

9. More than seven months have now passed since the initial request for assistance was sent to Lebanon, yet no substantive response has been transmitted by the relevant Lebanese authorities to the Defence Office or counsel for Mr. Badreddine.

APPLICABLE LAW AND ANALYSIS

10. The Trial Chamber in its decision of 16 December 2013, ‘Orders relating to five Sabra defence motions for orders to Lebanon on state cooperation’, identified and comprehensively analysed the preconditions for making an order against Lebanon.
11. Article 15 (1) of the Agreement between the United Nations and Lebanon on the establishment of a Special Tribunal, annexed to Security Council Resolution 1757 (2007), mandates the cooperation of the Lebanese Republic with all organs of the Special Tribunal. Rule 16 of the Special Tribunal’s Rules of Procedure and Evidence establishes a procedural regime for the cooperation. Cooperation between the Lebanese Republic and defence counsel is formalised through the memorandum of understanding signed by the Head of the Defence Office and the Lebanese Minister for Justice on 28 July 2010.
12. Rule 20, ‘Non-compliance by Lebanon with a Tribunal Request or Order’, provides in full,
- (A) Whenever the Lebanese authorities receive a request for information, cooperation or deferral under Rules 16 and 17, they shall provide such assistance without delay and in accordance with the timeframe specified in the request. Where, within thirty days of notification of the request to the Lebanese authorities, or such longer delay as is provided in the request, such authorities fail to comply with the request, the Parties may seek an order from the Pre-Trial Judge or a Chamber, as appropriate, to the Lebanese authorities to compel the requested assistance.
- (B) Where the Lebanese authorities receive a summons to appear, a warrant of arrest, a transfer order, an order for the production of documents or information or any order for cooperation issued by the Pre-Trial Judge or a Chamber, they shall provide the requested assistance without delay.
- (C) 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.

(D) Unless otherwise indicated, this Rule shall apply to any Tribunal request or order directed to Lebanon pursuant to the Rules.

13. In its decision of 16 December 2013, at paragraphs 16-17, the Trial Chamber summarised as applicable the following principles,

‘Thus to issue an order under Rule 20 (A) the Trial Chamber must be satisfied that;

- the requests for information or cooperation comply with the procedure in Rules 16 (B) and (C),
- the Head of Defence Office has determined that the requests are not frivolous or vexatious,
- the requests relate to relevant documents required for the investigation,
- the documents are both relevant *and* required for the investigation, and
- the Lebanese authorities have not, without undue delay, satisfactorily complied with the requests.

[] Further, in applying the international case-law, the Trial Chamber should also be satisfied that;

- the request identifies, as much as possible, specific documents rather than broad categories of documents,
- reasonable efforts have been made to explore possible alternatives short of an order under Rule 20 (A),
- a reasonable effort has been made to persuade Lebanon to voluntarily provide the requested information, and
- the request cannot be unduly onerous on Lebanon.’

14. To these principles the Trial Chamber adds the following observations; State cooperation with Defence counsel has to be seen within the perspective of the principle requiring the equality of arms between the Prosecution and the Defence. This principle plays an increasingly important role in an international trial process that is substantially adversarial and ‘party driven’ and where a trial *in absentia* is held, and the Accused persons thus cannot provide instructions or assist with

‘Defence investigations’. Moreover, Article 16 (4) (b) of the Statute of the Special Tribunal provides an Accused person, as a minimum guarantee, with the right to adequate facilities for preparing his or her defence. The memorandum of understanding between the Defence Office and the Lebanese Government further elaborates on these important principles.

15. The Trial Chamber has carefully examined the Badreddine Defence request for assistance in the light of these legal principles. The Trial Chamber is satisfied that,

- The application was made under Rule 16 (C), through the Head of the Defence Office, in circumstances where Defence counsel considered it necessary to undertake investigative measures amounting to ‘defence investigations’ within the definition in Article 1 of the memorandum of understanding,
- The Head of the Defence Office implicitly determined that the request for assistance was not frivolous and vexatious when he sent it to the Lebanese Government,
- The request relates to documents relevantly required for Defence investigations,
- The Lebanese Government has thus far not complied with the request for assistance,
- The information sought is identified with sufficient specificity,
- The Defence, by making the relevant inquiries of the Prosecution, has made reasonable efforts to explore alternative methods of obtaining the information,
- Reasonable efforts have been made to persuade Lebanon to voluntarily provide the information sought, as is shown by the request for assistance of 24 May 2013 and the letter from the Registrar to the Lebanese authorities on 19 November 2013, and
- The request is not unduly onerous on Lebanon. The records are held either by telecommunications providers or Lebanese authorities, and some similar information – although far more limited than the defence request for assistance – was previously provided by the Lebanese Government to the United Nations International Independent Investigation Commission (UNIIC).

16. More than seven months have now elapsed since the initial request for assistance was made to the Lebanese authorities, on 24 May 2013. More than a month has passed since the deadline of 6 December 2013, set by the Trial Chamber to allow the Lebanese Government to comply with the request. Given that the trial is commencing on 16 January 2014, the Trial Chamber finds that there has been a protracted period of non-compliance amounting to undue delay.

17. The Trial Chamber is therefore satisfied that it should make the order requested, under Rule 20 (A) of non-compliance with the Special Tribunal, to the Government of the Lebanese Republic to cooperate with the Special Tribunal. To preserve the confidentiality of defence investigations Defence counsel have requested that any order be *ex parte* to the Prosecution and remain confidential to the public. The Trial Chamber will make the order on this basis; it must, however, be made public at an appropriate later stage in the proceedings.
18. The Trial Chamber, however, is not satisfied that it can make the order sought in respect of the fourth category of information listed (in items 22 and 23). Defence counsel are seeking an order for records for periods far exceeding the time period in the indictment and the conspiracy alleged; and Defence counsel have not demonstrated how this information is relevantly required for their investigations.

**OBSERVATIONS ON THE MEMORANDUM OF UNDERSTANDING BETWEEN
THE LEBANESE GOVERNMENT AND DEFENCE OFFICE**

19. Article 5 (3) of the memorandum of understanding, ‘Assistance for coercive measures’, provides,

The Government shall designate the President of the Court of Cassation as Liaison Judge to enforce orders for cooperation issued by the Pre-Trial Judge. To this end, and in accordance with the Statute and the Rules, the Liaison Judge shall, without delay:

- a. maintain the confidentiality of the orders, unless the Pre-Trial Judge considers them to be public;
 - b. take any measures necessary to ensure enforcement of the orders issued by the Pre-Trial Judge;
 - c. enforce the aforementioned orders or transmit them directly to the competent authorities for enforcement, without delay.
20. The First President of the Court of Cassation of Lebanon, in his letter to the President of 27 November 2013, pointed out that his role, pursuant to the memorandum was limited to one of a ‘Liaison Judge’; in accordance with the principle of the separation of powers between the executive and judiciary he did not represent the Lebanese Government.
21. There is some merit in his comments. It appears that the First President does not have the jurisdiction or power to compel the production of material sought by the Defence Office. His judicial role, contrary to what may have been contemplated by the Head of the Defence Office when signing the agreement with the Lebanese Minister of Justice, appears to be

limited to liaising; in effect First President operates as a 'post-box' to receive and transmit these requests for assistance onto other authorities. He has stated that he has sent some Defence requests for assistance to the Public Prosecutor of the Court of Cassation for action. The First President appears to have no power to do what Article 5 (3) (c) states that he should do. The First President also has no control over what happens after he transmits the request elsewhere.

22. The Trial Chamber is not convinced that this is the most effective or expeditious way to convey a request for assistance to a State. It may be more practical for requests for assistance to go directly to an authority that has the means to make compulsive orders to produce documents. The Prosecution has put such arrangements in place. The Trial Chamber believes that the Head of the Defence Office should consider entering into similar alternative arrangements. The Trial Chamber also observes that the memorandum, in Article 5 and in its definitions in Article 1 (i), refers only to the Pre-Trial Judge and not to the Trial Chamber or Appeals Chamber. Rule 130 (B), by contrast, provides that all rules governing the proceedings before the Pre-Trial Judge (with three exceptions) apply equally to those before the Trial Chamber after it receives the case-file. The memorandum appears to have overlooked this provision.

DISPOSITION

For these reasons, and pursuant to Article 15 (1) of the Agreement between the United Nations and the Government of Lebanon annexed to United Nations Security Council Resolution 1757 (2007), and Rule 20 (A) of the Special Tribunal's Rules of Procedure and Evidence,

THE TRIAL CHAMBER;

(1) ORDERS

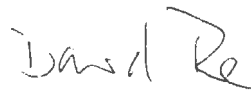
- (a) the Government of the Lebanese Republic to cooperate with the Special Tribunal for Lebanon, within fourteen calendar days of notification, in the manner specified in the annexed order and its schedule, by providing the information sought to counsel for Mustafa Amine Badreddine, through the Head of the Defence Office,
- (b) that the order and its schedule remain confidential and *ex parte* until otherwise ordered, and

(2) INSTRUCTS

- (a) The Registrar to immediately notify this decision to the Government of the Lebanese Republic.

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

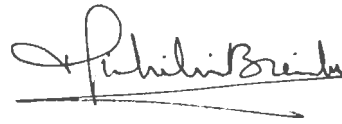
Leidschendam,
The Netherlands
13 January 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

