



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 Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr. Daryl Mundis

Date: 19 February 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

REASONS FOR DECISION DENYING CERTIFICATION TO APPEAL THE DECISION ON PROTECTIVE MEASURES FOR WITNESS PRH-566

Office of the Prosecutor:

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INTRODUCTION

1. On 4 February 2014, at the request of the Prosecution, and over the opposition of counsel for Mr. Hussein Hassan Oneissi, the Trial Chamber granted protective measures for witness PRH-566.¹ Counsel for Mr. Oneissi then immediately sought certification to appeal the Trial Chamber's decision.² At their request,³ the Trial Chamber heard oral argument supporting the application,⁴ and heard counsel for the Prosecution in response, opposing the application.⁵ Counsel for the other three Accused in this trial took no position,⁶ having not opposed the Prosecution's original request.⁷ The Legal Representatives of Victims stated their view that the legal test for certification had not been met.⁸ The Trial Chamber denied certification to appeal, with reasons to follow.⁹ This decision contains those reasons.

THE TRIAL CHAMBER'S DECISION

2. Rule 133 (A) of the Special Tribunal's Rules of Procedure and Evidence, 'Measures for the Protection of Victims and Witnesses', states that:

The Trial Chamber may, *proprio motu* or at the request of a Party, the victim or witness concerned, the Victims' Participation Unit or the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

3. Counsel for Mr. Oneissi had opposed the Prosecution's request for protective measures for Witness 566 arguing that the requirements of Rule 133 were not met.¹⁰ In particular, they argued that the Prosecution's request was not supported by an assessment of the Victims and Witnesses Unit of

¹ *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, STL-11-01/T/TC, Urgent Prosecution application for protective measures for Witness PRH566, Public with confidential Annex A, 30 January 2014; Version publique expurgée de la Réponse de la Défense de M. Oneissi à la 'Urgent Prosecution Motion for Protective Measures for Witness PRH566' déposé le 31 janvier 2014, 4 February 2014; transcript of 4 February 2014, pp. 2-4.

² Transcript of 4 February 2014, p. 27. *See also* pp. 32-33.

³ Transcript of 4 February 2014, pp. 27-37.

⁴ Transcript of 4 February 2014, pp. 65-75, 90.

⁵ Transcript of 4 February 2014, pp. 76-81.

⁶ Transcript of 4 February 2014, pp. 34-36. *But see* pp. 85-86 (counsel for Mr. Badreddine making an 'observation' in support of the application by counsel for Mr. Oneissi), 86-89 (counsel for Mr. Sabra making an 'observation' in support of the observation of counsel for Mr. Badreddine).

⁷ *See* transcript of 4 February 2014, pp. 2-3 (counsel for Mr. Ayyash, Mr. Badreddine, and Mr. Sabra did not oppose the Prosecution request for protective measures).

⁸ Transcript of 4 February 2014, p. 84.

⁹ Transcript of 4 February 2014, pp. 90-91.

¹⁰ Version publique expurgée de la Réponse de la Défense de M. Oneissi à la 'Urgent Prosecution Motion for Protective Measures for Witness PRH566' déposé le 31 janvier 2014, 4 February 2014, para. 13.

the Registry, as had been the practice before the Pre-Trial Judge,¹¹ and that ‘systematic’ recourse to protective measures for witnesses would ‘deal a fatal blow to the central tenet of the operation of justice, namely the open court principle’.¹²

4. The Trial Chamber’s oral decision reads, relevantly,

The Trial Chamber considers the protective measures sought are appropriate, given the specific personal circumstances and security concerns of this witness and most specifically because of where he lives. Further, the Chamber is satisfied that the measures sought will not prejudice the rights of the accused. The Chamber highlights that witnesses who are granted protective measures are not anonymous [...], as the Defence is aware of their identity, as is the Chamber and the Prosecution and the Legal Representative for the Victims, and they can appropriately investigate and prepare for questioning the witness as a result of knowing who the witness is. Protective measures, where appropriately implemented, simply serve to protect the witness from being exposed to [...] risks to their personal security and privacy. The request of the Prosecutor complies with Rule 133 and the Chamber thus grants the protective measures sought for Witness PRH566.¹³

APPLICABLE LAW ON CERTIFICATION TO APPEAL

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

[...] if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. The Appeals Chamber has held that the Trial Chamber must be satisfied that an issue for certification meets the *strict* requirements of the Rule.¹⁴ This is a high threshold, and grant of certification will therefore be exceptional.¹⁵ The Appeals Chamber has affirmed that a request for

¹¹ Oneissi Response, paras 5-7.

¹² Oneissi Response, para. 8 (‘le recours systématique aux mesures de protection [...] serait porté un coup fatal au principe fondamental du fonctionnement de la justice qu’est la publicité des débats’).

¹³ Transcript of 4 February 2014, pp. 3-4.

¹⁴ STL-11-01/PT/AC/AR126.5, Decision on Appeal by Counsel for Mr. Sabra against Pre-Trial Judge’s ‘Decision on Sabra’s Tenth and Eleventh Motions for Disclosure’, 6 November 2013 (‘Disclosure Appeal Decision’), para. 7; STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals against Trial Chamber’s ‘Decision on Alleged Defects in the Form of the Amended Indictment’, 5 August 2013, para. 11; STL-11-01/PT/AC/AR126.2, Decision on Appeal against Pre-Trial Judge’s Decision on Motion by Counsel for Mr. Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012 (‘Authority Appeal Decision’), para. 15. See also STL-11-01/PT/TC, Decision on Defence Motions for Certification for Appeal of the Trial Chamber’s 13 September 2013 ‘Decision on Alleged Defects in the Form of the Amended Indictment’, 9 October 2013, para. 2; STL-11-01/T/TC, Decision on Request for Certification to Appeal Orders Concerning Five Defence Motions on State Cooperation, 27 January 2014, para. 10.

¹⁵ Authority Appeal Decision, para. 11.

certification is not concerned with whether a decision was correctly reasoned or not.¹⁶ The Trial Chamber's analysis is thus confined to determining whether the challenged decision involves an issue, with an adequate legal or factual basis in the decision,¹⁷ which meets the requirements of Rule 126 (C).¹⁸ Judicial economy otherwise dictates that appeals on issues not meeting this threshold are heard, if necessary, once the Trial Chamber has rendered its Judgment on the merits.¹⁹

DISCUSSION

7. Counsel for Mr. Oneissi identified two issues for certification, which they contend significantly affect the fair and expeditious conduct of the proceedings.²⁰ These are whether the Trial Chamber's decision was made on the basis of proper evidence,²¹ and whether the Trial Chamber's interpretation of Rule 133 breached the principle of 'open justice'.²² They submitted that an immediate resolution of either issue may materially advance the proceedings by obtaining guidance from the Appeals Chamber, clarifying the 'actual state of the law before this Tribunal'.²³ Such guidance was said to be required because, unlike other international courts or tribunals, the Accused in this case are tried *in absentia* and therefore counsel may be required to depend on information received from the general public, rather than from the Accused, concerning forthcoming witnesses.²⁴

8. The Prosecution argued that the request for certification should be denied.²⁵ It submitted that the principle of open justice is well established and accepted by the Trial Chamber, and that it was not inconsistent with its decision.²⁶ The Prosecution further submitted that the Trial Chamber's decision was based on a proper factual basis, having regard among other factors to the prevailing security situation in Lebanon.²⁷

¹⁶ See Authority Appeal Decision, para. 13 (*citing* ICTY, *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, IT-04-84bis-T, Decision on Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65ter Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92ter, 15 March 2012, para. 8).

¹⁷ Authority Appeal Decision, paras 13, 22; Disclosure Appeal Decision, para. 7; Decision on Request for Certification to Appeal Orders Concerning Five Defence Motions on State Cooperation, para. 10.

¹⁸ See transcript of 4 February 2014, p. 30 (requesting the Parties to provide 'highly focused submissions on Rule 126 (C)').

¹⁹ STL-11-01/PT/AC/AR126.1, Decision on Defence Appeals against the Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012 ('Trial *In Absentia* Appeal Decision'), para. 11.

²⁰ Transcript of 4 February 2014, p. 65.

²¹ Transcript of 4 February 2014, p. 65.

²² See transcript of 4 February 2014, pp. 65-74.

²³ Transcript of 4 February 2014, p. 70.

²⁴ Transcript of 4 February 2014, pp. 74-75.

²⁵ Transcript of 4 February 2014, p. 78.

²⁶ Transcript of 4 February 2014, pp. 76-77, 79-80.

²⁷ Transcript of 4 February 2014, p. 80.

9. The Trial Chamber must therefore first evaluate whether either issue identified for certification would significantly affect the fair and expeditious conduct of the proceedings, and, if necessary, then consider whether immediate resolution of either issue will materially advance the proceedings. Defence counsel agreed that the issues identified would not ‘significantly affect the outcome of the trial’.²⁸

(i) The Trial Chamber allegedly erred in the evidentiary standard it applied in granting protective measures. Is this an issue that would significantly affect the fair and expeditious conduct of the proceedings?

10. Counsel for Mr. Oneissi contend that the Trial Chamber may only make an order under Rule 133 (A) where ‘concrete and persuasive evidence’ is shown of a valid reason justifying the protective measures sought.²⁹ They argue that the witness’ place of residence provided an insufficient basis to order protective measures in respect of this witness.³⁰ They referred to a decision of the Pre-Trial Judge requiring an assessment by the Victims and Witnesses Unit as an example of the proper approach that should have been followed.³¹

11. The Trial Chamber does not disagree that persuasive evidence is needed before an order for protective measures can be made. Indeed, before making the order, the Trial Chamber carefully examined ‘the specific personal circumstances and security concerns of this witness and most specifically [...] where he lives’.³² It further referred to the confidential annex of the Prosecution’s motion³³—which was not read in open court—detailing these ‘security and privacy concerns as a result of the prevailing tense situation in Lebanon’.³⁴ Thus, the Trial Chamber identified i.) a valid reason for protective measures (the witness’ fear), and; ii.) evidence of the circumstances giving rise to that fear (generally, the security situation in Lebanon; and, specifically, the witness’ place of residence).

12. Counsel for Mr. Oneissi also stated their wish to rely on jurisprudence from other international criminal tribunals considered ‘worthy of interest’.³⁵ Five decisions were provided to the

²⁸ Transcript of 4 February 2014, p. 65.

²⁹ Transcript of 4 February 2014, pp. 65-66.

³⁰ Transcript of 4 February 2014, pp. 65, 70.

³¹ Transcript of 4 February 2014, p. 70. *See* STL-11-01/PT/PTJ, Decision on the Prosecution Request Seeking Interim Protective Measures for the Expert Witnesses, 13 December 2012.

³² Transcript of 4 February 2014, p. 3.

³³ Transcript of 4 February 2014, p. 2.

³⁴ Transcript of 4 February 2014, p. 2.

³⁵ Transcript of 4 February 2014, p. 62. *See also* pp. 63-64.

Trial Chamber and the Parties,³⁶ but their relevance was not explicitly explained.³⁷ The Trial Chamber has examined these cases. The three relevant authorities³⁸ are Trial Chamber decisions of the International Criminal Tribunal for Rwanda, which refer to established practices based on hundreds of protective measures decisions made by the ICTR and other international criminal tribunals over the last twenty years. They state that decisions must be taken on a case-by-case basis to address a ‘real’ or ‘justified’ fear of the witness, and take into account the fairness of the trial and the rights of the Accused.³⁹ In evaluating whether a witness has a ‘real’ fear, the Parties’ submissions ‘must be examined in the context of the broader security situation affecting the concerned witnesses’.⁴⁰ Where a potential witness is ‘based’ is a factor which may further make a ‘general fear’ sufficiently specific for protective measures.⁴¹

13. The Trial Chamber has evaluated its decision in light of this jurisprudence and finds no meaningful distinction from its own practice, having regard to the fact that the Trial Chamber:

- specifically ‘emphasize[d] that it considers each application carefully and on its merits’;⁴²
- issued its decision, as already noted, on the basis of the interaction between the general security situation in Lebanon and the place of residence of the witness;⁴³ and
- expressly satisfied itself that the protective measures ordered ‘will not prejudice the rights of the Accused’ having regard to their knowledge of the witness’ identity and their continuing ability to ‘appropriately investigate and prepare for questioning the witness’.⁴⁴

³⁶ See e-mail of 4 February 2014 from counsel for Mr. Oneissi, attaching the following decisions: ICTR, *Prosecutor v. Nyiramasuhuko et al*, ICTR-98-42-T, Judgement and Sentence [excerpt], 24 June 2011; *Prosecutor v. Nizeyimana*, ICTR-2001-55-PT, Decision on Prosecutor’s Motion for Protective Measures for the Victims and Witnesses to Crimes Alleged in the Indictment, 9 June 2010; *Prosecutor v. Nshogoza*, ICTR-07-91-PT, Decision on Prosecutor’s Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008; *Prosecutor v. Muhimana*, etc, ICTR-95-1B/ICTR-95-1/ICTR-96-14/ICTR-96-10/17/ICTR-96-13, Decision on Prosecution’s Urgent *Ex Parte* Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses, 13 August 2008; *Prosecutor v. Karera*, ICTR-01-74-R54, Order for Submission, 21 November 2005.

³⁷ Transcript of 4 February 2014, p. 69 (‘if we go a little bit deeper into the first aspect of the fairness issue [...] it will be very rapid to peruse through the jurisprudence of the international criminal tribunals, but there needs to be some solid foundation before [...] the principle[] of open justice is encroached upon. And there is nothing of the sort here.’).

³⁸ *Nizeyimana* Decision, paras. 4-5; *Nshogoza* Decision, paras 6-7; *Karera* Decision, p. 1. Rule 75(A) of the ICTR’s Rules of Procedure and Evidence is substantially similar to Rule 133 (A) of the Special Tribunal’s Rules.

³⁹ The two other authorities add nothing to the certification request. The excerpt of the *Nyiramasuhuko* Trial Judgement provided to the Trial Chamber summarises the evidence of a protected witness at the ICTR, admitting that he had perjured himself. The *Muhimana* decision rescinds protective measures granted to 11 witnesses at the ICTR, with their consent.

⁴⁰ *Nshogoza* Decision, para. 7.

⁴¹ *Nizeyimana* Decision, para. 6.

⁴² Transcript of 4 February 2014, p. 3. See also pp. 85-86.

⁴³ Transcript of 4 February 2014, p. 3.

⁴⁴ Transcript of 4 February 2014, pp. 3-4.

The international case-law provided by counsel for Mr. Oneissi thus identifies no issue in the Trial Chamber's decision significantly affecting the fair and expeditious conduct of the proceedings.

14. The Trial Chamber has further considered whether counsel for Mr. Oneissi is challenging the Trial Chamber's competence to determine the *reasonableness* of a witness' fears, how that is done, and what measures may be appropriate to address those fears.⁴⁵ In other words, need the Trial Chamber seek further information concerning a witness' fears, such as an evaluation by the Victims and Witnesses Unit, beyond the submissions of the Parties? The Rules answer these questions:

- Rule 133 (C) states that it is for the Trial Chamber 'to determine whether to order' protective measures;
- Rule 133 (A) states that the Trial Chamber may order those protective measures which it considers 'appropriate' if it has determined that some kind of protective measure is warranted—provided that such measures are consistent with the rights of the Accused; and,
- Rule 133 (C) demonstrates that the Trial Chamber has discretion as to the basis on which it reaches its decision on protective measures, since the Trial Chamber 'may' hold an *in camera* proceeding—but, by necessary implication, may also choose not to do so.⁴⁶

15. Counsel do not explain how the Trial Chamber impermissibly departed from the ordinary requirements of Rule 133 and therefore cannot show that the Trial Chamber's decision significantly affects the fair and expeditious conduct of the proceedings.

16. The Pre-Trial Judge's decision also does not assist the arguments of Defence counsel. The Pre-Trial Judge held that, generally, any request for protective measures must be accompanied by an assessment of the Victims and Witnesses Unit.⁴⁷ Yet, although the Pre-Trial Judge cited a previous

⁴⁵ See transcript of 4 February 2014, p. 70 ('There's been [no assessment by the Victims and Witnesses Unit] [...] [T]here's only this very laconic two-paragraph investigator's note saying that the witness doesn't feel comfortable because of where he lives. I suggest to you that clearly we are very far from any level or threshold that we will decide to, you know, we should act upon where protective measures are granted.')

⁴⁶ See transcript of 4 February 2014, pp. 65-66 (counsel for Mr. Oneissi noting that, 'in Canada, we have a *voir dire*, where the witness, if he has fears or valid reasons not to testify openly, can express those to the Court'), 87-89 (counsel for Mr. Sabra endorsing the merit of using 'short *voir dire*s' in appropriate circumstances, which the Trial Chamber understands to be a reference to hearings under Rule 133 (C)).

⁴⁷ Pre-Trial Judge Decision, para. 32. See also transcript of 26 July 2012, p. 29 ('JUDGE FRANSEN: [...] If you ask for protective measures, you should necessarily ask [the Victims and Witnesses Unit] to assess the need and you would join this assessment to your application for protective measure or measures to the Judge. So this was done at my request, this additional step was done on my request. Whenever you think it necessary to make an application for protective measures, for victims or witnesses, please do turn to the support unit before you do and add their assessment to your application'). The Prosecution agreed to this procedure during pre-trial proceedings.

order by the Appeals Chamber,⁴⁸ that particular order established no general legal proposition making such an assessment a precondition to granting protective measures under Rule 133 (A).⁴⁹ And, furthermore, the Pre-Trial Judge sometimes also waived his own requirement for assessments by the Victims and Witnesses Unit.⁵⁰ Nothing in the Pre-Trial Judge's decision assists Defence counsel in identifying an issue which may be certified for appeal.

17. Counsel for Mr. Oneissi do not seem to argue that the Trial Chamber has systematically misapplied Rule 133 (A)⁵¹ but merely that it has somehow reached a wrong result with respect to Witness PRH-566. Yet they do not show how the Trial Chamber's approach in this instance alone would significantly affect the fairness or expedition of the proceedings as a whole.⁵² Indeed, granting this particular request for protective measures—in respect of one witness—*could* not have significantly affected the fair and expeditious conduct of the proceedings. No error has been identified that could, much less would, have affected the fair and expeditious conduct of the proceedings. This request for certification is therefore denied.

(ii) Is the treatment of the principle of 'open justice' in the Trial Chamber's decision an issue that would significantly affect the fair and expeditious conduct of the proceedings?

18. As a second basis for certification, counsel for Mr. Oneissi, relying upon a Canadian Supreme Court case,⁵³ referred to the 'general principle that justice should be done openly and publicly'.⁵⁴

⁴⁸ Pre-Trial Judge Decision, para. 31 (citing CH/AC/2011/02, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents, 7 October 2011 ('Appeals Chamber Order'), para. 34).

⁴⁹ In its decision, the Appeals Chamber granted the Prosecution appeal and remanded a decision back to the Pre-Trial Judge for a fresh determination with an assessment by the Victim and Witnesses Unit *on the basis of the Prosecution 'concession'* that, at that time, the VWU had superior capacities and experience in conducting threat assessments to victims or witnesses: *see* Appeals Chamber Order, paras 21, 28, 33-34. The Appeals Chamber expressly declined to analyse the 'reason for intervention' in light of this concession, only going so far as to state that it 'might' be an error for the Prosecution to fail 'to give careful consideration to what contribution the VWU might be able to make to the process of risk evaluation': para. 33.

⁵⁰ *See* Pre-Trial Judge Decision, paras 33-35 (noting that, '[n]otwithstanding the absence of VWU's opinion', the Pre-Trial Judge had 'already ruled in favour of the non-disclosure of the identity of the expert witnesses to the public').

⁵¹ *See* Oneissi Response, para. 4 (distinguishing PRH-566 from previous witnesses granted protective measures). *See further* transcript of 24 January 2014, pp. 15-17 (noting that counsel for Mr. Oneissi did not object to protective measures for PRH-352); transcript of 27 January 2014, pp. 2-4 (noting that counsel for Mr. Oneissi did not object to protective measures for PRH-427); transcript of 29 January 2014, pp. 66-67 (noting that counsel for Mr. Oneissi did not object to protective measures for PRH-301). *See also* STL-11-01/T/TC, Defence Response to the Urgent Prosecution Motion for Protective Measures for Witness PRH301 and Video-Conference Link Testimony for Nine Witnesses, 29 January 2014, para. 3.

⁵² *See also* transcript of 4 February 2014, pp. 30-31 (encouraging counsel to address this point).

⁵³ Transcript of 4 February 2014, pp. 71-72 (citing Canada, *Vancouver Sun v. Attorney-General of Canada and Others*, [2004] 2 S.C.R. 332, para. 24, quoting Trinidad and Tobago (Privy Council), *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322, *per* Lord Atkin at p. 335; J.H. Burton, ed., *Benthamiana: Or, Select Extracts from the*

19. The Trial Chamber strongly agrees with these sentiments, and, moreover, the Special Tribunal's Statute and Rules specifically provide for open hearings. Article 16 of the Statute states that '[t]he accused shall be entitled to a fair and public hearing' and that '[t]he hearings shall be public unless the Trial Chamber decides to hold the proceedings *in camera* in accordance with the Rules'.⁵⁵ Rule 136, 'Open Sessions', further specifies that '[a]ll proceedings before a Chamber,' other than deliberations, must 'be held in public' unless otherwise decided by the Trial Chamber after hearing the Parties. Furthermore, the Trial Chamber has informed the Parties of its strong inclination 'that the proceedings and filings should be public; justice should be open',⁵⁶ and for this very reason, it instructed counsel for Mr. Oneissi to re-file publicly their confidentially filed response to the Prosecution's publicly filed request for protective measures.⁵⁷

20. The Trial Chamber reiterates that national law will not generally assist tribunals like the Special Tribunal that are required to apply the general principles of international criminal procedural law.⁵⁸ Sometimes, however, such as where there is a novel procedural or factually analogous issue, national statutory or case-law may help.⁵⁹

21. The *Vancouver Sun* case, however, concerns a journalist being kept out of a closed judicial investigative hearing, and its relevance is confined to 'very, very general principles' such as those of the Canadian Charter of Rights and Freedoms.⁶⁰ Factually, it is unconnected with issues of witness protection; many hundreds of decisions granting witness protection have been issued in international criminal law proceedings over the past twenty years. And, on the procedurally novel issue of protective measures in trials *in absentia*, it is irrelevant.

22. The Trial Chamber understands, from reading the *Vancouver Sun* case, that counsel for Mr. Oneissi contend that the Trial Chamber failed to properly consider the right to a fair trial and/or the right to freedom of expression, which incorporate the public's right to receive information.⁶¹ These

Works of Jeremy Bentham (1843), p. 115). Counsel also provided the Trial Chamber with an additional Canadian authority, to which they did not refer in argument: *R v. McArthur*, [1984] O.J. No. 1183. See transcript of 4 February 2014, pp. 28-33, 37, 62-63, 66-69, 71-74, 76.

⁵⁴ Transcript of 4 February 2014, p. 66.

⁵⁵ Statute, Art. 20 (4).

⁵⁶ Transcript of 2 December 2013, pp. 39-40. See also transcript of 4 February 2014, pp. 72-73.

⁵⁷ Transcript of 4 February 2014, p. 3.

⁵⁸ See e.g. ICTY, *Prosecutor v. Erdemović*, IT-96-22-A, Judgement, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, paras 2-6.

⁵⁹ See transcript of 4 February 2014, p. 74 ('we have a rule in our Rules of Procedure and Evidence which reflects those very principles of open justice. So unless the Canadian case has something extra, I'm just wondering how it's going to assist us [...] applying [...] the principles to the facts').

⁶⁰ Transcript of 4 February 2014, p. 73.

⁶¹ See *Vancouver Sun* Decision, paras 25-26 ('Public access to the courts guarantees the integrity of judicial processes by demonstrating 'that justice is administered in a non-arbitrary manner, according to the rule of law' [...] Openness is

principles, however, merely reflect well-established national and international legal principles that are expressly enshrined in the Special Tribunal's Statute and Rules. The Statute obliges the Trial Chamber to ensure a fair trial for the Accused, which may entail balancing different interests.⁶²

23. This balancing is recognised in the Special Tribunal's Statute and Rules, in international human rights law, in international criminal law, and, ironically, even in the *Vancouver Sun* case. Specifically;

- Article 16 (2) of the Statute expressly makes the right to a 'public' hearing 'subject to measures ordered by the Special Tribunal for the protection of victims and witnesses'.⁶³
- The Appeals Chamber of the ICTY considered that the right to freedom of expression—which encompasses the public right to receive information⁶⁴—could be legitimately restricted if provided by law and proportionately necessary. It found that the imposition of protective measures under a tribunal's Rules of Procedure and Evidence can be an act 'provided by law' proportionately necessary to protect the public order as well, potentially, as the rights or reputations of others.⁶⁵
- The case-law of the European Court of Human Rights hold 'that, even in a criminal-law context where there is a high expectation of publicity, it may on occasion be necessary to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses'.⁶⁶

necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and public at large abide by the decisions of courts. The open court principle is inextricably linked to the freedom of expression [...] The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the [...] guarantee of freedom of expression [...] The press plays a vital role in being the conduit through which the public receives that information [...] Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.')

⁶² See also e.g. ECtHR, *Al-Khawaja and Tahery v. the United Kingdom*, 26766/05 and 22228/06, Grand Chamber, 15 December 2011, para. 118 ('the Court's primary concern [...] is to evaluate the overall fairness of the criminal proceedings [...]. In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that the crime is properly prosecuted [...] and, where necessary, to the rights of witnesses'); *Jasper v. the United Kingdom*, 27052/95, Grand Chamber, 16 February 2000, para. 52 ('[i]n any criminal proceedings, there may be competing interests, such as [...] the need to protect witnesses at risk of reprisals [...], which must be weighed against the rights of the accused').

⁶³ Emphasis added. The Trial Chamber understands this provision to qualify the right to a 'public' hearing, and not the (unqualified) right to a 'fair' hearing.

⁶⁴ See ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 37.

⁶⁵ ICTY, *Hartmann* Appeal Judgement, paras 160-161.

⁶⁶ ECtHR, *B and P v. the United Kingdom*, 36337/97 and 35974/97, 5 September 2001, para. 37. See further European Convention on Human Rights, Art. 6 (1) ('the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the private

- The Supreme Court of Canada itself acknowledged in its *Vancouver Sun* decision, notwithstanding its emphasis on open justice, that it had previously developed a test ‘to balance freedom of expression and other important rights and interests’. Those ‘rights and interests [...] are broader than simply the administration of justice and include a right to a fair trial [...] and may include privacy and security interests.’⁶⁷

24. The Special Tribunal’s protective measures regime in Article 16 (2) of the Statute and Rules 133 and 136 is, on its face, consistent with the principle of open justice cited by counsel for Mr. Oneissi. Furthermore, relevant to the Trial Chamber’s overriding duty of fairness is the ability of the Parties, through the Trial Chamber, to secure the safe and effective attendance of witnesses at the Special Tribunal.⁶⁸ In the context of the Trial Chamber’s reluctance to order ‘closed session’ or *in camera* hearings,⁶⁹ its decision to order protective measures for a witness was a minimal intrusion into the principle of open justice,⁷⁰ and one which was expressly considered in the context of the fair trial rights of the Accused.⁷¹

25. Supporting their argument for certification, counsel for Mr. Oneissi raise one potentially novel point of international criminal procedure, namely, that in an *in absentia* trial Defence counsel cannot obtain instructions from their client about possible witness credibility issues. According to counsel, unless good reasons are shown, witnesses should therefore testify without protective measures so that members of the public may come forward, on the day of testimony, with adverse information about witnesses:

So if my client had information, for example, about the background of that person, about whether he received money to say what he has to say, or whether he’s acquainted with persons of dubious character, that—not only from my client but also from the public—I mean, first my client and then the public in Lebanon, all of this information now is—it’s not possible to get it.⁷²

life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’).

⁶⁷ *Vancouver Sun* Decision, para. 28 (citing *R. v. Mentuck*, [2001] 3 S.C.R. 442; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835). The Court divided, 7-2, as to whether the *Mentuck/Dagenais* test was the proper means to strike the necessary balance in the context of a judicial investigative hearing to which a reporter was denied access.

⁶⁸ See also ICTY, *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, IT-04-84-A, Judgement, 19 July 2010, paras 35-39, 46, 49 (considering the duty of a Trial Chamber to ensure a fair trial even in the extreme context of serious witness intimidation); *Al-Khawaja* Judgement, para. 118.

⁶⁹ See e.g. transcript of 4 February 2014, p. 28 (‘we don’t want to go into private session or closed session. We’ve made it quite [clear]—our principle is operating in public session’).

⁷⁰ Compare *Al-Khawaja* Judgement, paras 124-125, 144.

⁷¹ Transcript of 4 February 2014, pp. 3-4.

⁷² Transcript of 4 February 2014, p. 75.

26. The Prosecution responded by describing this as a ‘rather bizarre way to prepare a defence and a very long shot indeed’, that ‘would not necessarily produce anything of value, even if people did choose to come forward and criticize individual witnesses’.⁷³

27. The Trial Chamber agrees. Counsel for the (then) four Accused had a considerable time to conduct any necessary investigations about the witness concerned and to prepare for cross-examination.⁷⁴ Counsel for Mr Oneissi and for Mr Badreddine did indeed cross-examine the witness, and at some length. And they did so without the Trial Chamber detecting any handicap from a lack of specific client instructions about the witness—or indeed spontaneous information received from the public. The Trial Chamber considers the possibility that a member of the public might come forward, unsolicited, with new relevant information on the day of testimony to be remote. Its restriction, on a properly reasoned and case-by-case basis in the interest of witness protection, could not affect the fair and expeditious conduct of the proceedings.

28. Nothing in counsel for Mr. Oneissi’s general reference to the open court principle reveals an issue that could significantly affect the fair and expeditious conduct of the proceedings. To the contrary, the balance struck by the Statute and the Rules of the Special Tribunal between the open court principle and the overriding concern to ensure the fairness of the trial *promotes* the fair and expeditious conduct of the proceedings. Moreover, if the Trial Chamber were to follow the logic of this argument, no protective measures would be granted in an *in absentia* trial. This issue cannot therefore be certified for interlocutory appeal.

(iii) ‘Let’s have the Appeals Chamber decide’: might an immediate resolution by the Appeals Chamber of either of the issues raised materially advance the proceedings?

29. Neither of the issues raised by counsel for Mr. Oneissi would significantly affect the fair and expeditious conduct of the proceedings, and normally, the Trial Chamber would take the analysis no further. Here, however, counsel have argued in support of the second limb of the test (immediate resolution by the Appeals Chamber) by saying:

Let’s have the Appeals Chamber decide. We’re very busy with daily similar motions, with daily motions for videolinks, so I guess we need some guidance to some extent. As far as we are concerned,

⁷³ Transcript of 4 February 2014, p. 79.

⁷⁴ See transcript of 4 February 2014, p. 4.

anyway, we are not satisfied right now, respectfully submitted, with the decision that was issued this morning, but also with the actual state of the law before this Tribunal [...] ⁷⁵

30. ‘Let’s have the Appeals Chamber decide’ and ‘we need some legal guidance’ do not form part of the legal test to certify an issue for appeal. The Appeals Chamber has stressed that there is no right to an interlocutory appeal and that ‘[m]ost issues, even when significant, may be resolved at the end of the case’. The Trial Chamber may only certify issues ‘for which an *immediate* resolution by the Appeals Chamber’ may, in the Trial Chamber’s view, materially advance the proceedings. ⁷⁶ The Appeals Chamber ‘will not rule in the abstract on issues that are irrelevant to [the Trial Chamber’s] decision’. ⁷⁷

31. Here, the legal principles are well-established and clear—there is nothing ‘to have the Appeals Chamber decide’, much less to seek guidance, gratuitously, from that Chamber.

DISPOSITION

FOR THESE REASONS, by its oral decision of 4 February 2014, the Trial Chamber:

DISMISSED the motion.

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

Dated 19 February 2014
Leidschendam
The Netherlands

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



⁷⁵ Transcript of 4 February 2014, p. 70. *See also* pp. 74-75.

⁷⁶ Authority Appeal Decision, para. 14 (emphasis supplied).

⁷⁷ Disclosure Appeal Decision, para. 6.