



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: 20 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**

DECISION ON PROSECUTION REQUEST FOR PROTECTIVE MEASURES (REDACTION OF FOUR DOCUMENTS) OF 27 JANUARY 2014

Office of the Prosecutor:

Mr. Norman Farrell, Mr. Graeme Cameron
& Mr. Alexander Milne

Victims' Legal Representative:

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

Counsel for Mr. Salim Jamil Ayyash:

Mr. Eugene O'Sullivan, Mr. Emile Aoun
& Mr. Thomas Hannis

Counsel for Mr. Mustafa Amine Badreddine:

Mr. Antoine Korkmaz, Mr. John Jones
& Mr. Iain Edwards

Counsel for Mr. Hassan Habib Merhi:

Mr. Mohamed Aouini, Ms. Dorothée Le Fraper
du Hellen & Mr. Jad Khalil

Counsel for Mr. Hussein Hassan Oneissi:

Mr. Vincent Courcelle-Labrousse, Mr. Yasser
Hassan & Mr. Philippe Larochelle

Counsel for Mr. Assad Hassan Sabra:

Mr. David Young, Mr. Guénaél M. M. M. M.
Geoffrey Roberts



INTRODUCTION

1. On 27 January 2014, the Prosecution filed a confidential and *ex parte* request to redact the names of three Lebanese officials and certain other material from four documents that the Prosecution proposes to seek leave to add to its exhibit list.¹ The documents comprise a statement (in two parts), the minute of a meeting in 2008, and an investigative record. The request, made under Rule 116 of the Special Tribunal's Rules of Procedure and Evidence, was supported by documents that included risk assessments undertaken by the Prosecution and the Victims and Witnesses Unit of the Registry.² The officials whose identities would be protected by the redactions are not witnesses in this case. Although the motion and supporting materials will remain confidential, this decision does not reveal the confidential information and is therefore made publicly.

APPLICABLE LAW

2. Rule 116 (A), 'Application and Grounds for Non-Disclosure,' provides relevantly that 'the Prosecutor may apply *ex parte* to the Trial Chamber sitting *in camera* to be relieved in whole or in part of an obligation under the Rules to disclose' material whose:

disclosure would ordinarily be required under Rule 110 or 113, but such disclosure (i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest or the rights of third parties [...]

3. Rule 116 requires the Prosecution, in making its application, to propose 'counterbalancing measures' to mitigate the effect of the requested non-disclosure.³ Disclosing a document with suitable redactions is a valid counterbalancing measure.⁴

DISCUSSION

4. The redactions sought by the Prosecution fall into two different categories: information to preserve the safety and security of three Lebanese officials, and additional information.

¹ *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/PT/TC, Prosecution Request for Protective Measures, 27 January 2014, Confidential and *Ex Parte*. This motion was a re-filed version of a previous motion of 29 November 2013, withdrawn on 27 January 2014. The Trial Chamber grants the Prosecution request, filed in respect of the original motion but applicable to the re-filed motion, to exceed the word limit: Prosecution Request Seeking Authorization to Exceed the Word Limit Applicable to the "Prosecution Request for Protective Measures", 3 December 2013, Confidential and *Ex Parte*.

² Motion, Annexes A-D, Confidential and *Ex Parte*.

³ Rule 116 (A).

⁴ See STL-11-01/PT/TC, Corrected Version of "Decision Authorising the Prosecution to Redact a *Curriculum Vitae*" of 28 November 2013, para. 4; Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, 19 November 2013, para. 11; Decision on Prosecution's Application to Authorise Necessary Redactions Pursuant to Rule 116 Dated 18 October 2013, 8 November 2013, para. 7.

Redaction of information to preserve the safety and security of three Lebanese officials

5. The Prosecution submits that it will seek to add the four relevant documents to its exhibit list, or otherwise will disclose them to the Defence.⁵ On this basis, the Trial Chamber is satisfied that the documents ‘ordinarily have to be disclosed’, as required by Rule 116 (B).

6. The Prosecution further submits that three Lebanese officials who are identified in the four documents work ‘in an inherently dangerous environment’ and that the risk to these officials ‘would increase as a result of the unredacted disclosure’ of the four documents.⁶ The Victims and Witnesses Unit concurs.⁷ The Trial Chamber is satisfied, from the information provided, of the potential risk posed to the three officials by disclosure, and considers that such a risk is ‘contrary to the public interest’ and ‘the rights of third parties’.⁸ Disclosure of the Lebanese officials’ employment, and details of their professional activities on behalf of the Lebanese authorities, may directly affect their personal safety. Exposure of public officials to unnecessary potential harm also threatens the existence of a professional and courageous public service and is therefore contrary to the public interest. The material thus meets one of the three grounds for non-disclosure specified in Rule 116 (A).

7. The Prosecution also argues that the redactions sought will not prejudice the rights of the four Accused to a fair trial because the identities of the Lebanese officials are of limited relevance to the forensic purpose of the documents.⁹ The Prosecution states that the ‘balance of interests’ favours the proposed redactions when weighing the ‘limited relevance’ of the non-disclosed information against ‘the potential risk’.¹⁰ Furthermore, with respect to a document given to the author of the statement by one of the three Lebanese officials, the Prosecution will obtain certification of that document’s ‘origin and authenticity’ from the Lebanese authorities.¹¹

8. The Trial Chamber is satisfied that the proposed redactions relate exclusively to information which may cause risk to the security of the Lebanese officials concerned, with three exceptions which should not be redacted. These exceptions, which are not necessary to protect the officials concerned and which obscure the general nature of the information redacted, are:

⁵ Motion, paras 1, 5, and fns 2-3.

⁶ Motion, paras 4-5. *See further* paras 18-24, 26, 28-36.

⁷ Motion, para. 4. *See further* paras 33, 37. *See also* Motion, Annex A, Confidential and *Ex Parte*.

⁸ *See* STL-11-01/PT/TC, Corrected Version of “Decision Authorising the Prosecution to Redact a *Curriculum Vitae*” of 28 November 2013, 9 December 2013, para. 5; Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, 19 November 2013, paras 12-13. *See also* Motion, paras 43-50, 54-55.

⁹ Motion, paras 59-65.

¹⁰ Motion, para.65.

¹¹ Motion, para. 63.

- Annex E, registry page R254285, reading ‘but the one who can confirm this point is’;
- Annex E, registry page R254292, reading ‘according to’; and
- Annex E, registry page R254393, where the redaction should only be applied to the official’s name.¹²

9. Furthermore, having reviewed the four documents to be redacted, the Trial Chamber is satisfied that the identities of the three Lebanese officials are unlikely to be material to the preparation of the Defence. Should counsel for the Accused consider otherwise, once disclosure is made, they may make an appropriate application to the Trial Chamber. The narrowly-focused nature of the redactions proposed by the Prosecution ensures that the limited relevance of the three Lebanese officials’ identities remains apparent when reading the four documents. The Trial Chamber further considers that, in these circumstances, the Lebanese authorities’ certification as to the origin of one document given to the author of the statement is a valid counterbalancing measure for non-disclosure of the name of the relevant Lebanese official.

10. The Pre-Trial Judge ordered that the Defence, when disclosing confidential material to third parties, must inform the third party of their obligations including ‘not to disseminate or copy that material’ and ‘of the sanctions to be applied in the event of a violation of those rules’.¹³ Nonetheless, the Trial Chamber agrees with the Prosecution that there remain ‘permitted circumstances where highly sensitive information can be disclosed to third parties in Lebanon or elsewhere’.¹⁴ Given the limited relevance of the information to be redacted, and the additional measure proposed by the Prosecution with regard to one of the four documents to be redacted (the minute of a meeting in 2008), the Trial Chamber is therefore satisfied that the proposed redactions would not prejudice the procedural rights of the five Accused and are in the interests of justice. This decision, it is emphasised, is confined to authorising disclosure with redactions and does not relate to the admissibility or otherwise of the documents under Rules 149 (C) and (D).

¹² The remainder of the material sought for redaction at this point, although not marked as such, might fall within the scope of the additional redactions requested by the Prosecution: *see* para. 10 and following, below.

¹³ 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, Disposition.

¹⁴ Motion, para. 40. *See also* paras 39, 41.

Redaction of additional information

11. The Prosecution also seeks to redact additional information, unrelated to the safety and security of the three Lebanese officials, on the basis of Rule 116.¹⁵

12. The Prosecution makes no specific argument that the additional redactions fall within any of the three grounds for non-disclosure specified in Rule 116 (A)—either to avoid prejudice to ongoing or future investigations, to protect the security of a witness or their family, or in the public interest or to protect the rights of third parties. It asserts only that the additional redactions relate to Prosecution activity conducted on a confidential basis,¹⁶ and continues:

Although Rule 118 only came into force in March 2009, the Prosecution submits that [the material sought to be protected by the additional redactions] should be afforded the same protection as Rule 118.¹⁷

13. The Prosecution concludes that the additional redactions fall ‘within the protection [of] Rule 118.’¹⁸ The Trial Chamber, however, does not have jurisdiction to hear requests under Rule 118, ‘Information Never Subject to Disclosure without Consent of Provider’; these must be made before the Pre-Trial Judge.¹⁹ The Trial Chamber will consider instead whether information which *might* be exempt from disclosure under Rule 118 may also be exempt from disclosure under Rule 116 (A).

14. Rule 116 excludes its use by the Trial Chamber to order non-disclosure of ‘information in the possession of the Prosecutor [...] obtained or otherwise subject to Rule 118’.²⁰ Rule 118 applies to:

information which was provided on a confidential basis and which affects the security interests of a State or international entity or an agent thereof [...]

15. The Prosecution relies on the fact that the additional proposed redactions relate to third party contact conducted on a confidential basis. The Trial Chamber does not consider that this alone makes that information ‘obtained or otherwise subject to Rule 118’. To fall under Rule 118, the information would also have to affect the security interests of a State or international entity or an agent thereof.

¹⁵ Motion, paras 1, 25, 56, 68, 71.

¹⁶ Motion, para. 56.

¹⁷ Motion, para. 56.

¹⁸ Motion, para. 57.

¹⁹ See Rule 118 (C), (D), (J), (K). See also Rule 130 (B) (‘Rules that govern proceedings before the Pre-Trial Judge, except for those under Rules 93, 117 and 118, shall apply *mutatis mutandis* to proceedings before the Trial Chamber after submission of the file to the Trial Chamber’).

²⁰ Rule 116 (A).

16. Accordingly, nothing in the Rules prohibits the Trial Chamber, under Rule 116 (A), from ordering the non-disclosure—with suitable counterbalancing measures—of confidential material obtained from a third party. The Trial Chamber can envisage circumstances where breaching the third party's confidence in this way could indeed be contrary to the public interest or might prejudice ongoing or future investigations.

17. However, although the Prosecution does not argue that the additional redactions requested affect the security interests of a State or international entity, the motion clearly states that Rule 118 *would* ordinarily apply to this material. The Prosecution is incorrect in its assumption that the Special Tribunal's Rules may not apply, in appropriate circumstances, to transactions undertaken or evidentiary material gathered before the Rules entered into force. If that were so, the Rules—including Rule 116, upon which the Prosecution relies in respect of the very same documents—would be largely ineffective. Furthermore, Rule 118 applies not only to material formally obtained under the Rule but also to material which satisfies the requirements of Rule 118, irrespective of the form of the agreement—or if the agreement was made before Rule 118 entered into force. This is apparent from Rule 116 (A), which excludes information 'not obtained under *or otherwise subject to* Rule 118'.

18. Having received the Prosecution's submission that it considers these additional redactions to warrant protection under Rule 118, therefore, and having no reason to conclude that the Prosecution is incorrect, the Trial Chamber cannot now grant the requested relief under Rule 116 (A).

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

RELIEVES the Prosecution, under Rule 116 (A), of its disclosure obligations with regard to the information in the four documents which may prejudice the safety and security of three Lebanese officials;

AUTHORIZES the Prosecution to redact only those passages proposed in Annexes E and G of the motion necessary to protect the safety and security of three Lebanese officials; and

DENIES the Prosecution request, under Rule 116 (A), to be relieved of its disclosure obligations with regard to additional information contained in the four documents.

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

Dated this 20 February 2014,
Leidschendam,
the Netherlands

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

