

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: 9 May 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 MERHI DEFENCE MOTION SEEKING ACCESS TO CONFIDENTIAL AND *EX PARTE* PRE-TRIAL DOCUMENTS

Office of the Prosecutor:

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

Victims' Legal Representatives:

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. Dorothee 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 Mettraux
& Mr. Geoffrey Roberts



INTRODUCTION

1. Counsel for the Accused Hassan Habib Merhi have sought access to *ex parte* documents on the case file of the pre-trial proceedings in *Prosecutor v. Merhi*, STL-13-04.¹ These include specific filings,² correspondence between the Pre-Trial Judge and the Prosecutor, and any other ‘*ex parte*’ procedural document which has not been disclosed to the Defence and which it is therefore not in a position to identify.³ These documents relate to the pre-indictment confirmation stage in that case, before the Pre-Trial Judge. They also seek documents referred to in a post confirmation order of the Pre-Trial Judge.⁴

2. Additionally, the motion seeks the disclosure of *ex parte* documents the Trial Chamber relied on in its decision to hold the trial *in absentia*,⁵ and documents referred to in an order of the President of the Special Tribunal.⁶

DISCUSSION

Pre-Trial proceedings before the Pre-Trial Judge

3. Defence counsel express their motion to be made pursuant to Article 16 of the Statute of the Tribunal and Rule 96 of the Special Tribunal’s Rules of Procedure and Evidence.⁷ Both provide that the pre-trial proceedings should, in general, be public. The Prosecution’s response was that Article 7 (6) of the Practice Direction on Filings before the Special Tribunal for Lebanon, not Rule 96, sets out

¹ *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, STL-11-01/T/TC, Merhi Defence motion seeking access to the Confidential and *Ex parte* Procedural Documents, 31 March 2014.

² Filings F0001, F0002, F0003, F0005, F0007, F0015, F0023, F0055, and F0061 (with annexes). These include Prosecution submissions in relation to the indictment and supporting materials, Prosecution submissions in relation to proposed redactions and, internal memoranda regarding reports from the Acting Public Prosecutor at the Court of Cassation of Lebanon (‘the Acting Public Prosecutor’).

³ Motion, paras 17, 21.

⁴ *Prosecutor v. Merhi*, STL-13-04/I/PTJ, Order to seize the Trial Chamber pursuant to Rule 105 *bis* of the Rules of Procedure and Evidence in order to Determine whether to Initiate Proceedings *in absentia*, 25 November 2013. This order includes internal memoranda of the Special Tribunal and correspondence from the Registrar of the Tribunal to the Acting Public Prosecutor.

⁵ *Prosecutor v. Merhi*, STL-13-04/I/TC, Decision to hold Trial *in absentia*, 20 December 2013. This decision includes reports of the Acting Public Prosecutor with annexes; and correspondence from the President of the Tribunal and the Registrar of the Tribunal to the Acting Public Prosecutor.

⁶ *Prosecutor v. Merhi*, STL-13-04/I/PRES, Order Pursuant to Rule 76 (E) with Confidential and *Ex Parte* Annexes, 10 October 2013. Annexes to the Order include an International Warrant to Arrest Mr. Hassan Habib Merhi.

⁷ Motion, para. 1.

and governs the procedure for reclassifying confidential and *ex parte* documents.⁸ The Prosecution seeks the motion's dismissal.⁹

4. Counsel for Mr. Merhi further submit that pursuant to Rule 96 the Pre-Trial Judge should have jurisdiction to rule on lifting the confidentiality of the documents filed and decisions made at the pre-trial stage,¹⁰ and that the Trial Chamber should refer to the Pre-Trial Judge for decision the reclassification of submissions filed during pre-trial proceedings.¹¹ The Prosecution agrees that the Pre-Trial Judge is best placed to consider the reclassification of those materials.¹²

5. Article 7 (6) of the Practice Direction provides that a 'Judge or Chamber may change, *proprio motu* or upon request of a Participant, the classification of a document by an order or decision'. Although 'the conduct of fair and expeditious proceedings must always be the motivating factor in dividing responsibilities between the two chambers',¹³ it may sometimes be more judicially efficient for the original decision maker to determine such applications. Here, it is important to distinguish between documents on the case record during the pre-confirmation proceedings—in the sole domain of the Pre-Trial Judge and to which the Trial Chamber has not had access—and post-confirmation pre-trial proceedings before the Pre-Trial Judge, that is, the period before joinder of the two cases on 14 February 2014. Mr. Merhi was not a party to the proceedings before the Pre-Trial Judge confirmed the indictment against him on 31 July 2013.

6. The Trial Chamber's written decision on joinder leaves open the issue of which Chamber should determine applications such as these.¹⁴ The Trial Chamber has consulted the Pre-Trial Judge on this issue. Both he and the Trial Chamber agree that the Pre-Trial Judge's Chamber is the appropriate one to decide applications relating to the confidentiality of decisions he issued in the pre-confirmation stage of the proceedings. Here, it would also be appropriate for the Pre-Trial Judge to determine the application in relation to his order of 25 November 2013.

⁸STL-11-01/T/TC, Prosecution Response to «Requête de la Défense de Merhi sollicitant l'accès aux documents Confidentiels Ex Parte de la procédure », 15 April 2014, paras 2-3, 9-10.

⁹ Response, para. 16.

¹⁰ Motion, para. 18, citing STL-11/01/I/PTJ, Order Relating to making Public the Prosecutor's submissions concerning the Ayyash et al. Case, 6 December 2011, para 13.

¹¹ Motion, para. 20.

¹² Response, paras 3-4.

¹³ STL-11-01/T/TC, Decision on trial management and reasons for decision on joinder ('Joinder decision') 25 February 2014, para. 69.

¹⁴ Joinder decision, paras 70-77.

Documents and filings related to in absentia proceedings

7. Counsel for Mr. Merhi also seek disclosure of the *ex parte* documents listed in paragraph 2.¹⁵ They submit that the Trial Chamber already authorised disclosure of equivalent *ex parte* and confidential information to counsel for the original four Accused in the *Ayyash* case. They argue that the fundamental principles of a fair trial and equality among the Accused requires giving them access to these documents to prepare their case for trial, in accordance with Article 16 of the Statute.¹⁶

8. The Prosecution opposes the Defence being given documents beyond filings and orders, and submits that it has complied with its disclosure obligations.¹⁷ The Prosecution specifically opposes the disclosure of a request for assistance to the Lebanese authorities dated 5 June 2012,¹⁸ as it is an administrative document reflecting investigative steps taken by the Prosecution, and is not subject to disclosure.¹⁹ Generally, the Prosecution submits that ‘an assertion of materiality’ and reference to Article 16 of the Statute is not a sufficient basis for the application.²⁰

9. The Trial Chamber granted counsel for the other four Accused access to *ex parte* documents used in its decision to initiate proceedings *in absentia*, subject to the redaction of certain identifying information.²¹ However, circumstances differ in that counsel for those four sought reconsideration of that decision,²² while counsel for Mr. Merhi did not seek reconsideration of the later decision in respect of Mr. Merhi. Nonetheless, the Trial Chamber will order that counsel for Mr. Merhi be given the same access as the other Defence counsel to these documents. In relation to the documents referred to in the President’s order of 10 October 2013, the Trial Chamber has consulted the President and he consents to certain of these documents being disclosed to counsel for Mr. Merhi.²³

¹⁵ Motion, para. 27.

¹⁶ Motion, para. 28.

¹⁷ Response, para. 13.

¹⁸ Response, para. 14 citing STL-11-01/PT/PTJ, Decision on Sabra’s Ninth Motion for Disclosure – Requests for Assistance, 6 June 2013, para. 14.

¹⁹ Response, para. 14.

²⁰ Response, paras 14-15, citing STL-11-01/PT/PTJ, Decision on Sabra’s Ninth Motion for Disclosure – Requests for Assistance, 6 June 2013, para. 17.

²¹ STL-11-01, hearing of 14 June 2012, transcript pp. 45-46.

²² STL-11/01/TC, Request of the Defence for Mr. Badreddine for Reconsideration of the “Decision to Hold Trial *in Absentia*” Rendered by the Trial Chamber on 1 February 2012, 22 May 2012; Sabra Motion for Reconsideration of the Trial Chamber’s Order to Hold a Trial *in Absentia*, 23 May 2012; Request by the Oneissi Defence for Reconsideration of the Decision to Hold Trial *in Absentia* of 1 February 2012, 24 May 2012; Ayyash Motion Joining Sabra Motion for Reconsideration of the Trial Chamber’s Order to Hold a Trial *in Absentia*.

²³ Annexes G and H to the order.

DISPOSITION

FOR THESE REASONS, the Trial Chamber

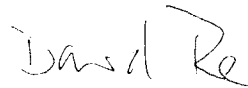
DISMISSES the application in respect of documents on the case file of *Prosecutor v. Hassan Habib Merhi*, STL-13-04 before the confirmation of the indictment;

INVITES counsel for Mr. Merhi to refile before the Pre-Trial Judge any application to modify the confidentiality status of filings related to the pre-confirmation proceedings in that case and the Pre-Trial Judge’s order of 25 November 2013; and


ORDERS the Prosecution and Registry to give counsel for Mr. Merhi the same access as that given to counsel for the other four Accused to the documents listed in paragraph 2 of this decision.

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

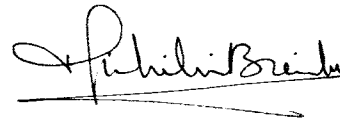
Leidschendam,
The Netherlands
9 May 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

