



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/T/PTJ**

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

The Registrar: **Mr. Daryl Mundis**

Date: **9 July 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 COUNSEL FOR MR. MERHI'S MOTION FOR
RECLASSIFICATION OF AND ACCESS TO MATERIAL**

Office of the Prosecutor:
Mr. Norman Farrell

Counsel for Mr. Salim Jamil Ayyash:
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Mr. Peter Haynes

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

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

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



I. INTRODUCTION

1. In this decision, the Pre-Trial Judge rules on a motion from Counsel for Mr. Merhi (the “Merhi Defence”) requesting the reclassification of confidential materials as public, and seeking access to confidential and *ex parte* decisions and filed documents, in the *Merhi* case¹ (the “Motion”).²

II. PROCEDURAL BACKGROUND

2. On 31 March 2014, the Trial Chamber ordered the Registry to provide counsel for Messrs. Ayyash, Badreddine, Oneissi and Sabra with access to confidential and confidential and *ex parte* filings in the *Merhi* case equivalent to the access given to the Merhi Defence for the *Ayyash* case record, thereby ensuring that Defence Counsel for each of the five accused enjoy the same access to confidential and confidential and *ex parte* case records in both the *Ayyash et al.* and *Merhi* cases.³

3. On 9 May 2014, the Trial Chamber issued its “Decision on Merhi Defence Motion Seeking Access to Confidential and *Ex Parte* Pre-Trial Documents”.⁴ The Trial Chamber found 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 [*Merhi*] proceedings.”⁵ The Trial Chamber therefore invited the Merhi Defence to re-file before the Pre-Trial Judge any application to modify the classification of filings related to (a) the pre-confirmation proceedings in the *Merhi* case, and (b) the Pre-Trial Judge’s 25 November 2013 order seising the Trial Chamber, pursuant to Rule 105 *bis* (A) of the Rules of Procedure and Evidence (the “Rules”), to determine whether to initiate proceedings *in absentia*.

¹ STL-13-04.

² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1528, *Requête de la Défense de Merhi sollicitant la levée de la confidentialité et l'accès aux documents confidentiels ex parte de la procédure*, 13 May 2014.

³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1467, Decision on Joint Defence Motion for Access to Confidential Material in the *Merhi* Case, 31 March 2014, disposition.

⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1522, Decision on Merhi Defence Motion Seeking Access to Confidential and *Ex Parte* Pre-Trial Documents, 9 May 2014 (the “Trial Chamber Decision”).

⁵ *Id.*, para. 6. The Trial Chamber also decided that it would be appropriate for the Pre-Trial Judge (and not the Trial Chamber) to determine the Merhi Defence’s associated request in relation to the Pre-Trial Judge’s ‘Order to Seise the Trial Chamber pursuant to Rule 105 *bis* (A) of the Rules of Procedure and Evidence in Order to Determine Whether to Initiate Proceedings *in Absentia*’, *Prosecutor v. Merhi*,’ STL-13-04/I/PTJ, F0021, 25 November 2013 (the “25 November 2013 Order”).

4. On 13 May 2014, the Merhi Defence filed the Motion to which the Registry⁶ and the Prosecution⁷ responded on 28 May 2014.

III. SUBMISSIONS

A. The Motion

5. The Merhi Defence requests that all decisions rendered — and all documents filed — as confidential and *ex parte* during the pre-trial phase of the *Merhi* case be reclassified as public.⁸ In addition to listing specific documents or categories of documents to which it seeks access, the Merhi Defence requests access to any other material classified as *ex parte* and of which it is unaware at this time.⁹

B. The Registry Submission

6. The Registry Submission relates to two documents which it has identified as subject to the Motion. The Registry does not object¹⁰ to the reclassification as public of the confidential and *ex parte* certificate it filed on 22 July 2013.¹¹ With respect to the Registry's confidential report of 25 November 2013,¹² however, the Registry considers that Annexes 2 and 3 to that Report amount to internal work product of the Tribunal, and it therefore opposes the reclassification of the Report's Annexes 2 and 3 as public.¹³ With respect to Annex 1, the Registry considers that it is internal correspondence and hence governed by the Practice Direction on Filings.¹⁴ But for its annexes, however, the Registry does not oppose the

⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1545, Registry Submission pursuant to Rule 48 (C) Regarding the Motion by the Merhi Defence Seeking Access to Confidential and *Ex Parte* Filings, 28 May 2014 (the "Registry Submission").

⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1547, Prosecution Response to « *Requête de la Défense de Merhi sollicitant la levée de la confidentialité et l'accès aux documents confidentiels ex parte de la procédure* », 28 May 2014 (the "Response").

⁸ Motion, paras 17, 20. The Merhi Defence recognises the right of the filing party to file submissions on the need to retain the current classifications of the documents concerned (Motion, para. 20).

⁹ Motion, para. 17(iii).

¹⁰ Registry Submission, para. 6.

¹¹ STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0005, Certificate, confidential and *ex parte*, 22 July 2013 (the "Certificate").

¹² STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0022, Registry Report on the Advertisement of the Indictment Against Hassan Habib Merhi with Annexes, confidential, 25 November 2013 (the "Report").

¹³ Registry Submission, para. 7.

¹⁴ *Ibid*, STL, Practice Direction on Filing Documents Before the Special Tribunal for Lebanon, STL/PD/2010/01/Rev.2, 14 June 2013 (the "Practice Direction"). The Pre-Trial Judge notes that the Registry Submission cites paragraph 6 of the Practice Direction. This reference can only be read as referring to paragraph 6 of Article 1 of the Practice Direction which governs the "correspondence file", and shall be treated as such. The relevant provision reads as follows: "A correspondence file shall be opened per case and maintained by the CMSS. The correspondence shall not be open to the public but shall be accessible to

reclassification of this Report as public, while noting that its current classification as confidential means that the Defence teams already have access to it.¹⁵

7. With respect to the Registry's correspondence and memoranda during the pre-trial phase of the *Merhi* case, the Registry confirms that all of these materials are contained within the Case Correspondence File to which the Merhi Defence has access, but which is not currently classified as public because it is subject to the Practice Direction.¹⁶

8. With respect to the Merhi Defence's apparent request for access to confidential and *ex parte* documents filed in the *Ayyash et al.* case prior to the joinder of the two cases, the Registry submits that the Merhi Defence should enjoy the same access as the other defence teams but asks to be heard in advance of a decision.¹⁷

C. The Prosecution Response

9. In the Response, the Prosecution requests the Pre-Trial Judge to dismiss the Motion on the basis that Rules 88(F) and (G) constitute *lex specialis* governing pre-confirmation filings and correspondence.¹⁸ According to the Prosecution, "Rule 88(F) governs the classification of any documents filed during the confirmation process."¹⁹ Since, according to those provisions, pre-confirmation filings and correspondence are to be provided to the Defence only to the extent that the Prosecution's disclosure obligations require it to do so, and since the Merhi Defence has not shown how it is entitled to the disclosure of the materials concerned, the Prosecution submits that the Motion must fail,²⁰ and the pre-confirmation materials sought must remain classified as confidential and *ex parte* pursuant to Rule 88(F).²¹ The Prosecution avers further that the Merhi Defence cannot demonstrate that it is entitled to access confidential and *ex parte* pre-confirmation filings in

Participants upon written request to the CMSS. The CMSS shall consult with the relevant Judge or Chamber and with the author of the correspondence as to whether access may be provided. The CMSS may provide such access only upon the instruction of the Judge or Chamber."

¹⁵ Registry Submission, para. 7.

¹⁶ Registry Submission, para. 8. *See* n. 14 *supra*.

¹⁷ Registry Submission, para. 9.

¹⁸ Response, para. 9.

¹⁹ Response, para. 10.

²⁰ Response, paras 2-4, 11.

²¹ Response, para. 7.

the *Merhi* case pursuant to Rule 88(G) because the filings concerned “consist of submissions, not evidentiary material” and as such are not subject to disclosure.²²

10. The Prosecution adds that the Merhi Defence has not, in any event, demonstrated that the materials concerned should be reclassified as public.²³

11. With respect to correspondence in particular, the Prosecution also refers to Article 1(6) of the Practice Direction as applicable and submits that this article provides that “the correspondence [in the Correspondence File] shall not be open to the public.”²⁴

12. The Prosecution requests that it first be afforded the opportunity to propose redactions in the event that the Pre-Trial Judge orders the reclassification of any of the materials concerned.²⁵

IV. DISCUSSION

1. The scope of this decision

13. The Pre-Trial Judge notes that — as highlighted by both the Registry Submission²⁶ and the Response²⁷ — the Trial Chamber invited the Merhi Defence to file submissions before the Pre-Trial Judge limited to the pre-confirmation proceedings in the *Merhi* case, and the 25 November 2013 Order. However, the Parties agree that the Merhi Defence effectively no longer seeks any material related to the 25 November 2013 Order.²⁸ This decision is therefore limited to materials filed prior to the confirmation of the indictment in the *Merhi* case.

14. In this regard, the Motion raises several discrete matters: the principle of transparency and the reclassification of materials as public; the classification of and access to materials subject to Rule 88(F) and (G) and the Merhi Defence’s access to confidential and *ex parte* pre-confirmation materials; the Merhi Defence’s access to correspondence; and the Merhi Defence’s access to materials sought from the Registry. Each of these matters shall now be dealt with in turn.

²² Response, para. 11.

²³ Response, para. 12.

²⁴ Response, para. 17, referring to Practice Direction, Art. 1(6).

²⁵ Response, paras 16, 18.

²⁶ Registry Submission, para. 5.

²⁷ Response, para. 1.

²⁸ Motion, para. 16; Response, para. 6.

2. The transparency of the proceedings pursuant to Rule 96 and the reclassification of materials as public

15. As the Merhi Defence points out,²⁹ the Pre-Trial Judge has continuously made clear his adherence to the principle of transparency of proceedings, consistent with Article 16 of the Statute and Rule 96 of the Rules.³⁰ While transparency requires that as many documents as possible are classified as public, this principle does not serve automatically to justify classifying all documents as such. The principle of transparency is not absolute, and exceptions to it are provided for by the Rules and by the Practice Direction which anticipates the classifications — ‘public’ or otherwise — under which documents can be filed in the interests of the integrity of the proceedings and/or the protection of persons.³¹ Where a party seeks to file a document with a classification other than public, it must indicate the factual and legal basis for the classification sought.³² Filings are not, therefore, arbitrarily classified other than as public.

16. The Pre-Trial Judge considers that the request of the Merhi Defence to reclassify as public all material submitted confidentially or confidentially and *ex parte* prior to the confirmation of the indictment in that case is dismissed.

3. The Merhi Defence’s access to confidential and *ex parte* pre-confirmation materials and the publicity of these materials

17. In the Response, the Prosecution suggests that Rules 88(F) and (G) constitute *lex specialis* governing all pre-confirmation filings and correspondence.³³ This is partly incorrect.

18. Rule 88(F) and (G) do not apply to all filings and correspondence preceding the confirmation of an indictment. Rather, Rule 88(F) and (G) constitute a specific procedure that allows the Prosecutor — during the investigation — to keep the Pre-Trial Judge informed of

²⁹ Motion, para. 19.

³⁰ Art. 16 STL St. (Rights of the accused); Rule 96 STL RPE (Public Nature of Pre-Trial Proceedings); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0085, Order Relating to Making Public the Prosecutor’s Submissions Concerning the *Ayyash et al.* Case, 6 December 2011, para. 17.

³¹ Art. 6(1) Practice Direction (Classification of Documents). The possible classifications are: (a) public; (b) confidential; (c) confidential and *ex parte*; and (d) under seal and *ex parte* with limited distribution. The Pre-Trial Judge notes that the applicable rule entitled ‘Public Nature of Pre-Trial Proceedings’, and which provides that “pre-trial filings, proceedings and orders shall be public, unless otherwise provided by the Rules or decided by the Pre-Trial Judge at the request of a Party” (Rule 96(A)), is itself subject to Rule 96(B), which recognises those filings and orders that “shall remain confidential for as long as is necessary for the effective conduct of the investigation and/or the protection of any person”.

³² Art. 6(2) Practice Direction.

³³ Response, para. 9.

the progress thereof, in order to permit the latter to exercise his functions in accordance with Rules 11 and 68. Only materials provided by the Prosecutor pursuant to Rule 88(D) and — where applicable — during meetings convened pursuant to Rule 88(E), are subject to Rule 88(F) and (G) and hence remain strictly confidential and *ex parte*. Items subject to Rule 88(F) constitute an exception to the general principle of transparency that is applicable after confirmation of the indictment. After the confirmation of the indictment, Rule 88(G) obliges the Prosecutor to provide Rule 88(F) materials to the Defence to the extent that they are material to the rights of the Defence in accordance with the Prosecutor's obligations under the Rules. It is therefore incorrect to state that all documentation filed or generated in the proceedings prior to the confirmation of the indictment is to remain classified as confidential and *ex parte* pursuant to Rule 88. In the *Merhi* case, the Pre-Trial Judge observes that no such documents and information exist.

19. Accordingly, all filings in the *Merhi* case are subject to the principles of disclosure provided by Rules 110 and 113 and of transparency provided for by Rule 96, but for the exceptions expressly provided for by the Rules.

20. In this respect, the Pre-Trial Judge recalls that the regime of confidentiality and publicity in this case, prior to the joinder, has been established by his orders of 16 August 2011,³⁴ 21 September 2011,³⁵ 13 October 2011,³⁶ 6 December 2011³⁷ and 8 February 2012.³⁸ This regime should apply *mutatis mutandis* to the filings and documents submitted in the *Merhi* case.

21. Consequently, the Pre-Trial Judge considers it appropriate that the Prosecution review the confidential and *ex parte* pre-confirmation materials in the *Merhi* case with a view to reclassifying them. Such review must apply to the filings specifically identified by the Merhi Defence in the Motion³⁹ and other filings not specifically identified, if any.

³⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0032, Order on Lifting the Confidentiality of the Indictment Against Messrs. Ayyash, Badreddine, Oneissi and Sabra and Other Documents, 16 August 2011.

³⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0048, Order to Make Public the Prosecutor's Submissions Concerning the *Ayyash et al.* Case, 21 September 2011.

³⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0051, Order Relating to the Prosecutor's Request for Clarification of the Order of 21 September 2011 to Make Public the Prosecutor's Submissions Concerning the *Ayyash et al.* Case, 13 October 2011.

³⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0085, Order Relating to Making Public the Prosecutor's Submissions Concerning the *Ayyash et al.* Case, 6 December 2011.

³⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0117, Order Making Public Certain Prosecutor's Submissions in the *Ayyash et al.* Case, 8 February 2012.

³⁹ Motion, para. 17.

22. In any event, confidential and *ex parte* filings related to the Pre-Trial Judge's public redacted decisions⁴⁰ should, in principle, be made public with appropriate redactions where necessary. For all other filings, if any, the Prosecution may well consider that some of the materials concerned should remain confidential and *ex parte*, be reclassified either as confidential or public, or should be subject to redactions before reclassification either as confidential or as public. Should that be the case, the Prosecution's motivated submissions must rely on the applicable Rules and jurisprudence (including this decision), and must include proposed redactions where relevant. Once in receipt of these submissions, the Pre-Trial Judge will rule on the matter.

4. The Merhi Defence's access to correspondence

23. The Practice Direction makes it clear that the Merhi Defence, as a "Participant", shall have access to the correspondence upon written request to the Court Management Services Section (the "CMSS"). Thereafter, the CMSS shall consult with the relevant Judge or Chamber, and with the author of the correspondence, as to whether access may be provided.⁴¹ To the extent that the Merhi Defence has failed to address its request for access to the correspondence in the prescribed manner, the Pre-Trial Judge will dismiss this aspect of the request and instead invite the Merhi Defence to submit its request to the CMSS in a manner consistent with the Practice Direction.

5. The Merhi Defence's access to materials sought from the Registry

24. The Merhi Defence effectively seeks access to two documents from the Registry. The first is the Certificate that the Registry filed on 22 July 2013, the reclassification of which as public is not opposed by the Registry.⁴² This Certificate should, accordingly, be reclassified as public.

25. The second is a report of the Registry dated 25 November 2013. The Registry does not oppose the reclassification of this Report itself as public, but correctly submits that its

⁴⁰ STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0008, 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, 11 October 2013; STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0006, Public Redacted Version of the "Decision Authorising the Withdrawal of Two Internal Memoranda from Supporting Materials" dated 25 July 2013, 14 March 2014; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1456, Order Lifting Confidentiality Restrictions on a Decision and a Submission, 20 March 2014.

⁴¹ Art. 1(6) Practice Direction.

⁴² Registry Submission, para. 6.

Annex 1 is internal correspondence governed by the Practice Direction, and that its Annexes 2 and 3 amount to internal work product of the Tribunal.⁴³ Therefore, the report itself should be reclassified as public while its three annexes must remain confidential.

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Article 16 of the Statute, Rules 88, 96, 110 and 113 of the Rules, and the Practice Direction;

DISMISSES the Merhi Defence's request for an order reclassifying all confidential and *ex parte* filings in the *Merhi* case as public;

GRANTS the Motion in part and **ORDERS** the Prosecution:

(a) to reclassify the documents identified in paragraph 17 (i) of the Motion as public, or to submit motivated proposals for redactions thereto, consistent with Article 16 of the Statute and Rule 96 of the Rules;

(b) to review any filings in the *Merhi* case that would remain classified as confidential and *ex parte*, other than the documents identified in paragraph 17 of the Motion, and to file its observations with regard to maintaining, in whole or in part, the classification of each of the submissions, and, where appropriate, include with its observations suggested redactions and the reasons for them if it wishes that its submissions remain partially confidential or confidential and *ex parte*;

(c) to file its submissions, before 16:00 on 24 July 2014;

GRANTS the Motion in part and **ORDERS** the CMSS to reclassify as public:

(a) the Certificate filed by the Registry on 22 July 2013; and

(b) the Report filed by the Registry dated 25 November 2013, but the annexes thereto shall remain classified as confidential; and

⁴³ *Id.*, para. 7.

INVITES the Merhi Defence to submit, if it wishes, a written request for access to the correspondence it seeks in a manner consistent with the Practice Direction.

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

Leidschendam, 9 July 2014



Daniel Fransen
Pre-Trial Judge

