

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: 22 February 2016

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THE PROSECUTOR

v.

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

ORDER IN RELATION TO SABRA MOTION FOR DISCLOSURE OF A DOCUMENT

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 Iain Edwards &
Ms Mylène Dimitri

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 Mettra
Mr Geoffrey Roberts



PROCEDURAL HISTORY

1. In June 2012, the Prosecution interviewed Mr Wissam Al Hassan¹ (Witness PRH680) who, up to the assassination of the former Prime Minister of Lebanon, Mr Rafik Hariri, on 14 February 2005, was Mr Hariri's Chief of Protocol. During Mr Al Hassan's interview, the Special Tribunal's investigators used a document referred to as 'WAH/001'.² It was disclosed to the Defence in a heavily redacted form.³ The entire document fell under Rule 118⁴ of the Special Tribunal's Rules of Procedure and Evidence as the Lebanese Internal Security Forces (ISF) provided it, confidentially, to the United Nations International Independent Investigation Commission.
2. On 27 January 2015, counsel for the Accused, Mr Assad Hassan Sabra, requested the Trial Chamber, under Rules 110 (A) (ii), 110 (B), 113 (A) and/or 118 (B), to order the Prosecution to give them access to the full, unredacted version of document 'WAH/001'.⁵ Counsel for Mr Sabra submitted that the unredacted document was material to their preparations for trial as it relates to the origin and circumstances surrounding the 'discovery' of the mobile telephones allegedly used to plan

¹ Mr Al Hassan was assassinated in a car bombing in Beirut on 19 October 2012.

² In the transcript of an interview with Mr Al Hassan, on 16 and 17 June 2012, the Prosecution's investigator described document 'WAH/001' as '40 pages of the record of previous meetings dated between 11 April 2008 and 14 December 2010' and 'memorandum written by staff from [UN]IIIC and STL following meeting with [Mr Wissam Al Hassan]'. See document with ERN 60263705 _TS_O_EN_AR_01, pp 174 and 176.

³ On 14 March 2014, the Prosecution disclosed four redacted pages of document 'WAH/001' following a request for full disclosure by counsel for Mr Hussein Hassan Oneissi.

⁴ Rule 118 states that, '(A) Where the Prosecutor is in possession of information which was provided on a confidential basis and which affects the security interests of a State or international entity or an agent thereof, he shall not disclose that information or its origin without the consent of the person or entity providing the information. (B) Where, in the Prosecutor's view, confidential information provided to him by a person or entity under paragraph (A) contains information referred to in Rule 113, the Prosecutor shall take reasonable steps to obtain the consent of the provider to (i) disclose that information or the fact of its existence to the accused or (ii) provide an alternative form of disclosure such as: identification of new similar information; provision of the information in summarised or redacted form; or stipulation of the relevant facts. If the Prosecutor obtains such consent, the Prosecutor shall make the disclosure that has been consented to without delay'.

⁵ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1829, Request for Disclosure of a Document, 27 January 2015. A public redacted version of the Request was filed on 9 February 2015. Rule 110 (A) (ii) states, 'the Prosecutor shall make available to the Defence in a language which the accused understands, [...] (ii) [...] copies of: (a) the statements of all witnesses whom the Prosecutor intends to call to testify at trial'. Rule 110 (B) states, 'the Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused'. Rule 113 (A) states, 'Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence'.

the assassination of the former Lebanese Prime Minister, Rafik Hariri, in Beirut on 14 February 2005.⁶

3. On 16 April 2015, the Trial Chamber instructed the Prosecution to contact the Lebanese Government to request their consent to disclose document 'WAH/001' in an unredacted form.⁷ On 8 July 2015, the Prosecution informed the Trial Chamber that the Lebanese Government had authorized the Prosecution to disclose a less redacted version of the document, and that it disclosed it to the Defence. Some information (redacted from the document) is still subject to Rule 118.⁸ On 7 August 2015, at the Trial Chamber's invitation, the Defence filed submissions stating that it was not satisfied that the Prosecution had fully complied with its disclosure obligation and did not withdraw its motion.⁹ On 28 August 2015, the Trial Chamber referred the matter to the Pre-Trial Judge given that only he has jurisdiction to decide requests under Rule 118.¹⁰

4. On 26 October 2015, the Pre-Trial Judge found that the request for disclosure of document 'WAH/001' was 'unfounded on the basis of Rule 118', as the Prosecution did not seize him under Rule 118 (C) and did not notify him of the existence, in the document, of any exculpatory information.¹¹

5. On 30 October 2015, the President of the Tribunal, seized of a request from counsel for Mr Sabra to appoint a Special Counsel under Rule 119 (A), dismissed it after considering that, for the President to consider the merits of an application under Rule 119 (A), the Pre-Trial Judge must perform his Rule 118 (C) functions, and that, in the circumstances, the Pre-Trial Judge concluded that he could not perform them on the basis of the Defence's disclosure request.¹²

⁶ Sabra request of 27 January 2015, para. 3.

⁷ F1910, Order in Relation to Sabra Motion for Disclosure of a Document, 16 April 2015, p. 2.

⁸ F2060, Prosecution Further Update concerning the Trial Chamber's Order in Relation to Sabra Motion for Disclosure of a Document (public with confidential Annex A), 8 July 2015.

⁹ F2113, Further Submissions on Request for Disclosure of a Document, 7 August 2015.

¹⁰ F2148, Decision to Refer Sabra Motion for Disclosure of a Document to the Pre-Trial Judge, 28 August 2015, pp. 2-3.

¹¹ STL-11-01/T/PTJ, F2287, Decision Relating to the Request for a Document by the Sabra Defence, 26 October 2015, para. 11, Disposition.

¹² F2294, STL-11-01/T/PRES, Decision on Application for Appointment of Special Counsel Pursuant to Rule 119 (A), 30 October 2015, para. 5, Disposition.

APPLICATION AND SUBMISSIONS

6. Counsel representing Mr Sabra now requests the Trial Chamber (i) to order the Prosecution to request authorization from the Lebanese authorities to provide the Trial Chamber with an unredacted version of document 'WAH/001', on an *ex parte* basis; and, therefore, (ii) to conduct its own analysis as to the exculpatory nature of the contents of the document.

7. The Defence submits that document 'WAH/001' contains potentially exculpatory material because it provides information: (a) on the attribution of Purple 018¹³ to Mr Sabra; (b) that goes to the credibility of Mr Al Hassan, particularly with respect to the circumstances under which Purple 018 and other contested numbers were 'discovered'; and (c) that goes to the credibility of other Prosecution witnesses.¹⁴ They further submit that the recent testimony of Witness PRH308, stating that the 'phone numbers of the Purple Group of Phones were brought to the Prosecution's attention by the Lebanese Internal Security Forces', is an in-court development of central relevance to the issue.¹⁵ The Defence argues that, unlike any situation falling under Rule 113, the responsibility to assess the exculpatory nature of the material rests only on the Prosecution, with no possibility of judicial review,¹⁶ and claims that this represents 'a fundamental flaw' in the Special Tribunal's Rules, and a grave breach of the Accused's right to a fair trial'.¹⁷ Counsel for Mr Mustafa Amine Badreddine joined the Sabra Defence motion.¹⁸

8. The Prosecution, in its response, requests the Trial Chamber to dismiss the motion, submitting that it has reviewed document 'WAH/001' and has determined that it does not contain any information, potentially exculpatory or otherwise, on the attribution of Purple 018 or the 'discovery' of that telephone or of other contested numbers, nor any information that undermines the credibility

¹³ The 'purple telephones' functioned as a group involved in the planning and carrying out of the false claim of responsibility for the attack of 14 February 2005. See F1444, Redacted Version of the Consolidated Indictment (consolidated indictment), 7 March 2014, paras 5, 15 (e), 23-29 and 44.

¹⁴ F2391, Urgent Motion for a Trial Chamber Order, 23 December 2015, para. 9. The Sabra Defence qualified the motion as 'urgent' because of the imminent testimony of Witness PRH486, who was a staff member of the Special Tribunal's Office of the Prosecutor who conducted the interview during which document 'WAH/001' was initially discussed.

¹⁵ Sabra motion, paras 17-20.

¹⁶ Sabra motion, paras 10-12.

¹⁷ Sabra motion, para. 13.

¹⁸ F2396, Badreddine Defence Joinder to Sabra Defence "Urgent Motion for a Trial Chamber Order", 4 January 2016.

of Mr Al Hassan or of other Prosecution witnesses.¹⁹ Since Witness 308 did not testify that Mr Al Hassan discussed the discovery of Purple 018 or any other telephones with the Prosecution, Witness 308's evidence is not proof that Mr Al Hassan discussed these matters during the meetings described in document 'WAH/001'.

9. The Prosecution submits that the Pre-Trial Judge properly found that the Rule 118 procedure had not been triggered,²⁰ and that counsel for Mr Sabra have not provided any foundation for asserting that the document contains Rule 113 information.²¹ It further argues that, even in circumstances not involving Rule 118, the Trial Chamber's power to review information or material in possession of the Prosecution is discretionary and its exercise requires that the Defence has provided some legitimate basis for the Trial Chamber to consider that the relevant information is exculpatory.²²

10. At the hearing of 28 January 2016, the Trial Chamber drew to the attention of the Prosecution and Defence counsel a decision of the International Criminal Court, in *Ntaganda*, and the case law that it references on disclosure of information obtained by the Prosecution on condition of confidentiality, and invited them to make additional submissions in light of any practice at the ICC.²³

11. Counsel for Mr Sabra, in their additional submissions, describe their understanding of the practice and case-law at the ICC in relation to material covered by Article 54 (3) (e) of the Rome Statute of the ICC. Counsel argue that Article 54 (3) (e) and Rule 118 (A) of the Special Tribunal's Rules contain similar provisions, the main difference being that the former is applicable only to evidence obtained for the purpose of generating new evidence, whereas Rule 118 (A) is concerned with evidence in general. On this basis, counsel claim that the ICC procedure should be applicable for evidence the Prosecution intends to use at trial.²⁴ Counsel for Mr Mustafa Amine Badreddine endorse the additional submissions filed by the Sabra Defence.²⁵

¹⁹ Prosecution response, paras 4 and 9.

²⁰ Prosecution response, para. 4.

²¹ Prosecution response, paras 6-7, 9 and 11.

²² Prosecution response, paras 12-14.

²³ Transcript of 28 January 2016, pp 34-36.

²⁴ Sabra additional submissions, paras 9-10.

²⁵ F2437, Badreddine Defence Additional Submission on "Urgent Motion for a Trial Chamber Order" Dated 23 December 2015, 5 February 2016, para. 1.

12. The Prosecution responded submitting that, unlike at the ICC, the Special Tribunal's Rules address the possible tension between the receipt of confidential information by the Prosecution and its disclosure obligations, precisely in Rules 118 and 119, and therefore, contrary to the Defence's suggestion, it would be unnecessary and inappropriate to apply the practice adopted by the ICC Appeals Chamber in *Lubanga*.²⁶ The Prosecution argues that, in any event, the procedure established by the ICC Appeals Chamber would not apply in the present circumstances because the Defence has not provided any *prima facie* basis for considering that the Prosecution has violated its disclosure obligations.²⁷

13. Furthermore, the Prosecution submits that, while the Rule 118 procedure and the ICC practice are similar in several ways, the Rules 118 and 119 regime does not allow for judicial review of material provided under this Rule, and this approach is consistent with Rule 113 which—unlike its ICC equivalent, Article 67 (2) of the Rome Statute of the ICC—does not assign an explicit role to the court in determining whether information is subject to disclosure. Further, Rule 118 (A) only applies when the information provided to the Prosecution on a confidential basis affects the security interests of a State or international entity or agent thereof, while this qualification is not found in Article 54 (3) (e).²⁸

DISCUSSION

14. The Trial Chamber sympathises with the Defence position. Rule 118, however, explicitly prevents the Trial Chamber's access to the redacted portions of document 'WAH/001'. The Prosecution's obligation under Rule 118 (B) to take reasonable steps to obtain the consent of the information provider, or to provide an alternative form of disclosure, only arises after the Prosecution itself has determined that the material obtained on condition of confidentiality contains exculpatory information. The Trial Chamber has examined the ICC case law, including the *Lubanga* and *Ntaganda* cases, and the ICC practice in this matter. The essential distinction between Rule 118 (B) regime and the ICC's practice under Article 54 (3) (e) is that the ICC's Prosecutor must seek the provider's consent to disclosure after the Trial Chamber's review of the material and determination

²⁶ F2442, Prosecution Response to Additional Defence Submissions on Urgent Motion for a Trial Chamber Order Dated 23 December 2015, 5 February 2016, paras 5, 9, 14, 18 and 20.

²⁷ Prosecution response to additional Sabra submissions, para. 8.

²⁸ Prosecution response to additional Sabra submissions, paras 22-30.

that it contains information subject to disclosure.²⁹ This contrasts with Rule 118 preventing the Trial Chamber's access to such material.

15. The Trial Chamber accepts the Prosecution's determination that document 'WAH/001' does not contain any information under Rule 113, potentially exculpatory or otherwise, on the attribution of Purple 018 or the 'discovery' of that telephone or of other contested numbers, nor any information that undermines the credibility of Witness 680 or of other Prosecution witnesses. The Government of Lebanon has responded favourably to the previous Prosecution's requests to lift the Rule 118 redactions from document 'WAH/001' and recognising its continuing obligation to cooperate with the Special Tribunal.

16. In all of the circumstances, the Trial Chamber is of the view that the interests of justice require the Prosecution to reapproach the Government of Lebanon to ascertain if it would consent to further disclosure of the redacted portions in document 'WAH/001'.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

INSTRUCTS the Prosecution to reapproach and seek the consent of the Government of Lebanon to further disclosure of redacted portions in document 'WAH/001'.

²⁹ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 OA 13, Judgement on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference of 10 June 2008", 21 October 2008, para. 48.

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

Leidschendam,
The Netherlands
22 February 2016

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

