

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No: STL-17-07/I/AC/R176bis

Before: Judge Ivana Hrdličková, Presiding
Judge Ralph Riachy, Judge Rapporteur
Judge David Baragwanath
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko

Registrar: Mr Daryl Mundis

Date: 5 September 2017

Original language: English

Classification: Confidential

**DECISION ON DEFENCE OFFICE REQUEST TO LIFT
THE CONFIDENTIALITY OF INFORMATION**

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux



1. On 11 August 2017, the Pre-Trial Judge submitted to the Appeals Chamber, confidentially and *ex parte*, preliminary questions pursuant to Rule 68 (G) of the Rules of Procedure and Evidence (“Preliminary Questions” and “Rules”, respectively).¹ In a confidential and *ex parte* decision issued on 23 August 2017, the Appeals Chamber granted the Prosecution’s request that the proceedings relating to the Preliminary Questions under Rule 176 *bis* of the Rules be maintained as strictly confidential until 7 September 2017, so that the risks associated with public proceedings may be minimized. On 24 August 2017, the Appeals Chamber ordered the Prosecutor and the Head of Defence Office to file confidential written submissions on the Preliminary Questions by 7 September 2017.²

2. The Appeals Chamber is now seized of a request filed by the Head of Defence Office on 25 August 2017, seeking that the Appeals Chamber immediately make public the Rule 176 *bis* proceedings in their entirety as from the referral to the Appeals Chamber by the Pre-Trial Judge or, in the alternative, grant the Head of Defence Office leave to inform Defence Counsel in the *Ayyash et al.* case (“*Ayyash et al.* Defence Counsel”) of the existence of the Rule 176 *bis* proceedings.³ In addition, the Head of Defence Office requests that the Appeals Chamber order the Prosecution to inform him and the *Ayyash et al.* Defence Counsel whether one or more accused in the *Ayyash et al.* case are implicated in the STL-17-07 case, and, if so, to disclose those names to him and to Counsel for the accused concerned.⁴

3. In support of his request on confidentiality, the Head of Defence Office submits that there is no valid reason for the Rule 176 *bis* proceedings to remain confidential until 8 September 2017 and that, at a minimum, he should be able to inform the *Ayyash et al.* Defence Counsel of these proceedings so as to avoid any injustice.⁵ As to his request for disclosure of information, the Head of Defence Office argues that he cannot make decisions

¹ STL, STL-17-07/I/AC/R176bis, F0003, Order on Preliminary Questions Addressed to the Appeals Chamber Pursuant to Rule 68 (G) of the Rules of Procedure and Evidence, Confidential and *Ex Parte*, 11 August 2017. A confidential redacted version with limited distribution was issued by the Pre-Trial Judge and communicated to the Head of Defence Office on 24 August 2017. See STL, STL-17-07/I/AC/R176bis, F0003, *Version confidentielle expurgée de l’« Ordonnance relative aux questions préjudicielles adressées à la Chambre d’appel conformément à l’article 68 G) du Règlement de procédure et de preuve » du 11 août 2017*, Confidential, 24 August 2017. All further references to filings and decisions relate to this case number unless otherwise stated.

² F0006, Scheduling Order for Written Submissions Pursuant to Rule 176 *bis* (B) of the Rules, Confidential, 24 August 2017 (“Scheduling Order”).

³ F0007, Urgent Defence Office Request to Lift the Confidentiality of Information, Confidential, 25 August 2017 (“Request”), paras 2, 14-15, 19.

⁴ *Id.*, paras 4, 18, 19.

⁵ *Id.*, paras 2, 12-15.

on the applicable law without knowing whether the STL-17-07 case concerns one or more accused in the *Ayyash et al.* case, while these cases are connected, without running the risk of causing prejudice to the interests of these accused.⁶ In his view, he is put in an “untenable ethical situation with respect to his colleagues appointed by him to represent the rights and interests of the accused in the *Ayyash et al.* case.”⁷

4. The Prosecution responds that the Request should be dismissed.⁸ It submits that the Defence Office has not provided any reason for the Appeals Chamber to revisit the classification of the filings in these proceedings and that the Head of Defence Office has access to all information that falls within the parameters of his functions under Rule 176 *bis*.⁹

5. On 31 August 2017, the Head of Defence Office sought leave to file a reply to the Prosecution’s response.¹⁰ The Prosecution opposed the request.¹¹ The Appeals Chamber considers that the issues identified by the Head of Defence Office do not constitute new issues warranting additional submissions and, consequently, rejects the Head of Defence Office’s request for leave to file a reply.

6. The Appeals Chamber sees no merit in any of the arguments in the Head of Defence Office’s Request. The Head of Defence Office’s argument that there is no valid reason for the proceedings to remain confidential until 7 September 2017 ignores the Appeals Chamber’s assessment that strict confidentiality is required until that date so that the risks associated with public proceedings may be minimized.¹² While mindful of the significance of the principle of publicity of proceedings before the Tribunal, it also falls to the Appeals Chamber to balance this principle with any concerns that may militate against such publicity and to decide whether the circumstances require an exception to the public proceedings. The Appeals Chamber decided that this was one such case. The Head of Defence Office provides no reason for it to reconsider its decision.

⁶ *Id.*, paras 3, 16.

⁷ *Id.*, para. 17.

⁸ F0008, Prosecution Response to Urgent Request by the Head of Defence Office, Confidential, 30 August 2017.

⁹ *Id.*, paras 1-5.

¹⁰ F0009, *Demande du Chef du Bureau de la Défense de l’autoriser à répliquer à la Réponse du Procureur sur sa Requête urgente en levée de la confidentialité d’informations*, Confidential, 31 August 2017.

¹¹ F0010, Prosecution Response to “*Demande du Chef du Bureau de la Défense de l’autoriser à répliquer à la Réponse du Procureur sur la Requête urgente en levée de la confidentialité d’informations*”, Confidential, 4 September 2017.

¹² Scheduling Order, para. 4.

7. The Head of Defence Office also fails to substantiate his allegation of unfairness and prejudice to the *Ayyash et al.* Defence Counsel by preventing immediate disclosure of the existence of the Rule 176 *bis* proceedings to them. At paragraphs 7-11 of its Interlocutory Decision on the Applicable Law of 16 February 2011,¹³ this Chamber described the principles relevant to Rule 176 *bis* proceedings. In essence, the Rules deliberately confine Defence argument at the public session under Rule 176 *bis* (B) of the Rules to the Head of Defence Office and do not include any person named in the indictment that has not been confirmed by the Pre-Trial Judge. Although “connected” within the meaning of Article 1 of the Statute of the Tribunal, these proceedings are separate and distinct from the proceedings in the *Ayyash et al.* case. The Head of Defence Office has failed to show that absence of knowledge of the existence of the Rule 176 *bis* proceedings has any impact on the *Ayyash et al.* proceedings, including the consultative process on the relevant applicable law before the Trial Chamber seized of that case.¹⁴

8. As far as disclosure of information on the identity of the suspect(s) in Case STL-17-07 is concerned, the Appeals Chamber recalls that, under Rule 176 *bis* of the Rules, it is “invited to make legal findings *in abstracto* (in the abstract), without any reference to facts”.¹⁵ In compliance with Rule 96 (B) of the Rules, which prescribes that “a request for confirmation of an indictment that is filed confidentially by the Prosecutor, shall remain confidential for as long as is necessary for the effective conduct of the investigation and/or the protection of any person”, the Appeals Chamber has not been provided with the indictment submitted to the Pre-Trial Judge in Case STL-17-07. Pursuant to Rule 73 of the Rules, the indictment, including the name(s) of the suspect(s), will be made public only upon confirmation by the Pre-Trial Judge. There is no right under the Rules for suspects, let alone for the Head of Defence Office or Defence counsel representing accused prosecuted on different charges in separate proceedings, to be informed of the indictment, or the existence of an indictment, prior to its confirmation. The nature of Case STL-17-07 as a “connected case” does not justify departing from the Rules in this regard.

¹³ STL, STL-11-01/I/AC/R176bis, F0010, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (“Interlocutory Decision on the Applicable Law”), paras 7-11.

¹⁴ See Request, paras 8-9.

¹⁵ Interlocutory Decision on the Applicable Law, para. 8.

9. The Head of Defence Office further fails to substantiate his contention that he needs to know whether Case STL-17-07 concerns any of the accused in the *Ayyash et al.* case to be able to make legal submissions *in abstracto* on the crime of criminal association and the criteria for reviewing the indictment without running the risk of prejudicing the interests of those accused. The Request falls short of demonstrating that the Head of Defence Office is in the “untenable ethical situation” he alleges. His situation is dictated by the Rules.

10. Finally, as far as the rights of any potential accused are concerned, the Appeals Chamber recalls that any decision under Rule 176 *bis* (A) of the Rules is made “without prejudging the rights of any accused” and that, pursuant to paragraph (C) of that Rule, any accused has the right to request reconsideration of the interlocutory decision under paragraph (A). Safeguards therefore exist to remove any of the Head of Defence Office’s concerns pertaining to the rights of potential accused in Case STL-17-07.

11. Based on the foregoing, the Appeals Chamber dismisses the Request in its entirety.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously,

DISMISSES the Head of Defence Office’s request for leave to file a reply; and

DISMISSES the Request in its entirety.

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

Dated 5 September 2017

Leidschendam, the Netherlands



Judge Ivana Hrdličková
Presiding

