



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

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: 21 November 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ON REDACTIONS TO THE PROSECUTION INTERVIEW OF
MR WISSAM AL-HASSAN (WITNESS PRH680)**

Office of the Prosecutor:Mr Norman Farrell & Mr Alexander Hugh
Milne**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Youssef Khalil**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Geoffrey Roberts
Ms Sarah Bafadhel

INTRODUCTION AND BACKGROUND

1. On 20 October 2017, the Trial Chamber decided to admit into evidence the audio recordings and transcripts of the Prosecution's interview with the deceased Mr Wissam Al-Hassan (Witness PRH680), a former Lebanese Internal Security Forces (ISF) official and the head of security for the former Lebanese Prime Minister, Mr Rafik Hariri, at the time when Mr Hariri was killed in an attack in Beirut on 14 February 2005.¹ Mr Al-Hassan became the head of the ISF's Information Branch in early 2006 and was assigned to lead the investigation into Mr Hariri's death. On 19 October 2012, Mr Al-Hassan himself died in a car bombing in Beirut.²
2. The Prosecution interviewed Mr Al-Hassan on 16 and 17 June 2012, several months before his death. In early 2014, the Prosecution sought the Trial Chamber's authorisation to redact Mr Al-Hassan's interview before disclosing it to the Defence. The Trial Chamber examined the entire interview and partly granted the Prosecution's application authorising, under Rule 116 of the Special Tribunal's Rules of Procedure and Evidence, redactions to information that may prejudice the safety and security of three named Lebanese officials.³
3. The Prosecution then disclosed Mr Al-Hassan's redacted interview to the Defence⁴ and, in July 2017, disclosed a less redacted version.⁵ Another version, containing a mixture of further redactions and removals of redactions, was disclosed in October 2017.

¹ Twenty-one others were also killed in the attack and 226 were injured—see STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential) ('Amended consolidated indictment'), para. 4; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1492, Second Decision on Agreed Facts under Rule 122, 11 April 2014, disposition, recording these as facts that the Trial Chamber may accept as being proved at trial. See also STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3371, Decision Admitting into Evidence the Audio Recordings and Transcripts of the Prosecution Interview of Mr Wissam Al-Hassan (Witness PRH680) under Rule 158 and Three Related Documents under Rule 154, 20 October 2017 ('Decision of 20 October 2017'), para. 1.

² Decision of 20 October 2017, para. 2.

³ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1416, Decision on Prosecution Request for Protective Measures (Redaction of Four Documents) of 27 January 2014, 20 February 2014 ('Decision of 20 February 2014'), paras 8-10, disposition. The Prosecution submitted to the Trial Chamber the unredacted transcripts of Mr Al-Hassan's interview with proposed redactions in Annex E (confidential and *ex parte*) to F1346, Prosecution Request for Protective Measures, 27 January 2014 (confidential and *ex parte*). See also STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3348, Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan's Interview Transcripts, 3 October 2017 (confidential) ('Order of 3 October 2017'), para. 2.

⁴ See F3214, Prosecution Rule 158 Motion for Admission of Written Statement of Unavailable Person PRH680, 6 July 2017 (confidential) ('Prosecution Rule 158 application'), para. 6, fn. 7, referring to disclosure batch 1035;

4. In July 2017, the Prosecution eventually tendered the interview for admission into evidence, but with redactions going beyond those which the Trial Chamber had authorised under Rule 116 in 2014.⁶ Consequently, the Trial Chamber ordered the Prosecution to explain the basis for these additional redactions, to which the Prosecution responded that they were made under Rule 118.⁷ The Prosecution then also sought to replace the interview transcripts it had tendered with less redacted versions and to withdraw the last 12 pages of the 16 June 2012 interview transcript as irrelevant.⁸

5. Having decided to admit the interview into evidence, the issue for determination here is which version of Mr Al-Hassan's interview should be admitted and, accordingly, which parts of the interview will remain redacted.

RELEVANT RULES

6. Rule 116, entitled 'Application and Grounds for Non-Disclosure', specifies the grounds for non-disclosure of information that would ordinarily be subject to disclosure. The Prosecution may apply for non-disclosure if the disclosure of such information may prejudice ongoing or future investigations, may cause grave risk to the security of a witness or his family, or for any other reasons may be contrary to the public interest or the rights of third parties.

7. Rule 118 is entitled 'Information never Subject to Disclosure without Consent of Provider'. It applies where the Prosecution possesses information provided on a confidential basis and which affects the security interests of a State, international entity or an agent of either. The Prosecution cannot disclose that information or its origin without the consent of the information provider. If, however, the Prosecution believes that it contains exculpatory

STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1780, Decision Authorising the Prosecution to Amend its Witness and Exhibit Lists, 8 December 2014, para. 17.

⁵ See Prosecution Rule 158 application, para. 8, stating that the Prosecution disclosed to the Defence a less redacted version of Mr Al-Hassan's interview on 4 July 2017, and fn. 14, referring to disclosure batch 3336.

⁶ Decision of 20 October 2017, para. 91; Order of 3 October 2017, paras 1, 3.

⁷ Decision of 20 October 2017, para. 91; F3351, Prosecution Response to the "Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan's Interview Transcripts", 5 October 2017 (confidential with confidential and *ex parte* annex) ('Prosecution response'), para. 8 (the Trial Chamber notes the typographical error in the date on the title page of the Prosecution response—'2016' instead of '2017'); Order of 3 October 2017, para. 5.

⁸ F3364, Corrected Version of Further Prosecution Response to the "Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan's Interview Transcripts", 20 October 2017 (confidential with confidential and *ex parte* annex) ('Further Prosecution response'), paras 1-2, 5.

information, it must take reasonable steps to obtain the information provider's consent for disclosure. Without this consent, the Prosecution must notify the Pre-Trial Judge of the existence of the information, without divulging the information itself or any information concerning or indicating its origin. The Pre-Trial Judge must then take any appropriate action, including ordering counterbalancing measures.

SUBMISSIONS

Prosecution submissions

8. Following the Trial Chamber's authorisation of the Rule 116 redactions, the Prosecution carefully examined the interview and found that the Arabic transcript—in four instances—contained the name of an official which was not transcribed in the English version. Additional redactions were therefore required in the Arabic text to ensure consistency with the English redactions. The Prosecution therefore seeks redaction of those items, consistent with the Trial Chamber's previous authorisation under Rule 116.

9. The Prosecution also made slight new redactions to the English text at the request of the information provider, the Lebanese ISF, and some minor redactions it explained in a confidential and *ex parte* annex. Further, the last 12 pages of the 16 June 2012 interview transcript, at pages 168-179, deal with material extraneous to the *Ayyash* case. They are therefore irrelevant and are thus not relied upon. The Prosecution wants these pages withdrawn thereby making the interview shorter and more focused.⁹

10. In response to the Trial Chamber's order seeking the basis for the redactions exceeding those authorised under Rule 116, the Prosecution submits that Rule 118 applies to these further redactions. This claim is advanced on behalf of the ISF. Although, unusually, the Trial Chamber had seen the redacted material—as it was annexed to the Prosecution's original *ex parte* Rule 116 application—it has no authority to request evidence in support of a Rule 118 claim or to determine that evidence in this respect is lacking or insufficient.

11. The Trial Chamber cannot rule upon material in respect of which Rule 118 is claimed, as this falls within the Pre-Trial Judge's 'exclusive domain'. The Trial Chamber cannot

⁹ Further Prosecution response, paras 4-7; F3364, Corrected Annex, Further Explanation on Applied Redactions, 20 October 2017 (confidential and *ex parte*) ('Further explanation on redactions'), paras 4-8; Prosecution response, paras 4, 6.

intervene in Rule 118 matters and thus lacks authority to determine whether or not the Prosecution is correct in its Rule 118 claim.¹⁰

12. Further, the emergence of independent information underlying or relating to claims under Rule 118 does not determine whether the claim is valid or retains validity. The information provider, here the ISF, determines whether and to what extent the disclosure of information may adversely affect the security interests of the State, international agency or its agents. Rule 118 does not require the claiming party to justify or provide evidence of the risks involved in disclosure. In addition, disclosure of the justification for a claim under Rule 118 may well itself invoke a risk to those security interests. The maintenance of the redactions results in no prejudice to the interests of justice and is not antithetical to a fair trial.¹¹

13. The Prosecution could not provide a less redacted version of the audio recordings of the interview but will disclose the revised version as soon as practicable. Accordingly, the Prosecution seeks to amend its application to tender the audio recordings and transcripts of Mr Al-Hassan's interview into evidence by limiting the evidence sought into admission to the transcripts.¹²

Defence submissions

14. Counsel for the Accused, Mr Assad Hassan Sabra, joined by counsel for the Accused, Mr Salim Jamil Ayyash, Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi, welcome the removal of previous redactions, but strongly object to the additional redactions in the revised interview transcripts and express concern with regard to the nature of the implemented redactions.

15. The Prosecution is merely redacting information previously disclosed to the Trial Chamber and the Parties without providing any legal basis or explanation as to a change

¹⁰ Prosecution response, paras 8, 11-12, 20-22.

¹¹ Prosecution response, paras 17-19, 24.

¹² Further Prosecution response, paras 8-9. The transcripts of Mr Al-Hassan's interview of 16 June 2012 tendered with the Prosecution motion seeking their admission into evidence are ERN 60263705 (RED)-60263705 (RED) and ERN 60263705 (RED1)-60263705 (RED1), consisting of 179 pages each, and of 17 June 2012 are ERN 60263704 (RED)-60263704 (RED) and ERN 60263704 (RED1)-60263704 (RED1), consisting of 72 pages each. The less redacted versions submitted by the Prosecution on 18 October 2017 are ERN 60263705_TS_O_EN_AR_01(RED2) for the transcript of 16 June 2012, consisting of 167 pages, and ERN 60263704_TS_O_EN_AR_01(RED2) for the transcript of 17 June 2012, consisting of 72 pages.

in circumstances which would warrant the redactions. Any Rule 118 application in this regard would only serve to highlight the apparent misuse of this provision.

16. With respect to the material redacted under Rule 118, the Trial Chamber should not be prevented from drawing any ‘adverse inference in favour of’ the Accused, in accordance with its role in guaranteeing the fairness and integrity of the proceedings. Further, the Trial Chamber has already determined that the circumstances surrounding the admission of Mr Al-Hassan’s interview necessitate it considering the interview’s wider context.¹³

DISCUSSION AND DECISION

Redactions under Rule 116 in the Arabic text of the interview transcripts

17. The Prosecution seeks to add several redactions to the Arabic text of the interview transcripts,¹⁴ which it had not identified for redaction in its original Rule 116 application. They concern the names of the same Lebanese officials that the Trial Chamber authorised for redaction under Rule 116 and thus accord with that decision.¹⁵

18. The Trial Chamber explicitly authorised the Prosecution to redact ‘only those passages proposed in annexes E and G of the original motion necessary to protect the safety and security of three Lebanese officials’.¹⁶ Consequently, it will formally authorise the additional redactions in the Arabic text, as follows: in the transcript of 16 June 2012—page 62, line 17, page 63, line 21, page 67, line 25 and page 111, line 2; and in the transcript of 17 June 2012—page 6, lines 15-16 and page 38, lines 4, 7 and 18.

¹³ F3396, Defence for Hussein Hassan Oneissi Joinder to “Sabra Submissions on Corrected Version of Further Prosecution Response to the ‘Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan’s Interview Transcripts’”, 1 November 2017 (confidential), para. 2; F3395, Merhi Defence Joinder to the “Sabra Submissions on ‘Corrected Version of Further Prosecution Response to the ‘Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan’s Interview Transcripts’”, 1 November 2017 (confidential), para. 1; F3394, Ayyash Defence Joinder to Sabra Submissions in Relation to Redactions to Mr Wissam Al-Hassan’s Interview Transcripts, 1 November 2017 (confidential), paras 1-2; F3382, Sabra Submissions on “Corrected Version of Further Prosecution Response to the “Order to the Prosecution to Explain the Basis for Redactions to Mr Wissam Al-Hassan’s Interview Transcripts”, 25 October 2017 (confidential), paras 2-9.

¹⁴ Prosecution response, paras 4-5, seeking the following redactions: transcript of 16 June 2012, p. 62, line 17 (the Trial Chamber notes the typographical error in para. 5, referring to line 15 instead of line 17), p. 63, line 21 and p. 67, line 25; transcript of 17 June 2012, p. 6, lines 15-16; Further Prosecution response, paras 4 (b), 7 (d), seeking the following redactions: transcript of 16 June 2012, p. 111, line 2; transcript of 17 June 2012, p. 38, lines 4, 7, 18.

¹⁵ Decision of 20 February 2014, paras 8-10, disposition. *See also* Order of 3 October 2017, para. 3.

¹⁶ Decision of 20 February 2014, disposition.

Redactions under Rule 118 in the interview transcripts

19. The Trial Chamber has examined the latest redacted version of the transcripts tendered following the order of 3 October 2017 and is satisfied that the Prosecution has removed most of the claimed Rule 118 redactions.

20. The original transcripts total 251 pages in length but now only eight pages contain any Rule 118 redactions. These include both the redactions the Prosecution initially claimed under Rule 118 and maintained throughout the various versions, as well as new redactions claimed under Rule 118 in the latest version, disclosed in October 2017.

21. The Rule 118 redactions included in the original redacted versions of the transcripts, which the Prosecution maintains, are on: page 23, lines 13-14 (17 words in the English text), page 128, lines 19-20 (two words—that of a pseudonym), and pages 169-172 (which the Prosecution now seeks to withdraw as irrelevant) of the transcript of 16 June 2012; page 35, lines 12-13, 16-18, 20-22, 24-25, 28-29 (23 words in the English text, including three names), and page 39, line 6 (three words, including a name) of the transcript of 17 June 2012.

22. In addition, after disclosing the interview transcripts to the Trial Chamber and to the Defence the Prosecution added new Rule 118 redactions in the latest redacted version, disclosed in October 2017.¹⁷ In the 16 June 2012 transcript the new proposed redactions are on page 23, lines 15-21 (48 words in the English text) and page 128, lines 13-14 (five words in the English text—that of a pseudonym and a name). In the 17 June 2012 transcript these are the redactions on page 36, lines 3 and 10 (four words in the English text).¹⁸

23. Here, the Trial Chamber—having already examined the interview transcripts in their entirety in deciding the original *ex parte* Rule 116 application—finds itself in the highly unusual situation of having seen the information for which a Rule 118 claim is now made. The Defence, too, has seen some of the information.

24. On one view, logically this would deprive the material of any Rule 118 status that it may have had. However, on another view, the Trial Chamber has no power to determine whether the application of redactions under Rule 118 is correct.

¹⁷ Further explanation on redactions, para. 2.

¹⁸ Further explanation on redactions, paras 7-8; Further Prosecution response, para. 7 (c).

25. Rule 118 exists to protect the security interests of States, international entities and or their agents by shielding from disclosure information provided to the Prosecutor on a confidential basis. It does not envisage that information providers withdraw their consent, once disclosure has occurred—here to the Trial Chamber in its entirety and to the Defence in part. Nor does the Rule state that information providers may request the Prosecution to withdraw already disclosed information. The obvious intent behind this Rule is to conceal from the wider world that certain confidential information is in the Prosecution's possession. The Prosecution must *withhold* and thus *deny* access to this information. This provision does not permit the Prosecution to retrospectively make a Rule 118 claim after it has already disclosed the information. Doing so, on its face, would defeat the Rule's object and purpose.

26. However, as the Trial Chamber noted above, it cannot—even in the unusual circumstances described here—make any ruling concerning the Rule 118 claim. Moreover, even if it could, the Trial Chamber is admitting the interview for the purpose of corroborating other evidence connected to paragraph 49 of the amended consolidated indictment which pleads that the four Accused are 'supporters of Hezbollah, which is a political and military organisation in Lebanon', as was the former Accused, Mr Mustafa Amine Badreddine.¹⁹

27. The Trial Chamber has already held that nothing of real substance was redacted from the interview.²⁰ It is thus satisfied that redacting several names and some minor pieces of information, the subject of the Rule 118 claim, will cause no prejudice or injustice to the Accused. It will thus admit the interview into evidence with the claimed Rule 118 redactions, with the exception of six pages referred to below.

Withdrawal of 12 pages of the interview transcript of 16 June 2012

28. The Prosecution now tenders the transcript of 16 June 2012 without the last 12 pages (pages 168-179) which it seeks to withdraw. Pages 168-173 contain irrelevant information concerning the investigation of another case and thus do not impact the Trial Chamber's understanding of Mr Al-Hassan's evidence and or credibility. Therefore, pages 168-173 will not be admitted into evidence.

¹⁹ Decision of 20 October 2017, para. 55.

²⁰ Decision of 20 October 2017, paras 93-94, noting that the redactions could not affect in any material way Defence submissions on the admission of the evidence, and that nothing had been redacted that was exculpatory under Rule 113, or necessary for Defence preparations for trial under Rule 110 (A). *See also* para. 56, noting that some parts of the interview are not relevant to paragraph 49 of the amended consolidated indictment.

29. Defence counsel, however, have seen some portions of this newly redacted material, and most particularly pages 174-179. These pages are both relevant and probative. Page 178 contains Mr Al-Hassan's acknowledgement that he provided his account of his own free will. The Trial Chamber has previously held that this acknowledgement, together with the witness acknowledgement dated 17 June 2012 provide some indicia of reliability with respect to the interview and are thus relevant and probative of Mr Al-Hassan's evidence.²¹ The Prosecution has not asked the Trial Chamber to reconsider under Rule 140 its findings regarding the relevance of these pages and the Trial Chamber has no reason to do so. Pages 174-179 will therefore be received into evidence.

30. The Trial Chamber accordingly grants the Prosecution's application to withdraw pages 168-173 of the transcript of 16 June 2012, but will admit pages 174-179 of the same transcript into evidence.

Admitting the audio recordings into evidence

31. The Trial Chamber decided to admit both the audio recordings and the transcripts into evidence. The Prosecution must therefore tender the appropriately redacted audio recordings into evidence.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

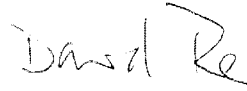
AUTHORISES, under Rule 116, the additional redactions to the Arabic text of Mr Wissam Al-Hassan (Witness PRH680)'s interview transcripts of 16 and 17 June 2012, noted at paragraph 18 of this decision; and

DECIDES to admit Mr Al-Hassan's interview into evidence in its latest version, with pages 174-179 of the transcript of the interview of 16 June 2012, which must be restored to the transcript, and the audio recordings, as redacted in accordance with this decision.

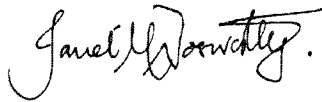
²¹ Decision of 20 October 2017, para. 60 and fn. 77.

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

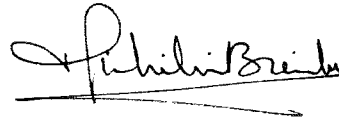
Leidschendam,
The Netherlands
21 November 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

