

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: 30 May 2014

Original language: English

Classification: Public with Confidential and Ex Parte Annex

THE PROSECUTOR

v.

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

SECOND DECISION ON BADREDDINE DEFENCE MOTION FOR ORDER TO LEBANON TO COOPERATE WITH THE SPECIAL TRIBUNAL AND ORDERS TO LEBANON

Office of the Prosecutor:

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

Counsel for Mr. Salim Jamil Ayyash:

Mr. Eugene O'Sullivan, Mr. Emile Aoun
& Mr. Thomas Hannis

Victims' Legal Representatives:

Mr. Peter Haynes, Mr. Mohammad F. Mattar
& Ms. Nada Abdelsater-Abusamra

Counsel for Mr. Mustafa Amine Badreddine:

Mr. Antoine Korkmaz, Mr. John Jones
& Mr. Iain Edwards

Defence Office:

Mr. François Roux

Counsel for Mr. Hassan Habib Merhi:

Mr. Mohamed Aouini, Ms. Dorothée Le
Fraper du Hellen & Mr. Jad Khalil

**The Government of the
Lebanese Republic**

Counsel for Mr. Hussein Hassan Oneissi:

Mr. Vincent Courcelle-Labrousse, Mr. Yasser
Hassan & Mr. Philippe Larochele

Counsel for Mr. Assad Hassan Sabra:

Mr. David Young, Mr. Guénaél Mettraux
& Mr. Geoffrey Roberts



INTRODUCTION AND BACKGROUND

1. On 24 May 2013, counsel for Mr. Mustafa Amine Badreddine sent a request for assistance to the Director of Litigation of the Lebanese Ministry of Justice—via the Special Tribunal’s Defence Office—seeking specifically identified telephonic and communications data related to telephone numbers allegedly connected with the circumstances leading to the death of the former Lebanese Prime Minister, Mr. Rafik Hariri.¹ The request for assistance sought from ALFA and MTC, two Lebanese telecommunications companies, cell records of specific mobile telephone calls showing the end cell. The end cell is the last cell through which a mobile telephone call is conveyed before its termination. The request, in a footnote, also sought the date of deactivation of four telephone numbers where that date was unknown. Counsel argued that the information is material and essential to properly investigate and prepare their case, and is in the possession and custody of the Lebanese authorities and is thus accessible to the Government of Lebanon.

2. On 24 October 2013, having not received a satisfactory response to the request for information, counsel for Mr. Badreddine filed a motion seeking an order compelling Lebanon to cooperate with the Special Tribunal,² in relation to four specified categories of information, namely, pre-paid and post-paid ALFA numbers, and pre-paid and post-paid MTC numbers. This included the deactivation dates of the four pre-paid mobile telephone numbers, one ALFA, and three MTC.³

3. At the Trial Chamber’s direction, the Special Tribunal’s Registrar wrote to the Lebanese authorities, seeking the requested cooperation by 6 December 2013.⁴ On 27 November 2013, the First President of the Court of Cassation of Lebanon responded by writing to the Registrar, but through the President of the Special Tribunal, informing him that although he does not represent the Lebanese Government, he had forwarded all previous requests for assistance sent to him by the Pre-Trial Judge to the relevant authorities, including the Public Prosecutor of the Court of Cassation, for execution.⁵

¹ STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/PT/PTJ, Requête de la Défense de M. Badreddine aux fins d’obtenir la coopération du Liban, Annex A, 24 October 2013. A public redacted version was also filed. This motion was subsequently transferred to the Trial Chamber with the transmission of the case file on 25 October 2013.

² Requête de la Défense de M. Badreddine aux fins d’obtenir la coopération du Liban, 24 October 2013.

³ Requête de la Défense de M. Badreddine aux fins d’obtenir la coopération du Liban, Annex A, 24 October 2013, footnote to para 6.

⁴ The procedural background is detailed in STL-11-01/PT/TC, Decision on Motion Filed by Counsel for Mr. Badreddine and Order to Cooperate with the Special Tribunal, 13 January 2014, paras 2-7.

⁵ Letter from the First President of the Court of Cassation: Reply to the letter dated 19 November 2013, 27 November 2013.

4. As the request for assistance had still not been answered, the Trial Chamber, on 13 January 2014, issued an order directing Lebanon to cooperate with the Special Tribunal in relation to three of the four specified categories. The fourth relates to two MTC post-paid numbers. In its decision the Trial Chamber specified that it did not have any information as to whether the Lebanese authorities were able or unable to comply with the request for assistance.⁶ Two issues, however, remain from the Defence motion of 24 October 2013, namely the deactivation dates of four specified mobile telephones, and additionally, the two post-paid MTC numbers in the fourth category. On 21 May 2014, counsel for Mr. Badreddine filed a motion seeking supplementary orders directing Lebanon to cooperate with the Special Tribunal by providing this information.⁷

ANALYSIS

5. In decisions issued on 16 December 2013 and 13 January 2014 the Trial Chamber set out the legal principles applicable to Lebanon's cooperation with the Special Tribunal.⁸

(i) Deactivation dates of four ALFA and MTC mobile numbers

6. In its order of 13 January 2014, the Trial Chamber inadvertently omitted to include the dates of deactivation of the four mobile numbers (one ALFA pre-paid number, and three MTC pre-paid numbers), referred to in the footnote to the request for assistance. Four months later, on 15 May 2014, the Defence brought this omission to the Trial Chamber's attention.⁹

7. The information regarding the deactivation dates of the four mobile telephone numbers sought in the request for assistance of 24 May 2013, was not the subject of the Trial Chamber's order and therefore remains outstanding. For the same reasons as those in the decision of 13 January 2014, the Trial Chamber is satisfied that the legal requirements for an order for cooperation have been met in relation to this information and an order will be made.¹⁰ The subject matter is the same as that in the order.

⁶ Decision of 13 January 2014, para. 6.

⁷ TSL, *Procureur v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, STL-11-01/T/TC, Requête de la Défense de M. Badreddine aux fins de délivrance d'une ordonnance complémentaire à celle du 13 janvier 2014, 21 May 2014, filed confidentially and *ex parte* the Prosecution and Legal Representatives for Victims. A publicly redacted version was also filed on 21 May 2014.

⁸ STL, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, STL-11-01/PT/TC, Orders Relating to Five Defence Motions for Orders to Lebanon on State Cooperation, 16 December 2013, paras 6-17; Decision of 13 January 2014, paras 10-14.

⁹ Email to Trial Chamber's legal officers.

¹⁰ Decision of 13 January 2014, paras 14-16.

(ii) *The fourth category of records – two MTC post-paid numbers*

8. In relation to the fourth category—the two MTC post-paid numbers—in its decision of 13 January 2014 the Trial Chamber declined to make the order sought, holding that it was,¹¹

not satisfied that it can make the order sought in respect of the fourth category of information listed (in items 22 and 23, which are both telephone numbers for MTC Post-Paid phones). Defence counsel are seeking an order for records for periods far exceeding the time period in the indictment and the conspiracy alleged; and Defence counsel have not demonstrated how this information is relevantly required.

9. Over four months later, on 21 May 2014, counsel for Mr. Badreddine filed a motion requesting an order to supplement the order of 13 January 2014 in regard to the end cell records of these two numbers.¹² No reason was provided for the delay in filing this motion. The Prosecution informed the Trial Chamber that it would not respond to the motion.¹³ Following a request from the Trial Chamber for further submissions, counsel for Mr. Badreddine, on 23 May 2014, filed a supplementary submission with two confidential annexes filed *ex parte* the Prosecution and the Legal Representatives for the Victims.¹⁴

10. The supplementary submissions explain that the information sought relates to mobile telephones ‘attributed’ to Mr. Badreddine and connecting him with mobile telephones allegedly used in the conspiracy to assassinate Mr. Hariri. The Prosecution case against Mr. Badreddine alleges that he used two mobile telephone numbers for considerable periods, commencing some years before the period specified in the consolidated indictment. This is described as ‘attribution’ of telephone usage. The Defence wants to obtain particular information showing the end cell location of the mobile telephones using those numbers, at the time calls were made, from their date of activation.

11. Following the Trial Chamber’s order of 13 January 2014 the Lebanese Government issued a directive to implement the order. As a result of this, touch—the telecommunications company owned by the Zain Group, that was in 2004 called ‘touch mtc’—wrote to the Special Tribunal’s Defence

¹¹ Decision of 13 January 2014, para. 18.

¹² TSL, *Procureur v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, STL-11-01/T/TC, Requête de la Défense de M. Badreddine aux fins de délivrance d’une ordonnance complémentaire à celle du 13 janvier 2014, confidentiel et *ex parte*, 21 May 2014. A public redacted version was filed the same day.

¹³ Email to Trial Chamber’s legal officers from the Prosecution on 22 May 2014.

¹⁴ Observations de la Défense de M. Badreddine supplémentaires a sa Requete du 21 mai 2014, 23 May 2014.

Office. In a letter dated 27 February 2014, touch explained that it did not have end cell records for mobile telephones before November 2011.¹⁵

12. Defence counsel, in their supplementary submissions argued that this letter was unclear and that communication between their experts and personnel from touch was required to clarify whether the end cell data is in fact extractable. They also pointed out that the other Lebanese telecommunications company, ALFA, had been able to extract the end cell data before November 2011.

13. The Trial Chamber has received evidence—the letter from touch (Annex B of the Defence supplementary submissions)—stating that it does not have the records requested. Defence counsel, on the other hand, have not provided any evidence contradicting that information. Rather, they have put into issue an apparent disagreement over the interpretation of a letter, but only to the extent that they wish to explore it with the company themselves. The Trial Chamber is satisfied that touch's letter *prima facie* answers the Defence's request for assistance of 24 May 2013 insofar as it relates to the end cell records of MTC mobile telephones. Generically, that would include the two numbers they seek.

14. The Trial Chamber understands that counsel for Mr. Badreddine received the letter from touch sometime in March 2014—that is, several months before they filed this supplementary motion seeking an order against Lebanon. It appears, however, that Defence counsel have not attempted to contact touch in the intervening months, either directly or through the Special Tribunal's Defence Office, which under Article 13 (2) of the Statute of the Special Tribunal, may 'provide support and assistance to defence counsel, including, where appropriate, legal research, collection of evidence and advice'. Defence counsel should take this investigatory step before asking the Trial Chamber to issue an order to Lebanon in respect of records that the relevant telecommunications company says that it does not have.

15. The Trial Chamber agrees that the Defence should be able to investigate the alleged use of these mobile telephones during a period found to be material to their investigations, and—if the relevant information exists—the Defence should be provided with the information sought in that material period. However, based on the Lebanese Government's response to the order of 13 January 2014 and the letter from touch of 27 February 2014, the Trial Chamber cannot be satisfied that it should make an order to Lebanon to cooperate with the Special Tribunal in respect of this matter. The Trial

¹⁵ Observations de la Defense de M. Badreddine supplementaires a sa Requete du 21 mai 2014, 23 May 2014, Annex B.

Chamber will not make an order to cooperate in respect of information that may not exist, and especially where it has positive evidence that it may not.

16. Defence counsel have a professional duty to Mr. Badreddine, if they disagree with touch's response, to attempt to directly resolve this issue with the company before involving the Trial Chamber. In the absence of any evidence to the contrary, the Trial Chamber cannot determine, as Defence counsel seem to contend, that the end cell information is actually extractable. To resolve the issue, and indeed to ascertain if an issue actually exists, Defence counsel should have their experts communicate with their counterparts at touch. The Defence Office, if necessary, may facilitate this through any available means including a further request for assistance to Lebanon.

17. For these reasons the Trial Chamber is not prepared to make the order sought in relation to the end cell records for these two post-paid MTC numbers. This part of the motion is therefore dismissed. If communications between the Defence experts and touch reveal that the information is available and that the Lebanese authorities are not cooperating with the Special Tribunal, Defence counsel may of course seek the Trial Chamber's intervention in an order for cooperation.

DISPOSITION

FOR THESE REASONS,

THE TRIAL CHAMBER;

DISMISSES the motion in respect of the fourth category of information for two MTC post-paid mobile telephone numbers; and

Pursuant to Article 15 (1) of the Agreement between the United Nations and the Government of Lebanon annexed to United Nations Security Council Resolution 1757 (2007), and Rule 20 (A) of the Special Tribunal's Rules of Procedure and Evidence,

ORDERS

(a) the Government of the Lebanese Republic to cooperate with the Special Tribunal for Lebanon, within fourteen calendar days of notification, in the manner specified in the annexed order, by providing the information sought to counsel for Mustafa Amine Badreddine, through the Head of the Defence Office,

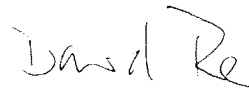
(b) that the order remain confidential and *ex parte* the Prosecution and the Legal Representatives of the Victims until otherwise ordered, and

INSTRUCTS

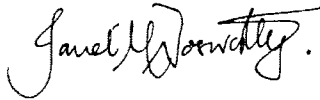
The Registrar to immediately notify this decision to the Government of the Lebanese Republic.

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

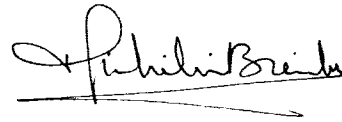
Leidschendam,
The Netherlands
30 May 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

