

**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: 17 November 2014

Original language: English

Classification: Public

DECISION DENYING THE DEFENCE REQUEST TO EXCLUDE CERTAIN PORTIONS OF THE EVIDENCE OF PRH038

(Extract from Official Public Transcript of Hearing on 17 November 2014, page 3, line 1 to page 15, line 9)

The Prosecution proposes to call Mr. Marwan Hamade to testify as a witness in this trial today, Monday, the 17th of November, 2014. Counsel for the five accused asked the Trial Chamber not to hear some of the evidence that the Prosecutor proposed to call.

Mr. Hamade's name appeared on the Prosecution's witness list filed on the 13th -- sorry, 15th of November, 2012, and has remained there since.

Mr. Hamade, it appears from the material provided to the Trial Chamber, made some 11 statements, including interviews, to the United Nations Independent Investigation Commission and to the Special Tribunal's Prosecution. The dates are 4 October 2014; 4 July 2005; 22 December 2005; 26 January 2006; 8 September 2006; 12 March 2008; 13th of March, 2008; 19th of March, 2008; two on the 21st of May, 2010; and again on the 3rd to 5th of October, 2011.

The Prosecution appears to be relying, for the purposes of Mr. Hamade's testimony, upon evidence contained in the statements of the 22nd of December, 2005; 13th of March,

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2008; 21st of May, 2010; 5th of October, 2011; and in an interview made on – over 12th to 13th of March, 2008.

The Prosecution disclosed these statements to counsel for the accused Mr. Ayyash, Badreddine, Oneissi, and Sabra on the 14th of November, 2012. The statements were disclosed to counsel for the fifth accused, Mr. Merhi, on the 3rd of January, 2014.

Mr. Hamade was himself the victim of an assassination attempt on 1st of October, 2004, and on the 5th of August, 2011, the Pre-Trial Judge in a decision entitled: Decision on the Prosecutor's connected case submission of 30th of June, 2011, held that the Special Tribunal has jurisdiction over this attack, that is, the attack on Mr. Hamade. We still await the confirmation of an indictment in that case.

The Prosecution in its pre-trial brief filed on the 15th of December, 2012, stated that it intended to lead evidence of the attack on Mr. Hamade as evidence in this trial, that's the trial against Mr. Ayyash and the other three accused. However, on the 18th of December, 2013, in a submission entitled: Prosecution submission pursuant to Rules 91(G) (ii) and (iii), the Prosecution informed the Trial Chamber that it was no longer going to lead that evidence in this trial.

Counsel for the Prosecution, in lengthy legal submissions on the 13th of November, outlined what were described as five themes of relevant evidence contained in Mr. Hamade's statements and interviews. He foreshadowed that a total of 13 Prosecution witnesses would give evidence in relation to these. The five themes are: Mr. Hariri's deteriorating relationship with Syria, as a consequence of his goal to strengthen the Lebanese autonomy; Syria's corresponding increasing resolve to exert control beyond mere influence over Lebanese internal affairs; growing concerns voiced by the international community regarding external pressures bearing upon the political affairs of Lebanon; the evolution of an effective opposition movement in September 2004, and thereafter in Lebanon, of which Mr. Hariri was first a silent and then a more public participant; and fifth, Mr. Hariri's status as an influential statesman in the Gulf Region and beyond.

This evidence, according to the Prosecution counsel, would provide useful background or context in respect of the political circumstances prevailing in Lebanon at the time of Mr. Hariri's assassination, and in understanding certain evidentiary aspects of the alleged co-conspirators' conduct in respect of the timing of the conspiracy and to the significance of particular acts committed to achieve the goals of the conspiracy charged. In support of its

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arguments, the Prosecution referred to and relied upon decisions of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, and the Special Court for Sierra Leone.

Mr. Hamade, who was a minister in the Lebanese government in 2004, is expected to testify about meetings that Mr. Hariri had with Syrian officials, including its President Mr. Bashar Al-Assad in December 2003 and then between August 2004 and February 2005. The most important meeting, according to the Prosecution case, occurred in Damascus on the 26th of August, 2004. It was followed by a number of relevant political events, including discussions about the extension of the mandate of the then-President Lahoud; the amendment of the Lebanese Constitution to permit this; the passing of United Nations Security Council Resolution 1559 on the 2nd of September, 2004; political debates about proposed reforms to the Lebanese electoral laws; the resignation of a number of ministers from Mr. Hariri's cabinet; and Mr. Hariri's own resignation as prime minister of Lebanon on the 20th of October, 2004.

The Prosecution connects this proposed evidence with the allegations in the consolidated indictment by explaining a possible confluence of events occurring during the initial preparations for the alleged conspiracy.

The Prosecution also connects the dates of the alleged surveillance of Mr. Hariri by some of the accused on 17 different dates between 20th of October, 2004, and 14th of February, 2005, including Mr. Hariri's trips to the Parliament in Beirut and to Beirut airport and to some of these other political events.

The evidence of contemporaneous political events and tensions in Lebanon, according to the Prosecution, is relevant background to what counsel described as "the political assassination of 14 February 2005." These events, in the Prosecution's view, could shed light on the progress of the conspiracy, including its preparations. The evidence could also provide the Trial Chamber with "an enhanced appreciation of the effect or reasons underlying the conduct itself. And it also adds to the political nature of the assassination itself." The Prosecution did not anticipate submitting at the end of the trial that the five accused had individual motives to assassinate Mr. Hariri.

The Prosecution also submitted that because the five accused have each been charged with committing terrorism-related offences, contrary to Lebanese law, Mr. Hamade's evidence could be used to establish a non-private motive for the commission of the alleged

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offences. Acts of terrorism, submitted the Prosecution, are "in most cases essentially a political act . . . terrorism is a criminal act, but is more than mere criminality." The evidence of Mr. Hamade and the other proposed political witnesses could provide this evidence.

Prosecution counsel also made it clear that the Prosecution was not intending to use evidence of the attempt on Mr. Hamade's own life as evidence against the five accused in this trial.

Prosecution counsel emphasized that the content of Mr. Hamade's proposed evidence was of evidence supporting material facts pleaded in the consolidated indictment and did not itself constitute material facts. Rather, they said, it was evidence possibly capable of supplying a general but not a personal motive, of any of the five accused, for the assassination of Mr. Hariri. The evidence will not demonstrate that they have committed any of the elements of the offences charged.

The Prosecution anticipates that Mr. Hamade will testify in giving his evidence in chief over about three or so days. His cross-examination by some Defence counsel would be anticipated in the week of 8 to 10 December, 2014. On 14th of October, 2014, Prosecution counsel notified Defence counsel that they would be calling Mr. Hamade to testify from today, Monday, 17th of November, and additionally of which other witnesses it anticipated calling this year.

Counsel for the four accused made submissions opposing the Trial Chamber hearing certain aspects of Mr. Hamade's evidence. None submitted that the Trial Chamber could not or should not receive evidence from Mr. Hamade relating to Mr. Hariri's movements and his schedule during the period of the conspiracy alleged in the consolidated indictment.

In this respect, counsel for Mr. Badreddine specifically submitted that they did not oppose the Trial Chamber hearing the foreshadowed evidence of Mr. Hamade insofar as it relates to evidence of Mr. Hariri's movements; his whereabouts in connection with the -- sorry, in relation to the connection with the alleged surveillance of Mr. Hariri by any of the five accused or other alleged co-conspirators, as alleged by the Prosecution. No other Defence counsel opposed the Trial Chamber hearing this aspect of Mr. Hamade's evidence nor made any submissions suggesting that they opposed Mr. Hamade testifying at all.

Defence counsel specifically opposed the Prosecution leading evidence of the content of the meetings between Mr. Hariri and Mr. Assad and Mr. Hariri and, for example, General Rustom Ghazaleh, who at the time was the Syrian chief of intelligence in Lebanon. Counsel

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for Mr. Oneissi argued that the evidence was not relevant or probative of anything pleaded in the consolidated indictment.

All Defence counsel supported the argument that the evidence was not relevant and had not been pleaded in the consolidated indictment, the pre-trial brief, nor referred to in the Prosecutor's two opening statements. The first of these was against the original four accused on the 16th of January, this year, and the second against Mr. Merhi on the 18th of June, 2014.

Counsel for Mr. Sabra described this omission in the Prosecution's conduct as a "very significant sea change in the way" that it had put its case.

Counsel for Mr. Badreddine submitted that the evidence of Mr. Hamade, outside of evidence of Mr. Hariri's movements and schedule, should also be -- should also be excluded as being irrelevant, there being no connection between the allegations against the five accused in the consolidated indictment and this evidence of the political background preceding the attack. The material was also speculative in their view. Moreover, it amounted to material facts that had not been pleaded in the consolidated indictment. This was prejudicial to the Defence case as Defence counsel had prepared to meet the case against the five accused on the basis of what was pleaded in the consolidated indictment and the pre-trial brief. If the Trial Chamber allows the evidence, the pre-trial brief and the consolidated indictment must therefore be amended.

Counsel for Mr. Merhi submitted that they needed more time to deal with the evidence of Mr. Hamade, as the case of Mr. Merhi had only been joined to the case of the other four accused nine months ago, on the 14th of February, 2014. They described the submissions of Prosecution counsel on Thursday, 13 November 2014 as a "third opening statement." They submitted that the evidence should be excluded under Rule 149(D) of the Special Tribunal's Rules of Procedure and Evidence. This rule is the general exclusionary rule which permits the Trial Chamber to exclude evidence on the basis that its probative value is substantially outweighed by the need to ensure a fair trial.

The Trial Chamber decided on 14th of November to allow the Prosecution to present this evidence. What follows are the specific reasons for that decision.

The Special Tribunal's Rules generally favour an inclusionary, rather than an exclusionary, approach to receiving evidence. Rule 149(C) provides that "a Chamber may admit any relevant evidence which it deems to have probative value." This is discretionary and does not mandate that the Trial Chamber should receive all such evidence. Indeed, given

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the vast quantity of available evidence, and for reasons of judicial economy and effective trial management, a Trial Chamber must be selective in what it receives into evidence.

The general exclusionary provision, Rule 149(D) , however, provides that:

"A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules."

No argument has been made that Mr. Hamade's evidence was gathered in violation of any of the accused's rights.

The issue for determination therefore is, first, whether the evidence is relevant and probative; and then, if so, whether it should nevertheless not be received into evidence because its probative value is substantially outweighed by the need to ensure a fair trial.

The evidence in the Trial Chamber's view is relevant and probative.

Evidence of the prevailing political situation in Lebanon in 2004 and early 2005 could provide background and give context to much of other evidence adduced by the Prosecution and even by Defence counsel.

Mr. Hamade, as a close political associate of Mr. Hariri and a Lebanese cabinet minister who was intimately involved in many of the events at the time, is ideally placed to provide some of this evidence. This includes the content of meetings between Mr. Hariri and Syrian officials; this could help to explain the wider circumstances leading to Mr. Hariri's assassination. The evidence in general could also be used to explain a non-private motive for the commission of any offence that the Trial Chamber could find proven.

Although the evidence is prima facie probative and relevant, the Trial Chamber acknowledges that some aspects of it could eventually turn out to be -- turn out not to be particularly relevant or probative. However, the Trial Chamber does not believe that it is now -- and emphasize "now" - in a position to parse the evidence by excluding at this stage - that's parse, p-a-r-s-e - evidence that could potentially assume greater relevance at a later point. This is especially so in circumstances when it must be viewed in its totality at the close of the case with all of the other evidence adduced by the Prosecution and the parties.

In proceedings where the parties gather and present their own evidence, such as those before the Special Tribunal, the significance of a piece of evidence, and particularly in the circumstances of a long and complex trial featuring hundreds of witnesses and thousands of documents, and especially one involving circumstantial evidence, may only become clear at a

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later point and when the evidence presented is assessed in its totality. The Trial Chamber cannot perform that evaluating role at this stage of the trial.

On the issue of whether relevant evidence should be excluded under Rule 149(D), the Defence arguments seem to be put on several overlapping bases. The first is that the evidence of the meetings and the political situation in Lebanon is a material fact that should have been pleaded in the consolidated indictment and pre-trial brief. This is of course somewhat contradictory of the argument that the evidence is irrelevant and should not be heard, so the Trial Chamber will treat it as an alternative argument; namely, that if it finds the evidence relevant, as indeed it has done, on this argument it should be treated as a non-pleaded material fact, which I will come to shortly.

The second issue is one of fairness which overlaps with the first and is of notice to the Defence of the Prosecution's intention to lead the evidence. This lack of notice, the Defence counsel argued, is unfair to the Defence. The third argument posed - one posed by counsel for Mr. Merhi - is that they need more time.

I turn to material facts. In relation to whether the proposed evidence contained in Mr. Hamade's statements amounts to material facts that should have been pleaded in the consolidated indictment or in the pre-trial brief, the Trial Chamber finds the following.

And in doing so refers to several decided international criminal law cases.

The ICTR Appeals Chamber case of Prosecutor versus Tharisse Muvunyi decided on 12 May 2005, the decision on Prosecution interlocutory appeal against Trial Chamber II decision of 23 February 2005, at paragraph 19 has defined the distinction between a charge and a material fact that must be pleaded in an indictment.

The ICTR Appeals Chamber held that a material fact is one of the "acts or omissions of the accused that give rise to the allegation of infringement of a legal prohibition." It confirmed this in another decision, Prosecutor against Theoneste Bagosora, decision on Aloys Ntabakuze's interlocutory appeal on questions of law raised by the 29 June 2006 Trial Chamber I decision on motion for exclusion of evidence, decided on 18 September 2006, at paragraph 29 of the decision.

Those are the guiding international law principles.

The Trial Chamber has reviewed the statements and interviews given by Mr. Hamade and considers their content to be evidence supporting the material facts pleaded in the consolidated indictment. Specifically, any evidence of Mr. Hariri's movements, his meetings,

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et cetera, relate to the alleged surveillance of Mr. Hariri between October 2014 [sic] and 14th of February, 2005, and in our view is clearly evidence supporting that pleaded material fact. The remainder of the proposed evidence, namely, that of the prevailing political situation in Lebanon, including Mr. Hariri's deteriorating relationship with the Syrian authorities provides background evidence that will make some of the evidence more explicable. It may also provide context to the events leading to his assassination.

The evidence set out in Mr. Hamade's statements is not an "act or omission of any of the five accused," and that's taken from the decisions of the ICTR Appeals Chamber, giving rise to an infringement of legal prohibition - here, the crimes of terrorism and murder, et cetera, as charged in the consolidated indictment. These facts do not constitute material facts that must be pleaded in the consolidated indictment.

On the issue of notice to counsel for the five accused, the Trial Chamber believes that Defence counsel have been on notice since the service of the documents to them, in the case of the original four accused in November 2012 and with counsel for Mr. Merhi since the 3rd of January, 2014, of the scope of Mr. Hamade's anticipated evidence. Defence counsel were notified on the 14th of October, this year, that Mr. Hamade was scheduled to testify today, 17th of November. They have had adequate notice, in the circumstances of his anticipated evidence, to prepare a defence at trial, including performing the necessary investigations and preparing their cross-examination.

We also note that the Defence questioning of Mr. Hamade will commence probably later in the week of 17th of November, that's this week, and continue in the week of 8th of December, thus providing some of them at least with eight weeks' notice of when they would be expected to cross-examine the witness. Counsel may of course seek an adjournment at any time if they consider it necessary to seek additional time. None so far has been sought.

The Trial Chamber will therefore hear the evidence as proposed by the Prosecutor. In evaluating the evidence at the appropriate time and in considering it in combination with all of the evidence before it, the Trial Chamber will then give it its appropriate weight.

It may be that this evidence is ultimately given no weight and is found to have little relevance or probative value. It may even be found to be exculpatory and possibly even used to acquit an accused person. However, it is far too early to make a determination to exclude this evidence and the Trial Chamber is not prepared at this stage to reject evidence that is prima facie relevant and probative.

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Therefore, to summarize, the Trial Chamber finds that the evidence is relevant and probative. It is satisfied the Defence is on notice of the scope of the proposed evidence and has had adequate time to prepare a defence. There is, therefore, no basis to exclude it under Rule 149(D) of the Rules.

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