

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 June 2015

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION TO ADMIT THE STATEMENTS OF
WITNESS PRH424**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Hugh 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

Counsel for Mr Hassan Habib Merhi:

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

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux
Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks to amend its exhibit list, filed under Rule 91 of the Special Tribunal's Rules of Procedure and Evidence, and to admit into evidence, under Rule 155, two witness statements by Witness PRH424, Mr Matthew Barrington.¹ Mr Barrington, a Prosecution analyst, approximates the times at which, on 14 February 2005, Al Jazeera television broadcast confirmation (i) that former Lebanese Prime Minister Mr Rafik Hariri had been killed in the explosion in Beirut, and (ii) that Al Jazeera had received a claim of responsibility for the explosion from a group identifying itself as *Al-Nasra wal-Jihad fee bilad Al-Sham*.² Counsel for the Accused, Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, responded to the motion.³ The Trial Chamber requested supplemental submissions from counsel for Mr Sabra, which they then filed confidentially and *ex parte*.⁴

SUBMISSIONS

2. Mr Barrington, in his first statement, calculates these times by working backwards through Al Jazeera's public broadcasts of 14 February 2005 from the known starting time of a meeting of the Lebanese Higher Council of Defence. The second statement merely corrects an ERN mentioned in the first statement.⁵

3. The Prosecution submits that the statements are relevant and probative, and do not go to the acts and conduct of the Accused as charged in the consolidated indictment. It intends to use these calculations during the testimony of Witness PRH020, Mr Ghassan Ben Jeddo. The Prosecution emphasises that the statements are derived entirely from materials previously disclosed to the Defence at a minimum one year and a half ago—namely, public broadcasts and minutes of a meeting of the Lebanese Higher Council of Defence from 14 February

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1990, Prosecution Motion to Admit the Statement of PRH424, 5 June 2015.

² Prosecution motion, para. 2.

³ F2013, Badreddine Defence Response to "Prosecution Motion to Admit the Statement of PRH424", 18 June 2015; F2020, Merhi Defence Response to "Prosecution Motion to Admit the Statement of PRH424", 22 June 2015; F2017, Oneissi Defence Response to the 'Prosecution Motion to Admit the Statement of PRH424' dated 5 June 2015, 19 June 2015; F2021, Sabra Defence Response to Prosecution Motion to Admit the Statement of PRH424, 22 June 2015.

⁴ Email from Trial Chamber's Senior Legal Officer to counsel for Mr Sabra, 29 June 2015; F2021, Sabra Defence Addendum to Response to Prosecution Motion to Admit the Statement of PRH424, confidential and *ex parte*, 30 June 2015.

⁵ Prosecution motion, paras 7-10. ERNs are evidence reference numbers used to catalogue and identify the parties' documents and other evidence.

2005.⁶ The statements contain the necessary indicia of reliability and comply with the relevant Practice Direction.⁷ Mr Barrington first performed these calculations in 2013 and recorded them in an investigator's note, which the Prosecution withheld from the Defence as internal work product under Rule 111.⁸

4. Counsel for Mr Badreddine, while taking no position on adding the statements to the Prosecution's exhibit list or on their admissibility, submitted that the investigator's notes that became Mr Barrington's first statement were wrongly considered work product under Rule 111 and that the Prosecution has not shown good cause for adding his statements only now, as they have had this information since 2013.⁹ Counsel for Mr Oneissi and Mr Merhi also oppose for lack of good cause the addition of the statements, submitting that this late addition to the Prosecution's exhibit list prejudices their right to adequate time to prepare to cross-examine Al Jazeera witnesses.¹⁰

5. Moreover, counsel for Mr Oneissi submit that the motion should be denied because Mr Barrington's calculations are unreliable. They point out an inconsistency between the time that Al Jazeera states the broadcast started and when Mr Barrington calculated that it started. They also argue that a witness should be called to testify to Al Jazeera's archiving and retrieval of previous broadcasts and that the Prosecution should establish that time-stamped versions of previous broadcasts do not exist. Counsel dispute the Witness's conclusion about the starting time of the meeting of the Lebanese Higher Council of Defence. Counsel conclude that, because the statements are unreliable and should have been disclosed earlier, adding to the Prosecution's exhibit list and admitting them into evidence would be antithetical to and would seriously damage the integrity of the proceedings, they must be excluded under Rule 162 (A).¹¹

⁶ Prosecution motion, paras 7-8. The Prosecution explains that counsel for Mr Salim Jamil Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra received the minutes of the Lebanese Higher Council on Defence in October 2012 and the public broadcasts in January 2013. Counsel for Mr Merhi received the materials in January 2014.

⁷ Prosecution motion, para. 4; STL-PD-2010-02, Practice Direction for Taking Depositions under Rules 123 and 157, and for Taking Witness Statements for Admission in Court under Rule, 15 January 2010.

⁸ Prosecution motion, para. 9. Rule 111 provides: '[r]eports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure or notification under the Rules'.

⁹ Badreddine response, paras 1-3.

¹⁰ Oneissi response, paras 8-10; Merhi response, paras 2-4.

¹¹ Oneissi response, paras 3-10. Rule 162 (A) provides: '[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings'.

6. Counsel for Mr Merhi submit that the chronology of events of 14 February 2005 goes to the acts and conduct of the Accused, as the Prosecution alleges Mr Merhi coordinated the claims of responsibility. Therefore, they submit, admission into evidence under Rule 155 is inappropriate.¹²

7. Counsel for Mr Sabra took no position on adding the two statements to the exhibit list or on admitting them into evidence, but they requested to cross-examine the witness on 'issues which are material and relevant to establishing several elements of the Defence's case and on-going defence investigations'.¹³ In supplementary submissions, counsel identified four specific issues on which they wished to cross-examine Mr Barrington.¹⁴

DISCUSSION

8. The Trial Chamber has previously held that it may, in the interests of justice, allow a party to amend its exhibit list, but that, in doing so, it must balance the Prosecution's interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for trial. The evidence must be *prima facie* relevant and probative, and the Trial Chamber may consider general factors that include: (i) whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage; (ii) the stage of the proceedings; and (iii) whether granting the amendment would result in undue delay.¹⁵ Procedural safeguards for admitting statements into evidence under Rule 155 include that a statement must meet the basic requirements for admission under Rule 149 (C) and, if going to the proof of the acts or conduct of the Accused, may not be admitted without cross-examination.¹⁶

A. The exhibit list may be amended

9. The Trial Chamber, having reviewed the documents, is satisfied that they are relevant and probative of the timing of the announcements on Al Jazeera on 14 February 2005. These statements, though similar to an investigator's note written in 2013, are new, and the Prosecution would now like to use portions of the first statement with Mr Ben Jeddo's live

¹² Merhi response, paras 5-6.

¹³ Sabra response, paras 6-8.

¹⁴ Sabra addendum, para. 4.

¹⁵ F1949, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH007, PRH115, PRH396 and PRH661, 14 May 2015, para. 14; F1781, Decision on Prosecution Motion to Admit into Evidence Geographic Documents, 8 December 2014, para. 4.

¹⁶ F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution, 6 May 2015, para.116.

testimony. While the Trial Chamber sympathises with the Defence that the investigator's note made in 2013 should not have been considered as falling under Rule 111 and that it should have been disclosed in a more timely fashion, these statements contain no new evidence. Rather, they draw conclusions from materials that the Defence have had for years. Adding these statements to the Prosecution's exhibit list will neither unduly burden the Defence nor delay the trial. The Trial Chamber is therefore convinced that good cause exists to allow the Prosecution to amend its exhibit list.

10. The Trial Chamber is also satisfied that the statements are sufficiently reliable to allow their addition to the Prosecution's exhibit list and for admission into evidence. Most of the submissions of counsel for Mr Oneissi go toward weight. Adding the statements to the exhibit list or admitting them into evidence does not prevent the Defence from presenting their own evidence as to why the conclusions are flawed or when, in their submission, the broadcasts aired. Counsel have not demonstrated that the statements are so lacking reliability as to prevent their addition to the witness list or admission into evidence. The Trial Chamber is satisfied that adding these two statements to the exhibit list is in the interests of justice.

B. Excluding this evidence under Rule 162 (A)

11. Since the Trial Chamber finds that allowing the Prosecution to amend its exhibit list will not unduly burden the Defence or delay the trial, the Trial Chamber therefore does not see how their addition to the exhibit list or admission into evidence is antithetical to or would seriously damage the integrity of the proceedings. To reiterate, the proposed evidence contained in the statement is merely a calculation based on materials in the possession of the Oneissi Defence since at least January 2013.¹⁷ Therefore, the Trial Chamber will not exclude this evidence under Rule 162 (A).

C. Admitting the statements under Rule 155

12. The Trial Chamber rejects counsel for Mr Oneissi's suggestion that the Prosecution should call a witness on the storage and retrieval of Al Jazeera's archival footage. This evidence would not assist the Trial Chamber. In its decision on admitting call sequence tables, the Trial Chamber requested contextual information on the provenance of the underlying

¹⁷ Prosecution motion, para. 7.

materials used to make the call sequence tables.¹⁸ Call sequence tables are a derivative form of demonstrative evidence, and, in the absence of the requested contextual information, the Trial Chamber could not assess their probative value. Mr Barrington's statements are not abstract or complicated. They are clearly based on public broadcasts and the minutes of the Lebanese Higher Council of Defence. The Trial Chamber is satisfied that the provenance of this material has been established.

13. The statements, contrary to the submissions of counsel for Mr Merhi, do not go to the acts and conduct of the Accused. The Trial Chamber is satisfied that Mr Barrington's statements are relevant and probative under Rule 149 (C), have sufficient indicia of reliability under both Rule 155 (B) and the Practice Direction, and are thus admissible. However, as counsel for Mr Sabra requested to cross-examine the witness and provided specific issues upon request of the Trial Chamber,¹⁹ the statements may be admitted under either Rule 155 (C) or Rule 156, and the Trial Chamber requires the Prosecution to make the witness available for cross-examination.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS the Prosecution leave to amend its exhibit list by adding the statements of Witness PRH424;

DECLARES admissible either under Rule 155 (C) or Rule 156 the statements of Witness PRH424 and orders the Prosecution to make this witness available for cross-examination;

DECIDES that it will, at a suitable stage in the proceedings, formally admit the statement; and

ORDERS that F2021, Sabra Defence Addendum to Response to Prosecution Motion to Admit the Statement of PRH424, be made public upon the completion of Mr Barrington's evidence.

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

¹⁸ F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution, 6 May 2015, para.115.

¹⁹ Sabra addendum, paras 1-4.

Leidschendam,
The Netherlands

30 June 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

