

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: 9 November 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 FOR THE ADMISSION UNDER
RULE 155 OF THE STATEMENTS OF WITNESSES PRH371 (HELENA
HABRAKEN) AND PRH698 (NICOLE BLANCH)**

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 Iain Edwards &
Ms Mylène Dimitri

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 Youssef
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks the admission into evidence, under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence, of two statements, by Witnesses PRH371 (Ms Helena Habraken) and PRH698 (Ms Nicole Blanch). The statements relate to the attribution of telephones to the Accused, Mr Mustafa Amine Badreddine and Mr Hussein Hassan Oneissi.¹ Counsel for Mr Badreddine and Mr Oneissi responded to the motion.² Replying to counsel for Mr Oneissi's submissions, the Prosecution acknowledged an inadvertent error in Ms Habraken's statement and proposed substituting a corrected statement.³

SUBMISSIONS

2. Ms Habraken is an analyst with the Special Tribunal's Office of the Prosecutor who has testified on producing call sequence tables.⁴ Her statement is relevant to attributing a telephone number to the Accused, Mr Oneissi. Witness PRH067 testified by video-conference link on 30 September 2015 and has provided Prosecution investigators with business records and a telephone number for his client, Mr Hussein Hassan Issa—who, as the Prosecution alleges, is the Accused, Mr Oneissi, using his former legal name. The Prosecution attributes this telephone number to Mr Oneissi. Ms Habraken analysed whether this telephone number activated cell towers in the vicinity of Witness 067's workplace. She found that forty telephone calls made in the vicinity of Witness 067's place of business took place on 37 days when Mr Oneissi had appointments with Witness 067.⁵

3. Ms Blanch is also an analyst with the Office of the Prosecutor. Her statement attributes a mobile telephone to a person the Prosecution alleges is a driver and bodyguard for Sami Issa—in the Prosecution's submission, an alias for the Accused, Mr Badreddine. The Prosecution submits that her statement is relevant to attributing two mobile telephones to the Accused, Mr Badreddine, and to the chronology of events leading to the assassination of

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2215, Prosecution Motion for the Admission of Witness Statements of PRH371 and PRH698, 24 September 2015.

² F2256, Badreddine Defence Response to Prosecution Motion for the Admission of Witness Statements of PRH371 and PRH698, 8 October 2015; F2254, Oneissi Defence Response to the "Prosecution Motion for the Admission of Witness Statements of PRH371 and PRH698" dated 24 September 2015, 8 October 2015. Counsel for Mr Badreddine filed their response confidentially, but they filed a public redacted version shortly thereafter. F2256, Public Redacted Version of Badreddine Defence Response to Prosecution Motion for the Admission of Witness Statements of PRH371 and PRH698 pursuant to Rule 155, 12 October 2015.

³ F2260, Prosecution Reply to Defence for Oneissi Response to Prosecution Motion for the Admission of Witness Statements of PRH371 and PRH698, 12 October 2015.

⁴ Transcript of 22 July 2015.

⁵ Prosecution motion, paras 2, 7-8.

former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005. Ms Blanch concluded this after examining evidence including call sequence tables⁶ and the evidence of Witness PRH416—who will testify. The Prosecution submits that the telephone Ms Blanch attributes to Mr Issa’s driver called two personal mobile telephones that it attributes to Mr Badreddine.⁷

4. The Prosecution submits that neither statement goes to the acts and conduct of the Accused as charged in the consolidated indictment, as they merely attribute mobile telephones to the Accused. Furthermore, both statements contain the necessary indicia of reliability and are compliant with the relevant Practice Direction.⁸ The statements can therefore be admitted into evidence without cross-examination. Ms Habraken’s statement is based on Witness 067’s evidence and a call sequence table, and Ms Blanch’s statement is based on two call sequence tables, and the evidence of Witness 416, who will testify. Moreover, as Witness PRH230 (Mr Andrew Donaldson) will testify about attributing the relevant telephones to Mr Oneissi and Mr Badreddine, the Defence may cross-examine him about these statements, as necessary.⁹

5. Though neither statement appears on the Prosecution’s exhibit list filed under Rule 91, the Prosecution submits that, as long as a witness appears on its witness list, adding every witness statement to its exhibit list is unnecessary.¹⁰

6. The Prosecution requests that both statements remain confidential as they contain information that may identify witnesses granted protective measures. If the Trial Chamber declares the statements admissible, it will read public summaries of the statements and prepare redacted versions of the statements for public display.¹¹

Defence submissions

7. Counsel for Mr Badreddine oppose the admission of both statements into evidence. They submit that the Prosecution must seek leave to rely on newly-obtained witness statements. Being on the Prosecution’s witness list is insufficient notice of the scope of the

⁶ The Prosecution submits that a call sequence table is a form of demonstrative evidence that presents relevant call data on a particular, or ‘target’, telephone number over a specified time range. *See* Transcript of 20 July 2015, p. 4.

⁷ Prosecution motion, paras 3, 9-10, 15.

⁸ STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010.

⁹ Prosecution motion, paras 11-15.

¹⁰ Prosecution motion, paras 16-19.

¹¹ Prosecution motion, para. 20.

witness's evidence, especially when the witness is a Prosecution investigator who could produce new statements on a broad variety of topics. Failure to seek leave defeats the purpose of the time limits, imposed to ensure the Defence has adequate notice and time to prepare. Merely disclosing new statements cannot substitute for seeking leave to add them to a Party's exhibit list. They submit that these new statements 'reflect a lack of diligence—as well as a lack of knowledge of its case in advance' on the Prosecution's part. They submit that the Prosecution did not show good cause to add Ms Blanch to its witness list. Therefore, the request in respect of both statements should be summarily dismissed.¹²

8. Substantially, counsel for Mr Badreddine argue that Witness 698's statement lacks probative value, as it is 'little more than a series of poorly substantiated submissions based on material which has not been admitted into evidence, approximations, and unfounded assumptions'.¹³ Furthermore, because she relies on call sequence tables which have not yet been admitted into evidence, the Trial Chamber cannot admit her statement either. They also argue that the statement is not relevant. Witness 698 attributes a mobile telephone to, in the Prosecution's submission, a driver and bodyguard for Sami Issa, but this telephone number does not appear in the Prosecution's 'Badreddine Attribution Report' nor in its 'Communications Chronology Report'. The Prosecution should therefore explain how this evidence fits into its case. For a telephone call allegedly made by a senior Hezbollah official who 'initiat[ed] a sequence of calls', counsel submits that this evidence is unrelated to any charge in the consolidated indictment and the telephone call is irrelevant to Witness 698's statement and should, therefore, be excluded for lack of relevance.

9. Counsel submit that any probative value of Ms Blanch's statement is substantially outweighed by the need to ensure a fair trial, so the Trial Chamber should exclude this statement under Rule 149 (D). This statement is unduly prejudicial because:

- (i) the late disclosure of this statement as a result of the Prosecution's lack of due diligence, (ii) the controversial nature of its subject matter, such that the applicability of Rule 155 is wholly inappropriate;¹⁴ (iii) the novelty of the allegations referred to therein; (iv) the lack of clear and specific explanation as to the relevance of these allegations.¹⁵

¹² Badreddine Defence response, paras 3-11.

¹³ Badreddine Defence response, para. 13.

¹⁴ Other than the submissions summarised above on lack of relevance, lack of probative value and prejudicial effect, counsel made no submissions on how the statement is controversial or Rule 155 should not apply.

¹⁵ Badreddine Defence response, para. 19.

10. In the alternative, if the Trial Chamber declares Witness 698's statement admissible, counsel for Mr Badreddine request to cross-examine her.¹⁶

11. Counsel for Mr Oneissi take no position on the admissibility of Ms Blanch's statement but request the Trial Chamber to require Ms Habraken to appear for cross-examination. They argue that her analysis relies on evidence 'neither proven at trial nor accepted by the Oneissi Defence'. They also point out an error in her statement as proof of the need to subject her evidence to cross-examination.¹⁷

Prosecution reply

12. In reply, the Prosecution acknowledged the inadvertent error in Ms Habraken's statement, as pointed out by counsel for Mr Oneissi and proposed to substitute a statement fixing the error.¹⁸

DISCUSSION

13. In earlier decisions, the Trial Chamber determined the procedural safeguards for admitting statements into evidence under Rule 155. These allow it to receive written testimony in lieu of live oral testimony in the courtroom. In particular, a statement must meet the basic requirements for admission into evidence under Rule 149 and, if going to proof of the acts or conduct of the Accused, may not be admitted without cross-examination.¹⁹ These principles are applicable here.

14. The Trial Chamber has held that, if a witness appears on a Party's witness list and the opposing Parties have notice of the scope of that witness's evidence, separately adding every statement by that witness to the Party's exhibit list is unnecessary.²⁰

15. The Trial Chamber considers that the Defence has had sufficient notice of the scope of Ms Habraken's and Ms Blanch's evidence. The Trial Chamber recently granted the

¹⁶ Badreddine Defence response, para. 20.

¹⁷ Oneissi Defence response, paras 3-7.

¹⁸ Prosecution reply, paras 2-5.

¹⁹ STL-11-01/PT/TC, F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, para. 13; F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, paras 7-14; STL-11-01/T/TC, F1785, Decision on the Prosecution Motion for Admission Under Rule 155 of Written Statements in Lieu of Oral Testimony Relating to Rafik Hariri's Movements and Political Events, 11 December 2014, para. 3.

²⁰ F2224, Corrected Version of 'Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087' of 29 September 2015, 5 October 2015, para. 18; F2282, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH575 and PRH703, 21 October 2015, paras 17-19.

Prosecution leave to amend its witness list to add Ms Blanch.²¹ In Annex A to the Prosecution's motion for the amendment, it references Witness 698's statement and explicitly states that Ms Blanch reviewed the SMS content of a telephone which the Prosecution attributes to a driver and bodyguard of Sami Issa.²² The Defence, therefore, was aware of her evidence and the Prosecution's intention to rely upon it.

16. Ms Habraken has been on the Prosecution's witness list since its initial submission under Rule 91 on 15 November 2012. In its description of her evidence, the summary says that Ms Habraken produced 'attribution maps'. While that description is not overly specific, her statement does, in fact, describe using mapping software to plot a location and, in combination with other sources of data including call sequence tables, attribute a mobile telephone to the Accused, Mr Oneissi. This appears to fall within the scope of her evidence as described in the Prosecution's witness list. The Trial Chamber therefore considers that the Defence had sufficient notice for Ms Habraken's statement to be admissible into evidence without requiring its separate addition to the Prosecution's exhibit list.

17. The Trial Chamber, having read both statements, considers them relevant and probative. Ms Habraken's statement assists to attribute a telephone number to the Accused, Mr Oneissi. And Ms Blanch's statement assists to attribute a telephone number to a driver and bodyguard for Sami Issa, which, in turn, assists in attributing personal mobile telephones to the Accused, Mr Badreddine—if the Prosecution, as it states that it will, produces sufficient evidence for the Trial Chamber to conclude that Sami Issa is an alias of Mr Badreddine. In attributing a telephone to Sami Issa's driver, the statement is also probative of the chronology of events leading to Mr Hariri's assassination.

18. Contrary to the submission of counsel for Mr Badreddine, the Trial Chamber does not see any prejudice to their case to merit the Trial Chamber exercising its discretion to exclude Ms Blanch's statement under Rule 149 (D). The Trial Chamber considers that the Defence had adequate notice of her evidence, that it is relevant and probative, and that it may be admitted under Rule 155 (C) or 156. The Trial Chamber, therefore, will not exclude this evidence.

²¹ F2263, Corrected Version of 'Decision on Prosecution Request to Amend its Witness and Exhibit Lists' Dated 13 October 2015, 19 October 2015, para. 29.

²² F2133, Prosecution Request to Amend its Witness and Exhibit Lists, 21 August 2015, Annex B, item 5.

19. The statements, however, reach their conclusions by relying on documents and testimony not yet in evidence, including call sequence tables. Therefore, while statements are, in principle, admissible, the Trial Chamber will not formally admit them into evidence until after the Prosecution has tendered—and the Trial Chamber admitted into evidence—the evidence relied upon by the witnesses. However, the statements may be provisionally marked for identification and publicly summarised.

20. The Trial Chamber considers justified counsel for Mr Badreddine’s and counsel for Mr Oneissi’s requests to cross-examine the witnesses, and it is appropriate under Rule 155 (A) (ii) (c). Their evidence goes to live issues between the Parties, and the Trial Chamber would be assisted by questions on the witnesses’ methodologies. The Trial Chamber, exercising its discretion, requires the Prosecution to call Ms Habraken and Ms Blanch and, under Rule 155 (C) or Rule 156, make them available for questioning by the Judges and cross-examination by the Defence.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

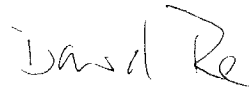
DECLARES admissible under Rule 155 (C) Ms Habraken’s statement as listed in Revised Annex A of the Prosecution’s reply and Ms Blanch’s statement as listed in Annex A to the motion and requires the Prosecution to make them available for questioning and cross-examination under Rule 156; and

DECIDES that it will, at a suitable stage in the proceedings, formally admit the statements into evidence.

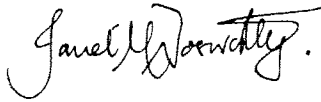
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,
The Netherlands

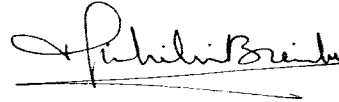
9 November 2015



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

