

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

BEFORE 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: 15 July 2016

Original language: English

Classification: Public

PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION TO DECLARE WITNESS PRH620 AS AN
EXPERT WITNESS AND TO RECEIVE HER REPORT INTO EVIDENCE**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron &
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 Dorothee Le Fraper du
Hellen & Mr Jad 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 Guénaél Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks to have Witness PRH620 declared as an expert witness and to admit her report dated 17 December 2012 into evidence.¹ Counsel for the Accused, Mr Salim Jamil Ayyash, Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi, and counsel acting for the then Accused Mr Mustafa Amine Badreddine,² opposed the motion.³ The Prosecution intends to call the witness for cross-examination.

WITNESS 620'S QUALIFICATIONS AND HER REPORT

2. Witness 620 considers that she is an expert in 'global jihadi movements, online jihadist infrastructure' and terrorism generally, including terrorist groups, their financing and front groups for terrorist organisations. She works in the field of counter-terrorism.

3. The witness has prepared a lengthy 176-page report on the credibility of the claim by a group, 'the Nasra and Jihad Group—Greater Syria', to have perpetrated the assassination of the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut, Lebanon, on 14 February 2005. The report analyses the circumstances surrounding the video they produced in detail, including its methodology, production quality, content and how it was delivered to Al-Jazeera in Beirut that same day. The report also examines the reactions to the attack, including denials of complicity, by the 'global jihadist community', including Al-Qaeda.

4. These indicia are compared with what are termed 'authentic jihadist media'. Case studies are made of claims of responsibility for suicide bombings in Iraq, Saudi Arabia, Pakistan, Jordan, the United Kingdom, Tunisia, Russia, Kenya, Turkey, Indonesia, Qatar and Morocco. These are then contrasted with the video claiming responsibility for the attack on

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2480, Prosecution Motion for the Admission of Witness PRH620 as an Expert Witness, 3 March 2016. The Prosecution also replied to the Defence responses: F2516, Prosecution Reply to Badreddine Consolidated Response to Prosecution Motions for the Admission of Witnesses PRH620 and PRH147 as Expert Witnesses, in Respect of Witness PRH620 Only, 23 March 2016.

² F0019-AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of the Proceedings", 11 July 2016; F2633, Order Terminating Proceedings Against Mustafa Amine Badreddine Without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016.

³ F2506, Ayyash Defence Response to "Prosecution Motion for the Admission of Witness PRH620 as an Expert Witness", 18 March 2016; F2501, Badreddine Consolidated Response to Prosecution Motion for the Admission of Witness PRH620 as an Expert Witness, 17 March 2016; F2495, Merhi Defence Response to "Prosecution Motion for the Admission of Witness PRH620 as an Expert Witness", 16 March 2016; F2508, Defence for Hussein Hassan Oneissi Response to "Prosecution Motion for the Admission of Witness PRH620 as an Expert Witness" of 3 March 2016, 18 March 2016. The Sabra Defence takes no position on the motion: F2490, Sabra Defence Response to "Prosecution Motion for the Admission of Witness PRH620 as an Expert Witness", 15 March 2016.

Mr Hariri on 14 February 2005. The report's conclusion is that the attack was not carried out by jihadist groups and that Mr Hariri was not a target of such groups at the time of his death.

5. The witness has previously testified as an expert in Canadian and American courts in terrorism related matters, has been retained as an expert witness by the Swiss Government, has participated in various international law enforcement conferences and has written a book on radical Islamist groups. She has authored newspaper opinion editorials and made numerous media appearances on these topics. The witness has an undergraduate degree, but appears to have no formal academic or professional qualifications in counter-terrorism; none are noted in the *curriculum vitae* appended to her report.

SUBMISSIONS

Prosecution submissions

6. The Prosecution submits that the witness's evidence is relevant because it relates to a false claim of responsibility for the attack—made by video and letter to Al-Jazeera in Beirut on 14 February 2005—which is of central relevance to the Prosecution's case. She has had much experience in analysing other false claims of responsibility thereby placing this one in its context. The Trial Chamber should consider the witness's professional experience in determining whether she is an expert. The Prosecution intends to submit the witness for cross-examination in court.

Defence submissions

7. Counsel for Mr Ayyash—in the absence of any positive evidence of her qualifications—challenge the witness's expertise and contend that the report is so lacking in methodology as to be entirely unreliable. The remaining Defence counsel, except those acting for Mr Sabra who take no position on the motion, seek to have the witness examined on a *voir dire* to determine whether she is qualified to give her opinions as an expert witness. According to counsel for Mr Badreddine, who was then an Accused, the Trial Chamber's practice has been, when expert qualifications have been challenged, to defer a decision on admissibility of reports until after a *voir dire*. It is therefore premature to decide on the qualifications or to admit the report into evidence.

8. Counsel for Mr Oneissi submit that the report can only be accepted into evidence if it is not challenged by Defence counsel. As it, and the witness's qualifications, are challenged, it

cannot be received into evidence. They challenge the legal basis of the Prosecution seeking to have the statement of an expert witness accepted into evidence under Rule 154.⁴

9. The Prosecution replied, pointing out that the Trial Chamber did not have a practice of holding a *voir dire* prior to ruling on expert qualifications. Rather this occurred only once out of 21 declarations of expertise to date.⁵

APPLICABLE LAW ON EXPERT TESTIMONY

10. Rule 161 of the Special Tribunal's Rules of Procedure and Evidence, entitled 'Testimony of Expert Witnesses', does not define what an 'expert' is.⁶ The Trial Chamber has nevertheless held that whether a witness may be qualified as an expert under Rule 161 rests on whether he or she is:⁷

'a person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute.'⁸ Accordingly, to determine whether a person is an expert, the Trial Chamber should consider past and current professional experience and training, publications and other relevant information, as described in a *curriculum vitae* or other pertinent documents accompanying the report.⁹

11. The issue is whether Witness 620 possesses such 'specialized knowledge, skill or training' that can assist the Trial Chamber to understand or determine a fact in issue, namely,

⁴ Rule 154 allows the Trial Chamber to admit documents or other record into evidence, subject to Rules 155, 156, 158 (accepting witness statements into evidence either with or without cross-examination, and receiving the statements of 'unavailable' persons) and the general admissibility requirements of Rules 149 (C) and (D) in that the evidence must be relevant and deemed to have probative value and its probative value is not substantially outweighed by the need to ensure a fair trial.

⁵ Since the filing of the response, the Trial Chamber has held one further *voir dire*, on 4 and 5 April 2016, to determine the qualifications of Mr Gary Platt to give expert opinion evidence. See F2549, Decision allowing Mr Gary Platt (Witness PRH147) to give expert opinion evidence, 13 April 2016.

⁶ Rule 161 provides only for disclosure timetables and admitting a statement without cross-examination.

⁷ F1610, Decision on Expert Witness PRH120, Professor Fouad Hussein Ayoub, and Expert Witness PRH508, Dr. Issam Mansour, 7 July 2014, para. 6; see also F2549, Decision allowing Mr Gary Platt (Witness PRH147) to give expert opinion evidence, 13 April 2016, para. 4.

⁸ Footnote 11 of the decision of 7 July 2014, referring to: ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Expert Report by Richard Phillips, 10 March 2009, para. 7; *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević*, IT-05-88-T, Second Decision regarding the evidence of General Rupert Smith, 11 October 2007, p. 3; *Prosecutor v. Galić*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Phillips, 3 July 2002, p. 2; *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4. See also, SCSL, *Prosecutor v. Brima, Kamura, and Kanu*, SCSL2004-16-T, Decision on Prosecution Request for Leave to call an additional witness (Zainab Hawa Bangura) pursuant to Rule 73 *bis* (E), and on Joint Defence Notice to Inform the Trial Chamber of its position via-à-vis the proposed expert witness (Mrs. Bangura) pursuant to Rule 94*bis*, 5 August 2005, para. 31.

⁹ Footnote 12 of the decision of 7 July 2014, referring to ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on admission of Expert Report of Ratko Skrbčić with Separate Opinion of Judge Mindua and dissenting opinion of Judge Nyambe, 22 March 2012, para. 14; *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution's Notice Re Defence Expert Witness Radomir Milašinović, Aleksandar Pavić and Zoran Stanković, 24 March 2010, para. 6; *Prosecutor v. Perišić*, IT-04-81-T, Decision on Expert Report of Richard Higgs, 26 January 2009, para. 6.

whether the claim of responsibility for the attack on Mr Hariri, as pleaded in the consolidated indictment, was false. Further, is it necessary to hold a *voir dire* in advance of the witness's testimony to decide this?

DISCUSSION

12. The Trial Chamber has examined the witness's detailed report. For the reasons stated by the Prosecution, it is relevant to the matters pleaded in the consolidated indictment connected with the allegation of the false claim of responsibility.¹⁰

13. Although it is not the report of an academic, its author evidently has some considerable 'specialized knowledge' in the area of analysing videoed jihadist claims of responsibility for attacks. The witness has carefully compared and contrasted various 'genuine' jihadist video claims of responsibility with that aired on Al-Jazeera on 14 February 2005, concluding that the latter was not genuine. Whether that is correct is ultimately the Trial Chamber's decision, however, the detail in the report and the professional experience detailed in the witness's *curriculum vitae* support her ability to reach this conclusion. The Trial Chamber has no expertise in this area. But by virtue of the witness's obvious experience and her analysis of numerous videos in which similar claims of responsibility have been made—and the conclusions drawn—the Trial Chamber is of the view that she has some 'specialized knowledge' in this area that can assist it in deciding the issue.

14. For these reasons, the report has some probative value.

15. The content and detail of the report, and the experience set out in the witness's *curriculum vitae*—and the fact that she will be cross-examined—make it unnecessary to hold a *voir dire* to decide this witness's ability to provide limited expert opinion evidence. In these circumstances, judicial economy dictates against holding a courtroom *voir dire*.

16. The Trial Chamber will therefore declare the witness as qualified under Rule 161 to provide limited expert opinion evidence. The Ayyash Defence's complaint that the report lacks methodology, and that the witness lacks qualifications, may be explored in cross-examination.

¹⁰ F1444, Consolidated indictment, 7 March 2014, paras 3, 3 (c), 3 (d), 3 (e), 5, 44, 44 (b), 44 (d), 44 (e) and 44 (g).

17. Finally, on the Oneissi Defence's submission that only an unchallenged report may be received into evidence,¹¹ no Rule regulates the admission of expert reports into evidence, unlike the situation with the statements of other witnesses. The Trial Chamber therefore deals with the admission of each expert report individually.

18. An unchallenged expert report may be received into evidence—subject to the normal criteria of admissibility in Rules 149 (C) and (D)—without requiring the attendance of a witness for cross-examination. But if the report is challenged, and the witness appears for cross-examination, the Trial Chamber requires the witness to authenticate their report before receiving it into evidence.

19. Witness 620's report may therefore be received into evidence when the witness testifies. The witness is also required to attend court for cross-examination.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES Witness 620 as qualified to provide expert opinion evidence in the limited area referred to in paragraphs 12 and 13; and

DECIDES that it will admit the report into evidence when Witness 620 testifies.

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

Leidschendam,
The Netherlands
15 July 2016

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



¹¹ Oneissi Defence response, paras 22-24.