

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:** 25 November 2016

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

**DECISION ON PROSECUTION MOTION TO ADMIT PASSPORT APPLICATIONS**

**Office of the Prosecutor:**  
Mr Norman Farrell & Mr Alexander Hugh  
Milne

**Counsel for Mr Salim Jamil Ayyash:**  
Mr Emile Aoun, Mr Thomas Hannis &  
Mr Chad Mair

**Head of Defence Office:**  
Mr François Roux

**Counsel for Mr Hassan Habib Merhi:**  
Mr Mohamed Aouini, Ms Dorothée Le Fraper  
du Hellen & Mr Jad Khalil

**Legal Representatives of  
Participating Victims:**  
Mr Peter Haynes, Mr Mohammad F. Mattar  
& Ms Nada Abdelsater-Abusamra

**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's case is that five interconnected groups of mobile telephones were involved in the killing of the former Lebanese Prime Minister, Mr Rafik Hariri, and others, in Beirut on 14 February 2005.<sup>1</sup> To assist the Trial Chamber in attributing various telephone numbers to the then five Accused, the Prosecution sought to tender 76 Lebanese passport applications under Rules 149 (C) and 154 of the Special Tribunal's Rules of Procedure and Evidence.<sup>2</sup> Counsel for the Accused, Mr Salim Jamil Ayyash and Mr Assad Hassan Sabra, responded to the motion, as did counsel for the former Accused, Mr Mustafa Amine Badreddine.<sup>3</sup>

## SUBMISSIONS

### **A. Prosecution submissions**

2. The Prosecution submits that the 76 Lebanese passport applications, which contain the name, address and telephone number of the given applicant, are generally relevant and probative because they assist in identifying various 'third party contacts' and attributing telephone numbers to them. These telephone numbers were allegedly in contact with numbers the Prosecution seeks to attribute to each Accused and Mr Badreddine and can be used as a basis for the geographic profile of a given phone. Contact between these 'third party' telephone numbers and the telephone numbers attributed to the Accused and Mr Badreddine are reflected in the call sequence tables listed in annex C to the Prosecution's motion. The Prosecution emphasises that the attribution of a telephone number is based on an analysis of

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2640, Amended consolidated indictment, 12 July 2016, para. 14.

<sup>2</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2499, Corrected Version of Prosecution Rule 154 Motion for the Admission of Passport Applications, 5 April 2016 (public with confidential annexes A, B and C), paras 1, 16. The original Prosecution motion sought the admission of 77 passport applications; however, pursuant to a corrigendum, this number was revised to 76. The Prosecution uses the term 'third party contact' to refer to an alleged user of a telephone number that was in contact with one or more telephone numbers which the Prosecution attributes to an Accused or Mr Badreddine.

<sup>3</sup> F2528, Ayyash Defence Response to "Prosecution Rule 154 Motion for the Admission of Passport Applications", 31 March 2016; F2526, Sabra Defence Response to "Prosecution Rule 154 Motion for the Admission of Passport Applications", 30 March 2016 (confidential; a public redacted version was filed on 1 April 2016); F2530, Badreddine Response to Prosecution Rule 154 Motion for the Admission of Passport Applications, 31 March 2016 (confidential). The Appeals Chamber has found that sufficient evidence has been presented by the Prosecution to convince it that the death of Mr Badreddine has been proven to the requisite standard. Accordingly, the Trial Chamber terminated, without prejudice, the proceedings against Mr Badreddine. See STL-11-01/T/AC/AR126.11, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, 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 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.

the totality of the evidence, with each individual record fitting into the Prosecution's case as one piece of evidence considered in the analysis of telephone attribution. The relevance and probative value of each individual application is detailed in annex A to the Prosecution's motion.<sup>4</sup>

3. As to reliability, the Prosecution submits that the proposed passport applications were collected by the Directorate of General Security within the Lebanese Ministry of the Interior and Municipalities. They were subsequently provided to the Special Tribunal's Office of the Prosecutor in response to requests for assistance. These requests for assistance, and a witness statement of an investigator involved in collecting the applications, are included in annex B to the Prosecution's motion. The indicia of reliability of each application are further described in annex A to the Prosecution's motion.<sup>5</sup>

4. Further, the Prosecution argues that the proposed passport applications constitute an 'official act' according to the Lebanese Code of Civil Procedure. Under Lebanese law, a *mokhtar* (local mayor) has the authority to deliver the certificate sought by the Passport Department in the Directorate of General Security within the Ministry of the Interior and Municipalities. Each passport application is filled by the applicant, and then signed and certified by the *mokhtar* of the region in which the applicant was born. The *mokhtar* affixes his or her stamp and signature on the application after hearing two witnesses who are called to confirm the applicant's identity. The Prosecution submits that the passport applications are signed and stamped by the *mokhtar*, and bear the signature of two witnesses attesting to the identity of the applicant. Relying on the Trial Chamber's decisions, the Prosecution submits that the Ministry of the Interior and Municipalities is the best placed authority to evaluate the authenticity of the passport applications.<sup>6</sup>

5. The admission of the evidence does not prejudice the right to a fair trial of the Accused as their probative value is not outweighed by prejudicial effects. The passport applications have been previously disclosed, and their relevance is known, as Mr Andrew Donaldson (Witness PRH230) relies upon the proposed applications in his attribution reports.<sup>7</sup> The Defence will

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<sup>4</sup> Prosecution motion, paras 6-8. The Prosecution clarifies that eight passport applications are only relevant in that they assist 'in the identification of geographical locations and do not assist in the identification of third party contacts'. Prosecution motion, fn. 4.

<sup>5</sup> Prosecution motion, para. 9.

<sup>6</sup> Prosecution motion, paras 10-11, referring to Articles 143 and 145 of the Lebanese Code of Civil Procedure.

<sup>7</sup> Specifically, the attribution reports at ERN D0480976-D0481042 (for Mr Oneissi), ERN D0483333-D0483835 (Mr Ayyash), ERN D0482455-D0483255 (for Mr Badreddine), ERN D0481216-D0481351 (for Mr Sabra) and ERN D0481043-D0481215 (for Mr Merhi).

have the opportunity to cross-examine this witness. Admitting the applications will be efficient and serve the interests of justice and a fair and expeditious trial.<sup>8</sup>

## **B. Defence submissions**

6. Counsel for Mr Sabra note a duplicative entry and a translation error in annex A of the Prosecution's motion which have since been addressed by the Prosecution in a corrigendum. Subject to its usual caveats, in particular its ability to challenge various Prosecution attribution witnesses, the Sabra Defence does not take a position on the Prosecution's request.<sup>9</sup> Counsel for Mr Ayyash do not oppose the admission of the passport applications, however they contest the attribution of specific names to certain telephone numbers, particularly to Mr Ayyash, and take issue with the inferences the Prosecution draws from the passport applications, namely, that the applicant was the user of the listed number in the application. They also reserve the right to make submissions on the matter of attribution and third party contacts at an appropriate time.<sup>10</sup>

7. Counsel for former Accused, Mr Badreddine, address only 17 passport applications that are directly relevant to Mr Badreddine and submit that the requisite indicia of reliability of four passport applications<sup>11</sup> have not been met, and that they do not have probative value. The precise reasons vary from application to application, but concern their general form, content and style, which is different from the remaining 13 passport applications; illegible or missing details (with respect to dates, nationality, issuance number, signature and name of administrative personnel); do not contain one or two witnesses who attest to the applicant's identity; the age of the document, which precede the assassination of Mr Hariri by 7 to 8 years; or that their probative value has not been explained by the Prosecution.<sup>12</sup>

## **DISCUSSION**

8. Admitting evidence 'from the bar table', under Rule 154, without requiring a witness to produce or to identify it, is a well-established practice before international courts and tribunals. Material tendered in this manner—like any other evidentiary material—must meet the basic requirements for the admission of evidence in Rule 149 (C) and (D), in that it must

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<sup>8</sup> Prosecution motion, para. 12.

<sup>9</sup> Sabra response, paras 2-8.

<sup>10</sup> Ayyash response, paras 2-4.

<sup>11</sup> Specifically, the passport applications at ERN 59000260-59000261; ERN 59000264-59000265; ERN 59000906-59000907; and ERN 59001553-59001554.

<sup>12</sup> Badreddine response, paras 7-10.

be relevant and probative, and its probative value must not be outweighed by its prejudicial effect. Only *prima facie*—rather than definite—reliability and probative value is required at this stage. Probative value, in this sense, is distinct from the weight that the Trial Chamber may ultimately give to a document or record. The tendering party must also demonstrate, with clarity and specificity, where and how each document or record fits into its case.<sup>13</sup>

9. The passport applications are all relevant, since the attribution of mobile telephones to the Accused and Mr Badreddine is a key part of the Prosecution’s case as alleged in the amended consolidated indictment.<sup>14</sup> The passport applications provide evidence that assists the Prosecution in this respect. Further, the Defence do not generally challenge the relevance of the applications.<sup>15</sup>

10. The Trial Chamber has previously held that the ‘Lebanese Ministry of the Interior, as the authority responsible for issuing national identifications cards, driving licenses, passports [...] provides the best evidence of these documents’ authenticity (or lack of), and hence the reliability of the contents of their responses to the Prosecutor’s requests for assistance’.<sup>16</sup> While this, strictly speaking, related to the admission of official communications from the Government of the Lebanese Republic attesting to the reliability of identification documents, its underlying rationale holds true as it concerns the passport applications.

11. As the accompanying statement of the Prosecution investigator attests, the passport applications were stored at the premises of the *Direction Générale de la Sûreté Générale*, located within the Lebanese Ministry of the Interior and Municipalities, and scanned on site. Alternatively, they were provided to the Prosecution with an accompanying letter from the Lebanese Ministry of the Interior and Municipalities attesting they were the documents that

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<sup>13</sup> See F1308, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, paras 6, 8; F1350, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, para. 7; 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. 111; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015 (‘Decision of 6 March 2015’), para. 33; F1781, Corrected Version of “Decision on Prosecution Motion to Admit into Evidence Geographic Documents” of 8 December 2014, 10 December 2014, para. 4.

<sup>14</sup> See Amended consolidated indictment, paras 14-47.

<sup>15</sup> To the extent that the Badreddine defence challenges the relevance (rather than the reliability) of the passport application at ERN 59001553-59001554 (see Badreddine response, para. 10 (iii)), the Trial Chamber notes that the Prosecution has explained (see Prosecution motion, annex A, line 33, ‘specific probative value’ column) that while they do not know the exact relationship between this applicant and Mr Badreddine, the telephone number given by this individual in the application matches a telephone number which the Prosecution alleges had been in contact with various telephone numbers which they seek to attribute to Mr Badreddine. This, in the Trial Chamber’s view, renders the application relevant and addressed its probative value.

<sup>16</sup> Decision of 6 March 2015, para. 44.

had been sought by the Prosecution in its corresponding requests for assistance.<sup>17</sup> In addition, the applications were themselves examined and approved by the mokhtar and are ‘official acts’ under Lebanese domestic law.

12. The mokhtar’s scrutiny of the applications, their sourcing by the Prosecution, and their transfer to the Prosecution through the Lebanese Ministry of the Interior and Municipalities are sufficient to render them *prima facie* reliable. While the Trial Chamber takes note of the matters raised by the Badreddine Defence, they do not reasonably call into question the *prima facie* reliability, and hence probative value, of the applications. In particular, missing details, such as signatures or stamps, do not of themselves deprive a document of authenticity.<sup>18</sup> At best, they may go to their weight, rather than admissibility. That is to be determined at a later stage of the proceedings.

### **CONFIDENTIALITY**

13. The Trial Chamber notes that these proceeding are public and transparent; confidentiality is the exception, not the rule. Consequently, filings are to be public whenever possible. Here, the Prosecution requests that annex A to its motion remain confidential, in light of the personal details of numerous third party individuals it contains and the amount of redactions that would be required would render it illegible.<sup>19</sup> The Defence has not objected. For the reasons submitted by the Prosecution, the Trial Chamber grants its confidentiality request. The Trial Chamber orders the Head of the Defence Office to file a public redacted version of the response filed by the then counsel for Mr Badreddine, or have it reclassified as public.

### **DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

**DECLARES** the 76 passport applications admissible under Rule 154;

**DECIDES** that it will, at a suitable stage in the proceedings, formally admit them into evidence;

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<sup>17</sup> See Prosecution motion, annex B, lines 1-5.

<sup>18</sup> See ICTY, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 20; ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, annex A, para. 5.

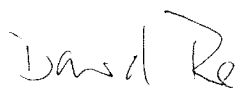
<sup>19</sup> Prosecution motion, paras 15-16.

**ORDERS** the Prosecution to file public redacted versions of annexes B and C to the motion, or have them reclassified as public; and

**ORDERS** the Head of the Defence Office to file a public redacted version of F2530, Badreddine Response to Prosecution Rule 154 Motion for the Admission of Passport Applications, 31 March 2016, or have it reclassified as public.

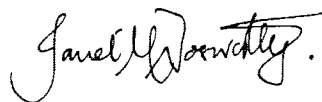
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,  
The Netherlands  
25 November 2016



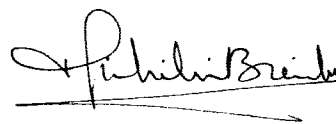
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Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

