

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

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: 2 June 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DISMISSING DEFENCE MOTION TO POSTPONE
MR ANDREW DONALDSON'S TESTIMONY**

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

INTRODUCTION

1. Defence counsel seek an order from the Trial Chamber to postpone the testimony of a Prosecution analyst, Mr Andrew Donaldson, until the Trial Chamber has determined a Defence motion seeking disclosure of material related to his testimony, and if successful, they have had sufficient time to review the material. The Trial Chamber has ordered the Prosecution to disclose some of the material sought, but does not believe, in the circumstances that such a postponement is justified.

2. Mr Donaldson (Witness PRH230), in five reports, provides summary evidence for the Prosecution about mobile telephones allegedly used in the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, on 14 February 2005, in Beirut. He has summarised the Prosecution's evidence and, additionally, provides some opinion evidence about whether the four Accused and the former Accused, Mr Mustafa Amine Badreddine, were using the mobiles referred to in the amended consolidated indictment.¹ To assist the Trial Chamber in understanding some complex technical evidence related to each Accused and Mr Badreddine, and Mr Donaldson's methodology, the Prosecution also prepared PowerPoint slide presentations.²

3. Mr Donaldson was scheduled to commence his testimony in early May 2017.³ On 21 March 2017, however, counsel for the Accused, Mr Hassan Habib Merhi, sought an order from the Trial Chamber seeking the extensive disclosure of documents—in eight specified categories—relating to Mr Donaldson's evidence.⁴

4. On 20 April 2017, the Trial Chamber ordered the Prosecution to provide it, on an *ex parte* basis, with documents in three of those categories, namely—(i) any documents containing questions put to or answers given by Mr Donaldson directly relating to the subject matter of his expected testimony; (ii) any draft statements prepared by Mr Donaldson directly relating to the subject matter of his expected testimony; and (iii) any draft reports prepared by Mr Donaldson directly relating to the subject matter of his expected testimony. A five-day

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016, for example paras 14-19.

² F3125, Decision Denying Joint Defence Motion to Prevent the Prosecution Using Demonstrative Evidence (PowerPoint Slides) during Mr Andrew Donaldson's Testimony, 5 May 2017.

³ F3096, Prosecution Witness Schedule for the Weeks Commencing 24 April & 1 May 2017, 21 April 2017.

⁴ F3045, Merhi Defence Motion for Disclosure of Documents relating to the Witness Andrew Donaldson (PRH230), 21 March 2017 (public with confidential annexes A-G).

time period was allowed for the Prosecution to comply.⁵ The order was to allow the Trial Chamber to examine any potentially disclosable material itself to determine if it should be disclosed.

5. Following oral submissions, the order was varied on 21 April 2017 to include only samples of these documents.⁶ On the same day, the Trial Chamber heard submissions from the Parties on the Prosecution's argument that it would be unable to comply with the order without delaying the disclosure of Mr Donaldson's PowerPoint presentations. As a result, the Trial Chamber suspended the compliance with the order of 20 April 2017 regarding documents under category (i), until further order.⁷

6. On 3 May 2017, counsel for Mr Merhi and Mr Assad Hassan Sabra, requested a stay of Mr Donaldson's evidence (i) until the determination of the Merhi Defence's disclosure request, and, (ii) if granted, until disclosure has been completed and the Defence had appropriate time to prepare for Mr Donaldson's testimony. They also requested the Trial Chamber to lift the partial suspension of its order of 20 April 2017, and to rule on the Merhi Defence disclosure motion of 21 March 2017.⁸ Counsel for the Accused, Mr Salim Jamil Ayyash, for a different reason, supported the request to stay the proceedings.⁹ The Prosecution responded to the Defence submissions in court, opposing the relief sought.¹⁰

7. On 8 May 2017, the Trial Chamber lifted the suspension of its order of 20 April 2017,¹¹ and the same day, for reasons explained in court, adjourned hearing Mr Donaldson's testimony following his *voir dire*.¹² The Trial Chamber also deferred recommencing Mr Donaldson's testimony until it had decided the issue of what, if anything, should be disclosed.¹³ This decision is therefore limited to whether Mr Donaldson's evidence should be postponed until the disclosure is completed and the Defence has had appropriate time to

⁵ F3094, Order on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230 (Andrew Donaldson), 20 April 2017.

⁶ Transcript of 21 April 2017, pp 6-7.

⁷ Decision Suspending a Deadline and Deferring a Decision until after Further Review with respect to order (ii) and (iii) in F3094; *see generally* transcript of 21 April 2017, pp 104-116.

⁸ F3117, Merhi and Sabra Defence Request to Postpone the Testimony of Witness Andrew Donaldson (PRH230), 3 May 2017 ('Joint Defence motion'). Counsel for Mr Merhi and Mr Sabra foreshadowed such submission in the hearing on 21 April 2017, *see* transcript at pp 108, 116-117.

⁹ Transcript of 4 May 2017, pp 92-93.

¹⁰ Transcript of 4 May 2017, pp 90-95.

¹¹ Email from Trial Chamber Legal Officer to Prosecution counsel on 8 May 2017.

¹² Transcript of 8 May 2017, pp 5-9, 19.

¹³ And, additionally, whether his opinion evidence on co-location should be excluded from his reports; *see*, transcript of status conference of 17 May 2017, pp 35-36.

familiarise itself with this material. On 2 June 2017, the Trial Chamber issued decisions allowing Mr Donaldson to give qualified opinion evidence and ordering the Prosecution to disclose his draft statements and reports to the Defence.¹⁴

SUBMISSIONS

Defence submissions

8. Counsel for Mr Merhi and Mr Sabra submit that Mr Donaldson's testimony cannot begin until the Trial Chamber has determined the Merhi Defence motion for disclosure, and the Defence is given adequate time to review the material to adjust their cross-examination strategy and make appropriate objections during Mr Donaldson's examination in chief.

9. Since February 2017, the Merhi Defence has contacted the Prosecution on three occasions requesting disclosure of the relevant material. The Trial Chamber has already held that the material is potentially disclosable.¹⁵ If the Trial Chamber determines that the requested documents fall under the Prosecution's disclosure obligations under Rule 110 (A) (ii) of the Special Tribunal's Rules of Procedure and Evidence,¹⁶ those would necessarily be disclosed in an untimely manner making it impossible for the Defence to prepare for the witness' testimony as guaranteed by Article 16 (4) (b) and (e) of the Statute of the Special Tribunal.¹⁷ The Defence, however, should not suffer the consequences of the Prosecution's failure to comply with its disclosure obligations.

10. Mr Donaldson, the Defence submit, is one of the most important witnesses for the Prosecution. Postponing his testimony is the only appropriate remedy to avoid prejudice to the Accused' fair trial rights.¹⁸ The duration of the stay could be determined once the Trial

¹⁴ F3171, Decision on Merhi Defence Request for Disclosure of Documents concerning Witness PRH230, 2 June 2017 ('Decision on disclosure'); F3172, Decision Allowing Prosecution Analyst Andrew Donaldson to Provide Opinion Evidence, 2 June 2017.

¹⁵ Referring to F3094, Order on Merhi Defence Request for Disclosure of Documents concerning Witness PRH230 (Andrew Donaldson), 20 April 2017.

¹⁶ Rule 110 (A) (ii) states that: Subject to the provisions of Rules 115, 116, 117 and 118, the Prosecution shall make available to the Defence in a language which the accused understands, within the time-limit prescribed by the Trial Chamber or by the Pre-Trial Judge, copies of: (a) the statements of all witnesses whom the Prosecutor intends to call to testify at trial; (b) all statements, depositions, or transcripts taken in accordance with Rules 93, 123, 125, 155, 156, 157 and 158; and (c) copies of the statements of additional prosecution witnesses.

¹⁷ Article 16 (4) of the Statute provides that 'In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees in full equality: [...] (b) To have adequate time and facilities for the preparation of his or her defence [...] (e) To examine, or have examined, the witness against him or her [...]'.
¹⁸ Referring to F3106, Decision Allowing the Prosecution to Add to its Exhibit List a Statement by Mr Andrew Donaldson (Witness PRH230), 28 April 2017, para. 23.

Chamber has decided how much material is subject to disclosure, considering also the limited size of the Defence teams to review it. The principle of equality of arms requires that the Defence is afforded the same treatment that the Prosecution had to disclose Mr Donaldson's PowerPoint presentations when the Trial Chamber suspended its order of 20 April 2017 regarding category (i) documents.

11. Referring to case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), counsel argue that disclosure violations adversely affect the Defence preparations and cause prejudice to the fair trial rights of the Accused. An ICTY Trial Chamber in *Karadžić* held that 'the cumulative effect of [a] stream of disclosure violations by the Prosecution is likely to have placed a strain on the resources of the Accused in the preparation of his defence.' To avoid prejudice, that Trial Chamber delayed the testimony of witnesses affected by the untimely disclosure.¹⁹

12. Deciding on the admissibility of a witness' statements, an ICTR Trial Chamber in *Bagosora* recognised that 'disclosure requirements [...] were essential fair trial mechanisms'.²⁰ Another ICTR Trial Chamber, in *Gatete*, considered several factors when determining the adequate length of the Defence's preparation, for example, the complexity of the case, the status and scale of the Prosecution's disclosure, and the staffing of the Defence team.²¹

13. Finally, counsel argue that the Trial Chamber, in a previous decision allowing the Prosecution to add to its exhibit list Mr Donaldson's statement of 13 October 2016 (related to Mr Merhi) foresaw that it would consider any reasonable and substantiated request for adjournment the Defence may wish to present regarding Mr Donaldson's testimony.²²

14. Counsel for Mr Ayyash supported the joint Defence motion, adding that Mr Donaldson relied on a number of documents that the Prosecution has not yet tendered into evidence.

¹⁹ ICTY, *The Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, para. 43. See also, ICTR, *The Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for Stay of Proceedings; Reconsideration and/or Certification of Decision Rendered on 29 October 2009; and Reconsideration and/or Certification of the Decision Rendered on 30 October 2009, 13 November 2009, para. 50.

²⁰ ICTR, *The Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003, para. 26.

²¹ ICTR, *The Prosecutor v. Gatete*, ICTR-2000-61-PT, Decision on Defence Motions for Disclosure pursuant to Rule 66 (A) (ii) and Commencement of Trial, 13 October 2009, para. 42.

²² Referring to F3106, Decision Allowing the Prosecution to add to its Exhibit List a Statement by Mr Andrew Donaldson (Witness PRH230), 28 April 2017, para. 23; Joint Defence motion, paras 1, 4, 12-32.

These pieces of evidence have not yet been examined by the Trial Chamber as to their admissibility.²³

Prosecution response

15. In oral submissions, the Prosecution responded that the only value, or use, to the Defence of these documents would be during cross-examination; so there was no reason to delay Mr Donaldson's examination in chief. This will take 12 to 14 court days and, considering the trial schedule, the Defence cross-examination would not start within a month.²⁴

DISCUSSION

16. Defence counsel are seeking a postponement of Mr Donaldson's testimony rather than a stay of the proceedings. The Trial Chamber has now ordered the Prosecution to disclose to the Defence documents in two categories, namely, Mr Donaldson's draft reports and his draft statements. The issue therefore is whether Mr Donaldson's evidence *must* be postponed to allow Defence counsel to review the disclosed material *before* he testifies. In other words, must Defence counsel have this material before Mr Donaldson commences his evidence in chief? The answer is in the negative.

17. The Trial Chamber agrees in principle with the ICTY and ICTR case law referred to above, but the issue of postponing testimony or granting other adjournments is a discretionary one to be decided on a case-by-case basis. The Trial Chamber has considered whether the essential preconditions of a fair trial are missing and, hence, whether postponing Mr Donaldson's testimony is justified. Those essential preconditions are not missing.

18. In its disclosure decision the Trial Chamber outlined its concerns about the unjustified and unexplained delay of counsel for Mr Merhi in filing their motion for the disclosure of materials related to a witness—whom they describe as having 'crucial importance' to the Prosecution case—so near to its closure.²⁵ Further, in a status conference on 17 May 2017, counsel for Mr Merhi were unable to articulate any reason for the late filing of the disclosure

²³ Transcript of 4 May 2017, pp 92-93.

²⁴ Transcript of 4 May 2017, pp 91-93.

²⁵ Decision on disclosure, paras 100-101.

motion, submitting that the matter only arose from 16 February 2017, and ‘everything has to be done in its proper time’.²⁶

19. This statement is quite correct, but the ‘proper time’ to have filed such a motion passed several years ago. In these circumstances, Defence counsel may not in good faith now claim that an untimely late disclosure will prejudice their preparations for trial. Moreover, they failed to explain, using their existing resources, what reasonable efforts would be necessary to expedite their trial preparations.

20. The ambit of Mr Donaldson’s evidence is well-known to Defence counsel, regardless of whether his reports and statements have gone through various iterations in their drafting. Mr Donaldson is neither a fact nor expert witness; rather he provides summary analytical evidence, to which he adds some opinion evidence. This is an important consideration in determining the extent of any prejudice caused by ‘late’ disclosure, albeit made on an order in response to a very late Defence application.

21. The Defence have long had versions of Mr Donaldson’s attribution reports, which were disclosed on different dates between 2013 and 2017.²⁷ Mr Donaldson is one of the last Prosecution witnesses in the case and almost all of the material he has analysed—witness statements, testimony and other documents—is already admitted into evidence, or is the subject of a motion awaiting decision. Defence counsel are therefore completely aware of the scope of the evidence he reviewed and have had the opportunity to review and or challenge it during the proceedings.²⁸ The only additional matter is Mr Donaldson’s potential opinion evidence on the attribution of mobile usage to the Accused and Mr Badreddine.

22. The Trial Chamber has reviewed a sample of the material it ordered disclosed and is satisfied that Defence counsel can review it during Mr Donaldson’s evidence in chief without

²⁶ Transcript of status conference of 17 May 2017, p. 21.

²⁷ Mr Donaldson’s four investigator’s notes related to Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra were disclosed to the Defence on 26 April 2013 and 12 September 2013. Mr Donaldson’s indictment report related to Mr Merhi was disclosed on 30 September 2013 and 31 October 2014. Updated versions of these reports, titled as ‘Evidence of Telephone Attribution’ were also disclosed subsequently. Versions 2 of attribution reports, related to Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra were disclosed to the Defence on 21 February 2014. Versions 2 of the reports relating to Mr Oneissi and Mr Sabra, were re-disclosed on 31 October 2014. Versions 3 of the attribution reports related to Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra were disclosed on 10 February, 20 June and 15 July 2016. Versions 4 of the attribution reports related to Mr Ayyash and Mr Badreddine were disclosed on 16 and 28 February 2017, respectively. Version 3 of the report related to Mr Merhi was disclosed on 14 April 2014, and version 4 of the same on 10 February, 20 June and 15 July 2016.

²⁸ Transcript of 4 May 2017, pp 94-95.

prejudicing their preparations for trial. Moreover, Prosecution counsel submitted that Mr Donaldson's reports went through many iterations, meaning that he retained only his final reports. Draft reports may exist in the form of an eclectic mix in various stages of progression. There are also only a few draft witness statements.²⁹ The size of the disclosable material, therefore, does not appear to be such as to impede the Defence preparations for Mr Donaldson's evidence. It also appears to be capable of immediate disclosure.

23. Additionally, the main value to Defence counsel in having this material is in their cross-examination of Mr Donaldson, rather during his examination in chief. The Trial Chamber is therefore not of the view that Defence counsel must have this material in order to make objections to his testimony in examination in chief, but notes that the draft reports and statements will most probably in any event be disclosed before Mr Donaldson's examination in chief commences on 6 June 2017.

24. Moreover, the Trial Chamber has ruled on the main foreshadowed objection to his evidence, namely whether Mr Donaldson may provide opinion evidence, finding that he can provide some opinion evidence as to colocation, but under specified conditions. Any further in-court objections during examination in chief will not depend upon Defence counsel examining prior versions of the reports. The fact that a witness providing limited opinion evidence may have changed his mind or altered an opinion—and especially in circumstances in which it may have evolved with the addition of new evidence—is normally a matter for cross-examination, rather than exclusion of the evidence during examination in chief or *in limine* before it starts. Postponing Mr Donaldson's testimony in its entirety until disclosure is complete is therefore unnecessary.

25. In the Trial Chamber's view, in these circumstances, there will be no procedural prejudice to the Defence in allowing Mr Donaldson to testify in chief. The Trial Chamber is satisfied that the time estimated for the witness' evidence in chief is sufficient for the Defence teams to prepare for Mr Donaldson's cross-examination. The Trial Chamber, however, in the interests of justice, may consider a renewed Defence request for adjournment, if necessary.

26. Finally, the Prosecution informed the Trial Chamber that it may have some further motions for the admission of evidence relating to the source material in Mr Donaldson's

²⁹ Transcript of 21 April 2017, pp 2-3, 98.

reports. This should be finalised as soon as possible.³⁰ The Trial Chamber therefore orders the Prosecution to submit any outstanding motions tendering evidence relevant to Mr Donaldson's reports as expeditiously as possible. However, even if Mr Donaldson's reports rely on evidence that has not been admitted, this does not justify the postponement of his testimony. The Trial Chamber will take this into account when considering his evidence.

DISPOSITION

FOR THESE REASONS, the Trial Chamber,

DISMISSES the Defence motions to stay Mr Andrew Donaldson's testimony; and

ORDERS the Prosecution to submit any outstanding motions tendering evidence relevant to Mr Donaldson's reports as expeditiously as possible.

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

Leidschendam,
The Netherlands
2 June 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

³⁰ Transcript of 4 May 2017, pp 92-96.

