



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:** 31 July 2019

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**  
v.  
**SALIM JAMIL AYYASH**  
**HASSAN HABIB MERHI**  
**HUSSEIN HASSAN ONEISSI**  
**ASSAD HASSAN SABRA**

***PUBLIC REDACTED VERSION OF***  
**‘DECISION AUTHORISING THE PROSECUTION TO ADD**  
**WITNESS PRH705 TO ITS WITNESS LIST’**  
**OF 15 DECEMBER 2015**

**Office of the Prosecutor:**  
Mr Norman Farrell & Mr Nigel Povoas

**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 Hammis &  
Mr Chad Mair

**Counsel for Mr Hassan Habib Merhi:**  
Mr Mohamed Aouini & Mr Jad Khalil

**Counsel for Mr Hussein Hassan Oneissi:**  
Mr Vincent Courcelle-Labrousse, Mr Yasser  
Hassan & Ms Natalie von Wistinghansen

**Counsel for Mr Assad Hassan Sabra:**  
Mr David Young, Mr Geoffrey Roberts &  
Ms Sarah Bafadhel



## INTRODUCTION

1. On 17 November 2015, the Prosecution sought leave to amend its witness list, filed under Rule 91 of the Special Tribunal’s Rules of Procedure and Evidence, to add Witness PRH705. Touch<sup>1</sup>—one of the two Lebanese mobile telecommunication service providers—appointed Witness 705 as its representative to appear before the Special Tribunal to replace Witness PRH011.<sup>2</sup> Counsel for the Accused, Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine and Mr Hassan Habib Merhi responded.<sup>3</sup> The Prosecution replied to the Defence responses.<sup>4</sup>

## SUBMISSIONS

### *A. Prosecution submissions*

2. The Prosecution intended to call Witness 011 as the representative of Touch to testify about Touch’s network, call data record processing, cell site data and subscriber records. However, for the reasons given by the Prosecution in the closed session status conference on 3 November 2015, this is no longer possible.

3. In October 2015, Touch nominated Witness 705 to replace Witness 011 as its representative before the Special Tribunal. Witness 705’s statement organises and replaces Witness 011’s evidence, and includes information contained in subsequent responses to requests for assistance sent by the Prosecution to Touch.<sup>5</sup> The statement contains significant additional details about Touch’s network, call data record processing, cell site data and subscriber records that were largely received in response to these requests for assistance.<sup>6</sup>

4. The Prosecution submits that good cause exists to add Witness 705 to its witness list. This was only possible after his appointment by Touch and after he had finished making his consolidated witness statement. Touch appointed Witness 705 on 20 October 2015, and the

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<sup>1</sup> The current trade name of Mobile Interim Company 2 SAL (MIC2), which previously traded as ‘Mobile Telecommunication Company’ (MTC); STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2328, Prosecution Motion to add PRH705 to its Witness List, confidential, 17 November 2015, footnote 3.

<sup>2</sup> Prosecution motion, paras 1 and 4; Also, generally, see transcript of hearing on 3 November 2015.

<sup>3</sup> F2346, Response by the Ayyash Defence to Prosecution Motion to Add PRH705 to its Witness List, confidential, 1 December 2015; F2355, Badreddine Defence Response to the “Prosecution Motion to add PRH705 to its Witness List”, confidential, 2 December 2015; F2353, Merhi Defence Response to “Prosecution Motion to Add PRH705 to its Witness List Pursuant to Rule 91”, confidential, 2 December 2015.

<sup>4</sup> F2362, Prosecution Consolidated Reply to the Defence Responses to Prosecution Motions to Add PRH705 and PRH707 to its Witness List, confidential, 7 December 2015.

<sup>5</sup> Prosecution motion, para. 4; Transcript of hearing on 3 November 2015, pp 49-51 and 58-59.

<sup>6</sup> Prosecution motion, paras 7 and 10.

Prosecution then contacted him to organise his statement. He signed the statement on 16 November 2015 and it was disclosed to the Defence on 17 November 2015.<sup>7</sup> The Prosecution filed its motion the same day.

5. According to the Prosecution, Witness 705's proposed evidence is relevant to and probative of Touch's cellular telecommunications network, business practices and records. His evidence relates to the generation, use and storage of call data records, cell site data and subscriber records. The Prosecution submits that this evidence is crucial to its case.<sup>8</sup> The Trial Chamber found that admitting the call sequence tables derived from the call data records into evidence was conditional upon receiving this type of evidence.<sup>9</sup> Further, 13 pending Prosecution motions rely on the Trial Chamber receiving this evidence.<sup>10</sup>

#### *B. Defence submissions*

6. Counsel for Mr Ayyash and Mr Merhi submit that the Prosecution failed to demonstrate that it has exhausted all available remedies to ensure the appearance of Witness 011 and without seeking the Trial Chamber's assistance in this matter. The Prosecution's explanations are insufficient to constitute a valid reason justifying 'a significant change in witnesses at this very advanced stage of the trial'.<sup>11</sup>

7. Defence counsel for Mr Badreddine object to adding Witness 705 to the Prosecution's witness list, arguing that the Prosecution did not show good cause for not preparing the witness statement at an earlier stage. The Prosecution provides no good explanation for this failure other than that the delay was a consequence of Witness 011 [REDACTED] which, according to the Prosecution, [REDACTED]. The Prosecution may not have adequately addressed Witness 011 [REDACTED] and has not acted with sufficient diligence to identify a substitute witness.<sup>12</sup>

8. They also argue that (i) the delay in sending the relevant request for assistance seeking the nomination of a new Touch representative, and (ii) the late addition of significant

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<sup>7</sup> Prosecution motion, paras 4-5 and 9-10.

<sup>8</sup> Prosecution motion, paras 7-8.

<sup>9</sup> 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 UNIIIC and STL's Prosecution, 6 May 2015, para. 115.

<sup>10</sup> Prosecution motion, para. 8 and footnote 5.

<sup>11</sup> Ayyash Defence response, para. 4; Merhi Defence response, paras 4-7.

<sup>12</sup> Badreddine Defence response, para. 6.

additional detail (on Touch's network, call data record processing, cell site data and subscriber records) to Witness 705's witness statement are unjustified.<sup>13</sup>

9. According to counsel for Mr Ayyash, Mr Merhi and Mr Badreddine, having to analyse and investigate new information in Witness 705's statement will cause prejudice and delays. Counsel for Mr Ayyash and Mr Merhi request sufficient time to prepare, analyse, and conduct investigations on Witness 705's statement.<sup>14</sup> Counsel for Mr Badreddine request sufficient time to prepare their cross-examination of Witness 705, so as to limit the impact of the prejudice to the Accused; sufficient preparation includes 'taking of steps to interview Witness 705 ahead of his evidence'.<sup>15</sup>

### *C. Prosecution reply*

10. In its reply, the Prosecution argues the distinction between witnesses who testify in their personal capacity based on their personal knowledge and those, such as this witness and Witness 011, testifying in their professional capacity for the legal entity they represent.<sup>16</sup> His statement contains additional details relevant to the provenance and probative value of the communications evidence already on the Prosecution's Rule 91 list, and the systems used by Touch to generate, maintain and store that evidence.<sup>17</sup>

11. The Prosecution's continuing cooperation with Touch resulted in Witness 705's appointment and, in this process, the Prosecution had no obligation to pursue efforts to secure Witness 011's testimony.<sup>18</sup> Further, Witness 705's statement does not cover new subject matter, and the Defence does not contest the relevance or probative value of the new evidence, and has not demonstrated any prejudice resulting from the additional details. The Defence's objection in relation to the additional details should not prevent Witness 705's addition to the witness list.<sup>19</sup>

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<sup>13</sup> Badreddine Defence response, paras 7-12.

<sup>14</sup> Ayyash Defence response, para. 5; Merhi Defence response, para. 8.

<sup>15</sup> Badreddine Defence response, para. 14.

<sup>16</sup> Prosecution reply, para. 2.

<sup>17</sup> Prosecution reply, paras 8-9.

<sup>18</sup> Prosecution reply, paras 2-7.

<sup>19</sup> Prosecution reply, paras 8-10.

12. The Prosecution submits that counsel for Mr Ayyash did not demonstrate that lack of good cause for not seeking to amend the witness list at an earlier stage—a discretionary factor that the Trial Chamber may consider—justifies denying the Prosecution’s application.<sup>20</sup>

### DISCUSSION

13. The Trial Chamber has previously held that it may, in the interests of justice, allow a party to amend its witness list, but 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.<sup>21</sup> 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.<sup>22</sup>

14. The Trial Chamber has carefully scrutinised Witness 705’s proposed evidence. Information about Touch’s network, call data record processing, cell site data and subscriber records is essential to the Prosecution’s case. Witness 705’s proposed evidence is highly relevant and probative. This is not contested by the Defence. Because of the circumstances surrounding Witness 011 [REDACTED] the Prosecution would be prevented from presenting its case in the manner it intended if the Trial Chamber denies this addition to the witness list. The Trial Chamber is therefore satisfied that the interests of justice require adding his name to the Prosecution’s witness list.

15. Witness 705 is intended to replace Witness 011, who is on the Prosecution’s witness list and whose statements the Defence have had since 2012 and 2014. Therefore, while adding Witness 705’s lengthy statement with numerous annexes will inevitably impact the Defence’s preparations for trial, the Trial Chamber finds that it is neither prejudicial nor unduly burdensome.

16. Witness 705’s statement does contain some additional evidence. The new evidence, however, which results from the recent requests for assistance sent by the Prosecution to the Government of Lebanon, is not so expansive or burdensome as to prevent adding the witness to the Prosecution’s witness list. And Witness 705 will not testify until sometime in 2016. The

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<sup>20</sup> Prosecution reply, paras 12-16.

<sup>21</sup> F2263, Decision on Prosecution Request to Amend its Witness and Exhibit Lists, 13 October 2015, para. 28; F2149, Decision on Prosecution Motion to Admit 62 Photographs, 28 August 2015, para. 3; F2062, Decision on ‘Prosecution Motion for the Admission of Locations Related Evidence’, 9 July 2014, para. 66.

<sup>22</sup> Decision of 28 August 2015, para. 3.

Trial Chamber is thus satisfied that that Defence counsel will have adequate time to prepare for Witness 705's testimony. The Trial Chamber encourages Defence counsel to liaise with the Prosecution in relation to the scheduling of this witness. Counsel may, if necessary, seek an adjournment.

17. Sufficient good cause therefore exists to allow the requested amendment. Witness 705 was designated by Touch only on 20 October 2015 as its representative for the purpose of testifying, and the Trial Chamber is satisfied by the Prosecution's explanation regarding the delay between the witness's designation and his signing of the statement. Notwithstanding that the Prosecution has not explained why Touch only designated Witness 705 as its representative in October 2015, the Trial Chamber is satisfied that the Prosecution requested this amendment as soon as it could after working with Witness 705 to finalise his statement. It also agrees with the Prosecution that—as found in a similar decision—a witness designated by a company as its representative is materially different from a witness of personal knowledge.<sup>23</sup> Furthermore, as previously held, in deciding whether to authorise an amendment to a witness or exhibit list, good cause for not seeking the amendment at an earlier stage is only one of the factors the Trial Chamber may consider.<sup>24</sup> The Trial Chamber also emphasises the distinction between admission into evidence and addition to a witness list.

### **CONFIDENTIALITY**

18. The Defence of Mr Ayyash filed a public redacted version of their response, while counsel for Mr Merhi and Mr Badreddine, and the Prosecution filed their submissions confidentially. As the circumstances surrounding this application were canvassed in the closed session status conference on 3 November 2015, the Trial Chamber is filing its decision confidentially. Reiterating the public nature of these proceedings, the Trial Chamber orders the Parties to file public redacted submissions. At the appropriate time, after the witness has testified, the Trial Chamber will either file a redacted version of this decision or reclassify it as public.

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<sup>23</sup> F2376, Decision on Prosecution Motion to Add Witness PRH707 to its Witness List, 11 December 2015, para. 13.

<sup>24</sup> Decision of 11 December 2015, para. 13.

**DISPOSITION**

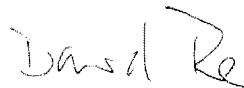
**FOR THESE REASONS**, the Trial Chamber:

**GRANTS** the Prosecution leave to amend its witness list to add Witness 705; and

**ORDERS** the Prosecution and counsel for Mr Badreddine and Mr Merhi to file public redacted versions of their respective motion, responses and reply after the Trial Chamber files a public redacted version or reclassifies this decision as public.

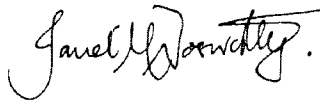
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,  
The Netherlands  
31 July 2019



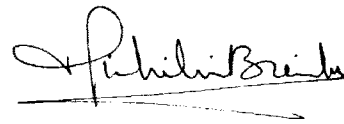
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Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

