

BEFORE THE TRIAL CHAMBER
SPECIAL TRIBUNAL FOR LEBANON

Case No: STL-11-01/PT/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 20 December 2013

Filing Party: Defence Counsel – Oneissi

Original language: English

Classification: Public

PROSECUTOR

v.

**SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DEFENCE FOR HUSSEIN HASSAN ONEISSI RESPONSE TO “PROSECUTION RULE 154
MOTION FOR THE ADMISSION OF PHOTOS, VIDEOS, MAPS AND THREE-
DIMENSIONAL MODELS” OF 13 DECEMBER 2013**

Office of the Prosecutor:

Mr. Norman Farrell

Defence Office:

Mr. François Roux

**Legal Representatives of
Participating Victims:**

Mr. Peter Haynes
Mr. Mohammad F. Mattar
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Mr. Vincent Courcelle-Labrousse
Mr. Yasser Hassan

Counsel for Mr. Assad Hassan Sabra:

Mr. David Young
Mr. Guénaël Mettraux



INTRODUCTION

1. The Defence for Hussein Hassan Oneissi (“the Oneissi Defence”) files this Response to the Office of the Prosecution’s (“the Prosecution”) 13 December 2013 “Prosecution Rule 154 Motion for the Admission of Photos, Videos, Maps and Three-Dimensional Models” (“Rule 154 Motion”).
2. The Oneissi Defence (i) requests clarification of the evidentiary status of the documents listed in Annex C; (ii) objects to the admission under Rule 154 of items 4, 5, and 33 to 36 of Annex A; and (iii) neither accepts nor challenges the admission of the remaining items.

PROCEDURAL HISTORY

3. During the Pre-Trial Conference of 2 December 2013, the Trial Chamber ordered the Prosecution to file a Rule 154 Motion “to cover photos, videos, maps, etc” by 13 December 2013 and the Defence teams to file their Responses by 20 December 2013.¹
4. Pursuant to that Order, the Prosecution filed its Rule 154 Motion for the first part of its case on 13 December 2013.² The Oneissi Defence hereby files its Response to that Motion.

APPLICABLE LAW

5. Documents may be admitted into evidence via the bar table under Article 21 of the Statute of the Special Tribunal for Lebanon and Rules 154 and 149(C), (D) and (F) of the Rules of Procedure and Evidence.
6. Documents tendered via Rule 154 are subject to the general prejudice/probative balancing exercise; as well as the residual discretion of the Tribunal. In order to tender documents for admission from the bar table, a party must (i) establish that the documents are relevant and probative and (ii) demonstrate where and how each document fits into its case.³

¹ STL, *Prosecution v Ayyash et al.*, Case No. STL-11-01/PT/TC, Oral Order on a Motion – Bar Table Motion of the Prosecution, 2 December 2013, p 9, line 17.

² STL, *Prosecution v Ayyash et al.*, Case No. STL-11-01/PT/TC, Prosecution Rule 154 Motion for the Admission of Photos, Videos, Maps and Three-Dimensional Models, 13 December 2013.

³ This is consistent with the approach taken in other Tribunals. See, e.g., ICTY, *Prosecutor v Radovan Karadzic*, Case No. IT-95-5/18-T, Decision on the Prosecution First Table Motion, 13 April 2010 at paras 3-5 and Decision on Prosecution’s bar table motion for admission of documents related to the Sarajevo component, 11 May 2012 at paras 3-6; *Prosecutor v Ratko Mladic*, Case No. IT-09-92/T, Decision on Prosecutor’s bar table motion the

7. Further specific considerations have been recognised in other Tribunals. For example, if it is possible to tender evidence through witnesses, this method is to be preferred;⁴ and these motions should not be used to “tender documents which are plainly unnecessary given the extremely voluminous amount of other evidence on similar issues”.⁵

8. As stated by the Prosecution, admission of evidence via Rule 154 “does not constitute a binding determination as to the authenticity or trustworthiness of the proposed evidence”. The Trial Chamber may assess the probative weight of the evidence at a later stage of the case.⁶

SUBMISSIONS

A. Prosecution’s Submissions

9. The Prosecution seeks to admit photographs and videos of the crime scene, maps of Beirut, and three-dimensional models of the crime scene location. These exhibits are separated into three Annexes.

10. It submits that the exhibits in Annex A are relevant and have probative value, as they demonstrate the effects of the explosion and the collection of the evidence; show Mr Hariri’s movements on the morning of 14 February 2005; and give an overview of the topography of Beirut.⁷

11. Annex A is supplemented by the items listed in Annex C, which “aid in demonstrating the indicia of reliability of some exhibits”. These items are submitted for the purposes of the Motion and, to the extent that they are not already on the exhibit list, the Prosecution does not seek to add them to the exhibit list.⁸

admission of intercepts: Sebnica segment, 2 May 2013 at paras 6-8. In the ICC, see, e.g., ICC, *Prosecutor v Jean Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012 at para 12-13; *Prosecutor v Thomas Lubanga*, Case No. ICC-01/04-01/061, Corrigendum to Decision on the legal representative’s application for leave to tender into evidence material from the “bar table” and on the Prosecution’s Application for Admission of three documents from the Bar Table Pursuant to Article 64(9), 9 March 2011 at para 10.

⁴ ICTY, *Prosecutor v Radovan Karadzic*, Case No. IT-95-5/18-T, Decision on Prosecution’s bar table motion for admission of documents related to the Sarajevo component, 11 May 2012 at para 4.

⁵ Ibid at para 11.

⁶ Rule 154 Motion at para 9 and jurisprudence cited at footnote 9.

⁷ Ibid at para 10.

⁸ Ibid at para 15.

12. Annex B contains six exhibits that the Prosecution seeks to “re-add” to the Rule 91 list. It submits that it is in the interests of justice to allow it to do so as they were “inadvertently removed” during efforts to remove duplicates from the exhibit list.⁹

B. Defence Response

13. As these proceedings are being held *in absentia*, the Oneissi Defence is forced to take a position on whether the items pass the Rule 154 threshold in the absence of instructions. The difficulties of this exercise are compounded by the fact that the Defence has far less time and resources at its disposal than those available to the Prosecutor.

14. In particular, the allegations and the use to which the evidence will be put are unclear. This is a case based on circumstantial evidence and inferences drawn from that evidence. Even at this late stage in the proceedings, the Defence has been provided with a broadly drafted and confusing Indictment, which is paraphrased in the Prosecution’s Pre-Trial Brief. These documents and the Witness and Exhibit lists have been subject to near-constant substantive changes.¹⁰ A vast bulk of evidence has been disclosed and re-disclosed under different Rules, with no indication of its purpose or role within the Prosecution’s case. The majority of the evidence disclosed via Legal Workflow has not been linked to any particular part of the Indictment or the Prosecution’s Pre-Trial Brief. Further, the Defence is aware that this represents only a fraction of the evidence available to the Prosecution from previous investigations and its own investigation.

15. With the Oneissi Defence’s current understanding of the Prosecution case, it is difficult to assess where exactly the items sought to be admitted fit in and, therefore, their relevance and probative value under Rule 154.

1. Annex C

16. The Oneissi Defence does not accept the material in Annex C. First, the status of some of the items listed in this Annex is unclear. Given the lack of identifying material in the exhibits themselves, these documents provide the only indications of reliability and probative value required for admission. For example, the reliability and probative value of the photographs cannot be properly assessed without clear information as to who took the

⁹ Ibid at para 14.

¹⁰ Most recently on 18 December 2013: see STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/TC, Prosecution Submission Pursuant to Rules 91(G)(ii) and (iii), 18 December 2013.

photographs, when the photographs were taken, for what purpose, etc. If the Annex A exhibits only pass the threshold for admission when read alongside the Annex C supporting material, the Annex C supporting material must be introduced as accompanying exhibits.

17. Secondly, and worryingly in light of its purpose, Annex C contains errors. Items 4,¹¹ 8¹² and 10¹³ of Annex C refer to exhibits that are not listed in Annex A. The Oneissi Defence assumes that item 8 of Annex C is intended to support item 2 of Annex A, but is unsure of the connection between the remaining items. It has ignored them for the purposes of evaluating the Annex A exhibits.

18. The Oneissi Defence requests clarification of the evidentiary status of these items and correction of the errors listed above. The Oneissi Defence reserves the right to respond to any clarifications.

2. Annex A

a. Admissibility challenged

19. The Oneissi Defence objects to the admission of the exhibits listed below.

20. Item 4 entitled “photographs from CD supplied with witness statements”.¹⁴ This is linked to item 3¹⁵ of Annex C, which is an affidavit of PRH009,¹⁶ a Rule 155 witness.¹⁷ If the Prosecution wishes to have this evidence admitted, it should do so via PRH009’s Rule 155 statement. It cannot seek to have that information tendered under the less exacting standards of Rule 154.

21. Items 5 entitled “photographs from Annex to the Forensic Report Preliminary Forensic Examination of the Hariri Convoy Vehicles Part 4”¹⁸ and item 6 entitled “photographs from Annex to the Forensic Report Electronic data collected by UNIIC February 2005-November 2005”.¹⁹ These Reports are attached to Forensic Reports authored

¹¹ Intended to support “R91-606477” of Annex A.

¹² Intended to support “R91-607016” of Annex A.

¹³ Intended to support “R91-607018” of Annex A.

¹⁴ R91-606470.

¹⁵ R91-606477.

¹⁶ PRH009.

¹⁷ STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/TC, Updated Consolidated Rule 91 Witness List, Annex E at p 32.

¹⁸ R91-606692.

¹⁹ R91-606959.

by PRH468,²⁰ and can only be understood alongside those Reports. The usual situation would be for PRH468 to tender the Reports and the associated documents in his *viva voce* testimony. However, as PRH468 has been re-listed as a factual witness, rather than an expert witness, the status of those Reports is not clear. These photographs should be attached to the Forensic Reports and their admissibility assessed as a whole.

22. Items 33 and 35 of Annex A²¹ entitled “Hariri Crime Scene Model – Part 1 of 2 of the pre-blast model” and items 34 and 36 of Annex A, entitled “Hariri Crime Scene Model – Part 2 of 2 of the pre-blast model”.²² Each of these exhibits is linked to item 9 in Annex C,²³ which is an Affidavit of a Visual Information Specialist for the FBI. The Annex A exhibits thus pertain to a model reconstruction of the crime scene made by an expert. The information provided in Annex C does not provide sufficient information to understand these photographs. There is a clear interest in exploring this reconstruction via examination and cross-examination. This evidence should have been brought in as part of an expert report; or be tendered by PRH468, who provided the instructions for this reconstruction.

b. Remaining items

23. The Oneissi Defence neither accepts nor challenges the admission of the remaining items under Rule 154, with the caveats listed above in regard to Annex C. It stresses that this position (i) does not indicate that it accepts or will not challenge the content of the items; and (ii) is based on their use being strictly confined to the description provided in the Rule 154 Motion and Annexes. It emphasises its right to challenge the authenticity, reliability and probative value of this evidence at trial.

24. At this stage, the Oneissi Defence makes three comments, in light of the jurisprudential guidelines,²⁴ to assist the Trial Chamber in the exercise of its discretion. First, in general, the Prosecution seeks to tender a large volume of essentially repetitive photographic and video evidence for the purpose of “show[ing] the immediate aftermath of the explosion”. This material is to be introduced without captions, explanatory notes, or details as to the exact time and place the video footage or photographs were taken.

²⁰ Item 5 is connected to ERN 60222063-60222117; item 6 is connected to ERN 60255568-60255573.

²¹ R91-607260 and R91-607262, respectively.

²² R91-607261 and R91-607263, respectively.

²³ ERN 60291679-60291680.

²⁴ See paragraph 7 above and the cases cited therein.

25. Secondly, items 9 to 12, 28 and 29 are photographs and a video sought to be tendered to demonstrate Mr Hariri's movements. These items comprise one short video and 243 photographs, many of which are repetitive, which are introduced to demonstrate the undisputed fact that Mr Hariri was in Parliament on the morning of 14 February 2005.

26. Thirdly, item 20 is a 12.01 minute video that stops after 35 seconds. The 35 seconds of footage is similar to that provided by item 19. Item 26 is a video of 2.03.81 hours that cuts to a cartoon at 30.57. Item 29 is a 16.06 minute video that cuts to an unrelated video at 5.34.

RELIEF REQUESTED

27. For all of the above reasons, may it please the Trial Chamber to:
- a. Order the Prosecution to (i) clarify the evidentiary status of the items listed in Annex C; and (ii) amend the errors in Annex C;
 - b. Order the Prosecution to remove items 4, 5, and 33 to 36 from Annex A and have these items tendered through a witness; and
 - c. Record the Oneissi Defence position as to the remaining items.

Respectfully submitted this 20th day of December 2013



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