



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: 6 June 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION CLARIFYING DECISION OF 30 NOVEMBER 2017 ADMITTING A
UNIHC MEMORANDUM (EXHIBIT 5D494) AND DENYING PROSECUTION
APPLICATION FOR PARTIAL RECONSIDERATION**

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

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 Dorothée Le Fraper
du Hellen & Mr Jad Youssef 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



BACKGROUND

1. In a decision on 30 November 2017, the Trial Chamber partly granted an application by counsel for the Accused, Mr Assad Hassan Sabra, to admit into evidence six documents relevant to the failed recruitment of Mr Ahmed Abu Adass to participate in a video falsely claiming responsibility for the attack on 14 February 2005 which killed the former Lebanese Prime Minister, Mr Rafik Hariri, and 21 others, and injured 226 people.¹

2. According to the Sabra Defence, the admitted documents demonstrate that Mr Abu Adass was not selected at random by the Accused, Mr Hussein Hassan Oneissi, as pleaded in the amended consolidated indictment, but rather that others had meticulously planned his recruitment earlier. Mr Abu Adass held extremist, radical beliefs and was closely associated with others who held similar views, including Mr Ahmed Salim Mikati. The Sabra Defence also contend that there were earlier attempts to assassinate Mr Hariri and to use Mr Abu Adass as part of the plan—including in a plot to attack Mr Hariri's convoy in Beirut in September 2004 which was mistakenly considered to be a plot against the Italian embassy.²

3. The Prosecution now, over five months later, seeks reconsideration under Rule 140 of the Special Tribunal's Rules of Procedure and Evidence of the decision to admit one of the six documents—exhibit 5D492—into evidence and further requests that the Trial Chamber clarify that a second document admitted into evidence—exhibit 5D494—is not admitted in its entirety.³

4. Exhibit 5D492 is a two-page document entitled 'Preliminary information: Summary of information related to the arrest of Ahmad Salim Mikati on 17/9/2004' from the Lebanese Internal Security Forces (ISF) Information Branch. It contains a mixture of investigative information related to Mr Mikati, who was a named suspect, and his involvement in the alleged Italian embassy plot. The document includes details of Mr Mikati's arrest, his outstanding warrants, and information he provided to the ISF on his involvement in

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3442, Decision Partly Granting Third Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – the Failed Recruitment of Mr Ahmed Abu Adass, 30 November 2017 ('30 November 2017 decision'), paras 26-40, disposition. *See also* F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 3 (b)-(c), 4-5, 23, 28, 44, 48 (c).

² 30 November 2017 decision, paras 4-9, 11, 31, 34, disposition.

³ F3644, Prosecution Motion for Partial Reconsideration and Clarification of the Decision of 30 November 2017 regarding Exhibits 5D00492 and 5D00494, 2 May 2018 (confidential) ('Prosecution motion').

preparations for the attack. The document ends with the statement: ‘Investigations are ongoing’.⁴

5. Exhibit 5D494 is a United Nations International Independent Investigation (UNIIC) internal memorandum authored by Prosecution investigator, Mr Alasdair Macleod (Witness PRH486) about a UNIIC mission to Syria on 9-10 August 2006. The Sabra Defence relied on two extracts of the memorandum—specifically footnotes 2 and 5—relating to extremist, radical beliefs held by Mr Abu Adass, to support its submissions.⁵

LEGAL PRINCIPLES – RECONSIDERATION

6. Under Rule 140, ‘[a] Chamber may, *proprio motu* or at a Party’s request, reconsider a decision, other than a judgement or sentence, if necessary to avoid injustice.’ Reconsideration of a decision is an exceptional remedy, and must not be used to redress ‘imperfections in a decision or to circumvent the unfavourable consequences of a ruling’. The Party requesting reconsideration of a decision must demonstrate, on specific grounds, an injustice involving prejudice. If such an injustice is demonstrated, the Trial Chamber may reconsider a decision on grounds including an error of law, an abuse of discretion, or the existence of new facts or a material change in circumstances that arises after the decision is made.⁶

SUBMISSIONS AND DECISION

7. The Prosecution argues that the Trial Chamber erred in law by admitting exhibits 5D492 and 5D494⁷ into evidence as they are both witness statements tendered over the Prosecution’s objection. The error prejudiced the Prosecution by denying its right to cross-examine the documents’ information providers. The Trial Chamber did not adhere to the requisite factors to determine if the documents were witness statements and did not provide a reasoned opinion for finding they were not. The Prosecution acknowledges that the decision

⁴ See exhibit 5D492.

⁵ See exhibit 5D494; F3109, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass – The Failed Recruitment of Ahmed Abu Adass, 28 April 2017 (confidential), annex A, item 24.

⁶ See F3459, Decision Clarifying Decision of 25 September 2017 Admitting Exhibit 5D251 MFI (Relevant to Mr Ahmed Abu Adass) and Denying Prosecution Application for Reconsideration, 6 December 2017 (‘6 December 2017 decision’), para. 8; STL-11-01/PT/AC/R176bis, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0327, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012, paras 22-26; F2719, Decision on Ayyash Defence Motion for ‘Reissuance’ and Oneissi Defence Motion for Reconsideration of the Trial Chamber’s Decision of 29 July 2016, 14 September 2016, para. 10.

⁷ See para. 13 below for the Prosecution’s specific submissions on exhibit 5D494.

was issued more than five months before its application for reconsideration but it assessed these exhibits when reviewing the court's evidential record before the end of trial.⁸

8. The Sabra Defence responds that the Prosecution's application should be denied for failing to sufficiently justify the delay in seeking reconsideration of a decision issued over five months ago (and three months after it closed its case on 7 February 2018). The Prosecution fails to demonstrate an injustice that involves prejudice as required by Rule 140 and is attempting to circumvent the unfavourable consequences of a ruling. Also the Prosecution has no right to cross-examine the documents' information providers as Defence witnesses as the Sabra Defence has elected not to present a case pursuant to Rule 128. Therefore, the Prosecution must re-open its case to call them as its own witnesses or seize the Trial Chamber under Rule 165.⁹

Exhibit 5D492: Lebanese ISF Information Branch preliminary information on the arrest of Ahmad Salim Mikati on 17 September 2004

9. The Prosecution submits that exhibit 5D492 is akin to an investigator's note which the Trial Chamber has consistently held 'can constitute witness statements or may contain statements from witnesses' and that it contains statements from Mr Mikati, an unidentified source from the ISF Information Branch, and potentially the author(s) of the document. Furthermore, the Trial Chamber erred when classifying the document as a report by the Syrian Military Intelligence. The Trial Chamber should therefore reconsider its decision under Rule 140 and declare exhibit 5D492 a 'witness statement' under Rule 155, and allow the Prosecution to cross-examine the document's 'information providers'.¹⁰

10. The Sabra Defence responds that it is not a witness statement but rather a summary of the ISF investigation into Mr Mikati at the time of his arrest and the investigators' preliminary analysis. The Prosecution also failed to refer to a recent Trial Chamber decision dismissing a Prosecution request for reconsideration regarding the admission of a very similar document. Further, the Trial Chamber did not err in fact in stating that the document was provided by the

⁸ Prosecution motion, paras 1-3, 7, 12-15, 21.

⁹ F3666, Sabra Response to Prosecution Motion for Partial Reconsideration and Clarification of the Decision of 30 November 2017 Regarding Exhibits 5D00492 and 5D00494, 16 May 2018 (confidential) ('Sabra Defence response'), paras 1-4, 24-26, 29-30, 33.

¹⁰ Prosecution motion, paras 2, 4, 8-11, 16-19, 27.

Syrian Military Intelligence. Based on material disclosed to the Parties, it appears to originate from Syrian Military Intelligence archives provided to the UNIIC.¹¹

Decision

11. The Trial Chamber does not consider that exhibit 5D492—entitled ‘Preliminary information: Summary of information related to the arrest of Ahmad Salim Mikati on 17/9/2004’—is a witness statement. It is an ISF investigative summary based on material from various sources and provides a preliminary analysis of the information available to the investigators the day after Mr Mikati’s arrest.

12. The Prosecution has not demonstrated any injustice sufficient to reconsider the Trial Chamber’s decision and deny its admission into evidence, or to order the document’s information providers to attend for cross-examination. The Prosecution submitted its application more than five months after the Trial Chamber’s decision and does not provide any cogent reasons for the delay or sufficient grounds to convince the Trial Chamber to grant such an exceptional remedy of reconsidering its decision.

Exhibit 5D494: UNIIC memorandum - Report on Mission to Damascus 9-10 August 2006

13. Regarding exhibit 5D494, the Prosecution requests the Trial Chamber to clarify that it is admitted solely for the two footnotes relied upon by the Sabra Defence, and not in its entirety. If the requested clarification is denied, the Prosecution seeks similar reconsideration of the decision to admit it into evidence as it contains witness statements and the Prosecution will be prejudiced by being denied its right to cross-examine the information providers in the 15-page document.¹²

14. The Sabra Defence argues that it is not a witness statement from Mr Macleod but instead describes information received by UNIIC investigators during meetings with three Syrian agencies. The Trial Chamber’s decision admitting it does not require further clarification. While the Sabra Defence has relied only on extracts of other documents it has previously tendered for admission, the Trial Chamber has repeatedly admitted the entire document for the purpose of providing context.¹³

¹¹ Sabra Defence response, paras 5-6, 11-16 (referring to 6 December 2017 decision).

¹² Prosecution motion, paras 3-4, 13-14, 22-24, 27.

¹³ Sabra Defence response, paras 18-23, 27-28.

Decision

15. Regarding exhibit 5D494, paragraph 31 of the 30 November 2017 decision stated:

In addition, *the extracts that the Sabra Defence rely on to support its submissions* relate to factual background of the Takfir doctrine associated with the Dinniyeh group (see paragraph 5 above). The Trial Chamber finds it relevant to Mr Abu Adass's disappearance and the false claim of responsibility and it hence has some probative value. [...] The Trial Chamber will therefore exercise its discretion to admit this memorandum into evidence.¹⁴

Also, on 14 December 2017, when exhibit 5D494 was admitted into evidence in court, the Presiding Judge noted that the Trial Chamber did not admit it for the truth of its contents as the document comprised an opinion of an investigator who reviewed some material and drew his conclusions.¹⁵

16. The Trial Chamber's intention was to admit the extracts of exhibit 5D494 relied upon by the Sabra Defence in its motion. This is apparent in the decision's explicit reference to 'extracts'. In order to make it more explicit, the Trial Chamber clarifies the last sentence of paragraph 31 of the decision to state that: 'The Trial Chamber will therefore exercise its discretion to admit into evidence the relevant extracts of the UNIIIC memorandum (Report on Mission to Damascus 9-10 August 2006) relied upon by the Sabra Defence to support its submissions—namely footnotes 2 and 5 of ERN 60006844-60006845.'

CONFIDENTIALITY

17. The Prosecution and the Sabra Defence filed their submissions confidentially based on the Prosecution argument that its motion and annex contain identifying information about potential witnesses who are sought for cross-examination.¹⁶ The Sabra Defence does not oppose the public reclassification of its submission in line with the Trial Chamber's practice.¹⁷ In order to maintain the public nature of the proceedings before the Special Tribunal, the Trial Chamber issues this decision publicly and orders the Parties to file public redacted versions of their filings, or have them reclassified as public.

¹⁴ 30 November 2017 decision, para. 31 (emphasis added).

¹⁵ Transcript of 14 December 2017, p. 54.

¹⁶ Prosecution motion, paras 25-26.

¹⁷ Sabra Defence response, paras 31-32.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

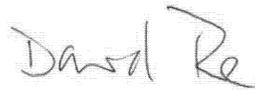
DISMISSES the Prosecution's application under Rule 140 for reconsideration;

CLARIFIES paragraph 31 of F3442, Decision Partly Granting Third Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – the Failed Recruitment of Mr Ahmed Abu Adass, issued on 30 November 2017, to specify, as set out in paragraph 16 above, that: 'The Trial Chamber will therefore exercise its discretion to admit into evidence the relevant extracts of the UNIIC memorandum (Report on Mission to Damascus 9-10 August 2006) relied upon by the Sabra Defence to support its submissions—namely footnotes 2 and 5 of ERN 60006844-60006845'; and

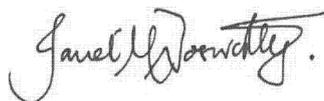
ORDERS the Prosecution and counsel for Mr Sabra to file public redacted versions of their filings, or have them reclassified as public.

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

Leidschendam,
The Netherlands
6 June 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

