



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, Registrar

**Date:** 21 May 2015

**Original language:** English

**Type of document:** Public

### THE PROSECUTOR

v.

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

### DECISION ON THE ADMISSIBILITY OF DOCUMENTS PUBLISHED ON THE WIKILEAKS WEBSITE

**Office of the Prosecutor:**

Mr Norman Farrell, Mr Graeme Cameron  
& Mr Alexander Milne

**Legal Representatives of  
Participating Victims:**

Mr Peter Haynes, Mr Mohammad F. Mattar  
& Ms Nada Abdelsater-Abusamra

**Counsel for Mr Salim Jamil Ayyash:**

Mr Eugene O'Sullivan, Mr Emile Aoun &  
Mr Thomas Hannis

**Counsel for Mr Mustafa Amine Badreddine:**

Mr Antoine Korkmaz, Mr John Jones &  
Mr Iain Edwards

**Counsel for Mr Hassan Habib Merhi:**

Mr Mohamed Aouini, Ms Dorothée Le Fraper  
du Hellen & Mr Khalil Jad

**Counsel for Mr Hussein Hassan Oneissi:**

Mr Vincent Courcelle-Labrousse, Mr Yasser  
Hassan & Mr Philippe Laroche

**Counsel for Mr Assad Hassan Sabra:**

Mr David Young, Mr Guénaël Mettraux  
Mr Geoffrey Roberts



## INTRODUCTION

1. Defence counsel moved the Trial Chamber to admit into evidence two purported American diplomatic cables—found on the website of WikiLeaks—describing meetings between Lebanese politicians and American diplomats. One is dated 6 July 2007, the other 8 April 2008. Counsel attempted to use these documents during the testimony of Mr Fouad Siniora and Mr Walid Jumblatt. The Prosecution objected.

2. The two documents are apparently part of a large collection of documents published by WikiLeaks relating to the diplomatic business of the United States of America. WikiLeaks is, in its own words, ‘a not-for-profit media organisation. Our goal is to bring important news and information to the public. We provide an innovative, secure and anonymous way for sources to leak information to our journalists (our electronic drop box).’<sup>1</sup> Many WikiLeaks documents have been published in the international media.

### **Mr Fouad Siniora**

3. Mr Fouad Siniora was the Prime Minister of Lebanon between July 2005 and November 2009. He testified between 23 and 26 March 2015. During cross-examination, counsel for the Accused, Mr Mustafa Amine Badreddine, questioned him about the circumstances of the Special Tribunal’s establishment. He was asked about a meeting between the Lebanese Minister of Justice, Mr Charles Rizk, and the United States Ambassador to Lebanon, said to have occurred on 6 July 2007. One of the subjects was the release of four Lebanese generals, detained in 2005 by the Lebanese authorities during the investigation into the attack on the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut, on 14 February 2005.

4. Mr Siniora denied any knowledge of the meeting, or what may have been discussed, saying ‘What is mentioned in WikiLeaks, I do not know. I have no information about it. And this is the first

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<sup>1</sup> [www.wikileaks.org](http://www.wikileaks.org).

time I hear about it'.<sup>2</sup> Mr Siniora also denied that Mr Rizk had asked the American Ambassador to 'bring pressure to bear to prevent the release of the four generals'. He had no information about this.<sup>3</sup>

5. The Prosecution objected to the Defence using the WikiLeaks document, arguing that its reliability was uncertain, the U.S. State Department had never acknowledged its provenance and, as it was illegally obtained, it could be excluded under Rule 162 (A) of the Special Tribunal's Rules of Procedure and Evidence. Questions, however, could be asked on the contents of the document, but without referring to it.<sup>4</sup>

6. The Trial Chamber ruled that Defence counsel could question Mr Siniora on information obtained from any source but, until it had ruled on its admissibility, they could not directly refer to the WikiLeaks document (1DT2-0312).<sup>5</sup>

7. The Trial Chamber invited written submissions on its admissibility, and counsel for Mr Badreddine subsequently filed submissions requesting its admission into evidence.<sup>6</sup> Counsel for Mr Hussein Hassan Oneissi filed observations supporting its admission.<sup>7</sup> The Prosecution responded, and counsel for Mr Badreddine replied.<sup>8</sup>

### **Mr Walid Jumblatt**

8. Mr Walid Jumblatt is the leader of the Progressive Socialist Party, a member of the Lebanese Parliament, and a leader of Lebanon's Druze community. During his testimony, counsel for Mr

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<sup>2</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, Transcript of 26 March 2015, pp. 82-83.

<sup>3</sup> Transcript of 26 March 2015, p. 92.

<sup>4</sup> Transcript of 26 March 2015, pp. 84-87. Rule 162 (A) states that '(A) [n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. (B) [i]n particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture'.

<sup>5</sup> Special Tribunal's internal number, 1DT2-0312, transcript of 26 March 2015, pp. 86-87, 88-89.

<sup>6</sup> F1913, Request for the Admission of a Document and Submissions in favour of the Admissibility of Diplomatic Cables Published on the WikiLeaks Website, 17 April 2015.

<sup>7</sup> F1900, Defence for Hussein Hassan Oneissi Observations on the Issue of the Admissibility of United States Diplomatic Cables, 10 April 2015.

<sup>8</sup> F1933, Prosecution Response to Request for the Admission of a Document and Submissions in favour of the Admissibility of Diplomatic Cables Published on the WikiLeaks Website, 1 May 2015; F1944, Badreddine Defence Reply to the Prosecution Response to its Request for the Admission of a Diplomatic Cable Published on the WikiLeaks Website, 11 May 2015. The reply was filed confidentially seeking an order that it remain confidential until the end of Mr Siniora's testimony.

Badreddine questioned him about the emergence of radicalism in Lebanon, suggesting that jihadist movements were accused of ‘being behind Mr Hariri’s bombing’. Counsel suggested that Mr Jumblatt attended a meeting with the American Ambassador to Lebanon on 8 April 2008, where he had (i) expressed concerns about the building up of Sunni militias through the Al-Mustaqbal movement and (ii) said that ‘the constitution of a Sunni militia by Saad Hariri... would cause significant damage to the 14<sup>th</sup> of March movement’. In relation to the first topic, Mr Jumblatt responded that it was not helping him to remember and, additionally, denied it. Of the second, he said that it was an inaccurate and personal analysis.<sup>9</sup> The Prosecution objected to counsel referring to this document as an authentic U.S. cable, arguing that its provenance and its authenticity—as the Ambassador’s actual words—had not been established.<sup>10</sup> No further written submissions were made in relation to this second WikiLeaks document, Defence exhibit 2D133 MFI (marked for identification).

#### **Admissibility of the WikiLeaks documents under Rule 149**

9. The Trial Chamber may receive evidence, under Rule 149 (C), ‘which it deems to have probative value’. It may exclude the evidence under Rule 149 (D) if satisfied that ‘its probative value is substantially outweighed by the need to ensure a fair trial’. Under Rule 149 (E), the Trial Chamber ‘may request verification of the authenticity of evidence obtained out of court’. Rule 162 permits the exclusion of evidence obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

10. Rule 154 allows a Chamber to admit documents, consistent with Rules 149 (C) and (D). The Trial Chamber has admitted documents into evidence under this rule from the ‘bar table’, holding that the offering party must demonstrate, with clarity and specificity, where and how each document or record fits into its case.<sup>11</sup>

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<sup>9</sup> Transcript of 7 May 2015, pp. 31-32, 37-38.

<sup>10</sup> Transcript of 7 May 2015, p. 38. This document was marked for identification as exhibit 2D133; Transcript of 7 May 2015, p. 35.

<sup>11</sup> F1802, Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs, and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events, 30 December 2014, para. 29; F1781, Corrected version of ‘Decision on Prosecution Motion to Admit into Evidence Geographic Documents’ of 8 December 2014, 10 December 2014, para. 4; F1308, Decision on Prosecution’s Motion to Admit into Evidence, Photographs, Videos, Maps and 3-D models, 13 January 2014, para. 5.

11. Rules 89 (C), (D) and (E) of the International Criminal Tribunal for the Former Yugoslavia's Rules of Procedure and Evidence are identical to the Special Tribunal's Rules 149 (C), (D) and (E). The ICTY's case law holds that a document's *prima facie* reliability 'is an underlying factor relevant in determining whether the prerequisites of relevance and probative value have been met'. Authenticity relates to 'whether a document is what it professes to be in origin and authorship' and 'may be relevant in assessing whether a document is *prima facie* reliable'. Definitive proof of reliability and authenticity is not required at the admissibility stage.<sup>12</sup>

12. Article 69 (4) of the International Criminal Court's Rome Statute is similar to the Special Tribunal's Rule 149,<sup>13</sup> but the ICC's interpretation of its application has varied. The *Lubanga* Trial Chamber held that where evidence is 'demonstrably lacking any apparent reliability the Chamber must equally carefully decide whether to exclude the evidence at the outset' or wait to assess it at the end of the case.<sup>14</sup> But another, *Katanga*, applied a stricter assessment of authenticity at the admissibility stage, holding, that if, 'when tendering an item of evidence, the party is unable to demonstrate relevance and probative value, including its authenticity, it cannot be admitted'.<sup>15</sup>

13. The Trial Chamber agrees with the ICTY Appeals Chamber's approach in interpreting its identical Rules on admissibility. *Lubanga* is closer to this than *Katanga*. The Trial Chamber will therefore assess the authenticity of the WikiLeaks documents based on 'whether a document is what it professes to be in origin and authorship'.

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<sup>12</sup> ICTY, *Prosecutor v. Prlić and others*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras 33-34, referring to other decisions of the ICTY and the International Criminal Tribunal for Rwanda.

<sup>13</sup> Article 69 (4), 'The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.' Rule 63 (2) ICC Rules of Procedure and Evidence provides, 'A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.'

<sup>14</sup> ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the admissibility of four documents, 13 June 2008, para. 30.

<sup>15</sup> ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on Prosecutor's bar table motions, 17 December 2010, para. 13.

**No oral hearing is needed**

14. Counsel for Mr Badreddine submitted that the complexity and importance of the issues required a hearing.<sup>16</sup> The Trial Chamber, however, has everything it needs to decide this without further oral submissions.

**Relevance: the subject matter of the WikiLeaks documents may be relevant to the Defence case**

15. The Trial Chamber is satisfied that the subject matter of both documents *may* be relevant to the proceedings and to the Defence case.

16. According to counsel for Mr Badreddine, the first WikiLeaks document—because it relates to Mr Siniora’s testimony—is relevant to test his credibility.<sup>17</sup> Counsel for Mr Oneissi observed that the WikiLeaks documents were similar to others admitted by the Trial Chamber under Rule 154, and are a useful resource to clarify political background.<sup>18</sup> The document is also relevant to test Mr Siniora’s credibility; it shows that his government intervened in the case-file of the four generals and thus illustrates its ‘sleights of hand and manoeuvres’. This indicates that Mr Siniora himself might attempt to influence the course of justice for political purposes. And, as it relates to the arbitrary detention of the generals, it could affect the integrity of the investigation, and hence the *proceedings*.<sup>19</sup> The Prosecution responded that the Badreddine Defence had not demonstrated the relevance of the document, especially as Mr Siniora had no knowledge of the meeting.<sup>20</sup>

17. Defence counsel made no submissions as to the relevance of the second WikiLeaks document—exhibit 2D133 MFI—in relation to Mr Jumblatt’s testimony.

18. The Trial Chamber accepts that the subject matter of the first WikiLeaks document, 1DT2-0312—relating to the detention of the four Lebanese generals—concerns the integrity of the investigation, and hence, culpability for the crimes charged. It *may* therefore be relevant to the

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<sup>16</sup> Badreddine motion, para. 31.

<sup>17</sup> Badreddine motion, para. 28.

<sup>18</sup> Oneissi observations, paras 6-7.

<sup>19</sup> Badreddine reply, para. 3.

<sup>20</sup> Prosecution response, paras 36-37.

proceedings. But because Mr Siniora testified that he did not know about the meeting—and denies sending Mr Rizk there with instructions to seek the U.S. Government’s interference in the manner alleged—its utility is markedly diminished. In these circumstances, it is difficult to see how the document—even if authentic—is relevant to his *credibility*. If admitted into evidence, the document would be only a hearsay—and hence untested and unauthenticated—account of a meeting not attended by any witness in the case.

19. The subject matter of the second, exhibit 2D133 MFI, *could* be relevant both to the issue of a motive for the attack on Mr Hariri and—as the document concerns a meeting that Mr Jumblatt is said to have attended and expressed views about militias in Lebanon—to Mr Jumblatt’s credibility. However, the document is not Mr Jumblatt’s and he denies that he said what the document attributes to him.

20. To receive it into evidence, the Trial Chamber has to be convinced of the document’s probative value, and in particular, its reliability. This includes its authenticity. But even if the Trial Chamber were satisfied of its authenticity and admitted it into evidence, the Trial Chamber would be faced with—on one hand, Mr Jumblatt’s sworn testimony denying something—and on the other, someone else’s hearsay document stating something to the contrary. Without proof of the document’s accuracy, and hence its reliability, the Trial Chamber is left only with Mr Jumblatt’s word.

21. The next issue, therefore, is whether the two documents have sufficient probative value, including their reliability and authenticity, for admission into evidence.

#### **International and national case law on the admissibility of WikiLeaks documents**

22. International and national courts have considered the admissibility of WikiLeaks documents. Their reasoning and decisions may be relevant here, and both the Defence and the Prosecution used them to support their arguments about the documents’ admissibility.

23. According to the Defence an emerging trend of judicial reasoning favours admitting WikiLeaks documents into evidence.<sup>21</sup> Defence counsel pointed to a decision in *Charles Taylor* at

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<sup>21</sup> Badreddine motion, paras 24-26.

the Special Court for Sierra Leone (SCSL) admitting a purported U.S. Government cable obtained from the WikiLeaks site, and holding that it was relevant.<sup>22</sup> The Prosecution responded, but incorrectly in relation to that case, that Rule 89 (C) of the SCSL's Rules of Procedure and Evidence only requires that documents are relevant; the documents need not be probative.<sup>23</sup>

24. In *Gotovina*, according to the Defence, the ICTY held that a large number of documents, including a 'diplomatic cable' prepared by a Prosecution witness, had sufficient indicia of credibility, including dates, names of recipients, signatures and seals and were therefore *prima facie credible* for admission.<sup>24</sup> But, responded the Prosecution, for reasons unrelated to its reliability, the document was not admitted, so any comments about its *potential* reliability create no precedent for admissibility.<sup>25</sup> The Defence submitted that in *Milošević* and *Karadžić and Milošević*, where allegations of interference in the administration of justice were sourced in WikiLeaks documents, the ICTY and MICT<sup>26</sup> decisions challenged neither the admissibility of the document nor the facts to which they referred.<sup>27</sup> The Prosecution responded that neither decision admitted the WikiLeaks documents into evidence nor made any findings regarding their admissibility.<sup>28</sup>

25. The Defence also referred to *Bancoult*, where the English High Court found that several WikiLeaks documents had been leaked, widely published, were before the court, and could be used

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<sup>22</sup> Badreddine motion, para. 24, citing SCSL-03-01-T, SCSL, Trial Chamber II, *Prosecutor v. Charles Ghankay Taylor*, Decision on the urgent and public with annexes A-C defence motion to re-open its case in order to seek admission of documents relating to the relationship between the United States Government and the Prosecution of Charles Taylor, 27 January 2011, p. 6.

<sup>23</sup> Prosecution response, para. 15. The decision, however, was made under the SCSL's Rule 92 *bis* rather than Rule 89 (C). Rule 92 *bis* (B) of the SCSL's Rules of Procedure and Evidence, 'Alternative proof of facts', which provides, 'The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted *and if its reliability is susceptible of confirmation*' (italics added).

<sup>24</sup> Badreddine motion, para. 25; ICTY, *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, Public Redacted Version of the 21 June 2012 Decision on Ante Gotovina's and Mladen Markač's Motions for the Admission of Additional Evidence on Appeal, 2 October 2012, para. 26.

<sup>25</sup> Prosecution response, paras 19-20.

<sup>26</sup> Mechanism for International Criminal Tribunals.

<sup>27</sup> Badreddine motion, para. 26 and footnote 32. ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54-Misc.5 & IT-02-54-Misc.6, Decision on the Initiation of Contempt Investigations, 18 July 2011; MICT, *Prosecutor v. Radovan Karadžić & Prosecutor v. Slobodan Milošević*, MICT-13-55-R90.1 & MICT-13-58-R90.1, Decision on *Karadžić* Requests to Appoint an *Amicus Curiae* Prosecutor to Investigate Contempt Allegations against Former ICTY Prosecutor Carla Del Ponte, 27 November 2013.

<sup>28</sup> Prosecution response, para. 22.



for cross-examination.<sup>29</sup> But *Bancoult*, responded the Prosecution, did not address the issue of the authenticity of the documents.<sup>30</sup>

26. The Prosecution also referred to *Case 002* at the Extraordinary Chambers in the Courts of Cambodia where the court refused to admit WikiLeaks documents, finding that it could not conclude the documents were authentic.<sup>31</sup>

27. The Prosecution, additionally, relied upon a U.S. Federal District Court case—the *American Civil Liberties Union v. Department of State*—to challenge the authenticity of the WikiLeaks documents.<sup>32</sup> There, a Freedom of Information Act request sought 23 diplomatic cables from the U.S. State Department, and some were released with redactions. The court held that the State Department had properly invoked exemptions to the Act, and that the ACLU had failed to prove the doctrine of ‘prior disclosure’, namely that the cables were already in the public domain. The prior disclosure had to be officially acknowledged as opposed to an unofficial disclosure, and disclosure on the WikiLeaks website did not substitute for an official acknowledgement. The ACLU could not show that the State Department had officially acknowledged that the cables formed part of the WikiLeaks disclosure.<sup>33</sup>

28. Further, according to the Prosecution, the Trial Chamber must decide the admissibility of the specific WikiLeaks documents tendered and not whether *all* documents obtained from the WikiLeaks website are admissible.<sup>34</sup> The Defence did not demonstrate the authenticity of the relevant document (1DT2-0312) and therefore failed to establish that it was reliable and had probative value.<sup>35</sup>

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<sup>29</sup> England and Wales, High Court of Justice (Administrative Court), *The Queen (on the application of Louis Oliver Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), 11 June 2013, paras 27, 35.

<sup>30</sup> Prosecution response, para. 23; England and Wales, High Court of Justice (Administrative Court), *The Queen (on the application of Louis Oliver Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), 11 June 2013, and England and Wales Court of Appeal (Civil Division), *The Queen (on the application of Louis Oliver Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708, 23 May 2014.

<sup>31</sup> Prosecution response, para. 13; ECCC, *Case 002*, Decision on the Co-Prosecutors’ and Khieu Samphan’s Internal Rule 87 (4) Requests concerning US Diplomatic Cables (E282 and E282/1; E290 and E290/1), 13 June 2013, paras 7, 11.

<sup>32</sup> Transcript of 26 March 2015, p. 85; United States District Court for the District of Columbia, *American Civil Liberties Union and another v. Department of State*, Civil Action No. 11-01072 (CKK), Memorandum Opinion, 23 July 2012.

<sup>33</sup> United States District Court for the District of Columbia, *American Civil Liberties Union and another v. Department of State*, Civil Action No. 11-01072 (CKK), Memorandum Opinion, 23 July 2012, p. 10.

<sup>34</sup> Prosecution response, para. 2.

<sup>35</sup> Prosecution response, para. 4.

29. The Trial Chamber has carefully examined these cases. The only decision admitting into evidence WikiLeaks documents—expressed to be American diplomatic cables—is that of two judges in *Charles Taylor*,<sup>36</sup> where the SCSL admitted two documents under its Rule 92 *bis*. The court, however, gave no reasoning for its decision and did not analyse the documents' authenticity.

30. The ECCC, by contrast, refused to admit the WikiLeaks documents. They did not satisfy its internal rules' *prima facie* standards of relevance, reliability and authenticity. Because the documents originated from the WikiLeaks website, rather than the U.S. State Department, the court could not conclude that they were authentic, and rejected them as 'unsuitable to prove the facts it purports to prove'.<sup>37</sup> The court noted, however, that authentic versions of the proposed cables could be sought from official sources.<sup>38</sup>

31. *Bancoult* related to a document referring to a meeting between U.S. and U.K. officials in May 2009. The U.K. Government had no note of it. The document had been published in *The Guardian*. The court allowed the cross-examination of U.K. officials on the contents of the document, but—on the basis of a possible violation of Articles 24 and 27 of 1961 Vienna Convention on Diplomatic Relations<sup>39</sup>—did not allow its admission as an authentic cable.<sup>40</sup> This was upheld on appeal.<sup>41</sup>

32. *Gotovina* merely stated that certain categories of documents had sufficient indicia of *credibility* to be admissible as additional evidence on appeal, but without stating why, or analyzing reliability, authenticity or accuracy. And, in the other two ICTY and MICT cases *Milošević* and *Karadžić and Milošević*, the admissibility of the WikiLeaks documents was not an issue.

33. The only comparable precedents on the admission of WikiLeaks documents therefore are: the unreasoned *Charles Taylor* decision where they were received into evidence; the reasoned ECCC Trial Chamber decision rejecting them; and the two reasoned decisions in *Bancoult* declining

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<sup>36</sup> The third judge, Justice Sebutinde, excused herself, naming herself as the subject of unsourced allegations in one of the cables, see, Declaration of Justice Julia Sebutinde.

<sup>37</sup> Under ECCC internal rule 87 (1), 'Unless provided otherwise in these IRs, all evidence is admissible.' Internal rule 87 (3) provides for exclusion, 'The Chamber may reject a request for evidence where it finds that it is: (c) unsuitable to prove the facts it purports to prove'.

<sup>38</sup> ECCC, *Case 002*, Decision of 13 June 2013, paras 7, 11.

<sup>39</sup> Article 24, on the inviolability of the archives and documents of a diplomatic mission, and Article 27, on the inviolability of a mission's correspondence.

<sup>40</sup> *Bancoult*, High Court, para. 51.

<sup>41</sup> *Bancoult*, Court of Appeal, paras 89 and 93.

admission. The judicial trend is therefore not, as argued by the Badreddine Defence, towards admitting WikiLeaks documents into evidence.

34. Here, the Trial Chamber has followed the *Bancoult* approach by permitting cross-examination on the contents of the disputed documents but disallowing reference to them as authentic U.S. cables.<sup>42</sup> But, relevantly, in cross-examination in *Bancoult* the two U.K officials who attended the meeting with the U.S. officials disagreed with some of the WikiLeaks documents' assertions. This shows the caution needed in assessing the admission into evidence of unauthenticated documents.

**Probative value: reliability, authenticity and accuracy of the documents**

35. In deciding whether to admit the WikiLeaks documents into evidence, the Trial Chamber must consider whether they contain adequate indicia of reliability. This includes authenticity and accuracy.

36. According to the Badreddine Defence, the WikiLeaks documents are admissible as evidence and, in principle, nothing prevents the Trial Chamber from admitting them.<sup>43</sup> WikiLeaks documents have been extensively published in, for example, *The New York Times*, *The Guardian*, *Der Spiegel*, *El País* and *Le Monde*. The U.S. Government has never denied the provenance of the WikiLeaks documents, and its State Department has in reality acknowledged that the WikiLeaks documents are leaked cables.<sup>44</sup> This gives them the necessary indicia of reliability. The document relating to Mr Siniora's Government was probative as it had indicia of reliability and was reliable because of its purpose—namely, to transmit an accurate report of a meeting.<sup>45</sup>

37. The Oneissi Defence argued that WikiLeaks documents are already public, reliable and have been admitted by international tribunals. And, their 'historical value has been widely acknowledged

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<sup>42</sup> *Bancoult*, High Court, paras 59-61. Cross-examination of the contents of the document was not objected to, 'provided that it was not asserted that it was a true copy of an "Embassy" cable', para. 27.

<sup>43</sup> Badreddine motion, paras 2-3.

<sup>44</sup> Badreddine motion, para. 15.

<sup>45</sup> Badreddine motion, para. 29.

in political and academic spheres, and their content never denied by the United States and most states...<sup>46</sup>

38. Relying upon the *ACLU* case, the Prosecution responded that Defence counsel had not demonstrated that the WikiLeaks documents are authentic United States diplomatic cables.<sup>47</sup> The ACLU did not convince the U.S. District Court that the U.S. Government had formally acknowledged the cables.<sup>48</sup> Similarly, here, the Trial Chamber has no evidence that the U.S. Government has acknowledged the two particular WikiLeaks documents. Moreover, Defence counsel have not demonstrated how general comments about the provenance of the WikiLeaks documents, newspaper reports, comments by politicians and the conviction of a U.S. soldier for disclosing classified material prove the authenticity of these specific documents. References to these external sources do not demonstrate authenticity. Further, an insufficient link exists between the suggestion that the entire WikiLeaks collection is genuine, and Defence submissions that specific documents should be admitted into evidence.<sup>49</sup>

39. The Oneissi Defence observed that the *ACLU* case concerned the State Department's disclosure of cables, and not their admissibility once disclosed.<sup>50</sup> The Badreddine Defence argued that the only conclusion that can be drawn from this case is that the U.S. State Department did not acknowledge the source of the WikiLeaks documents. The case is otherwise irrelevant.<sup>51</sup> The Prosecution replied that this case directly addressed the authenticity of the WikiLeaks documents, distinguishing it from those cited by the Defence.<sup>52</sup>

#### **Decision not to admit the two WikiLeaks documents into evidence**

40. The Trial Chamber accepts the Prosecution's submissions on authenticity. The Defence has not proved that the documents—apparently downloaded from the WikiLeaks website—are authentic

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<sup>46</sup> Oneissi observations, paras 3-5, citing *Karadžić and Milošević*, see footnote 27 above; *Charles Taylor*, see footnote 22 above; and ICTR, *The Prosecutor v. Karemera*, ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of UNAMIR documents, 30 October 2007. This case, however, pre-dates by three years the WikiLeaks disclosures and concerns documents obtained by the ICTR Prosecution from the UN archives in New York. It is not relevant.

<sup>47</sup> Prosecution response, paras 18-23.

<sup>48</sup> Cited at footnote 31 above, at p.10.

<sup>49</sup> Prosecution response, paras 24-27.

<sup>50</sup> Oneissi observations, para. 10.

<sup>51</sup> Badreddine motion, para. 11.

<sup>52</sup> Prosecution response, paras 27-28.

U.S. diplomatic cables. The documents may be authentic, but the Trial Chamber has no evidence of the U.S. Government acknowledging their authenticity, or indeed their accuracy. And, directly to the point on the reliability of the documents, the Trial Chamber has no evidence that they accurately describe the events referred to in them. In fact, Mr Siniora and Mr Jumblatt both denied what is stated in the documents. The *Bancoult* decision illustrates the difficulty in admitting such disputed documents in these circumstances.

41. Counsel for Mr Badreddine have not satisfied the ‘verification of the authenticity of evidence obtained out of court’ required under Rule 149 (E) when the Trial Chamber invited written submissions on the admission of WikiLeaks documents.

42. In these circumstances, the Trial Chamber is not satisfied that the documents have the necessary *prima facie* indicia of reliability—namely, authenticity and accuracy—for admission into evidence. As already noted, even if it found them authentic—as opposed to accurate—and received them into evidence, the Trial Chamber would face having the sworn testimony of two witnesses denying their contents, yet none affirming their accuracy. Without more, little weight could be given to them. It would be different if the moving party, here the Defence of Mr Badreddine, brought persuasive evidence of their authenticity and accuracy.<sup>53</sup>

43. The Trial Chamber is therefore not satisfied that either document ‘is what it professes to be in origin and authorship’,<sup>54</sup> and denies the Defence motion to admit the two documents into evidence. Consistent with previous rulings, however, counsel may question witnesses on the contents of such documents.<sup>55</sup>

### **No need to rule on the applicability of Rule 162**

44. The Prosecution initially argued that receiving the WikiLeaks documents into evidence could breach Rule 162 (A),<sup>56</sup> but did not advance this argument in written submissions.<sup>57</sup> As the Trial Chamber has decided the issue on the documents’ probative value, it need not consider this.

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<sup>53</sup> The Trial Chamber has required the Prosecution to call witnesses to prove the provenance of and to provide contextual evidence of business records, see, F1876, Decision on three Prosecution motions for the admission into evidence of mobile telephone documents, 6 March 2015, paras 40, 48, 52, 54.

<sup>54</sup> See footnote 12 above.

<sup>55</sup> Transcript of 26 March 2015, pp. 86-87, 88-89; 7 May 2015, pp. 37-38.

<sup>56</sup> Transcript of 26 March 2015, p. 86.

**DISPOSITION**

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

**DENIES** the Defence motion to admit into evidence two WikiLeaks documents: document 1DT2-0312 dated 6 July 2007, and exhibit 2D133 MFI (marked for identification) dated 8 April 2008.

**ORDERS** that the Badreddine Defence Reply to the Prosecution Response to its Request for the Admission of a Diplomatic Cable Published on the WikiLeaks Website remains confidential until the end of Mr Fouad Siniora's testimony.

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

Leidschendam,  
The Netherlands

21 May 2015

*David Re*

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Judge David Re, Presiding

*Janet Nosworthy*

\_\_\_\_\_  
Judge Janet Nosworthy

*Micheline Braidy*

\_\_\_\_\_  
Judge Micheline Braidy



<sup>57</sup> Defence counsel rejected this, arguing that the documents were already in the public domain and that any person using them could not therefore commit a crime; Oneissi observations, paras 9-10; Badreddine motion, para. 18.