

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: 3 February 2015

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

DECISION ON ‘THE DEFENCE FOR HUSSEIN HASSAN ONEISSI REQUEST FOR CERTIFICATION OF THE “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” OF 30 DECEMBER 2014’

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Counsel for Mr Salim Jamil Ayyash:

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

Victims’ Legal Representatives:

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

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 Dorothee Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yassine
Hassan & Mr Philippe Larochelle

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux
& Mr Geoffrey Roberts



BACKGROUND

1. Counsel for the Accused, Mr Hussein Hassan Oneissi, seek certification to file an interlocutory appeal, under Rule 126 (C) of the Special Tribunal's Rules of Procedure and Evidence, against a decision the Trial Chamber issued on 30 December 2014 to receive 485 documents into evidence under Rule 154.¹ The decision found that 485 documents, photographs and witness statements relating to Mr Rafik Hariri's movements and to political events preceding his assassination in Beirut on 14 February 2005, were all *prima facie* relevant and probative.²
2. The Trial Chamber (relevantly) adopted the following headings to analyse the disputed documents: a) United Nations Security Council Resolution 1559 of 2004 and UN media or press reviews; b) international and domestic legal instruments, and d) media or press releases and newspaper articles.³ The Trial Chamber reviewed each document and concluded that evidence relating to the political situation in Lebanon before the assassination could provide relevant background and give context to other evidence. It could also help to explain the wider circumstances leading to the assassination and any non-private motives for the commission of an offence that the Trial Chamber could find proven.⁴
3. Defence counsel specifically wish to appeal the admission into evidence of the documents listed in Annex A of the Prosecution's motion for the admission of the documents into evidence, under the headings: 1.2, documents related to Resolution 1559;⁵ 1.3, legal instruments and related documents; 1.5, press releases; and 1.6, newspaper articles.⁶ They had opposed the Trial Chamber receiving

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, 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 (Trial Chamber decision). Rule 154 reads: 'Subject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149 (C) and (D).'

² Trial Chamber decision, paras 27, 31 and 36.

³ Trial Chamber decision, paras 5-11.

⁴ Trial Chamber decision, para. 30.

⁵ Except UN Security Council Resolution 1559 and three documents listed under this item of which the Trial Chamber took judicial notice and one press release it admitted into evidence. (Trial Chamber decision, para. 5)

⁶ F1807, The Defence for Hussein Hassan Oneissi Request for Certification of the "Decision on Prosecution's Motion for Admission Into Evidence 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri's Movements and to Political Events" of 30 December 2014, 6 January 2015 (Oneissi motion) para. 4.

On 4 November 2014, the Oneissi Defence objected to the admission of documents in Annex A of the "Prosecution Motion for Admission of Evidence Relevant to Movements of Rafik Hariri and Political Events." (F1733, The Defence for Hussein Hassan Oneissi Response to "Prosecution Motion for Admission of Evidence Relevant to Movements of Rafik Hariri and Political Events" Filed 21 October 2014, 4 November 2014 (in relation to F1711, Prosecution Motion for Admission of Evidence Relevant to Movements of Rafik Hariri and Political Events, 21 October 2014)).

these documents into evidence,⁷ and have posed the following question for certification for an interlocutory appeal:⁸

whether the documents listed under Annex A, items 1.2, 1.3, 1.5 and 1.6 of the “Prosecution Motion for Admission of Evidence Relevant to Movements of Rafik Hariri and Political Events”; and, more particularly, whether the “political situation” (including “background”, “context”, the “wider circumstances” and “non-private motives”) meets the threshold of Rule 149 (C).

4. The ‘threshold’ of Rule 149 (C) is that ‘A Chamber may admit any relevant evidence which it deems to have probative value’.

DISCUSSION

The legal principles

5. Rule 126 (C), ‘Motions Requiring Certification,’ requires the Trial Chamber to certify a decision for interlocutory appeal:⁹

if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. The Trial Chamber must be satisfied that an issue meets these strict requirements to certify an interlocutory appeal. Its analysis includes deciding whether the challenged decision involves a precise issue with an adequate legal or factual basis, but is not concerned with whether a decision was correctly reasoned.¹⁰

Defence submissions

7. According to Defence counsel, the ‘sole issue for which certification is sought is whether the documents admitted under Rule 154 are relevant to the proceedings’. The broad and overlapping notions of ‘background,’ ‘context,’ the ‘wider circumstances,’ and, particularly, ‘non-private motives,’ all purportedly falling under the umbrella of ‘the political situation,’ are not relevant to the

⁷ F1733, The Defence for Hussein Hassan Oneissi Response to “Prosecution Motion for Admission of Evidence Relevant to Movements of Rafik Hariri and Political Events” filed 21 October 2014, 4 November 2014.

⁸ Oneissi motion, para. 17.

⁹ Rule 126 (C).

¹⁰ STL-11-01/PT/AC/AR126.2, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, F0008, Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, paras 13-15 (and references therein). Cf. STL-11-01/PT/AC/AR126.5, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, F0003, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judge’s “Decision on Sabra’s Tenth and Eleventh Motions for Disclosure”, 6 November 2013, para. 7.

proceedings. Alternatively, even if the documents are relevant, the evidence sought to be admitted has no probative value.¹¹

8. The relevance of the disputed evidence, according to Defence counsel, impacts on the fair and expeditious conduct of the proceedings. The sudden and exceptional introduction of ‘broad swathes of evidence’ has modified the nature of the proceedings in a manner not foreshadowed by the consolidated indictment, the pre-trial brief, or during the pre-trial proceedings.¹² This breaches the Accused’s rights to have ‘adequate time and facilities for the preparation of his or her defence’ and to ‘examine all evidence to be used against him or her during the trial’ under Article 16 (4) (b) and (f) of the Statute of the Special Tribunal. Defence counsel argue that while examining this ‘new political evidence’ admitted under Rule 154, they may need to re-examine certain witnesses or request a stay of proceedings to conduct investigations or retrieve evidence from the Lebanese authorities. This would inevitably delay the trial, contrary to Articles 21 (1) and 28 (2) of the Statute.¹³ Further, admitting this type of evidence changes the nature of the trial and therefore affects its outcome, as such evidence could be used against Mr Oneissi and lead to prejudicial impressions that are unrelated to any specific charge.¹⁴

9. In relation to the second part of the test for certification, an immediate resolution by the Appeals Chamber would materially advance the proceedings by allowing Defence counsel to plan the nature of defence preparations regarding the meaning and scope of this evidence.¹⁵

Prosecution submissions

10. The Prosecution opposed the motion, arguing that the Defence submissions have not met the strict requirements for certification.¹⁶ The motion does not address any specific aspect of the relevant evidence, and it is therefore merely an attempt to argue in the abstract against a general approach to the Trial Chamber’s admission of evidence.¹⁷ Similarly, the reference to the right to have adequate time to prepare for trial does not arise from the Trial Chamber’s decision.¹⁸ The evidence does not go to the acts and conduct of the Accused, and, since it cannot of itself form the basis of a criminal

¹¹ Oneissi motion, paras 7-8.

¹² Oneissi motion, para. 12.

¹³ Oneissi motion, para. 13.

¹⁴ Oneissi motion, para. 14.

¹⁵ Oneissi motion, para. 16.

¹⁶ F1822, Prosecution Response to the Oneissi Defence Request for Certification of the “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”, 21 January 2015, para. 3.

¹⁷ Prosecution response, paras 8-10.

¹⁸ Prosecution response, para. 12.

conviction, it may not significantly affect the fair conduct of the proceedings or the outcome of the trial.¹⁹ Moreover, because Defence counsel may continue throughout the proceedings to challenge the evidence, the issue does not require immediate resolution by the Appeals Chamber.²⁰ Finally, the other arguments are either speculative or are a mere attempt to reargue a decided issue.²¹

Discussion

11. The Trial Chamber has endorsed the well-settled principle of international criminal procedural law that certification to appeal is the absolute exception when deciding on the admissibility of evidence.²² A question for certification relating to admitting something into evidence will therefore rarely meet the standard in Rule 126 (C).

12. The first part of the test is whether the question involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial. In this respect, Defence counsel have posed a general question of whether admitting a particular class of documents into evidence could meet the standard in Rule 149 (C)—in that the evidence must be relevant and probative. However, they have not demonstrated with any specificity—much less in relation to any particular document or class of documents—how the admission into evidence of any of these documents would affect ‘the fair and expeditious conduct of trial’. More specifically, the Prosecution has correctly submitted that the issue of adequate preparation time is unrelated to the question for certification, namely whether the disputed evidence is relevant.²³

13. As to whether receiving the documents into evidence could affect ‘the outcome of the trial’, the Trial Chamber agrees with the Prosecution’s submission that admitting this background evidence does not represent a ‘sudden sea change’ which has ‘transformed the nature of the trial’.²⁴ The admission into evidence of ‘background’ or ‘contextual’ material cannot change the scope of the Prosecution case as set out in the consolidated indictment, read in conjunction with the pre-trial brief. The concerns of Defence counsel that this type of evidence unfairly changes the case against the Accused are misplaced; the Trial Chamber is not allowing the Prosecution to amend the documents outlining the charges, and none of the documents provide evidence directly going to the acts and conduct of the Accused. At trial, the Prosecution must generally offer its best understanding of the

¹⁹ Prosecution response, para. 5.

²⁰ Prosecution response, paras 6-8.

²¹ Prosecution response, paras 13-15.

²² F1798, Decision on Application for Certification of Decision Regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, para. 14.

²³ Prosecution response, para. 12.

²⁴ Prosecution response, para. 11.

case in its indictment,²⁵ and this is what the Trial Chamber has allowed it to do. But in any event, the disputed evidence aims to provide relevant background material and to give context to any evidence directly relevant to the individual criminal responsibility of the Accused.

14. It is also not clear what is meant by the submission that ‘the net effect is that the political evidence will raise a prejudicial impression that need not be proven to any particular standard – as it does not relate to any particular charge – but will nevertheless contribute to the weight of evidence against the Accused and thereby affect the outcome of the trial’.²⁶ It is unclear what this ‘prejudicial impression’ is supposed to be, or how—at this point in the proceedings—it could affect the outcome of the trial. The Trial Chamber has decided that the evidence is *prima facie* relevant and probative and will only determine its weight, if any, at the conclusion of the trial. For these reasons the first part of the test in Rule 126 (C) has not been met.

15. Having made this finding, the Trial Chamber would not normally move to consider the second part of the test, namely that an immediate resolution by the Appeals Chamber ‘may materially advance the proceedings’. However, here, and to provide some guidance to the Parties in making future applications under Rule 126 (C), the Trial Chamber observes that it could envisage situations where the standard for certification under the second part of the test could be met. These could include where a Chamber has declined to admit evidence in circumstances that would deprive a Party of a final chance to put relevant evidence before the court. Here, however, an immediate resolution by the Appeals Chamber will not materially advance the proceedings, as the Trial Chamber will only decide—when the trial record is complete—as to the weight, if any, it can give to the disputed evidence. Further, Defence counsel may challenge it during the Prosecution case and in any Defence case, and, additionally, make submissions as to whether the Trial Chamber can give it any weight.

The status of exhibit MFI P364

16. In a court session on 15 January 2015, Prosecution counsel questioned a witness, Dr Ghattas Khoury, on two of the documents covered by this decision, namely, some media or press releases issued by the United National Information Centre in Beirut on 23 August, and 2 September 2004.²⁷

²⁵ F1105, Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013, para. 17 (and cited case law).

²⁶ Oneissi motion, para. 14

²⁷ T. 107, 15 January 2015, pp 15-17.

These were marked for identification in court as exhibit MFI P364.²⁸ As a consequence of this decision, MFI P364 will be admitted into evidence as Prosecution exhibit P364.

DISPOSITION

FOR THESE REASONS, the Trial Chamber

DISMISSES the motion.

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

Leidschendam,
The Netherlands
3 February 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



²⁸ T. 107, 15 January 2015, p. 16.