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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: 10 July 2015

Original language: English

Classification: Confidential

THE PROSECUTOR

v.

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

**DECISION DENYING CERTIFICATION TO APPEAL THE TRIAL
CHAMBER'S DECISION ON ISSUING A SUMMONS TO WITNESS 012**

Office of the Prosecutor:

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& Mr Alexander Hugh Milne

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Mr Thomas Hannis

Victims' Legal Representatives:

Mr Peter Haynes, Mr Mohammad F. Mattar
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Mr Antoine Korkmaz, Mr John Jones &
Mr Iain Edwards

Witness 012

Mr Geoffrey Robertson & Mr Toby Collis,
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Morley of Howard Kennedy LLP, with Gail
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Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothee Le Fraper
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Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts



INTRODUCTION AND PROCEDURAL HISTORY

1. The Trial Chamber, on 1 July 2015, issued a summons to a witness, Witness PRH012, to appear to testify in the trial. In its decision, the Trial Chamber decided that the qualified privilege that, in some limited circumstances, excuses ‘war correspondents’ from testifying in international trials—as found in a decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY)—did not apply to this witness.¹ Witness PRH012 seeks certification to file an interlocutory appeal, under Rule 126 (C) of the Special Tribunal’s Rules of Procedure and Evidence, against this decision.² The Prosecution opposed the application.³

2. The brief procedural history is that the Prosecution sought a summons for Witness 012 to appear to testify.⁴ At the Trial Chamber’s invitation, Witness 012 filed submissions opposing the summons. She did so on the basis of this ‘war correspondent’s’ privilege.⁵ The Prosecution filed a reply,⁶ and the Trial Chamber issued its decision on 1 July 2015.⁷ This summons was served on Witness 012 on 4 July 2015 at her office.⁸

3. Witness 012 wrote to the Special Tribunal’s Registrar on 8 July 2015, requesting an extension of time to seek certification to appeal the decision ordering the summons, but before the Trial Chamber had could decide this issue, filed her application.⁹

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2040, Decision on Prosecution Application for a Summons to Appear for Witness 012 and Order Issuing a Summons for a Witness, 1 July 2015.

² F2059, Application for Certification for the Appeal of the Trial Chamber’s Decision Dated 1 July 2015, pursuant to Rule 126, 8 July 2015.

³ F2065, Prosecution Response to “Application for Certification for the Appeal of the Trial Chamber’s Decision Dated 1 July 2015, pursuant to Rule 126”, 10 July 2015. As the witness was ordered to appear to testify on 14 July 2015, the Trial Chamber shortened the deadline to respond to this application. Email from Trial Chamber’s Senior Legal Officer to counsel, 8 July 2015.

⁴ F1966, Application for a Summons to Appear in respect of Witness PRH012, 26 May 2015.

⁵ F2019, Written Submissions on Behalf of Witness 012 in Opposition to the Prosecutor’s Application dated 26 May 2015 for a Summons to Appear, 21 June 2015.

⁶ F2027, Prosecution Submissions on ‘Written Submissions on Behalf of Witness 012 in Opposition to the Prosecutor’s Application dated 26 May 2015 for a Summons to Appear’, 25 June 2015.

⁷ Witness 012 sent a reply to the Prosecution submissions on 3 July 2015, but this was not filed before the Trial Chamber because leave had not been sought under Rule 8 (B) to file a reply and the Trial Chamber had already issued its decision. Application for certification, para. 3.

⁸ Application for certification, para. 4.

⁹ Application for certification, para. 5. Witness 012 states that, having not heard from the Trial Chamber, she filed her application at 15:45, London time. The Trial Chamber was still in session and only adjourned at 16:47, Leidschendam time. Transcript of 8 July 2015, p. 107.

THE LEGAL PRINCIPLES FOR CERTIFICATION FOR APPEAL

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

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.

5. The Trial Chamber must be satisfied that an issue for certification meets the Rule’s strict requirements.¹⁰ This high threshold means certification for appeal is exceptional.¹¹ A request for certification is concerned not with whether a decision was correctly reasoned or not but solely whether the challenged decision involves a precise issue, with an adequate legal or factual basis in the decision, which meets the requirements of Rule 126 (C).¹² Judicial economy dictates that appeals on issues not meeting this threshold are heard, if necessary, once the Trial Chamber has rendered its judgment on the merits.¹³

SUBMISSIONS

6. Witness 012 submits, without citing any of the Special Tribunal’s case law on certification for an interlocutory appeal, that a number of ‘issues’ involved in the decision merit appellate consideration. She does not, however, articulate a precise certifiable issue or a question to submit to the Appeals Chamber.

7. She argues, first, that Rule 126 applies to the application for a summons. She submits that ‘the rules of the SLA [meaning, presumably, the Special Tribunal for Lebanon, or, as commonly abbreviated, ‘the STL’] do not foresee interlocutory appeals by third parties’ but such appeals could be made through direct application to the Appeals Chamber—as *in the matter of El Sayed*¹⁴—or, applying the ICTY’s case law, by holding that Rule 126 applies to applications for summons.¹⁵ Witness 012 then argues that this very issue itself requires

¹⁰ STL-11-01/PT/AC/AR90.2, F0007, Decision on Defence Appeals against Trial Chamber’s “Decision on Alleged Defects in the Form of the Amended Indictment”, 5 August 2013, para. 7 and references therein.

¹¹ STL-11-01/PT/AC/AR126.2, 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, para. 11 and references therein.

¹² Decision on Appeal on Absence of Authority of the Prosecutor, paras 13-15 and references therein.

¹³ STL-11-01/PT/AC/AR126.1, F0012, *Corrected Version of* Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial *in Absentia* Decision, 1 November 2012, para. 11.

¹⁴ STL, CH/AC/2010/02, *In the matter of El Sayed*, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010.

¹⁵ Application for certification, para. 6. See ICTY, *Prosecutor v. Radoslav Brđanin and Momir Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

certification, namely, ‘whether there is a route, under Rule 126 or the inherent jurisdiction, for the Appeal Chamber to hear an appeal against a decision that impacts on the rights of a third party to the trial.’ This issue, according to the witness, may arise in future summons or in the contempt proceedings. The overall fairness of the trial would be affected if there is no avenue for appeal against decisions affecting the rights of third parties.¹⁶

8. Second, Witness 012 argues that the decision involves the issue of the correct interpretation of Rules 149 (C), 154 and 155.¹⁷ She reiterates the Prosecution’s lack of opposition to the Trial Chamber receiving Witness 012’s evidence under Rule 155, and asserts (but incorrectly repeating her earlier submissions),¹⁸ that no inquiry has been made of the Defence to see whether they have relevant questions for her on cross-examination.

9. Article 19 of the Statute of the Special Tribunal¹⁹ controls the interpretation of the Rules relating to evidence, and, according to Witness 012, requires that the Trial Chamber receive evidence collected by Lebanese authorities or the United Nations International Independent Investigation Commission (UNIIC). Because she made statements, including at least one sworn statement to the Lebanese authorities, and then to the UNIIC, the Trial Chamber should admit these into under Rules 149 (C) and 154. This interpretation ‘is a matter appropriate for appellate consideration’ because the ready admissibility of investigative material ‘would assist the fair and expeditious proceedings’.²⁰

10. Third, Witness 012 submits that the Trial Chamber erred in interpreting what constitutes ‘the acts and conduct of the Accused’ under Rule 155. She contends that ‘as charged in the indictment’ in that Rule means that the acts and conduct must amount to a

¹⁶ Application for certification, para. 11.

¹⁷ Rule 149 (C) states: ‘A Chamber may admit any relevant evidence which it deems to have probative value’. Rule 154 states: ‘Subject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rules 149 (C) and (D)’. Rule 155 states: ‘Subject to Rule 158, the Trial Chamber may admit in lieu of oral testimony the evidence of a witness in the form of a written statement [...] which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment’.

¹⁸ Application for certification, para. 12. *See also* Decision of 1 July 2015, para. 16 (stating that Defence counsel have informed the Prosecution that they wish to cross-examine Witness 012 when she testifies).

¹⁹ Which states: ‘Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council Resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on the collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers’.

²⁰ Application for certification, para. 12.

crime. This interpretation is likely to recur and thus affects the fair and expeditious conduct of the proceedings.²¹

11. Fourth, Witness 012 argues that the Trial Chamber incorrectly determined that she was not a ‘war correspondent’ and that Lebanon was not a ‘conflict zone’ in 2005. The relevant time in determining whether Lebanon is a conflict zone, according to the witness, is 2015. She makes no submissions, however, on how this affects the fair and expeditious conduct of the proceedings, or that immediate resolution by the Appeals Chamber is required.

12. Finally, she submits that the Trial Chamber erred when it did not refer to the statement of Mr Thomas Perry, the Reuters’ Bureau Chief of Lebanon, Syria and Jordan, that was annexed to her submissions. His evidence was relevant to determining whether Lebanon is a conflict zone and the witness’s views on threats to her safety and professional reputation from testifying. She is entitled to have this evidence evaluated and appellate evaluation on these issues ‘may assist in future cases’.²²

13. Witness 012 also requests the Trial Chamber to suspend the summons for her appearance pending determination of these issues on appeal.²³

14. The Prosecution sought the dismissal of the application, arguing that Witness 012 is not authorised to request certification under Rule 126. The Rule does not apply to third parties, as seen by the word ‘a Party’ in Rule 126 (E), which is defined in Rule 2 as ‘The Prosecutor or the Defence’. The case law of the ICTY is irrelevant and non-binding, and the Special Tribunal’s Appeals Chambers’ decision in *El Sayed* is irrelevant as concerned a Prosecution appeal and not one by a third party. This issue also does not arise from the Trial Chamber’s decision, which only concerned the Prosecution’s request for a summons and not whether third parties may appeal Trial Chamber decisions.²⁴

15. Further, Witness 012 does not identify any issues meeting the threshold requirements of Rule 126. The issues raised in the application do not arise from the Trial Chamber’s decision, go to the general interpretation of the Statute, Rules and legal principles, and are either based on mere disagreements with the reasoning of the Trial Chamber, or on a mischaracterization of the Trial Chamber’s decision. Witness 012, therefore, has not

²¹ Application for certification, para. 13.

²² Application for certification, para. 15.

²³ Application for certification, para. 17.

²⁴ Prosecution response, paras 2, 8-13, 16.

identified any issues that affect the fair and expeditious conduct of the proceedings that require immediate resolution by the Appeals Chamber.²⁵

DISCUSSION

16. The Special Tribunal's Rule 126 is identical to the same Rules concerning certification at the ICTY and the International Criminal Court.²⁶ The Trial Chamber is prepared to construe Rule 126 liberally, in this particular case, and to follow the ICTY precedent in *Brđanin*, in certifying an issue for interlocutory appeal where the interests of third parties are affected.²⁷

17. However, this finding precludes her first issue from being certified. Having decided that the Trial Chamber can certify an issue for interlocutory appeal under Rule 126, an Appeals Chamber determination on this issue could not materially advance the proceedings. This submission is dismissed.

18. The second issue identified—whether Article 19 controls the interpretation of Rules 149 (C), 154 and 155—relies on an incorrect analysis of Article 19. Witness 012 suggests that Article 19 requires the automatic admission into evidence of everything collected by the Lebanese authorities or UNHCR. But if accepted, this reading would seriously infringe upon the rights of the Accused to a fair trial. Article 19 simply provides that the Prosecution receives all of the evidence collected, and, as is plainly stated, that the Trial Chamber will determine admissibility and weight independently. This 'issue' cannot arise from the Trial Chamber's decision: the statements to Lebanese authorities and UNHCR were provided to the Prosecution, and, as Witness 012 submitted, '[t]here has been no suggestion that international standards on the *collection* of evidence were not met in the collection of these witness statements'.²⁸ Article 19 has no bearing on Rules 149 (C), 154 or 155. Therefore, there is no appealable issue which would affect the fair and expeditious conduct of the trial or requires immediate resolution.

19. Similarly, Witness 012's third issue concerning the acts and conduct does not affect the fair and expeditious conduct of the proceedings. Witness 012 cites no authority for her interpretation and merely asserts that this interpretation may come up again so 'it would

²⁵ Prosecution response, paras 14-19.

²⁶ ICTY, Rule 73 (B); ICC, Rome Statute, Article 82 (1) (d). *See also* Special Court for Sierra Leone, Rule 73 (B); International Criminal Tribunal for Rwanda, Rule 73 (B).

²⁷ ICTY, *Prosecutor v. Radoslav Brđanin and Momir Talić*, IT-99-36-T, Decision to Grant Certification to Appeal the Trial Chamber's 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence', 19 July 2002.

²⁸ Application for certification, para. 12 (emphasis in the original).

contribute to the fair and expeditious conduct of the proceedings to have it settled by the Appeals Chamber'. But this is not the test. Rule 126 does not allow certification merely to settle a disputed interpretation. An identified issue must affect the fair and expeditious conduct of the proceedings and resolution by the Appeals Chamber must materially advance the proceedings. Witness 012 has not demonstrated how the Trial Chamber's interpretation rises to the level of significantly affecting the fair and expeditious conduct of the proceedings.

20. On the issue of the 'war correspondent's privilege', Witness 012 merely disagrees with the Trial Chamber's decision. She makes no submissions either on how the Trial Chamber's interpretation affects the fair and expeditious conduct of the proceedings or on how immediate resolution by the Appeals Chamber would materially advance the proceedings. Mere disagreement with the reasoning of the Trial Chamber does not rise to a certifiable issue. Witness 012 has not demonstrated that the Trial Chamber's decision that she was not a war correspondent and Lebanon was not a conflict zone in 2005 affects the fairness or expeditious conduct of the proceedings.

21. Finally, the fact that the Trial Chamber's decision did not explicitly refer to the statement of Mr Thomas Perry, Witness 012's employer at Reuters in Beirut, is not an error that can of itself be certifiable. The Trial Chamber is not obliged to cite everything placed before it by a Party. Particularly if it is not helpful. Nothing in Mr Perry's statement or the other documents annexed to Witness 012's submissions suggested that Mr Perry was qualified to provide an opinion on conflict zones, nor specifically, whether Lebanon, in February 2005, was in a state of conflict. This does not significantly affect the fair and expeditious conduct of the proceedings.

22. Moreover, Witness 012's submission that 'an appellate court evaluation of [...] whether Lebanon is (or was) a conflict zone may assist in future cases' is irrelevant. The Special Tribunal is not applying international humanitarian law, which requires the existence of an armed conflict. The Trial Chamber applies the substantive criminal laws of Lebanon and, procedurally, the Special Tribunal's Rules of Procedure and Evidence.²⁹ A determination of whether Lebanon was a conflict zone has no bearing on either. The standard for certification is not whether it may assist future cases to have an Appeals Chamber determination, but whether there is an issue that affects the fair and expeditious conduct of the

²⁹ See, STL-11-01/I/AC/R176bis, F0936, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* with corrected front page, 16 February 2011.

proceedings for which immediate resolution by the Appeals Chamber would materially advance the proceedings.

23. Witness 012 neither identified any issue that affects the fair and expeditious conduct of the proceedings and requires immediate resolution by the Appeals Chamber nor formulated any question for certification for interlocutory appeal. The application for certification is therefore dismissed.

24. Having found no appealable issue in Witness 012's submissions, there is no need to consider whether to suspend the effect of the summons. It remains in force.

CONFIDENTIALITY

25. The Trial Chamber reiterates the public nature of these proceedings. This decision is filed confidentially only pending an application for protective measures. Otherwise it will be reclassified as public. The Parties must file publicly redacted versions of their filings, or their filings will be reclassified as public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the application.

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

Leidschendam,
The Netherlands

10 July 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

