

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: 2 December 2016

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING CERTIFICATION TO APPEAL DECISION ON OGERO
SUBSCRIBER RECORDS**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Milne

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 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 Guénaél Mettraux &
Mr Geoffrey Roberts



TRIAL CHAMBER'S DECISION

1. The Trial Chamber, on 7 November 2016, issued a decision admitting into evidence, under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence, 60 telephone subscriber records from OGERO, a Lebanese telecommunications company.¹ This Rule permits the reception of documentary evidence without the testimony of a witness.

2. In its decision, the Trial Chamber noted that the landline subscriber records were relevant to show the identities of third parties who subscribed to OGERO numbers in contact with telephone numbers that the Prosecution seeks to attribute in its case to each of the four Accused and the former Accused, Mr Mustafa Amine Badreddine. Further, they show that two OGERO numbers were registered to the Accused, Mr Salim Jamil Ayyash.²

3. The Trial Chamber had previously admitted into evidence, without objection, subscriber notes in the Prosecution's possession, also extracted from OGERO's database. It found the requisite *prima facie* indicia of reliability from their sourcing from the business records of OGERO, as a Lebanese telecommunications service provider, and their transfer to the Prosecution through the Lebanese Ministry of Telecommunications.³

Defence motion

4. Counsel for the Accused, Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi, jointly seek to have the decision certified for interlocutory appeal under Rule 126 (C),⁴ arguing that the Trial Chamber erred in finding the documents *prima facie* reliable without first hearing the testimony of any witnesses from OGERO.

5. Defence counsel argue that the Trial Chamber erred in not requiring a witness to testify as to the accuracy of the documents when it took into account that it had previously admitted other OGERO records under Rule 154. Moreover, the Prosecution had also filed a motion seeking to tender into evidence under Rule 155 the consolidated statement of some

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2818, Decision on Prosecution Rule 154 Motion for the Admission of Documents Related to Telephone Subscriber Records from the OGERO Company, 7 November 2016.

² Decision, paras 7, 18.

³ Decision, para. 19; *see* F2297, Decision on Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155 and Documents pursuant to Rule 154, 2 November 2015, para. 51.

⁴ F2833, *Requête de la Défense de M^s Oneissi et Merhi aux fins de la Certification de l'Appel de la "Decision on Prosecution Rule 154 Motion for the Admission of Documents Related to Telephone Subscriber Records from the OGERO Company,"* 14 November 2016.

witnesses from OGERO before the Trial Chamber issued its decision.⁵ The matter should be certified for interlocutory appeal.

Prosecution's submission

6. The Prosecution opposed the motion, arguing that it merely expressed disagreement with the decision and had not demonstrated that the identified issues fell within the first limb of Rule 126 (C) in significantly affecting the fair and expeditious conduct of the proceedings or the outcome of the trial. Moreover, it mischaracterized the decision by ignoring that the Trial Chamber had considered the supporting statement of an OGERO representative as to the provenance and chain of custody of the documents. The decision had also considered that the Prosecution had sought the admission of this statement and that of other OGERO representatives.⁶

THE LAW – RULE 126 (C)

7. Rule 126 (C) permits the certification of a decision for interlocutory appeal where an issue arising from the decision ‘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’. A Chamber must be satisfied that an issue for certification meets the Rule’s strict requirements.⁷ To meet this high threshold, a request for certification concerns not whether the Trial Chamber provided correct reasoning, but whether the challenged decision involves a specific legal issue requiring further analysis that meets the standard in Rule 126 (C).⁸ Appeals not meeting this threshold are heard once the Trial Chamber has rendered its judgment.⁹

⁵ F2805, Prosecution Motion for the Admission of the Consolidated OGERO Statement pursuant to Rule 155, 2 November 2016, Public with Confidential Annexes A and C, and Public Annex B.

⁶ F2856, Prosecution Response to Request for Certification to Appeal the “Decision on Prosecution Rule 154 Motion for the Admission of Documents Related to Telephone Subscriber Records from the OGERO Company”, 25 November 2016, paras 3, 5-7.

⁷ F2069, Decision Denying Certification to Appeal the Trial Chamber’s Decision on Issuing a Summons to Witness 012, 10 July 2015, para. 5 (‘Decision of 10 July 2015’); 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.

⁸ Decision of 10 July 2015, para. 5; 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, paras 11, 13, 15.

⁹ 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.

DECISION

8. The Trial Chamber has informed the Parties that it has decided to accept the consolidated OGERO statement into evidence under Rules 155 and 156, while requiring some witnesses to appear for cross-examination, and that a written decision will follow.¹⁰ Defence counsel may question these witnesses about any relevant matters relating to the subscriber records. Any further submissions on the documents can be made then. The Defence motion has not raised an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. There is accordingly no need to examine the second limb of the Rule. The motion is without merit.

FOR THESE REASONS, the Trial Chamber dismisses the motion.

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

Leidschendam,
The Netherlands
2 December 2016

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



¹⁰ Email from Trial Chamber's legal officer to Parties, 24 November 2016.