

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: 6 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 THE
ADMISSION OF CALL SEQUENCE TABLES RELATED TO THE MOVEMENTS
OF MR RAFIK HARIRI AND RELATED EVENTS, AND FOUR WITNESS
STATEMENTS’**

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Hugh
Milne

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair

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 Guénaël Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. On 31 October 2016, the Trial Chamber, among other things, declared admissible forty-six call sequence tables and SMS call sequence tables related to the movements of the former Prime Minister of Lebanon, Mr Rafik Hariri, and related events leading up to the attack of 14 February 2005 in which he was killed, together with others.¹ Counsel for the Accused, Mr Hussein Hassan Oneissi, filed a motion requesting certification to appeal the decision, which the Prosecution opposes.²

SUBMISSIONS

2. The questions sought to be certified are whether the Trial Chamber erred in ruling that:

- a. the allegations in relation to a group of seven purple phones, close associates of the three ‘principal purple phones’ allegedly used by Mr Merhi, Mr Oneissi and Mr Sabra are not material facts which should have been included in the Indictment; and
- b. the allegations in relation to a group of seven purple phones, close associates of the three ‘principal purple phones’ allegedly used by Mr Merhi, Mr Oneissi and Mr Sabra are not new.³

3. The Oneissi Defence submits that these issues concern the nature and cause of the charges against Mr Oneissi. Further, since the indictment is at issue, any dispute in its regard, particularly involving specificity and enabling the Defence to prepare for trial, is so important that the certification standard is met. Their resolution may materially advance the proceedings, especially in light of recent and ‘controversial’ filings relating to the role of Hezbollah and in order to clarify the appropriate standard in relation to ‘facts versus evidence’. The Oneissi Defence argues that the Trial Chamber erred in finding that the call sequences tables related to ‘associate purple phones’ were new evidence rather than new allegations constituting additional material facts. The amended consolidated indictment does

¹ *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, F2798, Decision on the Admission of Call Sequence Tables Related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements, 31 October 2016. They are now exhibits P520-P521 and P1321-P1364.

² F2823, Request for Certification to Appeal the “Decision on the Admission of Call Sequence Tables Related to the Movements of Mr Rafik Hariri and Related Events”, 7 November 2016; F2846, Prosecution Response to “Oneissi Request for Certification to Appeal the Decision on the Admission of Call Sequence Tables related to the Movements of Mr Rafik Hariri and related Events”, 23 November 2016.

³ Oneissi motion, paras 2, 19.

not include any paragraph referring to a group of ‘associate purple phones’ or their purported role and that they cannot be considered as evidence simply because the Prosecution presented them as such in its original motion; they are facts that belong in an indictment. The Trial Chamber erred in deciding that the Oneissi Defence were properly notified of the allegations concerning the ‘associated purple phones’ and that the applicable procedure is that for the amendment of the indictment under Rule 71.⁴

4. The Prosecution responds that these issues are too broad and abstract for certification. They concern matters already addressed by the Trial Chamber in its decision on defects in the form of the indictment⁵ and could arise from other decisions on the admissibility of evidence. The Oneissi Defence does not demonstrate that the Trial Chamber’s interpretation of the matters raised could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Further, the Prosecution submits that the Oneissi Defence’s position concerning indictment issues generally, in light of case law from the Appeals Chamber, is wrong. Lastly, the motion discusses the correctness of the Trial Chamber’s decision which is not relevant to the question of certification.⁶

DISCUSSION

5. The Trial Chamber, under Rule 126 (C), may 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.

6. The Trial Chamber must ensure that the issue meets the rule’s strict requirements: leave to appeal is exceptional; the issue must be precise and have an adequate legal or factual basis; and certification is concerned not with whether a decision was correctly reasoned but solely on whether the rule is satisfied. Once the requirements of Rule 126 (C) have been met, the Trial Chamber does not have the discretion to refuse certification.⁷

⁴ Oneissi motion, paras 9-10, 14-17.

⁵ See e.g. F0952, Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2003.

⁶ Prosecution response, paras 5-7.

⁷ 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 11-15; STL-11-01/PT/AC/AR126.5, F1841, Decision on ‘The Defence for Hussein Hasan Oneissi Request for Certification of the “Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents,

7. In light of the strict standard set by Rule 126 (C), the Trial Chamber finds that the questions posed far from satisfy it. They relate, as acknowledged by Oneissi Defence, to the form of the amended consolidated indictment. In this respect, the Appeals Chamber has held that ‘[n]ot all indictment-related issues necessarily qualify for certification.’⁸ In this case, the questions posed do not raise an issue which ‘significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.’ As the Trial Chamber has held, the Oneissi Defence has been on notice concerning the associate purple mobiles since at least 18 June 2014 and they are accordingly not new.⁹

8. Furthermore, given this factual finding, which is not disputed by the Oneissi Defence, the Trial Chamber is satisfied that the questions posed are not matters of such significance that they require immediate appellate attention. It is accepted practice in international criminal law procedural law that defects in indictments, if any, can be remedied through adequate notice being given to the accused.¹⁰ Thus, the Trial Chamber is unconvinced that their immediate resolution by the Appeals Chamber ‘may materially advance the proceedings.’

9. For these reasons, certification is denied.

Photographs and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events” of 30 December 2014’, 3 February 2015, para. 6; STL-11-01/PT/AC/AR126.1, F0012, Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 8; F2069, Decision Denying Certification to Appeal the Trial Chamber’s Decision on Issuing a Summons to Witness 012, 10 July 2015, para. 5; STL-11-01/PT/AC/AR126.5, 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. 8; STL-11-01/T/AC/AR126.6, F0003, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge’s “Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer”, 12 May 2014, paras 19-21, 23; F1798, Decision on Application for Certification of Decision Regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, para. 13.

⁸ 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. 9.

⁹ F2798, Decision on the Admission of Call Sequence Tables Related to the Movements of Mr Rafik Hariri and Related Events and Four Witness Statements, 31 October 2016, paras 62-63.

¹⁰ See ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case Nos ICTR-96-10-A and ICTR-96-17-A, Appeal Judgment, 13 December 2004, para. 27; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeal Judgment, 28 February 2005, paras 33-35; ICTR, *Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Appeal Judgment, 7 July 2006, para. 163; ICTY, *Prosecutor v. Simić*, Case No. IT-95-9-A, Appeal Judgment, 28 November 2006, para. 23.

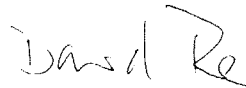
DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the motion.

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

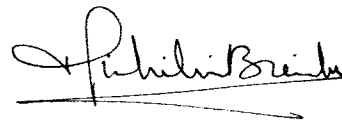
Leidschendam,
The Netherlands
6 December 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

