

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: 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 CALL
SEQUENCE TABLES OF FIVE COLOUR-CODED MOBILE TELEPHONE
GROUPS AND NETWORKS**

Office of the Prosecutor:

Mr Norman Farrell & 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 Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**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 Yasser
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts

INTRODUCTION AND BACKGROUND

1. The Trial Chamber, on 31 October 2016, issued a decision on five Prosecution motions to admit into evidence call sequence tables related to five colour-coded mobile telephone groups and networks allegedly involved in the attack on the former Lebanese Prime Minister, Mr Rafik Hariri, in Lebanon on 14 February 2005.¹ Witness PRH707 testified extensively before the Trial Chamber as an official representative of Alfa, a Lebanese telecommunications provider. The Trial Chamber accepted his witness statements and other documents into evidence.² Some of his evidence was hearsay.

2. Counsel for the Accused, Mr Hussein Hassan Oneissi, seek certification for interlocutory appeal, under Rule 126 (C) of the Special Tribunal's Rules of Procedure and Evidence of the decision on the colour-coded telephone groups.³

3. Defence counsel have identified two issues and posed two questions for certification for interlocutory appeal. They are: (i) whether the Trial Chamber erred in failing to appoint an expert with specialist knowledge who could advise it on technical issues relating to telephony; and (ii) whether the Trial Chamber erred in ruling that the hearsay evidence of PRH707, in relation to call data records, is admissible.

CERTIFICATION TO APPEAL—THE LEGAL PRINCIPLES

4. Rule 126 (C), 'Motions Requiring Certification,' permits 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 strict requirements of this Rule,⁴ and a request for certification should not be concerned with

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2799, Decision on the Prosecution Motions for the Admission of the Call Sequence Tables related to the Five Colour-Coded Mobile Telephone Groups and Networks, 31 October 2016.

² Transcript of 8 September 2016, pp 3-4; F2767, Written Reasons for Admitting Witness PRH707's Statements and Annexes into Evidence, 10 October 2016 ('Decision of 10 October 2016').

³ F2822, Request for Certification to Appeal the "Decision on the Prosecution Motion for the Admission of the Call Sequence Tables related to the Five Colour-Coded Mobile Telephone Groups and Networks", 7 November 2016.

⁴ 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; F2069, Decision Denying

whether the Trial Chamber provided correct reasoning, but rather whether the challenged decision involves a precise issue, with an adequate legal or factual basis in the decision, that meets the standard in Rule 126 (C).⁵ The Appeals Chamber hears appeals not meeting this threshold only after the Trial Chamber has delivered a judgment on the charges in the indictment.⁶

SUBMISSIONS

Defence submissions

6. The two issues identified relate to the Trial Chamber failing to appoint its own expert and to its receiving hearsay evidence.

Failing to appoint an expert consultant

7. Defence counsel argue that they had raised a number of discrepancies in the Prosecution's evidence showing telephone activity, opposing its admission into evidence. The Trial Chamber, however, in its decision had stated that these go to the weight of the evidence rather than its admissibility. The Trial Chamber failed to appreciate the significance of these errors and thus erred in not appointing an independent expert with specialized knowledge regarding telephony to advise it.

Hearsay evidence

8. Counsel for Mr Oneissi submit that Witness 707 was not an appropriate representative of Alfa and the Trial Chamber erred in admitting his hearsay evidence despite the fact he lacked personal knowledge as to the provenance of the evidence. The Trial Chamber's decision does not align with the standard in Rule 149 (C)⁷ that it should apply the rules of evidence that best favour a fair determination and are consonant with the highest standards of international criminal procedure. The fact that the Rules and Statute of the Special Tribunal do not outwardly prohibit the admission of hearsay evidence does not imply that the Chamber should accept all hearsay evidence as *prima facie* reliable. The issue of the admissibility of

Certification to Appeal the Trial Chamber's Decision on Issuing a Summons to Witness 012, 10 July 2015 ('Decision of 10 July 2015'), para. 5.

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; Decision of 10 July 2015, para. 5.

⁶ STL-11-01/PT/AC/AR126.1, F0012, Corrected Version of the Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial *in Absentia* Decision, 1 November 2012, para. 11.

⁷ The Rule provides, 'A Chamber may admit any relevant evidence which it deems to have probative value'.

Witness 707's hearsay evidence 'is a matter of continuing controversy', which, without resolution by the Appeals Chamber, the litigation will continue.⁸

Prosecution submissions

9. The Prosecution responded that the motion fails to show that the issues raised meet the standard of Rule 126 (C).⁹ These issues do not arise from the Trial Chamber's decision in relation to the call sequence tables but rather the Defence has focused on its alleged incorrectness. This is irrelevant as to whether an issue for appeal should be certified.

10. Whether the Trial Chamber should have appointed an independent expert to assist it in assessing Witness 707's evidence does not arise from the decision. The Trial Chamber has already found that Witness 707's evidence is *prima facie* reliable. Furthermore, the submission regarding the discrepancies in the call data records goes to the weight of the evidence rather than its admissibility. The Defence failed to demonstrate that the admissibility of the call data records or the Trial Chamber's failure to appoint an expert witness would significantly affect the fair conduct of the proceedings or the outcome of the trial.

11. Further, the argument that further litigation regarding the admissibility of the call data records would result without certification is unsubstantiated. The Defence fails to demonstrate how exactly these issues left uncertified would impact the proceedings. The Trial Chamber does not need to consider the second limb of Rule 126 (C) because the request failed to show how these issues would impact the fair and expeditious conduct of the proceedings or the outcome of the trial.

DISCUSSION

12. The first issue—that of the non-appointment, or otherwise, of an independent expert to advise the Trial Chamber—does not arise from the decision, or from anywhere else. It has never been raised before the Trial Chamber. It is a non-issue. It is dismissed.

13. The second issue is of the Trial Chamber's accepting Witness 707's hearsay evidence. This too does not raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The principles of international criminal

⁸ Motion, para. 19.

⁹ F2849, Prosecution Response to Request for Certification to Appeal the "Decision on the Prosecution's Motions for the Admission of the Call Sequence Tables related to the Five Colour-Coded Mobile Telephone Groups and Networks", 23 November 2016, paras 3, 5.

law and procedure, which the Trial Chamber must apply under Rule 3 (A), do not prohibit a Chamber accepting hearsay evidence.

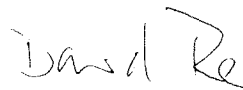
14. The Trial Chamber has previously ruled that hearsay evidence, unlike in some domestic jurisdictions, may be admissible.¹⁰ Any hearsay evidence given by Witness 707 goes to its weight, unless it is excluded under Rule 149 (D), namely ‘if its probative value is substantially outweighed by the need to ensure a fair trial’. But it was not so excluded. The use of hearsay evidence, of itself, is not one that falls within the first limb of Rule 126 (C). The Trial Chamber therefore does not need to move to the second limb of Rule 126 (C), in being an issue that must be immediately resolved by the Appeals Chamber to materially advance the proceedings.

DISPOSITION

FOR THESE REASONS, the Trial Chamber dismisses the motion.

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

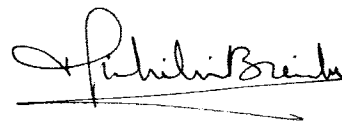
Leidschendam,
The Netherlands
6 December 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy



¹⁰ F2552, Corrected Version of Decision on Prosecution Motion for the Admission of Statements by Witness PRH707 and on Ayyash Defence Motion to Strike the Prosecution Reply, 11 May 2016, para. 49; F2597, Written Reasons for the Trial Chamber’s Decision on Prosecution Motion for the Admission of Statements by Witness PRH705, 13 May 2016, para. 19; F2750, Reasons for Admitting Witness PRH705’s Statements and Annexes into Evidence, 30 September 2016, para. 21; Decision of 10 October 2016, paras 44, 54.