

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: 16 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 THE ‘WRITTEN REASONS FOR ADMITTING WITNESS PRH707’S STATEMENTS AND ANNEXES INTO EVIDENCE’ AND ‘REASONS FOR DECISION ADMITTING PROSECUTION’S CELL SITE EVIDENCE’

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 Guénaël Mettrick & Mr Geoffrey Roberts



INTRODUCTION

1. The Trial Chamber, on 8 September 2016—in a decision delivered in court, followed by written reasons—admitted into evidence selected paragraphs and annexes from the three witness statements of Witness PRH707 who testified as an official representative of Alfa, a Lebanese telecommunications provider.¹ The same day, the Trial Chamber issued a decision in court admitting into evidence ten items related to the Prosecution’s cell site evidence; written reasons were also subsequently published.²

2. The Trial Chamber, in both decisions, assessed various telecommunications related documents that the Prosecution tendered in support of its case. The documents came from Alfa, and another Lebanese telecommunications provider, MTC Touch. Witness 707 testified—over 17 days—in relation to specific paragraphs of his three statements and many of the documents, which were annexes to his statements, were admitted into evidence.³ He also testified in relation to documents that were the subject of the Trial Chamber’s cell site decision. The Trial Chamber had held that his testimony was a precondition to receiving the cell site evidence.⁴

3. In relation to the reliability of Witness 707’s evidence generally, the Trial Chamber held that it had:

considered the general Defence objections that these paragraphs and annexes are unreliable because the witness did not work at Alfa in 2004 and 2005 and that he was not alone in the interview. The information is technical and the evidence was compiled by more than one Alfa employee. For the purposes of the *prima facie* reliability of the documents, the *Trial Chamber is satisfied with the witness’s explanation that employees at Alfa who either provided him with the information contained in these paragraphs and annexes or verified it, were qualified to do so.*

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi, and Sabra*, transcript of 8 September 2016, pp. 3-4; F2767, Written Reasons for Admitting Witness PRH707’s Statements and Annexes into Evidence, 10 October 2016 (‘Witness 707 decision’).

² Transcript of 8 September 2016, p. 4; F2793, Reasons for Decision Admitting Prosecution’s Cell Site Evidence, 26 October 2016 (‘Cell site decision’).

³ The Trial Chamber also heard nine days of testimony from Witness PRH705 who testified as the official representative of Touch. *See generally* F2750, Reasons for Admitting Witness PRH705’s Statements and Annexes into Evidence, 30 September 2016.

⁴ F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and the STL’s Prosecution, 6 May 2015, paras 115, 118, disposition.

The Trial Chamber is satisfied that the information contained in the specified paragraphs and annexes is relevant and probative of Alfa's record keeping practices, and, more specifically, how these business records were stored and retrieved. The information, whether it was extracted for the purposes of investigation or litigation, comes from Alfa's business records. In the Trial Chamber's view it has the necessary *prima facie* indicia of reliability for admission into evidence.⁵

4. In relation to the status of the relevant documents as the business records of Alfa, the Trial Chamber held generally:

that business records, by the fact alone that they have been produced in the normal course of business of the relevant organisation or workplace, possess the necessary indicia of reliability for admission into evidence. This indicia, however, may be challenged or undermined. This is to be determined on a case-by-case basis. Mere anomalies or irregularities in corporate records may not, without more, be sufficient to cast doubt on its reliability.⁶

5. And that, in any event:

business records, if produced in the normal course of business of the relevant organisation or workplace, usually by this fact alone have the necessary indicia of reliability of a business record. These indicia, however, may be challenged or undermined and will be determined on a case-by-case basis. Here, the records tendered by the Prosecution are generally business records, notwithstanding that some were produced for investigation or litigation. They were sourced from business records and thus the Prosecution was not required to attempt to call a witness or witnesses with first-hand personal knowledge of the details or the origins of every aspect of the records.⁷

6. Counsel for the Accused, Mr Hussein Hassan Oneissi, request in two separate motions filed under Rule 126 (C) of the Special Tribunal's Rules of Procedure and Evidence, certification to appeal the two decisions.⁸ The question posed in relation to the cell site decision is:

⁵ Witness 707 decision, paras 108-109 (emphasis added).

⁶ Witness 707 decision, para. 46.

⁷ Cell site decision, para. 70.

⁸ F2789, Request for Certification to Appeal the 'Written Reasons for Admitting Witness PRH707 Statements and Annexes into Evidence', 19 October 2016 ('Witness 707 decision motion'); F2810, Request for Certification

Whether the Trial Chamber erred in ruling that the cell site evidence produced by Alfa are business records and that as such, they presented the necessary indicia of reliability; and

Whether the Trial Chamber erred in ruling that the hearsay evidence of PRH707, in relation to Cell Site Evidence, is admissible.⁹

7. And, for the Witness 707 Decision:

Whether the Trial Chamber erred in ruling that cell site and call data records produced by Alfa are business records, and that as such, they presented the necessary indicia of reliability; and

Whether the Trial Chamber erred in ruling that the hearsay evidence of PRH707 is admissible.¹⁰

8. The Prosecution opposes both certification requests, and the Oneissi Defence replied to the Prosecution's submissions concerning their Witness 707 decision certification motion.¹¹

9. Regarding the second common question posed, that of the hearsay nature of Witness 707's evidence, the Oneissi Defence made similar arguments in a separate request for certification for interlocutory appeal concerning the Trial Chamber's decision to admit into evidence certain call sequence tables (derived from Alfa's call data records).¹² The Trial Chamber ruled on the issue of hearsay and dismissed the request for certification to appeal. The hearsay arguments are adequately addressed in that decision and the Trial Chamber need not revisit the issue.¹³ Thus, for the reasons expressed previously, the hearsay issues identified in both certification motions are dismissed.

to Appeal the 'Reasons for Decision Admitting Prosecution Cell Site Evidence,' 3 November 2016 ('Cell site decision motion').

⁹ Witness 707 decision motion, para. 2.

¹⁰ Cell site decision motion, para. 2.

¹¹ F2806, Prosecution Response to "Request for Certification to Appeal the 'Written Reasons for Admitting Witness PRH707 Statements and Annexes into Evidence'", 2 November 2016 ('Prosecution Witness 707 response'); F2840, Prosecution Consolidated Response to Requests for Certification Filed by the Oneissi Defence and Merhi Defence Against Trial Chamber's "Reasons for Decision Admitting Prosecution's Cell Site Evidence," 17 November 2016 ('Prosecution cell site response'); F2825, Oneissi Defence Reply to the Prosecution Response to "Request for Certification to Appeal the 'Written Reasons for Admitting PRH707 Statements and Annexes into Evidence'", 8 November 2016 ('Oneissi reply').

¹² See 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, para. 2 (b): 'Whether the Trial Chamber erred in ruling that the hearsay evidence of PRH707, in relation to Call Data Records, is admissible.'

¹³ See F2873, Decision Denying Certification to Appeal Decision on Call Sequence Tables of Five Colour-Coded Mobile Telephone Groups and Networks, 6 December 2016, paras 13-14.

SUBMISSIONS

Defence

10. Counsel for Mr Oneissi submit that the business records issue meets the requirements of Rule 126 (C), since proof of the geographic location of the users of mobile telephones attributed to the Accused is fundamental to the Prosecution's case and will be established almost exclusively through the use of cell site analysis. The admission of unreliable cell site evidence is highly prejudicial to the Accused and thus questions relating to the admission of this evidence would necessarily significantly affect the fair conduct of the proceedings or the outcome of the trial.

11. Whether the Trial Chamber erred in ruling that cell site evidence and call data records produced by Alfa are business records is a matter of continuing controversy and will engender continuing litigation unless the Appeals Chamber delivers a clear ruling on the matter. The expeditiousness of the proceedings is therefore also at stake. The issues are so fundamental to the Prosecution's case that they cannot await post-trial appeal proceedings.¹⁴

12. The Trial Chamber erred in ruling that cell site and call data records produced by Alfa are business records and using this finding as a 'sweeping, catch-all proof of reliability' to admit the evidence regardless of the Defence's concerns on their 'actual' reliability. The fact that the evidence was produced for the purpose of investigation or litigation and contained discrepancies, anomalies and irregularities impacts their classification as business records and, as such, presented the necessary indicia of reliability.¹⁵

13. Notwithstanding the evidence's characterization as business records, the Trial Chamber failed to consider various factors, including matters relating to azimuth information and Alfa's 'reconstruction' of its 2004-2005 coverage, as impacting their 'actual' reliability and their intended use, despite their being mentioned in the relevant decisions. Thus, the Trial Chamber did not assess its reliability 'in a global sense' and thus failed to appreciate its reliability at all. While the Trial Chamber ruled that the evidence was relevant and probative of Alfa's record keeping practices, the purpose of the tendered evidence is to prove the geographic locations of the Accused.¹⁶

¹⁴ Witness 707 decision motion, paras 10-13; Cell site decision motion, paras 20-23.

¹⁵ Witness 707 decision motion, paras 14-15; Cell site decision motion, paras 24-25.

¹⁶ Witness 707 decision motion, paras 16-18; Cell site decision motion, para. 26.

Prosecution

14. Relying on International Criminal Tribunal for Rwanda (ICTR) case law,¹⁷ the Prosecution submits that appellate intervention is the absolute exception when deciding the admissibility of evidence and would only be needed when the Trial Chamber abuses its discretion in that context. None of the Defence arguments demonstrate that the Trial Chamber had so abused its discretionary power.¹⁸

15. The Prosecution also submits that the Oneissi Defence's arguments merely address the correctness of the Trial Chamber's decision, or, as they concern the reliability of the cell site evidence, their weight rather than admissibility, which the Oneissi Defence will have the opportunity to address. The arguments fail to demonstrate that the admission of the evidence can significantly affect the fair conduct of the proceedings or the outcome of the trial. The Oneissi Defence allegation that further litigation regarding the admissibility of the evidence would be required is unfounded; once the Trial Chamber denies certification, the issue is closed for the rest of the trial proceedings. Further, the fact that the evidence at issue is fundamentally important does not, in of itself, mean that any issue related to its admission meets the standard in Rule 126 (C).¹⁹

16. The Trial Chamber need not consider the second part of Rule 126 (C) because the Defence had failed to demonstrate that evidence's admission would negatively impact the fair and expeditious conduct of the proceedings or the outcome of the trial.²⁰

Defence reply

17. Counsel for Mr Oneissi replies that the ICTR case cited by the Prosecution has since been further developed at the ICTR in a subsequent decision²¹ and that, in any event, the 'absolute exception' standard is met in this case since a situation such as the one at issue does not have precedent in international criminal law and is therefore exceptional 'in the absolute'.²²

¹⁷ See ICTR, *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramaruhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 6.

¹⁸ Prosecution cell site response, paras 5, 7.

¹⁹ Prosecution Witness 707 response, paras 7-8; Prosecution cell site response, paras 6, 8-10.

²⁰ Prosecution Witness 707 response, para. 9; Prosecution cell site response, para. 11.

²¹ See ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, para. 6.

²² Oneissi reply, paras 3-5.

18. Concerning the Prosecution’s submissions on the ‘alleged’ importance of the evidence, the Oneissi Defence replies that the Trial Chamber has rendered multiple decisions relying upon the evidence at issue—in one decision its importance was expressly noted by the Trial Chamber—and that the evidence’s importance is a factor that should be taken into consideration in the assessment of whether an issue meets the first part of the test in Rule 126 (C); the more important the evidence, the more significant the effect of its admission on the fair conduct of the proceedings.²³

19. Additionally, in relation to the Prosecution’s submission that the potential for further litigation regarding the admissibility of the evidence is unfounded, the Oneissi Defence notes that the Trial Chamber has issued multiple decisions that have found telecommunications evidence admissible which expressly rely on evidence tendered through Witness 707. The knock-on effect of the Trial Chamber’s decision concerning Witness 707 is self-evident and continues to significantly affect the expeditiousness of proceedings.²⁴

20. Lastly, the Prosecution erroneously argues that once the evidence is admitted the issue of admissibility would be closed as the Appeals Chamber may still reverse the Trial Chamber’s decision, even one relating to the admissibility of evidence.²⁵

CERTIFICATION TO APPEAL—THE LEGAL PRINCIPLES

21. Rule 126 (C), ‘Motions Requiring Certification,’ allows 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.

22. The Trial Chamber must be satisfied that an issue for certification meets the Rule’s strict requirements as leave to appeal is exceptional. To meet this high threshold, a request for certification should not be concerned with whether the Trial Chamber provided correct reasoning, but rather whether the challenged decision involves a specific legal issue that requires further analysis and meets the standard in Rule 126 (C). The issue must thus be

²³ Oneissi reply, paras 6-9.

²⁴ Oneissi reply, paras 10-11.

²⁵ Oneissi reply, para. 12.

precise and have an adequate legal or factual basis. Appeals that do not meet this threshold can be heard once the Trial Chamber has rendered its judgment on the merits.²⁶

DISCUSSION

23. The issues concerning business records in both certification motions that are posed for interlocutory appeal are almost identical, save for the addition of the words ‘and call data records’ in relation to the Witness 707 decision certification motion. They may therefore be dealt with together.

24. The Trial Chamber did not make the findings that the Oneissi Defence submit. It did not find, in either decision, ‘that cell site and call data records produced by Alfa are business records and that as such, they presented the necessary *indicia* of reliability’. The Trial Chamber in fact heard extensive evidence from Witness 707 about the provenance and reliability of each piece of evidence submitted by the Prosecution and assessed every document in the light of his evidence. The Trial Chamber found that the documents were business records. But it did not admit the contested documents into evidence based merely on their provenance as business records of Alfa. Rather, the Trial Chamber found that it was the combination of Witness 707’s evidence *and* the documents’ provenance as business records coming from Alfa that provided them with the necessary *prima facie* reliability to have the necessary probative value for admission into evidence.²⁷

25. Indeed, the Trial Chamber had previously held that hearing Witness 707’s evidence was a precondition for the admission of any of the documents into evidence,²⁸ and it only received the relevant cell site evidence, and the annexes to his statements, after hearing 17 days of testimony. Witness 707’s testimony covered the disputed paragraphs of his three

²⁶ 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 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/AR126.2, 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; 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. The Trial Chamber notes the Prosecution’s reliance on ICTR case law concerning the application of an ‘absolute exception’ standard for certification when the admissibility of evidence is at issue and the Oneissi Defence’s reply. In this case, the Trial Chamber need not consider the matter further since, for the reasons explained below, the Oneissi Defence have not identified a certifiable issue concerning the admissibility of evidence that arises from the decisions to which to apply this standard.

²⁷ See e.g. Witness 707 decision, paras 42, 108-109, 113-114, 118-119, 145-146, 154, 168; Cell site decision, paras 9, 125, 144-145, 159-161.

²⁸ Witness 707 decision, para. 5.

statements and 48 accompanying annexes. The Trial Chamber explained the extent of his testimony:

The witness testified extensively on many matters concerning his employer, Alfa. The content of his testimony was similar to that of Witness 705, and included an overview of Alfa; its network architecture, network components, call setup and cell tower selection; the records and data it generated, retained, stored and used in its business operations and its retrieval for the Special Tribunal. He also explained specific issues including call data records, cell sites and SMS content, Alfa's client services and features, its customer relations centres and its post and pre-paid systems, its tariff related issues, and SIM card supply, distributors and storage. Witness 707 testified as to the accuracy of the information in his three statements and annexes and explained its provenance, and specifically, who or which department in Alfa provided the information that was not within his personal knowledge. The Prosecution tendered relevant exhibits through his testimony.²⁹

26. Further, a large number of the tendered documents were uncontested and the Trial Chamber did not receive further submission from Defence counsel in relation to them, for example, those documents relating to the purely business affairs of Alfa, such as its management and distribution contracts, internal company documents and sales records.³⁰

27. The Oneissi Defence submissions thus misstate the Trial Chamber's findings and the basis of the decisions that admitted the contested evidence.³¹ In this context, the Trial Chamber concurs with the Appeals Chamber of the International Criminal Court which has defined an 'issue', under Article 82 (1) (d) of the Rome Statute—which is nearly identical to Rule 126 (C)—as:

²⁹ Witness 707 decision, para. 8.

³⁰ See e.g. Witness 707 Decision, paras 66-67 (exhibits P1192.2, P1192.3), 74 (exhibit P773), 177-180 (exhibits P1192.13, P1192.14, P1192.15, P1192.16, P1192.17, P1192.18, P1192.19, P1192.20, P1192.21, P1192.22, P1192.23, P1192.24, P1192.25, P1192.26, P1192.27, P1192.28, P1192.29, P1192.3, P1192.31, P1192.32, P1192.33, P1192.34, P1192.35, P1192.36, P1192.37, P1192.38), 189-190 (exhibit P784), 191-195 (exhibit P1194.1); The Trial Chamber decided that these undisputed documents were business records. Of these, annexes 24-41 are contracts between Alfa and authorised distributors; annexes 42-48 list unauthorised points of sale; annexes 2, 3 and 21 are business contracts/management agreements; and annex 4 is the network overview diagram.

³¹ Cell site decision motion, paras 24-30; See, e.g. ICC, *Prosecutor v. L. Gbagbo and Blé Goudé*, ICC-02/11-01/15-42, Decision on Defence requests for leave to appeal the 'Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurence Gbagbo and Charles Blé Goudé* and related matters', 22 April 2015, para. 15: 'The Chamber notes that both Defence Requests rely, in part, on what the Chamber considers to be misconceptions of, and unfounded assumptions concerning, the Impugned Decision. Such misconceived and unfounded submissions cannot satisfy the leave to appeal criteria'. The Chamber then outlined the relevant findings in its decision.

an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.³²

28. The Trial Chamber cannot certify for interlocutory appeal an issue that does not accurately reflect the decisions or arise from them. Nor can it certify an issue that represents a mere disagreement with the decision.

29. Having made this determination, there is no need to consider the second part of Rule 126 (C). The Oneissi Defence motions are therefore dismissed.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Oneissi Defence motions.

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

Leidschendam,
The Netherlands
16 December 2016

David Re

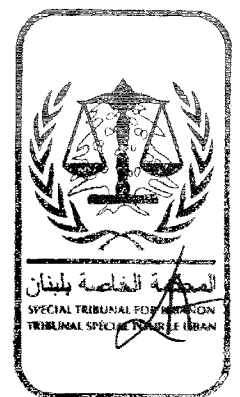
Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



³² ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9.