

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**

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**DECISION DENYING MERHI DEFENCE REQUEST FOR CERTIFICATION TO  
APPEAL 'REASONS FOR DECISION ADMITTING PROSECUTION'S CELL SITE  
EVIDENCE'**

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**Office of the Prosecutor:**

Mr Norman Farrell &amp; 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 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 Mertz &  
Mr Geoffrey Roberts

## INTRODUCTION

1. On 8 September 2016, the Trial Chamber issued a decision in court admitting into evidence ten items related to the Prosecution’s cell site evidence; it subsequently published written reasons.<sup>1</sup> The decision, at paragraphs 160 to 162, explained generally how the Trial Chamber had analysed the cell site evidence, stating:

The Trial Chamber has carefully reviewed the Prosecution’s cell site evidence, comprising the items in the motion and the evidence of Witnesses 705 and 707, testifying for Touch and Alfa. *It viewed each piece of evidence, and the evidence in its totality.* (Italics added)

It was satisfied that the evidence is relevant and that the Prosecution has demonstrated its *prima facie* reliability such as to make it probative for admission into evidence. The Trial Chamber was satisfied that items 1, 2, 4, 6, 7 (exhibit P780) 10, 11, 12, 14 and 15 of annex A to the motion may therefore be admitted into evidence. Although the Defence highlighted some possible deficiencies in the underlying cell site data, and in particular in relation to Alfa’s maps of its cell coverage in 2004 and 2005, this has not deprived the material of its probative value at the stage of its admission into evidence.

This decision does not mean that the material is probative enough for the Trial Chamber to rely upon it in its judgment, only that it is sufficiently so for the purpose of being admitted into evidence. The Trial Chamber will assess the weight of each item, if any, in light of the totality of evidence and submissions from the Parties.

2. Counsel for the Accused, Mr Hassan Habib Merhi, sought certification to file an interlocutory appeal—opposed by the Prosecution<sup>2</sup>—of the following issues:

- a) Did the Chamber err in assessing the shortcomings related to the probative value and the reliability of the evidence in isolation, which led it to find that the *prima facie* threshold for admission into evidence had been achieved?
- b) Did the Chamber err in taking into consideration irrelevant factors to assess the *prima facie* threshold for admission which thus led it to find that the threshold had been achieved?

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi, and Sabra*, transcript of 8 September 2016, p. 4. F2793, Reasons for Decision Admitting Prosecution’s Cell Site Evidence, 26 October 2016.

<sup>2</sup> F2809, Merhi Defence Request for Certification to Appeal the “Reasons for Decision Admitting Prosecution’s Cell Site Evidence”, 3 November 2016; 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.

**CERTIFICATION TO APPEAL—RULE 126 (C)**

3. Rule 126 (C) of the Special Tribunal’s Rules of Procedure and Evidence, ‘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.

4. The Trial Chamber must be satisfied that the issue meets the Rule’s strict requirements.<sup>3</sup> To meet this high standard, the request for certification should not concern whether the Trial Chamber provided correct reasoning but rather whether the decision involves a precise issue, with an adequate legal or factual basis that meets both limbs of Rule 126 (C).<sup>4</sup>

**SUBMISSIONS***Defence submissions*

5. Counsel for Mr Merhi submit that these issues meet the requirements of Rule 126 (C). The admissibility of the cell site evidence has an impact on the fair and expeditious conduct of the proceedings because it is essential to the Prosecution’s case. An Appeals Chamber decision would materially advance the proceedings because it would provide clarification as to the minimum threshold for the admission of evidence as the admissibility of cell site evidence continues to be an issue and is fundamental to the Prosecution’s case.<sup>5</sup> Counsel argue that the Trial Chamber erred in assessing the shortcomings regarding the probative value and reliability of the cell site evidence. Taken in isolation, each of the inconsistencies in the cell site evidence that the Trial Chamber assessed in its decision does not preclude their

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<sup>3</sup> STL-11-01/PT/AC/AR 90.2, 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, (‘Decision of 10 July 2015’) para. 5.

<sup>4</sup> 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.

<sup>5</sup> Merhi motion, paras 9-10, 12-13.

admission into evidence, however the Chamber failed to consider the impact of the totality of these shortcomings.<sup>6</sup>

6. Further, the Trial Chamber also erred in considering factors that were irrelevant to assess the standard for admission, including whether the Prosecution could proceed with presenting its case, and that the Trial Chamber will decide on the weight of the evidence at a later date. The ability of the Trial Chamber to assess the totality of the evidence at a later date does not justify the admission of defective evidence. The Trial Chamber should not issue a decision to allow a party to continue their case. In addition, the Trial Chamber failed to ensure that the Accused's rights had not been violated before ruling that the evidence was admissible and also incorrectly shifted the burden of proof by requiring the Defence to prove the evidence's lack of reliability.<sup>7</sup>

#### *Prosecution submissions*

7. The Prosecution submits that the motion fails to establish that the decision raises any issue meeting the requirements of Rule 126 (C). The Defence submissions concern more the correctness of the decision rather than demonstrating that the admission of the evidence would impact the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>8</sup>

8. The Defence argument that the Trial Chamber considered irrelevant matters is unrelated to the certification procedure because arguments regarding the correctness of a decision does not impact certification. The fact that the evidence is important to the Prosecution's case is irrelevant to certification procedure. The Defence arguments do not demonstrate that the Trial Chamber abused its discretionary power in admitting the cell site evidence. Furthermore, the Defence's argument that the Trial Chamber admitted the evidence despite its alleged inaccuracies goes to the weight of the evidence which will be decided at a later time.<sup>9</sup>

### **DISCUSSION**

9. Both questions posed for certification misstate the Trial Chamber's decision. In relation to the first question, the Trial Chamber—in paragraph 160 of the decision—stated that it had 'viewed each piece of evidence, and the evidence in its totality'. The Trial

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<sup>6</sup> Merhi motion, paras 14, 16-17.

<sup>7</sup> Merhi motion, paras 18, 20-24.

<sup>8</sup> Prosecution consolidated response, paras 4, 6, 11.

<sup>9</sup> Prosecution consolidated response, paras 6-8.

Chamber considered the discrepancies and inaccuracies of each item of evidence individually and collectively and was satisfied that the evidence was prima facie reliable. The issue posed by Defence counsel goes to the correctness of the decision rather than presenting a legal or factual issue within Rule 126 (C). It cannot be certified for interlocutory appeal.

10. Regarding the second question, the Trial Chamber did not take into account the issues raised by Defence counsel in deciding the admissibility of the evidence. The Trial Chamber did not consider the importance of the evidence to the Prosecution's case in deciding whether the cell site evidence had sufficient prima facie reliability to have the probative value required to admit it into evidence. Nor did it reverse the burden of proof by requiring the Defence to prove anything in relation to the admission of the evidence. The Defence submissions represent a disagreement with the result rather than raising an issue falling within Rule 126 (C), but more to the point they misstate the basis of the decision admitting the evidence.<sup>10</sup>

11. The issues posed for certification therefore do not fall within the first limb of Rule 126 (C). They do not raise '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 consider the second limb of the Rule.

### **DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

**DISMISSES** the motion.

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<sup>10</sup> See, e.g. International Criminal Court, Situation in the Republic of Côte d'Ivoire in the Case of *The Prosecutor v. Laurence Gbagbo and Charles Blé Goudé*, 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' ICC-02/11-01/15, 22 April 2015, at 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.

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

Leidschendam,  
 The Netherlands  
 16 December 2016

*David Re*

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 Judge David Re, Presiding

*Janet Nosworthy*

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 Judge Janet Nosworthy

*Micheline Braidy*

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 Judge Micheline Braidy

