

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:** 14 February 2017

**Original language:** English

**Classification:** Public

**The PROSECUTOR**

v.

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

**WRITTEN REASONS FOR DECISION DENYING CERTIFICATION TO APPEAL  
THE “DECISION CLARIFYING MR GARY PLATT’S AREA OF EXPERTISE”  
DATED 25 JANUARY 2017**

**Office of the Prosecutor:**

Mr Norman Farrell &amp; Mr Alexander Milne

**Counsel for Mr Salim Jamil Ayyash:**

Mr Emile Aoun, Mr Thomas Hannis &amp; 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 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 &amp; Mr Geoffrey Rowley



## INTRODUCTION

1. The Trial Chamber, on 6 April 2016, in a decision delivered in court, found that Mr Gary Platt (Witness PRH147) was qualified under the Rule 161 of the Special Tribunal's Rules of Procedure and Evidence to provide expert opinion evidence regarding the surveillance of criminal networks and the identification and organization of covert communications networks. Counsel for the then Accused, Mr Mustafa Amine Badreddine, joined by counsel for the Accused, Mr Hussein Hassan Oneissi, requested certification to appeal the decision. The Trial Chamber, on 28 July 2016, denied the request.<sup>1</sup>

2. On 24 January 2017, counsel for Mr Oneissi joined by counsel for Mr Hassan Habib Merhi, sought clarification from the Trial Chamber of the scope of Mr Platt's expertise and whether this extended to a group of so-called 'purple phones'.<sup>2</sup> The amended consolidated indictment alleges that the 'purple phones' were a group of three mobiles used between 1 January 2003 and 16 February 2005 in relation to a videoed false claim of responsibility made shortly after the attack on the former Lebanese Prime Minister Mr Rafik Hariri, and others on 14 February 2005.<sup>3</sup> On 25 January 2017, the Trial Chamber clarified that Mr Platt could provide expert evidence within the area of his expertise in relation to the 'purple phones'.<sup>4</sup>

3. On 1 February 2017, counsel for Mr Oneissi sought certification to appeal the Trial Chamber's decision. Counsel for Mr Merhi joined the request for certification. The question sought to be certified is:

Did the Trial Chamber err in qualifying Mr Platt as an expert in a non-existent field of expertise and that he may therefore provide expert opinion evidence - within this defined area of his expertise - as relevant, in relation to the Purple Phones.<sup>5</sup>

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, transcript of 6 April 2016, pp 1-2; F2549, Decision Allowing Mr Gary Platt (Witness PRH147) to Give Expert Opinion Evidence, 13 April 2016 ('Decision of 13 April 2016') (where the Trial Chamber provided written reasons of its decision delivered in court); F2559, Badreddine Defence Motion for Certification to Appeal the "Decision Allowing Mr Gary Platt (Witness PRH147) to Give Expert Opinion Evidence", 20 April 2016 ('Badreddine request'); F2568, Oneissi Defence Joinder to Badreddine Defence Motion for Certification to Appeal the "Decision Allowing Mr Gary Platt (Witness 147) to Give Expert Opinion Evidence", 22 April 2016; F2674, Decision Dismissing Application for Certification to Appeal the Trial Chamber's 'Decision on the Admission of Mr Gary Platt (Witness PRH147) as an Expert Witness', 28 July 2016 ('Decision of 28 July 2016').

<sup>2</sup> Transcript of 24 January 2017, pp 78-79.

<sup>3</sup> See STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi, and Sabra*, F2720, Amended consolidated indictment, 12 July 2016, para. 15 (e), 23, 44-47.

<sup>4</sup> Transcript of 25 January 2017, pp 36-41.

<sup>5</sup> F2966, Defence for Hussein Hassan Oneissi Request for Certification to Appeal the "Decision Clarifying Mr Gary Platt's Area of Expertise" Dated 25 January 2017, 1 February 2017, para. 27 ('Oneissi request'); F2968, Merhi Defence Joinder to the "Defence for Hussein Hassan Oneissi Request for Certification to Appeal the

4. On 2 February 2017, the Prosecution sent a letter to the Defence regarding the scope of Mr Platt's evidence. The next day, counsel for Mr Oneissi filed an addendum to their request.<sup>6</sup> On 6 February 2017, the Trial Chamber, in an oral decision delivered in court, denied the request.<sup>7</sup> These are the written reasons for that decision.

### **CERTIFICATION TO APPEAL: THE LEGAL PRINCIPLES**

5. 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.

6. The Trial Chamber must be satisfied that an issue raised for certification meets the standards in Rule 126 (C) as leave to appeal is exceptional. To meet this high threshold, a request for certification should not be concerned with the correctness of Trial Chamber's decision, 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).<sup>8</sup>

### **SUBMISSIONS**

#### *Defence submissions*

7. Counsel for Mr Oneissi submitted that the Trial Chamber erred in qualifying Mr Platt as an expert because his expertise is in a 'non-existent field' and his evidence should be categorised instead as lay witness opinion. Mr Platt's evidence does not assist the Trial Chamber with regard to issues of a technical nature requiring specialised knowledge in a

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'Decision Clarifying Mr Gary Platt's Area of Expertise' Dated 26 January 2017 in the Case STL-11-01", 2 February 2017.

<sup>6</sup> F2966, Addendum to the "Defence for Hussein Hassan Oneissi Request for Certification to Appeal the 'Decision Clarifying Mr Gary Platt's Area of Expertise' Dated 26 January 2017", 3 February 2017, para. 3; annex A ('Oneissi addendum').

<sup>7</sup> Transcript of 6 February 2017, p. 49.

<sup>8</sup> STL-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; 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, para. 5; F2873, Decision Denying Certification to Appeal Decision on Call Sequence Tables of Five Colour-Coded Mobile Telephone Groups and Networks, 6 December 2016, paras 4-5.

particular field. His evidence should be considered fact witness opinion because it does not go beyond a lay person's knowledge.

8. Mr Platt's evidence usurps the role of the trier of fact to decide on the alleged criminal use of the 'purple phones', a matter which is at issue in the case. By permitting Mr Platt to testify on the alleged criminal activity of the Prosecution's 'purple phones', an issue that affects the outcome of the trial, the Trial Chamber has impermissibly given Mr Platt the power to assess the evidence of a material element of the allegations, normally reserved for the trier of fact. The Prosecution and Mr Platt's use of the term 'purple phones' is leading and amounts to prejudgment which impacts the fairness and outcome of the proceedings.

9. The immediate resolution by the Appeals Chamber of the issue of Mr Platt's qualifications may materially advance the proceedings by providing the Trial Chamber with guidance as to the weight to be ultimately given to his evidence. Erroneously attributing undue weight to Mr Platt's evidence, heavily relied upon by the Prosecution, is an issue that significantly affects the outcome of the trial.

10. The Oneissi Defence also submitted that certain passages in the Prosecution's letter, 'Proofing Notes: Gary Platt re Purple Phones,' supports the Defence's certification request, specifically in regard to the issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Further, parts of Mr Platt's anticipated testimony can be categorised as common sense, speculation, and assertions of alleged criminal activity which should be left to the Trial Chamber to ultimately decide.<sup>9</sup>

#### *Prosecution submissions*

11. The Prosecution responds that the issue for certification is identical to that previously raised by the Badreddine Defence and Oneissi Defence when seeking certification to appeal the Trial Chamber's decision of 13 April 2016<sup>10</sup> declaring Mr Platt qualified to provide expert opinion. It has already been litigated and, in any event the same principles which were applied when the Trial Chamber rejected certification of that decision apply here.<sup>11</sup> The Defence's

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<sup>9</sup> Oneissi addendum, paras 3-4.

<sup>10</sup> Decision of 13 April 2016.

<sup>11</sup> Decision of 28 July 2016.

certification request is merely a disagreement with the Trial Chamber's decision and it would not significantly affect the fair and expeditious conduct of the proceedings.<sup>12</sup>

*Defence reply*

12. Counsel for Mr Oneissi replied to the Prosecution's submissions arguing that it was legitimate for the Defence to question again the Trial Chamber's decision, (or the clarification given by the Trial Chamber regarding that decision), in relation to the 'purple phones'.<sup>13</sup>

### **DISCUSSION**

13. The request for certification does not succeed for three reasons: (i) the issue raised for interlocutory appeal has already been decided in the Trial Chamber's decision of 28 July 2016; (ii) the Defence merely requests, and the Trial Chamber has already provided a clarification regarding the 'purple phones' which does not substantively change, or add anything to, the decision of 13 April 2016; and (iii) the motion simply disagrees with the Trial Chamber's decision rather than meeting the Rule 126 (C) test.

14. Firstly, counsel for Mr Badreddine and Mr Oneissi in their request for certification to appeal the Trial Chamber's decision of 13 April 2016, argued that Mr Platt's recognised area of expertise was not a subject for expert evidence, but fell within the scope of lay opinion. Although it specifically relates to analysis of the 'purple phones', the issue proposed for certification now is substantially identical.<sup>14</sup> In its decision of 28 July 2016, the Trial Chamber found that the motion did not argue that the Trial Chamber had applied an incorrect legal standard for determining the appropriate matters for expert testimony, but rather that the motion disagreed with the Trial Chamber's decision. Whether testimony constitutes lay witness opinion or expert opinion goes to assessing its weight. This will not affect the fair and expeditious conduct of the proceedings. The Trial Chamber found that the resolution of this issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>15</sup>

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<sup>12</sup> Transcript of 6 February 2017, pp 12-14.

<sup>13</sup> Transcript of 6 February 2017, pp 14-17.

<sup>14</sup> Badreddine request, para. 20; Oneissi request, para. 27.

<sup>15</sup> Decision of 28 July 2016, paras 8-9.

15. Secondly, in its submissions, the Defence simply requests clarification regarding Mr Platt's expertise on the 'purple phones' rather than raising a new or precise legal issue.<sup>16</sup> Although the Defence in this case argues that its request is not identical to the request made by the Badreddine and Oneissi Defence in April 2016 because this request is specific to the 'purple phones', the motions are fundamentally the same. The Trial Chamber's substantive decisions of 13 April and 28 July 2016 regarding Mr Platt do not specifically refer to the colour-coded networks or the group of 'purple phones'.<sup>17</sup> However, it is evident that these networks and the group of mobiles implicitly fall within Mr Platt's designated areas of expertise, based on the Prosecution's pleadings and how its case has been conducted during the trial. Furthermore, the difference between the terms 'group' and 'network' is one of terminology rather than substance. Both terms are used to describe the actions undertaken for the same purpose, namely having the alleged criminal networks remain covert.<sup>18</sup>

16. Thirdly, the issue raised for certification merely disagrees with the Trial Chamber's decision and is tantamount to rerunning the arguments the Trial Chamber rejected in its decision of 28 July 2016. The motion does not argue that the Trial Chamber applied an incorrect legal standard in its determination regarding Mr Platt but rather disagrees with the Trial Chamber's decision clarifying its qualification of Mr Platt as an expert. The motion therefore does not raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution by the Appeals Chamber would not materially advance the proceedings. It is dismissed.

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<sup>16</sup> Transcript of 24 January 2017, pp. 83-86.

<sup>17</sup> Decision of 13 April 2016; Decision of 28 July 2016.

<sup>18</sup> Transcript of 25 January 2017, pp. 39-40.

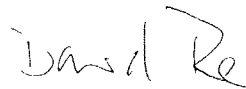
**DISPOSITION**

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

**DISMISSED** the motion.

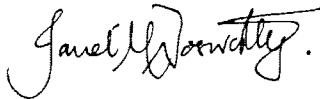
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,  
 The Netherlands  
 14 February 2017



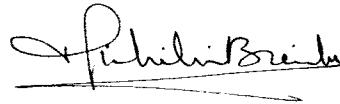

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Judge David Re, Presiding




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Judge Janet Nosworthy




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Judge Micheline Braidy

