

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: 8 June 2017

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 ADMITTING
10 CALL SEQUENCE TABLES RELATED TO MR SALIM JAMIL AYYASH AND
MR HASSAN HABIB MERHI UNDER RULE 154 AND TWO RELATED WITNESS
STATEMENTS UNDER RULE 155’**

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, Ms Sarah Bafadhel & Mr
Geoffrey Roberts

INTRODUCTION

1. The Prosecution pleads in the amended consolidated indictment that the Accused, Mr Hassan Habib Merhi, Mr Assad Hassan Sabra and Mr Hussein Hassan Oneissi, used three private mobile telephones, color-coded and referred to as ‘Purple telephones’ in relation to the preparation of the attack and assassination of the former Prime Minister of Lebanon, Mr Rafik Hariri in Beirut on 14 February 2005. More specifically, the ‘Purple telephones’ (from at least 1 January 2003 until 16 February 2005) were already used to communicate amongst each other, to communicate with others outside the group and coordinate the false claim of responsibility for the attack. ‘Purple 231’, in particular, is attributable to Mr Merhi as he had allegedly used this and other mobiles to frequently contact and send text messages to his family members and associates.¹

2. In its motion of 16 February 2017, the Prosecution asked the Trial Chamber to admit into evidence, under Rule 154 of the Special Tribunal’s Rules of Procedure and Evidence, two call sequence tables² related to Mr Merhi, for mobile numbers ending in 072 and 472, to support the attribution of these numbers to a member of Mr Merhi’s family. This was done through an addendum to the report of Prosecution analyst, Mr Andrew Donaldson (Witness PRH230). These call sequence tables also show patterns consistent with this member of Mr Merhi’s family being the single user of the two numbers and that he moved from one mobile to another. Both numbers are among the top thirty contacts with ‘Purple 231’, which supports the attribution of this number to Mr Merhi.³

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended consolidated indictment, paras 15-16.

² The Trial Chamber has previously described call sequence tables as lists of calls derived from call data records supplied to the Prosecution by the three Lebanese telecommunication service providers MTC, Alfa and OGERO. The Prosecution is using the cell towers, identified in the call data records by their ‘cell ID’, to which mobiles connected to prove the location of the caller or the person receiving the call, and, in conjunction with other evidence, to prove that the mobiles were engaging in the surveillance of Mr Hariri’s movements and planning the attack and assassination of the former Prime Minister of Lebanon, Mr Rafik Hariri in Beirut on 14 February 2005; see F2797, Decision on Four Prosecution Motions on Call Sequence Tables Related to Salim Jamil Ayyash, Hassan Habib Merhi, Assad Hassan Sabra, Mustafa Amine Badreddine, and Five Witness Statements, 31 October 2016 (‘Decision of 31 October 2016’), paras 3-5; see also 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 UNIIIC and STL’s Prosecution, 6 May 2015; F2750, Reasons for Admitting Witness PRH705’s Statements and Annexes into Evidence, 30 September 2016; F2767, Written Reasons for Admitting Witness PRH707’s Statements and Annexes into Evidence, 10 October 2016.

³ F2996, Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi pursuant to Rule 154 and one related witness statement pursuant to Rule 155, 16 February 2017 (confidential with confidential Annexes A-D) (a public redacted version of the motion was filed on 7 March 2017) (‘Prosecution motion’), paras 10, 17-18.

3. In its response to the Prosecution motion, the Merhi Defence argued that the Prosecution had reversed without justification its previous position regarding the attribution of ‘Purple associate’ telephone numbers to a member of Mr Merhi’s family. The Defence also submitted that the Prosecution had ‘ambushed’ the Defence through the ‘late attribution’ of the two numbers to a member of Mr Merhi’s family.⁴

4. On 31 March 2017, the Trial Chamber issued a decision admitting into evidence these two call sequence tables. The Trial Chamber found that the two call sequence tables did not as such attribute these two numbers to any specific person, but form part of the totality of the evidence, which also included other call sequence tables already admitted into evidence. It further held that the attribution of these numbers did not create any new allegations against Mr Merhi and therefore does not change the nature of the Prosecution case.⁵

5. Counsel for Mr Merhi sought, under Rule 126 (C),⁶ certification to file an interlocutory appeal—opposed by the Prosecution⁷—of the following issue:

Whether the Trial Chamber erred by failing to consider that the Prosecution was bound by its past statements regarding its intention not to attribute the ‘Purple associate’ telephone numbers.⁸

SUBMISSIONS

Defence submissions

6. Counsel for Mr Merhi submit that the Trial Chamber’s decision did not address the reversal without justification of the Prosecution’s position regarding the attribution of the

⁴ F3022, Merhi Response to the “Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi pursuant to Rule 154 and one related witness statement pursuant to Rule 155”, 6 March 2017, paras 10-17.

⁵ F3061, Decision Admitting 10 Call Sequence Tables Related to Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi Under Rule 154 and Two Related Witness Statements Under Rule 155, 31 March 2017, (‘Decision of 31 march 2017’) para. 21.

⁶ Rule 126 (C) provides that decisions on all motions under this rule are without interlocutory appeal save with certification, 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.

⁷ F3101, Prosecution Response to Merhi Defence Request for Certification to Appeal the Decision Admitting 10 Call Sequence Tables Related to Mr Ayyash and Mr Merhi under Rule 154 and Two Related Witness Statements under Rule 155, 25 April 2017 (‘Prosecution response’).

⁸ F3073, Corrected Version of the Merhi Defence Request for Certification of the “Decision Admitting 10 Call Sequence Tables Related to Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi Under Rule 154 and Two Related Witness Statements Under Rule 155” dated 10 April 2017, 18 April 2017 (‘Merhi motion’), para. 2.

'Purple associate' telephone numbers.⁹ The Defence submits that the issue would affect the fair conduct of the proceedings because allowing the Prosecution to reverse its previous position creates a lack of trust between the Parties and leaves the Defence without adequate time to prepare for the Prosecution's new approach.¹⁰

7. The Defence relies on the *Milutinović* case, where a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia decided on how an accused's pre-trial interviews with the Prosecution could be used at trial against a co-accused. The Trial Chamber held that the Defence was entitled to rely on the initial position of the Prosecution and that it would have been unfair to expect the Defence to adapt to the new position adopted by the Prosecution. The Trial Chamber noted that, in deciding to revert to its initial position, the Prosecution had itself observed that to do otherwise risks unduly prejudicing the accused's right to a fair trial.¹¹

8. Further, the Merhi Defence submits that it would have to devote additional time and resources to adjust to the Prosecution's new approach, which would likely delay the trial and significantly affect the expeditious conduct of the proceedings.¹² A finding of guilt on the basis of this attribution evidence could lead to an appeal or a new trial; a decision by the Appeals Chamber on the present issue could therefore materially advance the proceedings by allowing the trial to proceed on 'sounder footing'.¹³

9. The Defence submits that the annex filed with the motion must remain confidential as it is *inter partes* correspondence with the Prosecution.¹⁴

Prosecution response

10. The Prosecution submits that the issue does not arise from the decision because, contrary to the submissions of the Defence, the Trial Chamber did consider the issue, but dismissed it.¹⁵ Should the Trial Chamber find that the issue does arise, the Defence has nevertheless failed to satisfy the stringent requirements of Rule 126 (C).¹⁶

⁹ Merhi motion, paras 9 and 11.

¹⁰ Merhi motion, paras 11-12.

¹¹ Merhi motion, para. 13, referring to ICTY, *Prosecutor v. Milutinović*, IT-05-87-T, Decision on Use of Prosecution Interviews of Accused, 20 March 2008, paras 8-9.

¹² Merhi motion, paras 14-16.

¹³ Merhi motion, paras 17-18.

¹⁴ Merhi motion, para. 20.

¹⁵ Prosecution response, para. 4.

¹⁶ Prosecution response, paras 2-6, 10, 13.

11. The Prosecution notes that it is common for Parties to have differing views, and rejects the Defence's contention that an 'intention' not to attribute the two numbers is the same as an 'undertaking' or 'commitment'.¹⁷ The facts of the *Milutinović* case are distinguishable: in that case, the Prosecution attempted to rely on an interview of an accused to prove the acts and conduct of a co-accused whereas, in this instance, the attribution of the two numbers does not go to prove the acts and conduct of the accused.¹⁸ The Defence's submissions that the trial will be delayed because of additional work are essentially a restatement of the submissions in its response to the motion, which the Trial Chamber considered and decided that they lacked merit.¹⁹ The Defence's submissions that it may request an adjournment are merely hypothetical, and irrelevant to the Rule 126 (C) analysis of the issue.²⁰ Further, the possibility of an appeal or new trial is purely speculative, and one that technically applies to every issue for which certification is requested thus 'rendering the second requirement of Rule 126 (C) meaningless'; it is not a sufficient reason to justify the immediate resolution of the issue by the Appeals Chamber.²¹

12. The Prosecution agrees with the Defence that the annex filed must remain confidential on the basis that keeping *inter partes* correspondence confidential facilitates the discussion between the Parties without the need for judicial intervention.²²

DISCUSSION

13. 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.

14. The Trial Chamber must be satisfied that an issue for certification meets the strict requirements of the Rule.²³ This is a high threshold, and certification is exceptional.²⁴ A

¹⁷ Prosecution response, paras 6-8.

¹⁸ Prosecution response, para. 9.

¹⁹ Prosecution response, para. 11.

²⁰ Prosecution response, para. 12.

²¹ Prosecution response, para. 13.

²² Prosecution response, para. 14.

²³ STL-11-01/PT/AC/AR126.5, F003, 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 ('Disclosure Appeal Decision'), para. 7; STL-11-01/PT/AC/AR90.2, F0007, Decision on Defence Appeals against Trial Chamber's

request for certification is not concerned with whether a decision was correctly reasoned, and the Trial Chamber's analysis is confined to determining whether the challenged decision involves an issue, with an adequate legal or factual basis, that meets the two cumulative requirements of Rule 126 (C).²⁵ Once the two criteria are met, however, the Trial Chamber has no discretion in certifying 'the decision for appeal with respect to that issue'.²⁶

15. In light of the strict standard set by Rule 126 (C), the Trial Chamber finds that the question posed is far from satisfying it. The Merhi Defence's motion misstates the Trial Chamber's findings.

16. Contrary to the Defence's claim, the Trial Chamber carefully considered the Defence arguments related to the reversal of the Prosecution's position regarding the attribution of the 'Purple associate' telephone numbers. The Trial Chamber also disagrees with the Defence's submission that the Trial Chamber understood the Defence argument as being a matter of the Defence being 'ambushed' by the Prosecution through the 'late attribution' of the two telephone numbers to a member of Mr Merhi's family.

17. The Trial Chamber considered these arguments when it specifically held, at paragraph 21 of the decision, that the two call sequence tables do not as such attribute these two numbers to any specific person, but form part of the totality of the evidence, which also includes other call sequence tables already admitted into evidence. Further, the Trial Chamber found that the attribution of these two numbers did not create any new allegations against Mr Merhi and therefore did not change the nature of the Prosecution case.²⁷ The Trial Chamber therefore cannot certify for interlocutory appeal an issue that does not accurately reflect a decision or arise from one. Nor can it certify an issue that represents a mere disagreement with the decision.

"Decision on Alleged Defects in the Form of the Amended Indictment", 5 August 2013, para. 11; 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 ('Authority Appeal Decision'), para. 15.

²⁴ Authority Appeal Decision, para. 11.

²⁵ Authority Appeal Decision, para. 13; Disclosure Appeal Decision, para. 7; F1347, Decision on Request for Certification to Appeal Orders Concerning Five Defence Motions on State Cooperation, 27 January 2014, para. 10. *See also* transcript of 4 February 2014, p. 30 (requesting the Parties to provide 'highly focused submissions on Rule 126 (C)') 27 January 2014.

²⁶ Authority Appeal Decision, para. 12.

²⁷ Decision of 31 March 2017, para. 21.

18. Moreover, even if the Trial Chamber were to find that the motion meets the requirements of the first limb of the certification test, the motion must fail in relation to the second limb of the test in Rule 126 (C). The Trial Chamber has previously held that certification of an appeal has to be the absolute exception when deciding on the admissibility of evidence because it is first and foremost the responsibility of the Trial Chamber, as the trier of fact, to determine which evidence to admit; it is not for the Appeals Chamber to assume this responsibility.²⁸ For this reason, the motion cannot fall within the second limb of Rule 126 (C) in that ‘an immediate resolution by the Appeals Chamber may materially advance the proceedings’. The Trial Chamber is therefore unable to certify any ‘issue’ for interlocutory appeal.

CONFIDENTIALITY

19. The Merhi Defence submits that the annex to its motion was filed confidentially as it contains confidential correspondence between the Defence and the Prosecution.²⁹ However, the annex should be reclassified. The Prosecution argues that the annexed correspondence should remain confidential, as this facilitates frank discussion between the parties, potentially resolving issues without judicial intervention.³⁰ This letter, however, was clearly written with the intention of annexing it, if necessary, to filings. The Trial Chamber finds, in the circumstances, that in order to facilitate the public nature of these proceedings, the Merhi Defence should file a public redacted version of the annex, after having first consulted with the Prosecution. The Merhi Defence should also file a public redacted version of annex B to its Response to Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi Pursuant to Rule 154 and one Related Witness Statement Pursuant to Rule 155.³¹

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the motion; and

²⁸ F1798, Decision on Application for Certification of Decision Regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, para. 14 and reference therein.

²⁹ Merhi motion, para. 20.

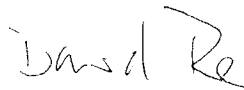
³⁰ Prosecution response, para. 14.

³¹ F3022, Merhi Defence Response to the “Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi Pursuant to Rule 154 and one Related Witness Statement Pursuant to Rule 155”, 6 March 2017.

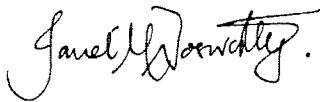
ORDERS counsel for Mr Merhi to file public redacted versions of the annex to its motion and of annex B to its Response to Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi Pursuant to Rule 154 and one Related Witness Statement Pursuant to Rule 155.

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

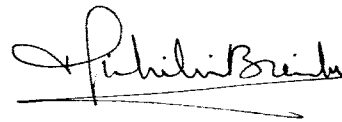
Leidschendam,
The Netherlands
8 June 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

