

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: 19 July 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
12 DOCUMENTS AND A WITNESS’ STATEMENTS RELATED TO HEZBOLLAH,
ITS OFFICIALS AND TELEPHONE NUMBERS’**

Office of the Prosecutor:
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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 Youssef 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 Geoffrey Roberts &
Ms Sarah Bafadhel



INTRODUCTION

1. The Trial Chamber, on the Prosecution's application, declared admissible, under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence, 12 documents related to Hezbollah, its officials and telephone numbers.¹ These included public statements of Hezbollah's Secretary-General, Mr Hassan Nasrallah, on-line articles relating to the deaths of the brothers of the Accused, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, the agenda of a Lebanese Cabinet Minister, Mr Marwan Hamade, a telephone notebook of a former brigadier-general of the Lebanese Army, Mr Nabih Sahyouni, a screenshot from the *Arab Decision* on-line portal, and a letter from a Lebanese investigating judge, Judge Said Mirza.

2. The Trial Chamber found that the documents were relevant to demonstrate the nature of the relationship of the Accused and the former Accused, Mr Mustafa Amine Badreddine, with Hezbollah—as paragraph 49 of the amended consolidated indictment pleads that all four Accused (as was Mr Badreddine) are supporters of Hezbollah—and to identify third party contacts of mobile telephones they allegedly used.

3. The Trial Chamber also permitted the Prosecution to amend its exhibit list to add four of those documents.² Counsel for Mr Oneissi did not oppose this application.³

CERTIFICATION OF ISSUES FOR INTERLOCUTORY APPEAL

4. Under Rule 126 (C) the Trial Chamber may certify for interlocutory appeal 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'. The Trial Chamber has set out and applied the legal

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi, and Sabra*, F3104, Decision Admitting 12 Documents and a Witness' Statements related to Hezbollah, its Officials and Telephone Numbers, 26 April 2017.

² These were listed in annex E to the Prosecution's motion, F2975, Prosecution Motion to Admit 12 Documentary Exhibits and One Witness Statement related to Hezbollah, its Officials and Telephone Numbers, pursuant to Rules 154 and 155, 3 February 2017 (confidential with confidential annexes A-F; annex E has since been reclassified to public).

³ F3003, Corrected version of the Response to the "Prosecution Motion to Admit 12 Documentary Exhibits and One Witness Statement related to Hezbollah, its Officials and Telephone Numbers pursuant to Rules 154 and 155", 21 February 2017 (confidential).

principles and standards governing the certification of decisions for interlocutory appeal in previous decisions.⁴ These are applicable here.

First issue

5. Despite not opposing the Prosecution's application to amend the exhibit list, counsel for Mr Oneissi now seek certification for interlocutory appeal of this decision,⁵ of the following issue,

Did the Chamber err by implicitly allowing the Prosecution Motion to amend the list of exhibits produced under Rule 91 (G) (iii) without establishing whether the Prosecution had good cause in this regard.

6. Defence counsel argued unfairness in the Trial Chamber again permitting the amendment of the Prosecution's exhibit list, and without specifying that good cause existed to do so, therefore requiring Appeals Chamber's guidance for future applications. The Prosecution opposed the application,⁶ arguing that this was not a ground for certification and, citing international criminal law case law, that the Oneissi Defence had waived its right to argue the issue in not having opposed the Prosecution's application.⁷

7. In the Trial Chamber's view this issue does not meet the strict standard to certify it for interlocutory appeal. Although accidentally omitted from the actual disposition, the Trial Chamber explicitly—at paragraphs 23-24 and 44 of the decision—dealt with each application to add to the Prosecution's exhibit list, and allowed the application.⁸ The decision and its

⁴ F1798, Decision on Application for Certification of Decision regarding the Scope of Marwan Hamade's Evidence, 18 December 2014, paras 12-14; F2874, Decision Denying Certification to Appeal 'Decision on the Admission of Call Sequence Tables related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements', 6 December 2016, paras 5-6; F2987, Written Reasons for Decision Denying Certification to Appeal the "Decision Clarifying Mr Gary Platt's Area of Expertise" dated 25 January 2017, 14 February 2017, paras 5-6.

⁵ F3121, Request for Certification of the "Decision Admitting 12 Documents and a Witness' Statements related to Hezbollah, its Officials and Telephone Numbers", 4 May 2017.

⁶ F3150, Prosecution Response to Oneissi Defence Request for Certification of "Decision Admitting 12 Documents and a Witness' Statements related to Hezbollah, its Officials and Telephone Numbers", 19 May 2017.

⁷ Referring to the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 55; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Judgement, 19 May 2010, paras 185, 244; *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 174; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Kambanda*, ICTR-97-23-A, Judgment, 19 October 2000, para. 25.

⁸ The Trial Chamber's decision explicitly allowed amendment of the Prosecution exhibit list to add the following four documents: Mr Hassan Nasrallah's speech of 11 November 2014 (paras 23-24); an online article from the *Shiaweb* website reporting Hezbollah's response, during the memorial of Mr Assad Hassan Sabra's younger brother, to Mr Samir Geagea's verbal attacks; another online article from the *Shiaweb* website, reporting the

disposition are clear. Thus, any ‘error’ in not formally specifying this in the disposition would be technical and harmless. Further, although the Trial Chamber did not specifically mention the formulation ‘good cause’, at paragraphs 23 and 44 it used, in its place, the term ‘interests of justice’ to allow the additions to the exhibit list. The concept of the ‘interests of justice’ encompasses a Party showing ‘good cause’. Additionally, the Defence application does not attempt to explain how this decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Moreover, seeking the Appeals Chamber’s general ‘guidance’ is not a valid ground for certification.

8. Combined with this is Defence counsel raising their opposition to the amendment for the first time on appeal, thus raising the issue of the admissibility of the motion, and waiver. Other international criminal tribunals have ruled motions in these circumstances inadmissible.⁹ The issue, therefore, does not meet the standard for certification and will not be certified.

Second issue

9. Defence counsel also seek to have a second issue certified for interlocutory appeal, namely,

Did the Chamber err when it held that documents pertaining to the alleged deaths of two members of Mr Oneissi’s family were relevant to demonstrate a link between Mr Oneissi’s family and Hezbollah.

10. Counsel argue error in the Trial Chamber finding that ‘open source’ (namely, publicly available) articles and screenshots of the deaths and funerals of Mr Oneissi’s family members were relevant to demonstrate a link between his entire family and Hezbollah. The decision lacks clarity between this alleged link and the accusations against Mr Oneissi himself, its reasoning is distorted and impacts the presumption of innocence. The fairness of the proceedings and the outcome of the trial are therefore affected. An immediate resolution by the Appeals Chamber would materially advance the proceedings by laying down criteria for the notion of ‘relevance’ of a document presented by the Prosecution.

deaths of Mr Ahmad/Ahmed Hassan Oneissi and Mr Ali Ahmad/Ahmed Oneissi, and two screenshots of the *Atharshohada* website showing photographs of these two individuals (para. 44).

⁹ See, e.g. ICTR, *The Prosecutor v. Bagosora and others*, ICTR-98-41-T, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 May 2006, para. 7, ‘This new argument is inadmissible as a basis for certification, having not been raised in the original motion’.

11. The Prosecution responded that the application did not demonstrate any error or contradiction by the Trial Chamber in its decision, nor how the decision on admissibility impacted the presumption of innocence.

12. The Trial Chamber is satisfied that the issue does not meet the strict standard for certification. Regarding the alleged breach of the presumption of innocence, accused persons are of course presumed innocent until convicted. Convictions, however, are based upon evidence that the Prosecution presents against accused persons in criminal trials. Such evidence is therefore, by its very nature, highly prejudicial to an accused's personal interest in not being convicted of a crime. But then, that is the essence of a criminal trial. Presenting evidence against an accused does not breach the *presumption* of innocence, but rather is used to prove that the accused is guilty of the offence(s) charged. Thus, in the context of a criminal trial, the Defence argument is manifestly illogical. The arguments supporting the issue posed for certification in reality only illustrate how criminal trials function.

13. Further, the disputed evidence consists of no more than (i) an on-line article published in *Shiaweb* reporting the deaths of Mr Oneissi's brother and nephew in 2007, and (ii) screenshots of photographs of them published on *Atharshohada's* website, describing them as 'martyrs', and accompanied by a Hezbollah flag. At paragraph 40 of the decision, the Trial Chamber—in deciding that the evidence was admissible—held only that the 'cumulation of evidence [...] could *potentially* support an inference that the relevant Accused is a Hezbollah supporter' (italics added). It was put no higher than that. How it can be used is a matter for later submission, evaluation and, ultimately, weight. The admission of these two documents into evidence cannot in any way significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

14. This application for certification is without merit and is dismissed.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the motion.

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

Leidschendam,
The Netherlands
19 July 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

