

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:** 20 October 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

**DECISION DENYING MERHI DEFENCE APPLICATION FOR  
CERTIFICATION TO APPEAL DECISION ADMITTING STATEMENTS  
OF WITNESS PRH103 UNDER RULE 158**

**Office of the Prosecutor:**

Mr Norman Farrell & Mr Alexander Hugh  
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 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



1. The Trial Chamber has admitted into evidence under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence, on the Prosecution's request, two statements and the transcript of an audio-recorded interview of Mr Ziad Ramadan (Witness PRH103), and, on the application of counsel for Mr Assad Hassan Sabra, four further statements and a report on his interrogation by Syrian officials.<sup>1</sup> The Trial Chamber found the witness to be someone 'who is for good reason otherwise unavailable to testify' within the meaning of Rule 158, considering the witness' trauma, his unwillingness to testify, the lack of any cooperation agreement with the State where he resides, and the public policy reasons inherent in not attempting to compel someone to testify in these circumstances.<sup>2</sup>

2. Counsel for the Accused, Mr Hassan Habib Merhi, opposed the admission of the statements and transcript proposed by the Prosecution, and now seek to certify for interlocutory appeal, under Rule 126 (C), the following issue:

Did the Chamber err in determining that the scope of Rule 158 of the Rules is necessarily sufficiently broad to include the circumstances of witness PRH103?<sup>3</sup>

3. Counsel for Mr Merhi argue that the admission of the evidence affects the fair and expeditious conduct of the proceedings and the outcome of the trial. The Trial Chamber's interpretation of Rule 158 is erroneous, unprecedented in international criminal law and therefore contrary to the principle of certainty of law. The case law of international criminal courts and tribunals is strict that the witness' unavailability must be objective; the witness' mere refusal to give evidence is insufficient to satisfy this Rule.<sup>4</sup>

4. Counsel submit that the evidence goes to the heart of the Prosecution's case related to the false claim of responsibility pleaded in the amended consolidated indictment.<sup>5</sup> The Prosecution has a limited number of witnesses to prove its theory in this regard, which gives the witness' evidence greater importance. Admitting his statements under Rule 158 deprives

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2901, Decision Admitting Statements of Witness PRH103 under Rule 158, 12 December 2016 (confidential) ('Decision'). Mr Ramadan's statements and interview transcript tendered by the Prosecution are exhibits P1774, P1775 and P1776.

<sup>2</sup> Decision, paras 34-36. Rule 158 permits a Chamber to admit into evidence the statement of a person 'who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally' if it finds that the statement is reliable. The Chamber must also consider whether the statement goes to the acts and conduct of the accused as charged in the indictment.

<sup>3</sup> F2917, Merhi Defence Request for Certification to Appeal the "Decision Admitting Statements of Witness PRH103 under Rule 158", 20 December 2016 (confidential) ('Application'), para. 2.

<sup>4</sup> Application, paras 12-20.

<sup>5</sup> The Prosecution alleges that Mr Merhi coordinated the finding of a suitable individual who would be used to make a false claim of responsibility, on a video, for the attack against Mr Rafik Hariri. *See*, for example, F2720, Amended Consolidated Indictment, 12 July 2016, paras 23, 44.

the Defence of the right to cross-examine the witness. The overt aim to admit the witness' evidence led the Trial Chamber to tailor its legal analysis of this Rule. An immediate resolution by the Appeals Chamber would materially advance the proceedings because the Parties would receive clarification on the scope of Rule 158 for similar future applications.<sup>6</sup>

5. The Prosecution objects to the application, arguing that it does not raise an issue that meets the standard of Rule 126 (C). Instead, the application focuses on the alleged incorrectness of the Trial Chamber's decision and expresses disagreement with its interpretation of Rule 158. The Defence's argument regarding the importance of the evidence is irrelevant to the certification procedure.<sup>7</sup>

6. Rule 126 (C) provides that a decision may only be subject to interlocutory appeal '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'. The Trial Chamber has previously acknowledged the legal principles and rules of international criminal law governing the certification of decisions for interlocutory appeal.<sup>8</sup> These are applicable here. The Trial Chamber again emphasises that decisions on the admission of evidence are discretionary and highlights its finding that 'certification to appeal is the absolute exception when deciding on the admissibility of evidence. A question for certification relating to admitting something into evidence will therefore rarely meet the standard in Rule 126 (C).'<sup>9</sup>

7. The Trial Chamber finds that counsel reargue their objection to the admission of the witness' statements, disagreeing with the Trial Chamber's interpretation of Rule 158 and its assessment of the witness' circumstances against this Rule. The Trial Chamber in its decision observed that Rule 158 differs in wording from its equivalents at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court.<sup>10</sup> Counsel for Mr

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<sup>6</sup> Application, paras 1-2, 13-21.

<sup>7</sup> F2930, Prosecution Consolidated Response to Defence Requests for Certification to Appeal the Trial Chamber's Decision Admitting Statements of Witness PRH103, 4 January 2017 (confidential), paras 1, 3, 5, 8, 10.

<sup>8</sup> See e.g. 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; F1798, Decision on Application for Certification of Decision regarding the Scope of Marwan Hamade's Evidence, 18 December 2014 ('Decision of 18 December 2014'), paras 12-14.

<sup>9</sup> F3328, Decision Denying 'Sabra Request for Certification to Appeal Decision Admitting Statement of PRH024 under Rule 158', 15 September 2017 ('Decision of 15 September 2017'), para. 11 and reference therein.

<sup>10</sup> Decision, para. 33, including footnote 15.

Merhi acknowledged this in their response objecting to the admission of the evidence.<sup>11</sup> The Trial Chamber will consider the Defence's inability to cross-examine the witness when ultimately deciding on the weight to give to his evidence.<sup>12</sup> The Trial Chamber emphasises that the decision was simply one among many discretionary decisions on the admission of evidence in the case and merely found admissible the corroborating evidence of one witness, among numerous other pieces of evidence.<sup>13</sup> The Defence's arguments that the decision goes against the principles of fair trial and certainty of law therefore fail. In addition, considering that the Trial Chamber has yet to determine the weight to be given to the evidence, the Defence has not shown any issue that would significantly affect the outcome of the trial. Counsel did not address how the admission of evidence under Rule 158 would affect the expeditiousness of the trial. For these reasons, the application fails the test of identifying an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

8. Moreover, even if the Trial Chamber were to find that the application meets the requirements of the first limb of the certification test, it must fail in relation to its second limb. The Merhi Defence's argument that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings because the Parties would receive clarification on the scope of Rule 158 for similar future applications is unconvincing. 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.<sup>14</sup> It is therefore primarily for the Trial Chamber to interpret the Rules to decide on the admission of evidence. Furthermore, at a late stage of the Prosecution's case, this contested interpretation of Rule 158 has not surfaced in any litigation since the decision was issued.<sup>15</sup> For these reasons, the Trial

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<sup>11</sup> F2619, Merhi Defence Response to the "Prosecution Motion to Admit Two Statements and an Interview Transcript of PRH103", 9 June 2016 (confidential), para. 5.

<sup>12</sup> Decision, paras 47-48.

<sup>13</sup> Decision, para. 47. *See* Decision of 15 September 2017, paras 30, 36.

<sup>14</sup> Decision of 18 December 2014, para. 14 and reference therein; F3175, Decision Denying Certification to Appeal 'Decision Admitting 10 Call Sequence Tables Related to Mr Salim Ayyash and Mr Hassan Habib Merhi under Rule 154 and Two Related Witness Statements under Rule 155', 8 June 2017, para. 18.

<sup>15</sup> Decision, paras 34-36. *See* F3309, Decision Admitting into Evidence 18 Witness Statements under Rules 155 and 158, and Reasons for Admitting Two Witness Statements of Participating Victims, 5 September 2017, paras 20-21; F3107, *Corrected Version of* "Decision on 'Prosecution Motion to Admit the Statement of PRH024 under Rule 158' – with Partially Dissenting Opinion of Judge David Re" dated 28 April 2017, 1 May 2017, paras 34-40, Partially Dissenting Opinion of Judge David Re; F3017, Decision Admitting Witness PRH437's Statements under Rule 158 and Granting Protective Measures, 28 February 2017, paras 12-14.

Chamber concludes that an immediate resolution by the Appeals Chamber could not materially advance the proceedings.

9. The decision was filed confidentially to allow the Prosecution to file an application for protective measures for Mr Ramadan. Since then, the Trial Chamber has denied the Prosecution request for protective measures for the witness and ordered that the decision be reclassified as public.<sup>16</sup> The Merhi Defence explained that it filed its application confidentially because it sought certification to appeal a confidential decision and that it was prepared to file a public redacted version at the request of the Trial Chamber.<sup>17</sup> Now that the decision is public, there is no apparent reason why the application should remain confidential. It should therefore be reclassified.

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

**DISMISSES** the Merhi Defence application for certification for interlocutory appeal; and

**ORDERS** this application to be reclassified as public.

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

Leidschendam,  
The Netherlands  
20 October 2017

*David Re*

Judge David Re, Presiding

*Janet Nosworthy*

Judge Janet Nosworthy

*Micheline Braidy*

Judge Micheline Braidy



<sup>16</sup> See F3366, Decision Denying Prosecution Motion for Protective Measures for Witness PRH103, 20 October 2017.

<sup>17</sup> Application, para. 23.