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:	**1 February 2018**
Original language:	**English**
Classification:	**Public**

THE PROSECUTOR

v.

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

DECISION DENYING ONEISSI DEFENCE APPLICATION FOR CERTIFICATION TO APPEAL DECISION ADMITTING STATEMENTS OF WITNESS PRH056 UNDER RULE 158

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Hugh 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 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 Robertson & Ms Sarah Bafadhel

INTRODUCTION AND BACKGROUND

1. According to the Prosecution, in early January 2005, the Accused, Mr Hussein Hassan Oneissi, introduced himself to Mr Ahmed Abu Adass as 'Mohammed' at the Arab University Mosque of Beirut (also known as the Al-Houry Mosque) under the pretence of asking Mr Abu Adass to teach him the precepts and prayers of Islam. This was part of a plan to lure Mr. Abu Adass into the false claim of responsibility for the planned assassination of the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005. The Prosecution further alleges that the two subsequently met on several occasions and that on the morning of 16 January 2005, Mr Abu Adass left his home to meet 'Mohammed' and has been missing since then.[1]

2. Soon after the blast on 14 February 2005, an anonymous caller claiming to represent the 'Nusra and Jihad Group in Greater Syria,' a previously unknown organization, told a reporter at the Al Jazeera office in Beirut that a videotape from the suicide bomber was hanging from a tree in Riad al Solh Square. In the recording, Mr Abu Adass claimed to be the suicide bomber and read from a sheet of paper, saying that they had avenged in this manner the 'innocent martyrs, who were killed by the security forces of the infidel Saudi regime' and punished Mr Hariri because he had allegedly betrayed his fellow Sunnis.[2]

3. On 13 December 2017, the Trial Chamber found that Witness PRH056 was for good reason unavailable to testify, and for that reason, nine statements, relevant to the false claim of responsibility, were subsequently admitted into evidence under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence. In particular, the Trial Chamber admitted five statements tendered by the Prosecution and four by the Sabra Defence. The statements relate to Mr Abu Adass, his meetings and interactions with 'Mohammed' and his subsequent disappearance.[3]

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[1] STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720/A02, Redacted Amended Consolidated Indictment, 12 July 2016 ('amended consolidated indictment'), paras 3-4, 23 (d), 28.
[2] Amended consolidated indictment, para. 5; STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Redacted Version of the Prosecution's Updated Pre-Trial Brief, dated 23 August 2013, 31 October 2013, paras 8, 62, 112, 114, 117, 122-123, 148,150-161.
[3] STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3480, Decision Admitting into Evidence Statements of Witness PRH056 under Rule 158, 13 December 2017 ('Decision of 13 December 2017'), paras 1-2, 54, 56, 60, disposition. The five statements tendered by the Prosecution are exhibits P2128, P2129, P2130, P2131, P2132. The four statements tendered by the Sabra Defence are exhibits 5D474, 5D475, 5D476, 5D477.

4. The Oneissi Defence seeks certification to appeal the decision to admit into evidence five statements tendered by the Prosecution.[4] The Sabra Defence also sought certification to appeal the decision,[5] and the Prosecution filed a consolidated response to both applications.[6] The Sabra Defence application is addressed in a separate decision.

LEGAL PRINCIPLES

5. Rule 126 (C) provides that an interlocutory decision may be subject to interlocutory appeal only '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 set out the principles governing the certification of decisions for interlocutory appeal,[7] which are equally applicable here.

6. The Trial Chamber emphasizes 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).'[8]

[4] F3499, Request for Certification to Appeal the "Decision Admitting into Evidence Statements of Witness PRH056 under Rule 158", 20 December 2017 (confidential) ('Oneissi Defence application').
[5] F3495, Request for Certification to Appeal "Decision Admitting into Evidence Statements of Witness PRH056 under Rule 158", 20 December 2017 ('Sabra Defence application').
[6] F3521, Prosecution Consolidated Response to Oneissi and Sabra Requests for Certification to Appeal Decision Admitting Statements of PRH056 under Rule 158, 18 January 2018 (confidential) ('Prosecution consolidated response'). The Trial Chamber granted the Prosecution's request to file a consolidated response to the Oneissi Defence and Sabra Defence applications in the interests of judicial economy. *See* email from Trial Chamber Senior Legal Officer to Prosecution counsel, 12 January 2018.
[7] *See, e.g.,* 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; 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; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1798, Decision on Application for Certification of Decision regarding the Scope of Marwan Hamade's Evidence, 18 December 2014, paras 12-14.
[8] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1841, Decision on 'The Defence for Hussein Hassan Oneissi Request for Certification of the "Decision on Prosecution's Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri's Movements and to Political Events" of 30 December 2014', 3 February 2015, para. 11. *See* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, 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.

SUBMISSIONS

Defence submissions

7. The Oneissi Defence seeks certification for interlocutory appeal under Rule 126 (C) of the following two issues:

(i) Whether the Trial Chamber erred in considering at this stage of the proceedings that the statements were *prima facie* reliable given the lack of manifest inconsistency within the statements or between them; and

(ii) Whether the Trial Chamber erred in considering at this stage of the proceedings that the statements did not go directly to proof of the acts and conducts of the Accused since the evidence is hearsay and does not identify Mr Oneissi as 'Mohammed'.[9]

8. Regarding the first issue, the Defence submits that the Trial Chamber erred in law and fact in finding Witness 056's statements to be *prima facie* reliable and with no manifest inconsistencies within or between them. This was despite the Defence's submissions that inconsistencies existed—for example with regard to 'Mohammed'—between the statements tendered by the Prosecution and the witness's other statements, including those tendered by the Sabra Defence.[10]

9. Given the stage of the proceedings, this finding was only based on Prosecution evidence. In addition, as Witness 056 has been found to be 'permanently unavailable', the Defence is deprived of its right to cross-examine the witness and use additional statements to show these inconsistencies. The Trial Chamber erred in not respecting the equality of arms principle in not hearing arguments from both Parties, and thus committed an error which significantly affects the fair conduct of the proceedings.[11]

10. The error may also have a 'massive' impact on the outcome of the proceedings, as Witness 056 provides crucial testimony to support allegations relating to Mr Abu Adass's interactions with 'Mohammed'—whom the Prosecution alleges was Mr Oneissi— and his subsequent disappearance, allegations which are key to the Prosecution's case against Mr Oneissi. If the Trial Chamber's decision were to be reversed on appeal, it would most

[9] Oneissi Defence application, para. 2.
[10] Oneissi Defence application, paras 4-5.
[11] Oneissi Defence application, paras 6-8.

likely lead to different findings of fact. The issue should be resolved without delay, in the interests of justice, to avoid grave prejudice to the Accused.[12]

11. Regarding the second issue, the Trial Chamber erred in its interpretation of 'acts and conduct', finding that Witness 056's evidence does not go to proof of the Accused's acts and conduct as it was hearsay and did not identify Mr Oneissi as 'Mohammed'. This contradicts its previous decision declining to admit into evidence the parts of Witness 056's statements concerning 'Mohammed', and asking to hear the witness's evidence on this matter precisely because it goes directly to proof of the Accused's acts and conduct as charged in the amended consolidated indictment.[13]

12. The Prosecution alleges, in the amended consolidated indictment and its pre-trial brief, that Mr Oneissi introduced himself as 'Mohammed' to Mr Abu Adass and recruited him to make the alleged false claim of responsibility. These allegations are the basis of its case against Mr Oneissi and thus go directly to his acts and conduct. The Trial Chamber's 'equivocal definition of "acts and conduct"' requires the Appeals Chamber to assess which interpretation is consonant with the Special Tribunal's Statute, international human rights and general principles of international criminal law.[14]

13. Any conviction depends on the legal characterisation of the Accused's acts and conduct, and the absence of a clear and unequivocal definition of which factual allegations and evidence are relevant to the Accused's acts and conduct breaches his right to be properly informed of the nature of the case against him. Rules 155, 156, 158 and 160 (governing the admission of witness statements and taking judicial notice of facts of common knowledge) also use the phrase 'acts and conduct' to safeguard the Accused's rights.[15]

14. The Trial Chamber's ambivalent definition leads to an uncertain interpretation and inconsistent application of these rules, to the detriment of the Parties and the Accused's rights. The second issue thus significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial, and only an immediate resolution by the Appeals Chamber will

[12] Oneissi Defence application, paras 9-10.
[13] Oneissi Defence application, paras 11-13.
[14] Oneissi Defence application, paras 14-15.
[15] Oneissi Defence application, paras 17-18.

settle the matter of which evidence is relevant to the Accused's acts and conduct, preventing the proceedings from taking the wrong course.[16]

Prosecution response

15. The Prosecution argues that the application should be dismissed as it does not meet Rule 126 (C)'s stringent requirements and focuses instead on the underlying merits of the Trial Chamber's decision.[17]

16. On the first issue, the Trial Chamber's *prima facie* assessment of the reliability of Witness 056's statements was an essential part of its determination as to whether to admit them into evidence and did not amount to a finding of fact. In fact, the Trial Chamber held that it was not assessing the weight to be accorded to the statements and would do so later only in view of the totality of the evidence in the case.[18]

17. In addition, the Oneissi Defence does not identify manifest inconsistencies between the five statements tendered by the Prosecution and ignores that the Trial Chamber considered the Oneissi Defence's arguments in their entirety before finding the statements admissible. This allegation of error is therefore wholly unfounded. As such, the Oneissi Defence has not identified how the first issue is an exceptional one that would significantly affect the proceedings or the outcome of the trial, or how the immediate intervention of the Appeals Chamber is justified.[19]

18. In relation to the second issue, the Trial Chamber appropriately supported its conclusion that Witness 056's statements do not directly go to proof of acts and conduct of the Accused. Further, even if the statements did go to acts and conduct, the Trial Chamber correctly reasoned that this would not preclude their admission into evidence in light of the circumstances and at this stage, as their weight will be assessed later in the proceedings. The Oneissi Defence does not challenge this reasoning. As a result, the Oneissi Defence fails to demonstrate that the second issue meets either part of the Rule 126 (C) test.[20]

[16] Oneissi Defence application, paras 18-20.
[17] Prosecution consolidated response, paras 1-2, 6, 21.
[18] Prosecution consolidated response, paras 14-15.
[19] Prosecution consolidated response, paras 16, 19.
[20] Prosecution consolidated response, paras 11-13.

DISCUSSION AND DECISION

19. The first issue raised by the Oneissi Defence is that the Trial Chamber erred in law and fact in finding Witness 056's statements to be *prima facie* reliable. The Trial Chamber considers, however, that the Oneissi Defence has failed to show that the issue *significantly* affects the fair and expeditious conduct of the proceedings.

20. First, the Oneissi Defence incorrectly argues that the Trial Chamber's assessment of *prima facie* reliability in the admission of the statements amounts to a final factual finding against Mr Oneissi, whereas the Trial Chamber only found that the evidence was not *manifestly* unreliable.[21] The Trial Chamber will assess the weight given to the statements on this specific point at the end of the trial, taking into consideration the lack of cross-examination and that a conviction cannot be based solely or decisively on insufficiently corroborated untested evidence.[22]

21. In addition, the admission of Witness 056's statements under Rule 158 merely adds a further piece of evidence corroborating other evidence—for instance, telecommunication evidence and statements of other witnesses[23]—concerning this part of the Prosecution's case against Mr Oneissi. Based on the above, this issue alone cannot significantly affect the outcome of the trial.

22. Moreover, the Oneissi Defence's application for certification concerns only the five statements tendered by the Prosecution, but not the four tendered by the Sabra Defence which were also admitted into evidence. Granting the application would thus be tantamount to the Trial Chamber implicitly holding that there were inconsistencies in the Prosecution's statements whereas the Sabra Defence's were fully reliable. Giving such a premature, selective and partial assessment at this early stage would be procedurally irregular.

23. The second issue raised by the Oneissi Defence, that the Trial Chamber erred in considering that the statements did not go directly to proof of the acts and conduct of the Accused, also fails to satisfy the Rule 126 (C) test. The application does not argue that the

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[21] *See* Decision of 13 December 2017, para. 46.

[22] *See* STL-14-05/A/AP, *In the Case Against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, F0028, Public Redacted Version of Judgment on Appeal, 8 March 2016, fn. 378, citing ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 53; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Request for Admission of the Statement of Jadranko Prlić, 22 August 2007, para. 33.

[23] *See, e.g.*, exhibits P596, P597, P760, P761.1, P762, P763, P807, 4D212, 4D213, 4D241, 5D239.

Trial Chamber erred in law in finding that Rule 158's requirements were met, but rather that the Trial Chamber should have found that the statements required cross-examination under Rule 156.

24. This, however, ignores two things. First, the Trial Chamber initially admitted the statements under Rule 156, which required the witness to attend for cross-examination,[24] and only admitted the statements into evidence under Rule 158 when the witness became unavailable to attend court. Second, Rules 158 (B) and 149 (D) permit the admission into evidence of statements going to proof of acts and conduct of the Accused.[25] The Trial Chamber has the discretionary power to admit evidence that goes to proof of acts and conduct of the Accused as charged, if it is satisfied that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial.

25. As stated above, the Trial Chamber will assess the weight of Witness 056's evidence at a later stage in the proceedings, in light of the Defence's inability to cross-examine the witness and the possible existence of other supporting evidence. Because the issue raised by the application would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it does not meet the requirements of the first part of Rule 126 (C).

26. As the first criterion of Rule 126 (C) has not been met for either issue, the Trial Chamber does not need to consider the Rule's second criterion. Nevertheless, for the sake of completeness, it will briefly address it.

27. Both issues also fail the second part of the test. By merely relying on generic claims of legal error, the Defence has failed to demonstrate how an immediate resolution of the issues on appeal may materially advance the proceedings. In particular, the second issue seeks a definitive clarification by the Appeals Chamber on evidence relevant to the Accused's acts and conduct, on the basis that it may arise again. However, the Trial Chamber has a statutory discretionary power to admit such evidence, and international criminal law procedural law—referred to in paragraph 20 above—is clear on how a Trial Chamber may assess its weight. There is thus no need for an immediate resolution by the Appeals Chamber of an issue that

[24] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2224, Corrected Version of 'Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087' of 29 September 2015, 5 October 2015, paras 14, 20, disposition.
[25] *See also* Decision of 13 December 2017, paras 50-51.

may never arise. Interlocutory appeals are exceptional, particularly as they could significantly delay the trial, and especially where such delay could preclude the closing of a Party's case.[26]

28. The Trial Chamber therefore finds that the issues identified by the Oneissi Defence do not satisfy either of the two criteria under Rule 126 (C). It therefore denies the application for certification to appeal.

CONFIDENTIALITY

29. The Oneissi Defence did not specify why it filed the application confidentially or whether the Trial Chamber should maintain that classification. The Prosecution filed its submission confidentially because it responded to the confidential Oneissi Defence application. It does not object to its response being reclassified as public should the Trial Chamber so order.[27] The Trial Chamber reiterates the principle of the public nature of proceedings before the Special Tribunal, and stresses that documents should, wherever possible, be filed publicly. The Trial Chamber issues this decision publicly and orders counsel for Mr Oneissi to file a public redacted version of the application and orders that the Prosecution consolidated response be reclassified as public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Oneissi Defence application for certification for interlocutory appeal;

ORDERS counsel for Mr Oneissi to file a public redacted version of the application; and

INSTRUCTS the Registry to reclassify as public the Prosecution consolidated response.

[26] *See, e.g.,* ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters", 16 December 2008, para. 25.
[27] Prosecution consolidated response, para. 20.

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

Leidschendam,
The Netherlands
1 February 2018

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy