



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: 12 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 DENYING ADMISSION
INTO EVIDENCE OF TWO CALL SEQUENCE TABLES**

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 Robert & Ms Sarah Bafadhel



INTRODUCTION

1. On 21 November 2017, counsel for the Accused, Mr Hussein Hassan Oneissi, filed an application for the Trial Chamber to admit two call sequence tables¹—exhibits 4D357 MFI and 4D363 MFI—into evidence under Rule 149 (C) of the Special Tribunal’s Rules of Procedure and Evidence.² Applying Rule 149 (E),³ the Trial Chamber ordered on 24 November 2017 the Oneissi Defence to provide the statement(s) of whoever had created call sequence tables, in support of their *prima facie* reliability and probative value.⁴ The Oneissi Defence did not comply with the order. Consequently, the Trial Chamber found on 26 January 2018 that the Oneissi Defence had failed to establish the *prima facie* reliability and probative value of the call sequence tables and denied their admission into evidence.⁵ The Oneissi Defence now seeks certification to appeal this decision.⁶

SUBMISSIONS

2. Counsel for Mr Oneissi identify one issue for certification for interlocutory appeal: ‘Whether the Trial Chamber erred in misapplying the principle of equality of arms in deciding that the call sequence tables were not admissible under Rule 149(C) without accompanying statements signed by members of the Defence Team of Mr Oneissi.’⁷

3. The Oneissi Defence submits that the issue significantly affects the fair and expeditious conduct of proceedings because the Trial Chamber may have misapplied the principle of equality of arms, which is fundamental to an accused’s right to a fair trial. By always requiring statements from the authors of call sequence tables, the Trial Chamber

¹ Call sequence tables present chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time, comprising relevant call data records and cell site information. *See, e.g.,* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3537, Decision Denying Admission into Evidence of Two Call Sequence Tables Tendered by the Oneissi Defence, 26 January 2018 (‘Decision of 26 January 2018’), fn. 3 with further references.

² F3419, Oneissi Defence Motion for the Admission into Evidence of Three Documents Marked for Identification, 21 November 2017. One of these three documents was admitted into evidence as exhibit 4D364. *See* Decision Admitting into Evidence a Series of Maps Showing Movement of Selected Mobiles in the Area of the Arab University Mosque between December 2004 and February 2005, transcript of 13 December 2017, pp 39-41.

³ Rule 149 (E) authorises the Trial Chamber to seek verification of the authenticity of evidence obtained out of court.

⁴ F3440, Decision on the Oneissi Defence’s Application for Clarification of an Order regarding Two Documents Marked for Identification, 30 November 2017, para. 3; F3427, Order to the Oneissi Defence regarding Two Documents Sought for Admission into Evidence, 24 November 2017, paras 2-3.

⁵ Decision of 26 January 2018, paras 20-21, 26-27, 39, disposition.

⁶ F3553, Oneissi Defence Request for Certification to Appeal the Trial Chamber’s Decision Denying Admission into Evidence of Two Call Sequence Tables, 5 February 2018 (‘Oneissi Defence application’), para. 1.

⁷ Oneissi Defence application, paras 2, 25.

applied the principle in a manner that was inflexible, unfairly restrictive, and in the Prosecution's favour. It is likely that the Defence will continue to tender telecommunications-based documents and repeatedly be forced to engage in time-consuming litigation. The Defence must draw upon telecommunications data to counter the Prosecution case, and in preparing a Defence case. The Defence cannot produce statements, as doing so would create a real and impermissible risk that the Prosecution would cross-examine a core Defence team member. Therefore, the Trial Chamber is preventing the Defence from adducing telecommunications evidence, which is of fundamental importance in these proceedings. The issue therefore also significantly affects the outcome of the trial. As a result, it would materially advance the proceedings to deal with it now rather than at the end of the proceedings.⁸

THE LEGAL PRINCIPLES: CERTIFICATION

4. The Trial Chamber will certify a decision for interlocutory appeal under Rule 126 (C) when:

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.

5. The Trial Chamber must ensure that the issue meets the rule's strict requirements. Leave to appeal is exceptional. The issue must be precise and have an adequate legal or factual basis. Certification is concerned not with whether a decision was correctly reasoned, but with whether Rule 126 (C) is satisfied. Once the requirements of Rule 126 (C) have been met, the Trial Chamber has no discretion to refuse certification.⁹

DISCUSSION AND DECISION

6. The Oneissi Defence application is without merit. The alleged misapplication of the principle of equality of arms ignores the fact that the Trial Chamber applied it in conjunction with Rule 149 (E), which applies equally to all Parties.¹⁰ The Oneissi Defence did not seek

⁸ Oneissi Defence application, paras 3, 6-24. The Oneissi Defence does not seek a decision on the application prior to the closing of the Prosecution case. Oneissi Defence application, paras 4-5.

⁹ See, e.g., F3489, Decision Denying Certification to Appeal Five Decisions Partly Granting Five Sabra Defence Motions to Admit Documents relating to Mr Ahmed Abu Adass, 18 December 2017, paras 4-5 with further references.

¹⁰ Decision of 26 January 2018, paras 6, 22, 26, 29, 37, 39.

certification to appeal the latter issue. The argument that the Defence will likely continue to tender telecommunications-based documents and repeatedly be forced to engage in time-consuming litigation is speculative. The Prosecution's case has been completed and the Trial Chamber has set a timetable for the Oneissi Defence's submissions under Rule 167.¹¹ The Oneissi Defence has not yet informed the Trial Chamber of the nature of its case or the evidence it will call, including documents, if the Trial Chamber makes an order under Rule 128.¹²

7. The argument that the Defence cannot produce statements merely disagrees with—without even addressing—the Trial Chamber's detailed explanation as to why this is not a valid argument.¹³ Again, the Oneissi Defence did not seek certification to appeal this issue. Thus, the Trial Chamber is not preventing the Defence from adducing telecommunications evidence. In fact, the Trial Chamber applied Rule 149 (E) in an attempt to assist the Oneissi Defence in establishing the *prima facie* reliability of such evidence, tried to show how it could produce supporting statements without creating any risk that a 'core Defence team member' be called to provide evidence, and gave it another chance to tender the two call sequence tables that were denied admission into evidence.¹⁴

8. Consequently, the Oneissi Defence has not demonstrated an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. As the application lacks merit, the Trial Chamber has issued this decision without awaiting a Prosecution response.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Oneissi Defence application for certification for interlocutory appeal.

¹¹ Rule 167 (A) provides: 'At the close of the Prosecutor's case, the Trial Chamber shall, by oral or written decision and after hearing submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count.'

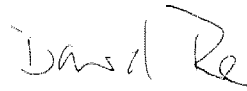
¹² F3563, Further Scheduling Order regarding Rule 167 Submissions, 8 February 2018, paras 1, 5-6; provisional transcript of 7 February 2018, pp 67-81; F3549, Scheduling Order regarding Close of Prosecution Case and Defence Submissions under Rule 167, 2 February 2018, paras 3-4. Rule 128 provides that the Trial Chamber shall, after the close of the Prosecution's case and upon a Defence election to present its case, order the Defence to file a list of the witness it intends to call and a list of the exhibits it intends to offer.

¹³ Decision of 26 January 2018, paras 27-39.

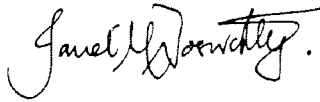
¹⁴ Decision of 26 January 2018, paras 37-38, 43.

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

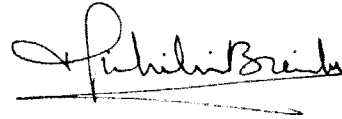
Leidschendam,
The Netherlands
12 February 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

