

**THE TRIAL CHAMBER**

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: 24 January 2017

Original language: English

Classification: Public

**DECISION DENYING MERHI DEFENCE'S REQUEST FOR CERTIFICATION OF
THE TRIAL CHAMBER'S DECISION DELIVERED IN COURT ON 12 JANUARY
2017**

(Extract from Official Public Transcript of Hearing on 24 January 2017, page 70, line 24 to
page 76, line 10)

The Trial Chamber in a decision delivered in court on 12th of January, 2017 permitted the Prosecution to use two documents: Exhibit P1780, marked for identification or MFI, a 33 page “chronology of relevant events” said to have occurred between 22nd of August, 2004 and 15 to 16 February, 2005, and Exhibit P1782, MFI, a “Narrative overview of telephone activity and events relevant to the case for the Prosecution” of 291 pages on, as it states in the title, relevant aspects of its case during the testimony of Mr. Gary Platt.

Mr. Platt is a Prosecution investigator the Trial Chamber has declared qualified to provide expert opinion evidence in relation to “matters connected with, one, the surveillance of criminal networks; and two, the identification and organization of covert communications networks.”

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The Trial Chamber also permitted the Prosecution to use PowerPoint slides with Mr. Platt and to allow him to continue working with Prosecution counsel to complete the slides during the continuation of his testimony.

Mr. Platt has been testifying since Tuesday, the 17th of January, 2017, providing evidence through his 458-page report, "Communications evidence concerning the assassination of Rafik Hariri: Chronology report," dated 20th of February, 2014, which is Exhibit P1783 MFI.

He is using the PowerPoint slides to highlight relevant aspects of this lengthy report. The Prosecution counsel are using the chronology and narrative overview to assist the Trial Chamber and the parties to provide context to Mr. Platt's report and to show where his evidence fits into the Prosecution case. The day-by-day narrative is footnoted to evidence that the Trial Chamber has received - either by exhibit number or transcript and witness reference. The chronology is also a day-by-day listing of events said to be relevant to the Prosecution's case.

On 19th of January, 2017, in filing F2946, "Requête de la Défense de Merhi en certification de la décision orale du 12 janvier 2017 concernant les modalités du témoignage de PRH147 PRH," or "Merhi Defence request for certification of the Oral Decision of 12th of January, 2017 Concerning the Modality of PRH147's evidence," counsel for the accused Mr. Hassan Habib Merhi requested the Trial Chamber to certify its decision for interlocutory appeal under Rule 126(C) of the Rules of Procedure and Evidence. Defence counsel sought a certification of the following issue:

"Did the Chamber err in deciding implicitly not to exclude from Mr. Platt's testimony the new evidence disclosed in the Prosecution's narrative and chronology?"

Counsel argued that the chronology and narrative overview contains facts not pleaded in the amended consolidated indictment, the pre-trial brief, nor mentioned in the Prosecution's opening statement. The documents, they argued, appear to form the basis of the Prosecution's final trial brief; thus, allowing the Prosecution to refer to this document will cause unfairness. Using new facts now will affect the outcome of the trial, although the Prosecution does not wish to admit the two documents into evidence.

The motion referenced submissions made by counsel for Mr. Merhi at the hearing on 11th of January, 2017, in which counsel stated that Mr. Platt did not refer in his chronology report to a group of Purple mobile telephones that are pleaded in the amended consolidated

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indictment as having involvement in the attack on Mr. Rafik Hariri on the 14th of February, 2005.

Immediate resolution of the issue by the Appeals Chamber is therefore required to allow the Defence to understand the Prosecution case. The prejudice is immediate and cannot be remedied at a subsequent stage of the proceedings.

The Prosecution responded in oral submissions heard on the 24th of January, 2016, opposing the motion. The Prosecution counsel argued that the Defence motion was merely criticizing the Trial Chamber's decision. The narrative overview and chronology do not refer to new facts. The Defence has notice of the Purple Phones from the Prosecution's opening statement against Mr. Merhi on the 18th of June, 2014. And further, from a Prosecution motion filed on the 26th of August, 2015, "Prosecution Motion for the Admission of Call Sequence Tables Related to the Movements of Rafik Hariri and Related Events," filing F2140.

Prosecution counsel submitted that the issue posed could not meet the first limb of Rule 126(C) and, further, that as the issue related to admissibility of evidence, that only exceptionally would such a matter satisfy the requirements of the second limb, and this application was not in that category.

Under Rule 126(C), the Trial Chamber may certify an issue for interlocutory appeal if it "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 two conditions are cumulative and the Appeals Chamber has held that certification for interlocutory is an exceptional measure.

The issue for which certification for interlocutory appeal is sought does not arise from the Trial Chamber's decision. The narrative overview and chronology do not form part of Mr. Platt's evidence, and the Prosecution is not asking him to comment on either document. The facts referred to in these documents are either material facts pleaded in the amended consolidated indictment or the Prosecution's pre-trial brief or the opening statement or have been derived from things already in evidence. These documents highlight facts that the Prosecution states are relevant to its case.

The narrative and chronology are not evidence and are closer in form to submissions or interpretations of evidence that the Prosecution urges the Trial Chamber to adopt. It goes

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no higher than that. These documents are not and do not contain “new evidence” as stated in the question posed for certification.

Further, the role of the so-called Purple Phones is pleaded in paragraph 3 of the amended consolidated indictment in relation to the false claim of responsibility for the attack on Mr. Hariri made shortly after his death on the afternoon of 14th of February, 2005, as an act in furtherance of the conspiracy in which all four accused are alleged to have participated.

The amended consolidated indictment, more specifically at paragraph 15(e), avers that “the Purple Phones were used to coordinate the false claim of responsibility.”

Moreover, on the issue of the alleged lack of notice to the Defence about the role of the Purple Phones pleaded in the amended consolidated indictment, the Trial Chamber definitively decided this in its decision on the 31st of October, where it ruled on the opposition of the Defence of the accused Mr. Hussein Hassan Oneissi to admitting call sequence tables into evidence relating to this group of mobile telephones, holding at paragraph 62 of the decision, which is entitled “Decision on the Admission of Call Sequence Tables Related to the Movements of Mr. Rafik Hariri and Related Events and Four Witness Statements,” and that is filing F2798, the Trial Chamber held the following:

“Moreover, the Prosecution in its second opening statement, after the joinder of Mr. Merhi's case to that of the other then four accused, referred to a group of seven 'Purple Phones' as close associates of the three ‘Principal Purple Phones’ that the Prosecution alleges were used by Mr. Merhi and Mr. Oneissi and Mr. Sabra. These allegations, therefore, are not new. It was actually first referred to on the 18th of June, 2014, in the Prosecution's preliminary statement after the joinder of Mr. Merhi's case to that of the other four. The call sequence tables related to the ‘Associate Purple Phones’ are relevant to the false claim of responsibility for the assassination of Mr. Hariri as pleaded in the amended consolidated indictment. The Trial Chamber therefore rejects the Oneissi Defence argument that the motion is pleading new evidence.”

This request for certification represents a mere disagreement with the Trial Chamber's decision. Further, it misconstrues the nature of the chronology and narrative overview as set out and defined in the decision. No new evidence is introduced in these documents; every footnote in the narrative overview refers to evidence already received by the Trial Chamber.

For these reasons, it cannot affect the fair and expeditious conduct of the proceedings in a manner negative to the Defence. The Trial Chamber therefore need not consider the

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second limb of Rule 126(C) and the application for certification to appeal the decision is refused.

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