



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: 13 April 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION PARTLY GRANTING SABRA DEFENCE APPLICATION AND
ORDERING THE ATTENDANCE OF A FORMER PROSECUTION
INVESTIGATOR TO TESTIFY UNDER RULE 165**

Office of the Prosecutor:
Mr Norman Farrell & Mr Nigel Povoas

Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair

Acting Head of Defence Office:
Ms Héleyn Uñac

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Youssef Khalil

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

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



PROCEDURAL BACKGROUND AND FACTS

1. The Trial Chamber heard from 300 witnesses before the Prosecution closed its case on 7 February 2018.¹ Following an order by the Trial Chamber under Rule 128 of the Special Tribunal's Rules of Procedure and Evidence² to all Defence counsel on 23 February 2018,³ only the Defence of the Accused Mr Hussein Hassan Oneissi elected to present a case, consisting of two witnesses—one expert witness and one witness providing political background evidence.⁴ Counsel assigned to act for the remaining three Accused, Mr Salim Jamil Ayyash, Mr Hassan Habib Merhi and Mr Assad Hassan Sabra, elected not to call a case.
2. Although counsel for Mr Sabra elected not to present a case, they filed an application on 5 March 2018 asking the Trial Chamber to order, under Rule 165, the attendance of four former Prosecution investigators to testify, and seeking suspensive effect of the Trial Chamber's order under Rule 128.⁵
3. Following a decision the Trial Chamber delivered in court on 8 March 2018 concerning several Sabra Defence filings including its 5 March 2018 application,⁶ counsel for Mr Sabra sought reconsideration of its application under Rule 165, apparently considering that the Trial Chamber had dismissed it.⁷ At a hearing on 22 March 2018, however, the Trial Chamber noted that the Sabra Defence's application under Rule 165 was still pending.⁸
4. Counsel for Mr Sabra claim that the investigators, which it requests the Trial Chamber to call under Rule 165, can provide relevant and probative evidence about the Prosecution's investigatory failures. Rule 165 allows the Trial Chamber to order the production of

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, transcript of 7 February 2018, pp 68-69.

² Rule 128 covers the functions that the Trial Chamber may exercise after the closure of the Prosecution's case and upon a Defence election to present its case, such as ordering the Defence to file a witness and an exhibit list.

³ F3583, Scheduling Order to the Defence under Rule 128, 23 February 2018.

⁴ F3596, Defence for Hussein Hassan Oneissi Submission Pursuant to the Trial Chamber's Scheduling Order of 23 February 2018, 7 March 2018 (public with confidential annexes A-B), para. 8; F3596, Second Updated Annex A to Defence for Hussein Hassan Oneissi Submission Pursuant to the Trial Chamber's Scheduling Order of 23 February 2018, 29 March 2018 (confidential, a public redacted version was filed on 12 April 2018).

⁵ F3591, Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128 Order, 5 March 2018 (public, with confidential annexes A-B, and public annex C) ('Sabra Defence motion'), paras 1, 22-23, 36.

⁶ Transcript of 8 March 2018, p. 14.

⁷ F3600, Motion for Reconsideration of Sabra Defence Request Pursuant to Rule 165, 9 March 2018 (confidential, a public redacted version was filed on 15 March 2018) ('Second Sabra Defence motion').

⁸ Transcript of 22 March 2018, p. 30. This was subsequently confirmed in an email by the Trial Chamber's Senior Legal Officer to the Parties sent on 27 March 2018. Consequently, the Trial Chamber will not address here the Parties' submissions related to the Sabra Defence's application for reconsideration.

additional evidence and provides that '[a]fter hearing the Parties, the Trial Chamber may, *proprio motu* or at the request of a Party, order either Party or a victim participating in the proceedings to produce additional evidence. It may, after hearing the Parties, *proprio motu* summon witnesses and order their attendance.'

5. The four investigators were apparently involved in investigating the circumstances surrounding the disappearance of Mr Ahmed Abu Adass in January 2005.⁹ His disappearance is part of the Prosecution's pleaded case that Mr Merhi, Mr Oneissi and Mr Sabra chose Mr Abu Adass as someone suitable to appear in a video-recorded false claim of responsibility for the attack that killed the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005.

6. The Prosecution alleges that, in early January 2005, at the Arab University Mosque of Beirut, Mr Oneissi introduced himself to Mr Abu Adass as 'Mohammed' and asked Mr Abu Adass to teach him how to pray. They subsequently met several times and, on the morning of 16 January 2005, Mr Abu Adass left his home to meet with 'Mohammed'. Mr Abu Adass has been missing ever since.¹⁰

SUBMISSIONS

7. The Sabra Defence requests the Trial Chamber to call the four investigators as Chamber witnesses to assist it in determining the truth and to insist on receiving further information from them in order to satisfy itself whether the Prosecution's investigation into Mr Abu Adass's disappearance was conducted diligently, competently and objectively. The Trial Chamber has heard evidence about the Prosecution's failure to investigate the provenance and ascertain the truth of a 'significant lead' which sought to demonstrate that, on 16 January 2005, Mr Abu Adass had actually left his home with another person, Mr Khaled Taha, rather than 'Mohammed', who is alleged to be Mr Oneissi. Mr Taha was considered a person of significant interest in the investigation of Mr Abu Adass's disappearance.¹¹

8. Confidential annex A to the application names the proposed four investigators. Confidential annex B refers to material related to Mr Abu Adass's disappearance and

⁹ See Sabra Defence motion, para. 1.

¹⁰ Amended consolidated indictment, paras 3 (b)-(d), 23, 28; Prosecution's Updated Pre-Trial Brief, paras 62, 114, 117, 121-122, 148.

¹¹ Second Sabra Defence motion, paras 20, 25; Sabra Defence motion, paras 3, 13-17, 19-20.

Mr Taha. Annex C contains a draft protocol for the conduct of proceedings and the testimony of the four investigators to be called under Rule 165.

9. The Sabra Defence argues that it could not have itself asked the four investigators to attend for cross-examination, as they were not Prosecution witnesses. Given the senior role each occupied for a significant period within the Office of the Prosecutor, it is highly unlikely that they would speak on the Defence's behalf. The Defence cannot challenge the testimony of its own witnesses without having the witnesses declared 'hostile', something which has not been explored at the Special Tribunal.¹²

10. The Prosecution opposes the application.¹³ It submits that the Sabra Defence has resorted to Rule 165 without exhausting other relevant Rules for calling witnesses and without explaining why it cannot call the investigators itself in a Defence case. The Sabra Defence must present admissible material to support its theory regarding Mr Abu Adass's disappearance, if it wishes to demonstrate that Mr Taha was involved, but cites to no evidence in this regard. The absence of evidence implicating Mr Taha undermines the Sabra Defence's claims about the investigation and the need to call former investigators. Furthermore, the motion breached the Special Tribunal's Code of Professional Conduct¹⁴ by unfairly and openly questioning the investigators' integrity.¹⁵

11. The Prosecution submits that the Trial Chamber has an interest in searching for the truth about the facts underlying the crime. However, the application fails to demonstrate that the Trial Chamber must 'search for the truth' about the investigation or has 'an obligation to ascertain the truth'. It fails to cite any case law, statutory provision or provision in the Rules in support of this submission.¹⁶

12. The stated purpose of summoning and examining the investigators lacks the requisite relevance and probative value. Any witness's expected testimony, whether called by a Party

¹² Second Sabra Defence motion, paras 13, 20-21; Sabra Defence motion, paras 21-24.

¹³ F3615, Prosecution Response to "Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128 Order", 4 April 2018 ('Prosecution second response'); F3609, Prosecution Response to Sabra "Motion for Reconsideration of Sabra Defence Request Pursuant to Rule 165", 26 March 2018 ('Prosecution first response').

¹⁴ STL-CC-2011-01, Code of Professional Conduct for Counsel Appearing Before the Tribunal, 28 February 2011.

¹⁵ Prosecution second response, paras 11-12, 19, 28-30; Prosecution first response, paras 1, 7, 19, 27-29.

¹⁶ Prosecution second response, para. 23.

or the Trial Chamber, must be relevant and have some probative value. Until the Sabra Defence has demonstrated both, the investigators cannot be summoned or examined.¹⁷

13. The Sabra Defence replied that it is not attempting to call its case through the Trial Chamber. It has already formally notified the Trial Chamber that it is not electing to present a Defence case and has no statutory disclosure obligations, irrespective of whether the Trial Chamber elects to summon the proposed investigators. Should they appear, they will do so as Trial Chamber witnesses and not as Defence witnesses.¹⁸

14. The Prosecution provides no supporting authority as to why it considers that the Defence should examine the proposed investigators before the Prosecution, given that the witnesses will not be Defence witnesses. The Prosecution misunderstands the purpose of Rule 165 which assists the Trial Chamber in ascertaining the truth. If the Trial Chamber determines that it would be assisted by their testimony and calls them, the Prosecution's concerns regarding the lack of notice or disclosure of the Sabra Defence's case are inapplicable.¹⁹

DISCUSSION AND DECISION

15. The proceedings before the Special Tribunal are adversarial. Each Party conducts its own investigations and presents its own case by calling witnesses and tendering documents designed to support its case and, where necessary, to undermine the opposing Party's case. The Trial Chamber, additionally, and under Rule 165, may, after hearing from the Parties, *proprio motu* summon witnesses and order their attendance. It may also order the production of additional evidence. Other international criminal courts and tribunals have similar provisions allowing chambers to call witnesses for themselves, but a survey of the international case-law reveals its very sparing use.²⁰

¹⁷ Prosecution second response, paras 2, 6-7, 13-14, 19; Prosecution first response, paras 1, 16.

¹⁸ F3619, Reply to "Prosecution Response to 'Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128 Order'", 6 April 2018, ('Sabra Defence reply'), paras 4-5.

¹⁹ Sabra Defence reply, paras 5-8.

²⁰ *E.g.* Rule 98 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda, Rule 120 of the Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals, Article 69 (3) of the Rome Statute of the International Criminal Court (ICC). At the ICTY, in the *Krstić* case, the Trial Chamber called *proprio motu* only two witnesses. The remainder of the 'more than 110 witnesses' that the Trial Chamber heard were called by the Prosecution or the Defence—see ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Judgement, 02 August 2001, para. 4. The ICTY's web-site states that as of June 2015, the ICTY had heard 4,650 witnesses of which 63% were called by the Prosecution, 35% by the Defence and 2% by the Chambers—see www.icty.org/en/about/registry/witnesses/statistics. At the ICC, in the *Katanga* case, the Trial Chamber heard 54

16. In deciding whether to take this step a Trial Chamber must consider how the evidence of a witness not called by a Party will assist it in determining a material fact in issue and, ultimately, whether an Accused is guilty beyond reasonable doubt; that, of course, includes assessing evidence that is potentially exculpatory. Under Rule 149 (C) the evidence must be relevant and must have some probative value.

17. Counsel for Mr Sabra, while electing not to call a Defence case and not filing a witness or exhibit list under Rule 128, have consistently posited that Mr Taha may have been involved in Mr Abu Adass's disappearance, and hence, implicated in the plan to assassinate Mr Hariri. The Sabra Defence contends that, if this is correct, then Mr Sabra is innocent. It also believes that the Prosecution failed to properly investigate this alternative theory of liability. Four former Prosecution investigators may shed light on this omission.

18. The Sabra Defence contends, however, that it is handicapped in attempting to call these witnesses because of their former employment relationship and argues, in essence, that the witnesses are inherently potentially uncooperative. The Trial Chamber does not accept this argument. Witnesses, whatever their background, have the duty to testify honestly before a court, as provided for in Rules 150 (A) and 152 (A), and their testimony is presumed truthful unless the converse is shown. The Sabra Defence has advanced no objective basis to rebut this presumption.

19. However, while this argument should not have been made, the Trial Chamber is not satisfied that it rises to a level of breaching the Code of Professional Conduct. The Trial Chamber, nevertheless, reminds counsel to exercise the necessary professional care not to demean potential witnesses in legal submissions. It follows that the Trial Chamber does not objectively accept that the Sabra Defence could not interview the four witnesses nor call them itself to testify.

20. The Trial Chamber will, however, in the exercise of its discretion, order the attendance of one of these witnesses to testify. Of the four witnesses, the most relevant appears to be Mr Michael Taylor, who was the Chief of Investigations at the Office of the Prosecutor of the

witnesses, only two of whom it called *proprio motu*—see ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 21.

Special Tribunal between 2010 and 2015²¹ and could be considered to have the necessary overview of the Prosecution's investigations.

21. To aid its determination under Article 16 (3) (a) of the Statute of the Special Tribunal of whether an Accused is guilty of a crime charged in the amended consolidated indictment, the Trial Chamber will therefore order Mr Taylor's attendance to testify.

22. Neither the Prosecution nor the conduct of its investigation is on trial. The relevant issue here—in a circumstantial case—is whether there are reasonable inferences available from the evidence which are consistent with the innocence of an Accused person.

23. Procedurally, the Trial Chamber will question Mr Taylor, after which the Parties may cross-examine him. The Trial Chamber has no need to adopt the Sabra Defence's proposed draft protocol for questioning the witness, as set out in annex C to its application. The Parties may, of course, interview and confer with Mr Taylor before he testifies.

24. In respect of the other three former Prosecution investigators, the Trial Chamber sees no reason why the Sabra Defence cannot call them as witnesses in its own case. In this respect the Trial Chamber reminds Defence counsel of the effect of Rule 145 (C) which permits the Trial Chamber to depart from the 'modes of proceeding' in Rule 145, entitled 'Questioning of Witnesses', listed in paragraphs (A) and (B), relevantly in paragraph (B)—first examination by the Party calling the witness, followed by cross-examination by an opposing Party. The application to call the other three potential witnesses under Rule 165 is therefore dismissed.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

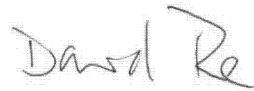
ORDERS, under Rule 165, the attendance of Mr Michael Taylor to testify on Monday, 23 April 2018; and

DISMISSES the Sabra Defence's application to call, under Rule 165, the other three potential witnesses and to adopt the proposed draft protocol for the conduct of proceedings and the testimony under Rule 165.

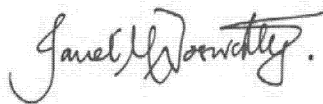
²¹ Sabra Defence motion, confidential annex A, item 4.

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

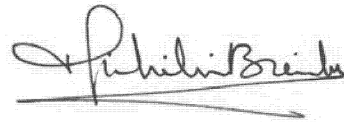
Leidschendam,
The Netherlands
13 April 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

