



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 July 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**REASONS FOR THE TRIAL CHAMBER'S DECISION DISMISSING THE
SABRA DEFENCE APPLICATION TO RECEIVE 112 WITNESS
STATEMENTS INTO EVIDENCE 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**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 & 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

PROCEDURAL BACKGROUND AND FACTS

1. These are the written reasons for the Trial Chamber's dismissal of the Sabra Defence's oral application asking the Trial Chamber to receive 112 witness statements into evidence, but without it calling a Defence case itself.¹ The procedural and factual background follows.

2. Mr Michael Taylor, the Prosecution's Chief of Investigations between 2010 and 2013, testified as a witness for the Trial Chamber, under Rule 165 of the Special Tribunal's Rules of Procedure and Evidence, on 25 and 26 June 2018.² During cross-examination, counsel for the Accused, Mr Assad Hassan Sabra, showed him three *aides-memoire* they had prepared. The third, entitled '*Aide-memoire 3: Information on Khaled Taha as a person of interest in the Ahmad Abu Adass investigation*', consists of 176 extracts, some of which are quotations, from 112 witness statements which mention Mr Khaled Taha, whom the Sabra Defence argues may have had a role in Mr Ahmed Abu Adass's disappearance on 16 January 2005.

3. In this respect, the amended consolidated indictment pleads that Mr Sabra and another Accused, Mr Hussein Hassan Oneissi, participated in Mr Abu Adass's disappearance. Mr Oneissi was allegedly using the alias 'Mohammed'. Mr Abu Adass was then used to make a video-recorded false claim of responsibility for the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005. He has not been seen since he left his home on 16 January 2005.³

4. The 176 extracts are taken from statements made to the Lebanese judicial investigating authorities, the United Nations International Independent Investigation Commission and the Special Tribunal's Office of the Prosecutor, from February 2005 onwards. Following Mr Taylor's testimony, the Sabra Defence asked the Trial Chamber to accept into evidence both the *aides-memoire* and the underlying 112 witness statements from which portions have been extracted.⁴ The Prosecution opposed the applications⁵ and the Trial

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, transcript of 28 June 2018, p. 40.

² Witness CH-001; see F3646, Decision Partly Granting Sabra Defence Application and Ordering the Attendance of a Former Prosecution Investigator to Testify under Rule 165, 13 April 2018 (circulated on 7 May 2018) ('Decision ordering Mr Taylor's attendance').

³ F2720, Amended consolidated indictment, paras 3 (b)-(d), 23, 28; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Annex A, Prosecution's Updated Pre-Trial Brief, dated 23 August 2013, paras 62, 114, 117, 121-122, 148. See also STL-13-04/PT/PTJ, *Prosecutor v. Merhi*, F0052, Annex A, Prosecution's Pre-Trial Brief, 8 January 2014, paras 53, 105, 107-108, 113.

⁴ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, transcript of 27 June 2018, pp 65-71. The number of witnesses whose statements the Sabra Defence seeks to admit into evidence is not specified.

Chamber rejected the admission into evidence of the 112 witness statements. A decision in relation to the *aides-memoire* will follow.

5. By carefully examining the extracts in *Aide-memoire* 3 and the Prosecution's response, the Trial Chamber has discovered that fourteen extracts form part of eleven witness statements and documents which are already in evidence.⁶ They are thus irrelevant to the application and should not have been included in it.

6. The Prosecution closed its case against the four Accused on 7 February 2018 and the Sabra Defence positively elected not to call a Defence case. The Oneissi Defence, by contrast, called two witnesses in its case and tendered 38 documents into evidence, before closing its case.

RULE 165

7. Rule 165, 'Power of Chambers to Order Production of Additional Evidence' provides that,

after 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.

8. The Trial Chamber has exercised its discretion under this Rule only with respect to Mr Taylor. The Sabra Defence, despite having advanced a positive Defence case during the Prosecution case, decided not to call any evidence at all—that is, not to tender any documents or to put the evidence of any witnesses before the Trial Chamber—either by calling witnesses to testify or by tendering their statements into evidence under Rules 155, 156 or 158.⁷ Rather, it attempted, unsuccessfully, to tender some witness statements during the Prosecution case,

⁵ Transcript of 27 June 2018, pp 77-78; F3702, Prosecution Response to Sabra Defence Request for Admission of Three 'Aides-Memoire', 2 July 2018 (public with confidential annexes A and B).

⁶ Exhibit P2128 (ERN L0005316); exhibit 5D477 (ERN 60006277-60006278); exhibit 4D545 (ERN 60014904); exhibit P2131 (ERN 60034951); exhibit P2132 (ERN 60147226, ERN 60147229); exhibit 5D494 (footnote 2 at ERN 60006844); exhibit 5D258 (ERN 60064985); exhibit 5D482 (ERN 60089087); exhibit 5D478 (ERN 310853); exhibit 5D490 (ERN 60252620, ERN 60252622); exhibit 5D479.

⁷ Under Rule 155, a chamber may admit witness statements or transcripts into evidence without requiring the witness to testify. Under Rule 156, a witness must attend court and attest to the statement's accuracy and be available for cross-examination. Under Rule 158, a statement or transcript may be admitted if a witness is 'unavailable' and the chamber is satisfied of its reliability.

and when this failed, it asked the Trial Chamber to admit them into evidence via the Trial Chamber under Rule 165.

Decision of 22 June 2018 rejecting a similar application

9. The Trial Chamber, in a decision issued on 22 June 2018,⁸ rejected a similar application by the Sabra Defence asking the Trial Chamber, under Rule 165, to receive 20 witness statements into evidence.

10. Prior to this, when cross-examining a Prosecution analyst, the Sabra Defence had similarly tendered into evidence an *aide-memoire* listing 24 witness statements.⁹ That *aide-memoire*, exhibit 5D412, however, merely lists the statements—four of which were already in evidence as Prosecution exhibits—and the relevant paragraphs in each statement. Counsel for Mr Sabra had then sought to tender the remaining 20 statements into evidence during the Prosecution case. The Trial Chamber, however, rejected that application.¹⁰ The Sabra Defence thereafter moved the Trial Chamber to exercise its discretion under Rule 165 and admit the 20 statements into evidence itself. In declining to do so, the Trial Chamber held, at paragraphs 26 and 27,

The Trial Chamber ordered the attendance of the former senior Prosecution investigator, Mr Michael Taylor, under Rule 165 (and dismissed the Sabra Defence's application to call three other investigators), specifically holding that it did not objectively accept that the Sabra Defence could not call former Prosecution investigators to testify in its own case. The Trial Chamber here also sees no reason why the Sabra Defence could not have called the witnesses who made the 20 statements in its own Defence case.

In these circumstances, the Trial Chamber is unconvinced that, in the exercise of its discretion, using its powers under Rule 165 to order, on its own volition, the production of the 20 witness statements and five responses as additional evidence—and admit them into evidence—is appropriate or would be in the interests of justice.¹¹

⁸ F3696, Decision Denying Sabra Defence Motion under Rule 165 in Relation to Mr Andrew Donaldson (Witness PRH230), 22 June 2018 ('Decision of 22 June 2018').

⁹ See transcript of 28 September 2017, pp 30-35.

¹⁰ F3498, Decision Denying Sabra Defence Motion to Admit into Evidence Twenty Witness Statements, 20 December 2017 ('Decision of 20 December 2017').

¹¹ Decision of 22 June 2018, paras 26-27 (internal citations omitted).

SUBMISSIONS AND DISCUSSION

Submissions

11. In oral submissions on 27 June 2018, counsel for Mr Sabra argued that the Trial Chamber could admit the 112 statements into evidence under Rule 154 but should use Rule 155. Counsel specified that they were not seeking to admit the statements into evidence for the truth of their contents but rather for the fact of what witnesses had told the investigators. The statements are intended to supplement the extracts in the third *aide-memoire*, in order to provide context to what was said.¹²

12. Prosecution counsel responded orally that the statements have no probative value as their admission was not sought to prove the truth of their contents.¹³

Reasons for the decision

13. The Sabra Defence case—as argued in various motions filed during the Prosecution case—is, in essence, that, on 16 January 2005, Mr Abu Adass did not leave with Mr Oneissi, alias ‘Mohammed’, but possibly with Mr Taha.¹⁴ The Prosecution was on notice of this ‘significant lead’ from the content of the statements referenced in the third *aide-memoire*—some of which were taken by Prosecution officials—but failed to investigate Mr Taha’s possible involvement into Mr Abu Adass’s disappearance.¹⁵ This, it may be argued in Defence closing arguments, is capable of supporting a reasonable inference consistent with Mr Sabra’s innocence, meaning that in a circumstantial case he must be acquitted.

14. The Sabra Defence, however, did not provide the Trial Chamber with a list of the statements or the witnesses. Rather, it relied upon the third *aide-memoire* and its 176 extracts,

¹² Transcript of 27 June 2018, pp 65-71.

¹³ Transcript of 27 June 2018, pp 77-78.

¹⁴ See F3529, Motion for the Admission of Documents Relating to the Claim of Responsibility – The Invention of the “Mohammed” story, 22 January 2018 (confidential, with confidential annexes A-F), paras 51-52; F3165, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass – The Successful Recruitment of Ahmed Abu Adass, 31 May 2017 (confidential, with confidential annexes A-B), para. 24; F3024, Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass with updated annexes, 7 March 2017 (public, with confidential annexes A-C and public annex D), para. 47.

¹⁵ 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), para. 25; 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), paras 16-17.

in effect asking the Trial Chamber to examine the extracts, find the statements and then admit them into evidence under an appropriate rule. The Trial Chamber has had to work out that fourteen extracts are already in evidence and thus irrelevant to the application. No substantive submissions were made as to the relevance and probative value of each statement individually.

15. As the Trial Chamber has noted before, the proceedings in the Special Tribunal are adversarial, and each Party (and the Legal Representatives of participating victims) investigates its own case and presents its own evidence.¹⁶ Of course, no Accused can be compelled to call a Defence case, and here counsel for three of the four Accused have positively elected not to call one and not to present evidence. But while counsel for Mr Sabra have elected not to call a Defence case themselves, they appear to be attempting to have the Trial Chamber call one for them through the ‘backdoor’ of Rule 165 in combination with Rule 155.

16. While the Sabra Defence wants the contents of the 112 statements to become evidence, it has not explained why it has not attempted either to call the witnesses or to move to tender the witness statements under Rules 155, 156 or 158 in a case of its own. The Trial Chamber is of the view that counsel for Mr Sabra could have themselves—with the assistance of the Defence Office if necessary—attempted to find and interview the witnesses who made the statements, and then made any applications to tender the statements under Rules 155, 156 or 158 in a Defence case. By taking their chosen route, counsel for Mr Sabra appear to be trying to shift this burden onto the Trial Chamber.

17. The Trial Chamber remains of the view, in the totality of the circumstances, that the 112 witness statements more appropriately belong in a Defence case. It therefore does not propose to examine the witness statements in an attempt to ascertain their relevance and probative value and to then admit them for itself under any of the three Rules under which witness statements are admissible.

¹⁶ See F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 (‘Decision of 25 September 2017’), paras 79, 100; F3260, Decision on the Legal Representatives of Victims’ Application to Call Evidence, Schedule the Presentation of Evidence and Directions on Disclosure Obligations, 31 July 2017.

18. Had the Trial Chamber done so, it would have needed to hear from the Parties as to the relevance and probative value of each piece of evidence, and inform them that it (a) was intending to call the witnesses to testify, or (b) was receiving the statements into evidence under Rules 155 or 156—and hear submissions as to whether the evidence of each witness was admissible under that Rule—or (c) was making inquiries of all witnesses to ascertain their availability and, if found to be ‘unavailable’, receiving the statements into evidence under Rule 158.

19. Completing this exercise would take many months. But the application to tender the 112 witness statements was made only on 27 June, the second-to-last scheduled day for receiving evidence in the case, and eleven days after the Trial Chamber had issued a revised scheduling order setting the date for the Prosecution to file its written final trial brief on 16 July.¹⁷ The Trial Chamber has already rejected the other alternative suggested by the Sabra Defence—that of admitting the statements into evidence under Rule 154, which as the heading ‘Admission of Documents’ suggests, applies just to that. The Trial Chamber has consistently held that it will not admit witness statements into evidence under Rule 154 if they are objected to.¹⁸

20. Further, and substantively on the extracts in the third *aide-memoire*, the Trial Chamber has received considerable evidence on the aspects of the investigation relating to Witness PRH056’s relative. Counsel for Mr Sabra extensively cross-examined Mr Quentin Mugg—one of the two investigators who took the relative’s statement in August 2010—on the process of taking the statement, on associated investigative matters and on portions of Witness 056’s statements.¹⁹ Mr Taylor was cross-examined for almost two days by lead counsel for Mr Sabra, including on the content of that same statement, the relevant portions of which are now on the court record. He was also questioned directly about the Prosecution’s investigations into any role Mr Taha may have had in Mr Abu Adass’s disappearance.

21. Mr Taylor explained in detail what the Prosecution did, including dedicating some resources to this issue. The Prosecution, he explained, had unsuccessfully tried to find Mr Taha. It had sent requests for assistance to the Lebanese government, and sought all relevant

¹⁷ F3687, Order Rescheduling Final Trial Briefs and Closing Arguments, 12 June 2018.

¹⁸ Decision of 25 September 2017, para. 103; Decision of 20 December 2017, para. 15.

¹⁹ See transcript of 11 January 2018.

records, including telephone, banking, domicile and entry and exit records to and from Lebanon. The Prosecution could not find Mr Taha, but he remains a person of interest and a potential witness. The Prosecution eventually eliminated him as having a role in Mr Abu Adass's disappearance and as a potential suspect in the attack on Mr Hariri.²⁰

22. The Sabra Defence has therefore already made its substantive point regarding the Prosecution's alleged non-investigation of Mr Taha's possible role in Mr Abu Adass's disappearance and has exhaustively explored this with two former Prosecution investigators, including its former Chief of Investigations.

23. The Sabra Defence will undoubtedly develop these points in its final written and oral submissions. The Trial Chamber is not of the view that the statements need to be in evidence for this purpose. The Trial Chamber therefore, in exercising its discretion under Rule 165, decided not to start the lengthy process necessary to admit the 112 statements into evidence.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSED the Sabra Defence application.

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

Leidschendam,
The Netherlands
13 July 2018

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

²⁰ See transcript of 25 June 2018, from p. 19 onwards; transcript of 26 June 2018, p. 88.

