

**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:** 7 July 2015

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH  
MUSTAFA AMINE BADREDDINE  
HASSAN HABIB MERHI  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

**DECISION ON PROSECUTION MOTION FOR GENERAL  
AUTHORISATION FOR VIDEO-CONFERENCE LINK TESTIMONY &  
NOTICE OF VIDEO-CONFERENCE LINK TESTIMONY FOR WITNESSES  
PRH006, PRH430, PRH 020, PRH007, PRH115**

**Office of the Prosecutor:**

Mr Norman Farrell, Mr Graeme Cameron  
& Mr Alexander Milne

**Counsel for Mr Salim Jamil Ayyash:**

Mr Eugene O'Sullivan, Mr Emile Aoun  
& Mr Thomas Hannis

**Defence Office:**

Mr François Roux

**Counsel for Mr Mustafa Amine Badreddine:**

Mr Antoine Korkmaz, Mr John Jones  
& Mr Iain Edwards

**Victims' Legal Representatives:**

Mr Peter Haynes, Mr Mohammad F. Mattar  
& Ms Nada Abdelsater-Abusamra

**Counsel for Mr Hassan Habib Merhi:**

Mr Mohamed Aouini, Ms Dorothee Le Fraper  
du Hellen & Mr Jad Khalil

**Counsel for Mr Hussein Hassan Oneissi:**

Mr Vincent Courcelle-Labrousse, Mr  
Hassan & Mr Philippe Larochelle

**Counsel for Mr Assad Hassan Sabra:**

Mr David Young, Mr Guénaél Mettraux  
& Mr Geoffrey Roberts



## INTRODUCTION

1. The Prosecution seeks, under Rules 124 and 130 of the Special Tribunal's Rules of Procedure and Evidence, general authorisation for all Parties to call witnesses via video-conference link with four weeks' notice. Under the proposed regime, Parties may object within three calendar days after receiving such notice.<sup>1</sup> Counsel for the five Accused, Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi, and Mr Assad Hassan Sabra, and Mr Hussein Hassan Oneissi oppose the Prosecution motion.<sup>2</sup> The Prosecution replied to the responses of counsel for Mr Merhi and Mr Ayyash.<sup>3</sup>

2. In the alternative, the Prosecution requested the Trial Chamber to authorise, under Rule 124, the video-conference testimony of Witnesses PRH006, PRH430, PRH020, PRH007, and PRH115. Because of the urgency of the request, the Trial Chamber issued a decision in relation to these five witnesses on 2 June 2015, granting the Prosecution request<sup>4</sup> in the absence of a ruling on the substantive issue of whether, on a proper interpretation of Rule 124, the Trial Chamber may grant an order for general authorisation of testimony via video-conference link. This decision addresses that issue.

## SUBMISSIONS

3. The Prosecution submits that Rule 124,<sup>5</sup> which permits video-conference link testimony, does not require individual authorisation requests for each witness to testify through video-conference link, but rather only requires that the request is in the interests of justice.<sup>6</sup> The Prosecution requests

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<sup>1</sup> *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, STL-11-01/T/TC, F1947, Prosecution Motion for General Authorisation for Video-Conference Link Testimony & Notice of Video-Conference Link Testimony for PRH006, PRH430, PRH020, PRH007, PRH115, 12 May 2015.

<sup>2</sup> F1963, Response of Merhi Defence to "Prosecution Motion for General Authorisation For Video-Conference Link Testimony & Notice of Video-Conference Link Testimony For PRH006, PRH430, PRH020, PRH007, PRH115", 22 May 2015; F1967, Ayyash Defence Response to Prosecution Motion for General Authorisation For Video-Conference Link Testimony & Notice of Video-Conference Link Testimony For PRH006, PRH430, PRH020, PRH007, PRH115, 26 May 2015; F1968, Badreddine Defence Response to Prosecution Motion for General Authorisation For Video-Conference Link Testimony & Notice of Video-Conference Link Testimony For PRH006, PRH430, PRH020, PRH007, PRH115, 26 May 2015; F1970, Sabra Defence Response to "Prosecution Motion for General Authorisation For Video-Conference Link Testimony & Notice of Video-Conference Link Testimony For PRH006, PRH430, PRH020, PRH007, PRH115", 26 May 2015; F1959, Oneissi Defence Response to Prosecution Motion for General Authorisation For Video-Conference Link Testimony & Notice of Video-Conference Link Testimony For PRH006, PRH430, PRH020, PRH007, PRH115, 22 May 2015.

<sup>3</sup> F1980, Prosecution Reply to Defence Responses to Prosecution Motion for General Authorisation for Video-Conference Link Testimony & Notice of Video-Conference Link Testimony for PRH006, PRH430, PRH020, PRH007, PRH115, 29 May 2015.

<sup>4</sup> Transcript of hearing of 2 June 2015, pp. 56-62.

<sup>5</sup> Rule 124 states: 'At the request of either Party, the Pre-Trial Judge or a Chamber may, in the interests of justice, order that testimony be received via video-conference link'.

<sup>6</sup> Prosecution general motion, para. 5.

the Trial Chamber, in the interests of justice, to order that testimony be received via video-conference link at the option of the Party calling the witness. It submits that: (i) testimony via video-conference link is equivalent to testimony physically presented in the courtroom, in terms of the relevant legal principles; (ii) a witness experiences significant disruption to his or her life in testifying in the Netherlands, but it adds no greater legal value to his/her evidence; (iii) constantly seizing the Trial Chamber with video-conference link motions for each witness is neither an efficient use of valuable judicial resources nor a necessity; instead, this general authorisation request addresses the Trial Chamber's comprehensive approach to video-conference link; and (iv) general video-conference link authorisation would streamline the scheduling of witnesses for all Parties.<sup>7</sup>

4. According to the Prosecution, the proposed regime seeks to reduce the need for repetitive filings by the Parties, to conserve judicial resources and to increase trial efficiency, while ensuring that Parties can raise objections, if any, to scheduled video-conference link testimony. The Prosecution argues that authorising video-conference link requests on a case-by-case basis is unnecessary because witnesses' circumstances and views do not affect the relevant principles for video-conference link testimony and the witnesses' circumstances are generally similar.<sup>8</sup>

5. Under the regime the Prosecution proposes, the Party intending to call a witness using video-conference link must file a notice at least 28 calendar days before the witness's testimony. If any Party objects, the objecting Party must file an objection within three calendar days after the notice is filed and distributed. Once an objection is filed, the Party intending to call the witness has three calendar days to respond to the objection.<sup>9</sup>

6. Counsel for Mr Merhi, Mr Ayyash, Mr Sabra, and Mr Badreddine oppose the motion arguing that the Prosecution misinterpreted and circumvented the requirements of Rule 124 in asserting that it does not require the Trial Chamber to assess a video-conference link request for each witness.<sup>10</sup> Counsel for Mr Merhi, Mr Ayyash, Mr Sabra, and Mr Badreddine submit that adopting the Prosecution's regime would shift the burden of proof on to the Defence and would replace in-court testimony with video-conference link evidence.<sup>11</sup> Further, counsel for Mr Merhi, Mr Badreddine and Mr Sabra submit that the Prosecution has not provided any legal precedent and that the proposed

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<sup>7</sup> Prosecution general motion, para. 6.

<sup>8</sup> Prosecution general motion, paras 14, 16.

<sup>9</sup> Prosecution general motion, paras 18-19.

<sup>10</sup> Merhi Defence response paras 1-3; Ayyash Defence response para. 5; Sabra Defence response, paras 3-5; Badreddine Defence response para. 5.

<sup>11</sup> Merhi Defence response, para. 5; Ayyash Defence response, para. 4; Sabra Defence response, paras 28-30; Badreddine Defence response, para. 8.

regime contravenes the principles identified by the Trial Chamber and its case law with regards to video-conference link evidence.<sup>12</sup>

7. Counsel for Mr Merhi find the new regime prejudicial because instead of having 15 days to respond they would only have three days.<sup>13</sup> Counsel for Mr Sabra argue that the Prosecution's general motion does not meet the interests of justice standard because: (i) the Trial Chamber's position on video-conference link testimony is not conclusive of the fact that it will always be equivalent to in-court testimony; (ii) the Prosecution places the convenience of witnesses above the rights of the Accused by overstating the difficulties that witnesses have traveling to the Netherlands; (iii) the Prosecution's scheduling cannot be used a 'global consideration' justifying the general authorisation sought by the Prosecution; and (iv) the Trial Chamber's limited reference in the general decision to the nature of the evidence criterion does not allow the Prosecution to circumvent the Special Tribunal's Rules, and disregard the rights of the Accused.<sup>14</sup>

8. Counsel for Mr Ayyash and Sabra submit that the Prosecution provided no reason as to why the Trial Chamber should not consider witnesses' personal circumstances and views when assessing individual video-conference link applications.<sup>15</sup> Counsel for Mr Oneissi submit that, contrary to the Prosecutor's argument that travelling to testify in the Netherlands is disruptive to witnesses lives, it allows them to focus on their testimony 'encumbered' by the pressures of daily life and minimizes the chances of the witnesses discussing their evidence with third parties.<sup>16</sup>

## DISCUSSION

9. The Trial Chamber has issued several decisions identifying the relevant principles for video-conference link testimony and, in its general decision of 25 February 2014, also provided a brief historical overview of the use of video-conference link in the international criminal proceedings.<sup>17</sup> These principles are applicable here. The Trial Chamber was unable to find support in the practice of

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<sup>12</sup> Merhi Defence response para. 1; Badreddine Defence response, paras 3-6; Sabra Defence response, paras 10-12.

<sup>13</sup> Merhi Defence response para. 7.

<sup>14</sup> Sabra Defence response, paras 12-14, 17-27.

<sup>15</sup> Ayyash Defence response, para. 19; Sabra Defence response, paras 15, 22.

<sup>16</sup> Oneissi Defence response, para. 3.

<sup>17</sup> F1696, Decision on the Prosecution Motion for Testimony by Video-Conference Link for Witness PRH291, 14 October 2014; F1586, Decision on the Prosecution Motion for Testimony by Video-Conference Link for Witnesses PRH130, PRH120 and PRH548, 19 June 2014; F1583, Decision on the Prosecution Motions for Testimony by Video-Conference Link and Protective Measures for Witness PRH450, 17 June 2014; F1425, General Decision on Video-Conference Link Testimony and Reasons for Decision on Video-Conference Link Testimony of Witness PRH128, 25 February 2014; see also oral decisions at Transcript of 15 December 2014, pp. 29-31; Transcript of 4 February 2014, p. 61; Transcript of 29 January 2014, pp. 64-67; Transcript of 22 January 2014, pp. 65-66; Transcript of 9 January 2014, pp. 12-14.

international courts and tribunals providing a general authorisation for Parties to call witnesses via video-conference link in the manner proposed by the Prosecution.

10. The Trial Chamber disagrees with the Prosecution's submission that Rule 124 does not require the Party intending to call a witness via video-conference link to file an application requiring the Trial Chamber to assess whether the interests of justice favours the video-conference testimony. On the contrary, the Trial Chamber held, in its general decision, that the ordinary course for *viva voce* (live) testimony is in-court presence. This is why the Rules require an application for video-conference link testimony and an assessment of whether the interests of justice favour granting the application.

11. In assessing whether the interests of justice favour video-conference testimony, the Trial Chamber adopted a comprehensive approach and considered what the relevant and appropriate circumstances could be. These include; the rights of the Accused, the nature of the evidence, the reported views and personal circumstances of the witness, the current situation in Lebanon, the concerns and objections, if any, of the Defence (or opposing Party), the expeditiousness of the proceedings, and, the Special Tribunal's logistical and financial resources.<sup>18</sup> The Trial Chamber therefore rejects, as inconsistent with the requirements of Rule 124 and these general principles, the general authorisation regime proposed by the Prosecution.

12. The Trial Chamber considers, however, that in some circumstances it could consider a group or bloc of witnesses under an umbrella-type application for video-conference link. For example, where the individual considerations and supporting circumstances are so indistinguishable as to warrant a more general approach. Certain categories of personal circumstances and conditions relating to witnesses could be consistent with and satisfy the Rule 124 criteria of being 'in the interests of justice'. In those circumstances, a more expeditious, simplified and consensus based approach could be more efficient.

13. The Trial Chamber is mindful that Rule 124 requires it to carefully scrutinise each application for video-conference link testimony. And, further, that the exercise of its discretion cannot appear to be circumvented or delegated to the Parties themselves—whether by their own consensus or otherwise. The Trial Chamber must always—before ordering testimony via video-conference link, for either a general or individual application—ensure that it has satisfied the requirement of the interests of justice.

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<sup>18</sup> General Decision of 25 February 2014, para. 27. *See*, STL-11-01/T/TC, Transcript of 9 January 2014, pp. 12-14; Transcript of 22 January 2014, pp. 65-66; and, Transcript of 29 January 2014, pp. 64-66.

14. The Trial Chamber, therefore—consistent with the requirements of Rule 124 and with the aim to ensuring judicial economy and efficiency and the guaranteed Accused’s rights, and particularly under Article 16 (c) of the Special Tribunal’s Statute to be tried without undue delay—invites the Prosecution to refile the general part of this motion. It should refile it as a ‘general request’ setting out any generic categories of circumstances that it considers justify receiving testimony from its proposed witnesses by video-conference link.

15. Under this regime, a Party intending to call witnesses via video-conference link—in future general requests under Rule 124—should group witnesses according to the non-exhaustive list of circumstances identified in paragraph 11 above.

16. The Party intending to call a group of witnesses via video-conference link should file any general request in a timely fashion, to allow—in case of an unfavourable decision—sufficient time to arrange the travel to the Netherlands of the witness or witnesses. The opposing Party may object within seven days.

17. The Trial Chamber, upon receiving a general request and after considering any objections, will—as a general rule—allow the testimony by video-conference link unless, exercising its discretion under Rule 124, it considers that the interests of justice do not favour receiving testimony by video-conference link.

**DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

**DISMISSES** the general part of the Prosecution Motion for General Authorisation for Video-Conference Link Testimony & Notice of Video-Conference Link Testimony for PRH006, PRH430, PRH020, PRH007, PRH115 of 12 May 2015;

**INVITES** the Prosecution to refile the general part of its motion of 12 May 2015 as a ‘general request’, as described in paragraph 14 of this decision; and

**ORDERS** the Defence to file any response to the Prosecution’s general request within one week from the notification of that request.

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

Leidschendam,  
The Netherlands  
7 July 2015

*David Re*

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Judge David Re, Presiding

*Janet Nosworthy*

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Judge Janet Nosworthy

*Micheline Braidy*

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Judge Micheline Braidy

