

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:** 14 June 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

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**ORDER AND DECISION IN RELATION TO A WITNESS TESTIFYING UNDER  
RULE 125**

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**Office of the Prosecutor:**Mr Norman Farrell & Mr Alexander Hugh  
Milne**Legal Representatives of  
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar  
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &  
Mr Chad Mair**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothee 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 Roberts &  
Ms Sarah Bafadhel

## INTRODUCTION

1. The Trial Chamber, on 30 June 2016, invited the President of the Special Tribunal to use the procedure in Rule 13 of the Special Tribunal’s Rules of Procedure and Evidence, because a Prosecution witness—resident in a Third State—was unwilling to testify before the Tribunal, and the Trial Chamber needed assistance in securing the witness’s evidence.<sup>1</sup>
2. After receiving information from the President’s office on possible forms of assistance, the Trial Chamber, on 27 September 2016, referred the matter to her ‘to engage with the Third State to enter into ad hoc arrangements under Rule 125 (A) and to explore—in consultation with the Trial Chamber and the Registrar—the modalities of collecting the witness’s evidence under Rule 125 (B) and (C)’.<sup>2</sup>
3. On 30 January 2017, the President informed the Trial Chamber that the Third State agreed with the modalities proposed in a request for assistance.<sup>3</sup> The Trial Chamber then held that the request was consistent with Rule 125 and the rights of the Accused to a fair and expeditious trial and, the following day, directed the Registrar to take all necessary steps, under Rule 13, to facilitate the collection of the witness’s evidence by the Third State, including signing and sending the request there.<sup>4</sup> On 1 February 2017, the Registrar signed and sent the request for assistance to the Third State which responded on 14 February 2017, granting the request.<sup>5</sup>

## RULE 125 – EVIDENCE COLLECTED BY JUDICIAL AUTHORITIES OF A THIRD STATE

4. Rule 125, under the heading ‘Evidence Collected by Judicial Authorities of a State’ allows the Special Tribunal to enter into a bilateral agreement or *ad hoc* arrangements with a Third State for this purpose.

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi, and Sabra*, F2630, Decision under Rule 13 in respect of a Witness, 30 June 2016 (confidential), paras 1, 5-6, disposition, (a public redacted version was filed on the same date). Rule 13 ‘Arrangements or Agreements between National or International Entities and the Tribunal’ provides for the Special Tribunal, through the President, to invite a Third State or an entity to provide assistance to the Special Tribunal.

<sup>2</sup> F2738, Referral to the President of the Special Tribunal to Enter into *Ad Hoc* Arrangements with a State under Rules 13 and 125, 27 September 2016, para. 6.

<sup>3</sup> STL-11-01/T/PRES, F2961, Concerning the Trial Chamber Referral Pursuant to Rule 13, 30 January 2017 (public with confidential annex), para. 4.

<sup>4</sup> STL-11-01/T/TC, F2962, Order to the Registrar under Rule 13 in relation to a Witness, 31 January 2017, para. 5.

<sup>5</sup> F2992, Registry Submission pursuant to Rule 48 (C) regarding the Trial Chamber’s “Order to the Registrar under Rule 13 in relation to a Witness”, 15 February 2017 (public with confidential annexes A and B), para. 2.

5. Rule 125 provides:

(A) Where the relevant State objects to the taking of testimony in accordance with Rule 123 or 124, judicial authorities of that State may, at the request of either Party and subject to the conditions set out in paragraphs (B) and (C), collect testimony in accordance with a bilateral agreement, if any, or *ad hoc* arrangements.

(B) The judicial authorities of the State concerned shall allow the Party calling the witness as well as the other Party and, if held necessary by the Pre-Trial Judge or a Chamber, legal representatives of victims participating in the proceedings, to attend the questioning of the witness by a judicial authority of the State on the basis of questions submitted to that authority by the Parties or the legal representative. Where the law of the State concerned so permits, the judicial authority shall also allow them to ask questions directly to the witness.

(C) The questioning shall be video-recorded or audio-recorded by a member of the Registry staff.

(D) Subject to the consent of the relevant State, the Pre-Trial Judge or a Judge appointed by the Presiding Judge of a Chamber may attend the questioning of the witness, if necessary.

(E) At the request of a Party or a legal representative of a victim participating in the proceedings, the Registry shall provide a transcript of the questioning.

### **MODALITIES**

6. The Registrar has since filed further information relating to the modalities of the procedure before the Third State judicial authorities.<sup>6</sup> These accord with the letter of Rule 125.

7. The Prosecution has provided to the Trial Chamber, on an *ex parte* and confidential basis, a list of seven questions that it wishes to be put to the witness.<sup>7</sup> The Prosecution also

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<sup>6</sup> F3128, Further Registry Submission pursuant to Rule 48 (C) regarding the Trial Chamber's "Order to the Registrar under Rule 13 in relation to a Witness", 8 May 2017 (confidential with confidential annex A); F3133, Registry Submission pursuant to Rule 48 (C) Providing a Further Update on Implementation of the Trial Chamber's "Order to the Registrar under Rule 13 in relation to a witness", 11 May 2017 (confidential); F3162, Reply to Party Responses to Registry Rule 48 (C) Submissions of 8 and 11 May 2017, 30 May 2017 (confidential) ('Registry Reply').

<sup>7</sup> F3151, Prosecution Response to Registry Submissions pursuant to Rule 48 (C) regarding the Trial Chamber's "Order to the Registrar under Rule 13 in relation to a Witness", 19 May 2017 (public with confidential and *ex parte* annex).

drafted a two page background document, which included a paragraph relating to anticipated Defence questioning. Defence counsel opposed this paragraph, and the Prosecution has agreed to delete it.<sup>8</sup>

### **DEFENCE OBJECTIONS**

#### *Merhi Defence*

8. Counsel for the Accused, Mr Hassan Habib Merhi, seek an order from the Trial Chamber (1) ordering the Registry to renegotiate the modalities of the hearing in accordance with the Statute of the Special Tribunal and its Rules, (2) deferring a decision regarding disclosing questions to the witness until new modalities have been proposed, (3) ordering the Registry to disclose to the Trial Chamber and the Parties ‘the contextual information’ provided to the Third State, and (4) ordering the Registry to clarify the question of the costs of the hearing of the witness in the Third State.<sup>9</sup>

9. The Prosecution opposed the request for order (1) pointing out that it was an international agreement that accorded with the Rules.<sup>10</sup> The Registrar responded, asking the Trial Chamber, for similar reasons, to dismiss the relief sought.<sup>11</sup>

10. The Trial Chamber agrees. The Special Tribunal and the Third State have entered into an agreement under Rule 125. It is a concluded international agreement and there is nothing to ‘renegotiate’. The agreed modalities mirror the wording of Rule 125. This request is therefore dismissed.

11. Regarding the second order sought, the agreement contemplates the Parties providing a list of questions for the Third State judge to ask the witness. This too is regulated by Rule 125 (B). Although the issue of whether Defence counsel may ask follow up questions is not yet fully resolved—and it too falls within Rule 125 (B)—nothing prevents Defence counsel, who have been on notice of the terms of the agreement since 15 February 2017 from

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<sup>8</sup> Transcript of hearing, 8 June 2017, pp. 34-36; *see also* F3168, *Sur-Reply to the Registry’s “Reply to Party Responses to Registry Rule 48 (C) Submissions of 8 and 11 May”*, 1 June 2017 (confidential), paras 7-8.

<sup>9</sup> F3158, *Defence Response to “Further Registry Submission pursuant to Rule 48 (C) regarding the Trial Chamber’s ‘Order to the Registrar under Rule 13 in relation to a Witness’”*, 22 May 2017 (confidential).

<sup>10</sup> F3161, *Prosecution Consolidated Submissions regarding the Sabra, Oneissi, Merhi Defence Responses to the Registry Submissions of 8 and 11 May 2017*, 26 May 2017 (confidential with confidential annex) (‘Prosecution Consolidated Submissions’), para. 12.

<sup>11</sup> Registry Reply, paras 10, 23.

compiling their list of questions for the witness now. The two issues are not mutually dependent. The Trial Chamber therefore dismisses this request.

12. Defence counsel are therefore ordered to file their list of questions by **Wednesday, 21 June 2017**. The Registrar has the responsibility of translating them into any relevant language(s). This includes any other material counsel want the Third State judge to put to the witness.

13. Defence counsel oppose providing their questions to the Prosecution; the Prosecution has informed the Trial Chamber that it will not provide its questions to the Defence unless Defence counsel agree to provide their questions to the Prosecution.<sup>12</sup> The Rules (including Rule 125) are silent on this point, and neither Party is obliged under the Statute or Rules to provide its questions to the other in advance. The Trial Chamber will not order the Parties to do this. The Defence may file its questions *ex parte* and the Registrar will transmit them to the Third State judge.

14. Normally, a Party may object to a question before it is answered. Here, however, as the proceeding will be conducted under Rule 125—which does not regulate in any detail the manner of questioning of witnesses—the Trial Chamber will view the transcript of the questioning and rule on any objections made after the questions have been asked and answers provided. As with any admitted evidence, the Trial Chamber will evaluate its weight after hearing submissions from the Parties.

15. In relation to requested order (3) disclosure of ‘contextual information’, in a confidential filing on 26 May 2017 the Prosecution disclosed its two-page summary of the witness’s evidence to the Defence.<sup>13</sup>

16. Defence counsel may provide their own background information if they wish, but must file it by **Wednesday, 21 June 2017**, but not *ex parte*. The Registrar also sought directions as to the specific contextual information to be provided to the Third State judge.<sup>14</sup> The Registry should provide the Third State judge with the contextual information submitted by the Parties.

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<sup>12</sup> Transcript of hearing, 8 June 2017, pp 45-46.

<sup>13</sup> Prosecution Consolidated Submissions, para. 11 (i); annex A.

<sup>14</sup> Registry Reply, para. 17.

17. Regarding costs (4), the Registrar is still considering this matter<sup>15</sup> and it does not, at this stage, concern the Trial Chamber. No order will therefore be made now.

#### *Oneissi Defence*

18. Counsel for Mr Hussein Hassan Oneissi, submit that the modalities are incompatible with Mr Oneissi's effective defence and the inherent principles of holding a fair trial,<sup>16</sup> but have sought no substantive orders in this respect.<sup>17</sup>

#### *Sabra Defence*

19. Counsel for Mr Assad Hassan Sabra submitted that the Registry's request for counsel to file questions was premature and that they were not in a position to file questions, pending judicial determination of certain motions. The Trial Chamber is urged not to proceed with the proposed hearing as it diminishes the Trial Chamber's autonomy over the proceedings.<sup>18</sup> No substantive order is sought. In a hearing on 8 June 2017, counsel informed the Trial Chamber that they wished to submit hundreds of documents for translation for the Third State judge to use in questioning the witness.<sup>19</sup> The Registrar asked the Trial Chamber to clarify with the Sabra Defence which materials it wishes provided to the Third State judge.<sup>20</sup> The Trial Chamber did this in the hearing on 8 June 2017.

20. The questioning of the witness is regulated by Rule 125 (B) which explicitly states of the procedure: the 'questioning of the witness by a judicial authority of the State on the basis of questions submitted to that authority by the Parties or the legal representative'. The agreement with the Third State accords with this. The Third State judge may allow them to directly pose questions; this, however, is a matter for that judge in applying the law of the Third State. Rule 125 (B) states this. Neither the Trial Chamber, the Third State, nor anyone else can direct the Third State judge in this regard.

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<sup>15</sup> Transcript of hearing, 8 June 2017, p. 44.

<sup>16</sup> F3156, Oneissi Defence Submissions in response to the "Registry Submission pursuant to Rule 48 (C) Providing a Further Update", 22 May 2017 (confidential), para. 28.

<sup>17</sup> See also, F3164, Oneissi Defence Reply to the "Prosecution Consolidated Submissions regarding the Sabra, Oneissi, Merhi Defence Responses to the Registry Submissions of 8 and 11 May 2017", 31 May 2017 (confidential).

<sup>18</sup> F3155, Sabra Defence Response to Registry Submissions pursuant to Rule 48 (C) regarding the Trial Chamber's "Order to the Registrar under Rule 13 in relation to a Witness", 22 May 2017 (confidential); see also, F3168, *Sur-reply* to the Registry's "Reply to Party Responses to Registry Rule 48 (C) submissions of 8 and 11 May 2017", 1 June 2017 (confidential).

<sup>19</sup> Transcript of hearing, 8 June 2017, p. 40, referring to 250 documents. Lead counsel for Mr Oneissi said that he had 200 documents he wished to put to the witness; see official confidential transcript of hearing, 8 June 2017, p. 70.

<sup>20</sup> Registry Reply, para. 19.

21. Defence counsel may submit any material they wish to be used in questioning the witness. How it is used is a matter for the Third State judge. The Trial Chamber will receive submissions as to the weight of the evidence—based on the manner of its collection under Rule 125—at the appropriate time in the proceedings. The Trial Chamber does not agree that its determination of pending motions will determine the questions that counsel for Mr Sabra wish to put to the witness. However, in any event, relevant decisions will be filed before the witness is questioned, and if necessary, Defence counsel may of course modify their proposed questions.

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

**DISMISSES** proposed orders (1) and (2) of counsel for Mr Hassan Habib Merhi’s motion of 22 May 2017, and makes no order in relation to proposed orders (3) and (4); and

**ORDERS** Defence counsel pursuant to Rule 125 (B) to file *ex parte* their proposed questions to the witness, and to file, confidentially, any contextual information by Wednesday, 21 June 2017.

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

Leidschendam,  
The Netherlands  
14 June 2017

David Re

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Judge David Re, Presiding

Janet Nosworthy

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Judge Janet Nosworthy

Micheline Braïdy

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Judge Micheline Braïdy

