

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: 21 July 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING CERTIFICATION TO APPEAL ‘ORDER TO PROVIDE
SUBMISSIONS ON THE RELEVANCE OF PROPOSED QUESTIONS TO A
WITNESS TESTIFYING UNDER RULE 125 (B), AS SUBMITTED BY THE ONEISSI
AND SABRA DEFENCE’**

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:

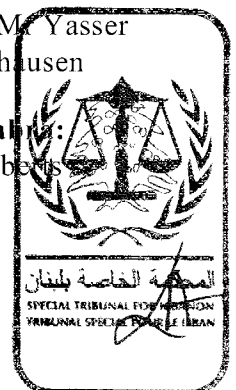
Mr Mohamed Aouini, Ms Dorothee Le Fraper du Hellen & Mr Jad Youssef Khalil

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



1. The Trial Chamber, on 18 July 2017, ordered counsel acting for the Accused, Mr Hussein Hassan Oneissi, and Mr Assad Hassan Sabra to file submissions on the relevance and probative value of specified questions, and on the reason for the repetition of specified questions, that they intend to pose to a witness, by 9 am on Thursday 20 July 2017.¹ The lists of questions will be posed to the witness by a Third State judge acting under Rule 125 (B) of the Special Tribunal's Rules of Procedure and Evidence.²

2. Counsel for Mr Sabra complied with the order and filed their submissions.³ Counsel for Mr Oneissi, however, disregarded the Trial Chamber's order and filed a submission stating that the Trial Chamber had 'no jurisdiction' to do this and that there was no legal basis for the order.⁴

3. In disregarding a Trial Chamber order, counsel for Mr Oneissi acted improperly. They failed to (a) seek reconsideration of the decision, (b) seek clarification of any potential conflict between different Trial Chamber orders, or (c) file a motion for certification for interlocutory appeal under Rule 126 (C).

4. After hearing submissions in court on this matter on 20 July 2017,⁵ the Trial Chamber refused an application to reconsider the decision, after co-counsel for Mr Oneissi conceded that there was no 'injustice' requiring the Trial Chamber to reconsider the decision, as is required by Rule 140 ('power to reconsider decisions').⁶ The Trial Chamber also ordered, pursuant to Rule 9, which permits the shortening of normal timetables for filing, the Oneissi Defence to file any application for certification by 9.30 am on Friday 21 July 2017.⁷

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3231, Order to Provide Submissions on the Relevance of Proposed Questions to a Witness Testifying under Rule 125 (B), as Submitted by the Oneissi and Sabra Defence, 18 July 2017.

² See, for the procedural history of this matter, F3180, Order and Decision in Relation to a Witness Testifying under Rule 125, 14 June 2017 ('Order of 14 June 2017').

³ F3236, Sabra Defence Submissions in Relation to the Trial Chamber's Order to Provide Submissions on the Relevance of Proposed Questions to a Witness Testifying under Rule 125 (B), 19 July 2017 (confidential with confidential and *ex parte* annex).

⁴ F3237, Defence for Hussein Hassan Oneissi Submissions on the Relevance of Proposed Questions to a Witness Testifying under Rule 125, 19 July 2017.

⁵ Provisional transcript of 20 July 2017, pp 30-37, 66-94.

⁶ Provisional transcript of 20 July 2017, pp 83, 85-86.

⁷ Provisional transcript of 20 July 2017, pp 94-95.

5. During the hearing, co-counsel for Mr Oneissi submitted that there was an apparent contradiction between an order the Trial Chamber made on 14 June 2017⁸ and its order of 18 July 2017.⁹ At paragraph 14 of the first order, the Trial Chamber observed,

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.

6. The Trial Chamber explained to counsel in the hearing that there was no contradiction between the two orders.¹⁰ The observation in the order of 14 June 2017 clearly related to Rule 150 (G) where a Party in a courtroom may raise an objection to a question posed by an opposing Party—that the Trial Chamber must determine. This is not possible in a proceeding conducted by a Third State judge who merely reads the questions to a witness. Any objections therefore must logically be considered afterwards by the Trial Chamber in reviewing the transcript. The Trial Chamber, however, retains the power *at all stages* of the proceedings to ensure that questions and answers—which amount to evidence—are relevant and have probative value under Rule 149 (C). This applies to evidence collected or received under any Rule—for example, Rules 125, 154, 155, 156 and 158.

7. Despite the Trial Chamber explaining this to counsel, counsel for Mr Oneissi filed an application for certification of the following issue:

Did the Trial Chamber err in delivering an order asking the Defence to provide submissions on the questioning of a witness conducted under Rule 125 (B), without providing any supporting legal basis and in contradiction with the interpretation it provided of this Rule in a previous Order dated 14 June 2017?

8. Under Rule 126 (C) the Trial Chamber may certify for interlocutory appeal 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 Trial Chamber has set out and applied the legal

⁸ Order of 14 June 2017, para. 14.

⁹ Provisional transcript of 20 July 2017, pp 68-71.

¹⁰ Provisional transcript of 20 July 2017, pp 72-73.

principles and standards governing the certification of decisions for interlocutory appeal in previous decisions.¹¹ These are applicable here.

9. This application is without merit. Rule 149 governs the admission of evidence, and specifically, Rule 149 (C) provides that a chamber may receive evidence that is relevant and has some probative value. That it applies to all evidence—including any received under Rule 125—is so trite that it need not be repeated. The Trial Chamber’s statutory obligation is to ensure that it *only* receives evidence that is relevant and has probative value. The Trial Chamber’s order was merely for *submissions* that would go to whether evidence was potentially admissible. An order seeking submissions on the relevance or probative value of questions, and hence the possible answers, which together form the evidence, cannot fall within the test in Rule 126 (C).

10. The Trial Chamber’s order for submissions on the relevance and probative value of questions posed by counsel is a fundamental function of a trial court which is exercised in virtually every hearing. It may be exercised in relation to any question of a witness. The order—and hence the issue for certification—could therefore not *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The application is dismissed.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the application.

¹¹ F1798, Decision on Application for Certification of Decision regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, paras 12-14; F2874, Decision Denying Certification to Appeal ‘Decision on the Admission of Call Sequence Tables related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements’, 6 December 2016, paras 5-6; F2987, Written Reasons for Decision Denying Certification to Appeal the “Decision Clarifying Mr Gary Platt’s Area of Expertise” dated 25 January 2017, 14 February 2017, paras 5-6.

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

Leidschendam,
The Netherlands
21 July 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

