

**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: 8 March 2018

Original language: English

Classification: Public

DECISION DISMISSING FOUR SABRA DEFENCE MOTIONS , FILINGS F3559, F3561, F3591 AND F3595, AND ORDERS TO THE SABRA DEFENCE

(Extract from Official Public Transcript of Hearing on 8 March 2018, page 9, line 15 to page 15, line 15)

On 7th of March, 2018, in filing F3597, notification in relation to the Trial Chamber's "Scheduling Order to the Defence under Rule 128," counsel for the accused Mr. Assad Hassan Sabra notified the Trial Chamber that they are not in a position to elect to present a case at this juncture, in particular noting that the outcome of seven pending motions before the Trial Chamber has a direct bearing on their decision how to proceed. Two of these motions had been filed over the preceding two days, on the 5th and 6th of March. The brief procedural history to this is that on Friday, the 2nd of February, 2018, counsel for the accused Mr. Hassan Habib Merhi informed the Trial Chamber that there were no further evidentiary matters requiring court time in respect of Mr. Merhi. The Trial Chamber immediately that day issued a Scheduling Order informing the parties that it would sit the following Wednesday,

Interpretation serves to facilitate communication.
Only the original speech is authentic.

the 7th of February, 2018, to receive any evidence remaining in the Prosecution case to deliver any outstanding decisions and to allow the Prosecution to formally close its case against the four accused. As foreshadowed, the Prosecution formally closed its case on the 7th of February and the Trial Chamber formally received outstanding exhibits, including some from the Sabra Defence. The Trial Chamber's intention in issuing that Scheduling Order on the 2nd of February was to receive any evidence that it had already decided to admit in written decisions, that was awaiting formal admission into evidence, and exhibits already marked for identification during the Prosecution case.

The order was not intended to invite counsel to start submitting new material or new evidence, namely, items not already considered by the Trial Chamber or clearly incapable of consideration in terms of volume or complexity, before the Prosecution case closed. However, despite this, on 6th and 7th of February, the Sabra Defence filed more evidentiary motions for which two weeks are normally allowed under the Rules of Procedure and Evidence for the Prosecution's or another party's response. Logically, therefore, unless the Prosecution consented to the applications - and it did not – the Prosecution would not have been required to respond to a motion seeking to tender evidence in its case until several weeks after its own case had closed. In particular, the Sabra Defence filed one motion on the 6th of February, 2018, that's filing F3559, "Sabra Defence Application for the Admission into Evidence of Documents Pursuant to Rule 154," seeking the admission of five documents in relation to the cross-examination of the Prosecution investigator, Mr. Andrew Donaldson, whose evidence in court had finished on the 18th of October, 2017. That was almost four months earlier.

The motion filed the following day, just before the Prosecution closed its case formally in court, on the 7th of February, 2018, filing F3561, entitled "Request for the Admission of Attribution-Related Material (public with confidential annexes A-H)," sought the admission of attribution-related material - namely, extracts of some 83 witness statements tendered under Rule 155 and 46 other documents tendered under Rule 154. Clearly, neither the Prosecution nor the Trial Chamber could possibly have dealt with the substance of these motions before the Prosecution case closed several hours later. Both the Prosecution and Trial Chamber were in court at the time. In its response to the motion filed on the 7th of February, 2018, the Prosecution objected to it. That was in filing F3580, entitled "Prosecution

Interpretation serves to facilitate communication.
Only the original speech is authentic.

Response to the Sabra 'Request for the Admission of Attribution-Related Material' and Prosecution Urgent Request for a Declaration and Orders," filed the 21st of February, 2018. In that response, the Prosecution moved the Trial Chamber to: One, issue a declaration recognizing that the Sabra Defence has elected to present a Defence case under Rules 112 and 118; two, order the Sabra Defence to provide the Prosecution with the particulars of its case and the disclosures required under Rules 112, 128, and 161; and three, order the Sabra Defence to file a pre-defence brief or a revised pre-trial brief detailing the legal basis for its case. Rule 112 is entitled "Disclosure by the Defence" and requires the Defence to file -- I'm sorry, at the end of the Prosecutor's case following a Defence election to present its case and within the time limits prescribed by the Trial Chamber but not less than one week before the commencement of the Defence case to provide certain disclosure to the Prosecution. Rule 128 is the rule requiring the Defence to file witness lists, exhibit lists, and other documents relating to the Defence case. And Rule 161 is the rule requiring either party to provide notifications of calling expert evidence. Although these motions, these two motions, were formally filed by the Sabra Defence before the closure of the Prosecution case, they obviously required the Trial Chamber to carefully consider them but after the close of the Prosecution case. This was given the volume of the tendered material and the time prescribed by the Rules of Procedure and Sabra Defence's application to resubmit Defence Request for Resubmission of Call Sequence Tables," and its application to order the production of evidence under Rule 165, filed on the 5th of March, 2018, in filing F3591, entitled "Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128, Order" Filed Confidentially. In the circumstances just outlined, the Trial Chamber finds that the material tendered by the Sabra Defence in these motions most properly belongs in a Defence case, should the Sabra Defence elect to present one. These four motions - filings F3559, F3561, F3591, and F3595 - are therefore dismissed on this procedural basis as they have improperly proposed the tender of evidence in the case of a party which is closed, namely, the Prosecution's. In making this decision, the Trial Chamber is making no determination on the merits of the applications and accordingly on the substance of the tendered material. The Trial Chamber also emphasizes that this ruling does not prejudice or in any way infringe upon the Defence's fair trial rights, such as its right to tender material into evidence. If the Sabra

Interpretation serves to facilitate communication.
Only the original speech is authentic.

Defence wants the Trial Chamber to receive this evidence now, it should elect to call a Defence case and file the documents specified in Rule 128, such as a witness and exhibit list and specifications as to the manner in which they wish to present any witness evidence, such as live in court or under Rules 155, 156, or 158, which are the rules which apply specifically to the calling of witnesses in statement form. Therefore, the Trial Chamber orders counsel for Mr. Sabra to inform it by Friday, the 9th of March, 2018, whether they elect to present a Defence case under Rules 112 and 128; and if they elect to do so, to file all material referred to in Rule 128 by Monday, the 12th of March, 2018. The Trial Chamber also orders the Sabra Defence to provide the Prosecution with the particulars of its case and the disclosures under Rules 112, 128, and 161, that is relating to expert evidence, by the same date; namely, Monday, 12th of March, 2018. Under Rule 165, the Trial Chamber may order additional evidence or summon witnesses to attend on its own volition but after hearing the parties. The Sabra Defence filed an application on Monday, the 5th of March, 2018, a mere two days before the Trial Chamber's scheduled delivery of its decision on the Oneissi Defence application to acquit Mr. Hussein Hassan Oneissi scheduled for 7th of March, 2018, in filing F3591, asking the Trial Chamber to call four former Prosecution investigators under Rule 165. The Sabra Defence submits that it cannot make an election under Rule 128 to call a case until this motion is decided. The Trial Chamber, however, disagrees. The application should not have been made at that late stage, a full month after the close of the Prosecution case. And the two concepts - namely, whether the witnesses are potentially called by the Trial Chamber or the Sabra Defence - are not mutually exclusive. The Sabra Defence should therefore file a witness list under Rule 128 which includes these four witnesses but specifying under which rule they intend to present their evidence; namely, live or under Rules 155, 156, 158, or, in the alternative, under Rule 165. The remaining motions filed by the Sabra Defence which were the subject of its filing of the 7th of March, 2018, F3597, its notification in relation to Rule 128 - namely, filing F3529, "Motion for the Admission of Documents Relating to the Claim of Responsibility - the Invention of the 'Mohammed' Story," filed on the 22nd of January, 2018; filing F3551, "Provision of Revised Exhibit 5D171, Marked for Identification," filed on the 5th of February, 2018; and filing F3573, a Sabra Defence application for admission into evidence of 19 documents marked for identification, filed on

Interpretation serves to facilitate communication.
Only the original speech is authentic.

the 16th of February, 2018 - were either pending before the Trial Chamber well before the closure of the Prosecution case or relate to documents marked for identification during the Prosecution case. Therefore, the Trial Chamber considers these motions as being properly filed during the Prosecution case and will decide upon them in due course, meaning that the Defence does not, at this point, need to make relevant filings under Rule 128 in relation to the documents and statements the subject of those three filings.

Interpretation serves to facilitate communication.
Only the original speech is authentic.