



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: 12 June 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DISMISSING THE PROSECUTION MOTION FOR
RECONSIDERATION OF THE TRIAL CHAMBER DECISION UNDER
RULE 165 TO CALL MR MICHAEL TAYLOR**

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

Acting Head of Defence Office:
Ms Héleyn Uñac

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Youssef Khalil

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courecelle-Labrousse, Mr Yasser
Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Geoffrey Robert
Ms Sarah Bafadhel



BACKGROUND

1. The amended consolidated indictment pleads that Mr Ahmed Abu Adass, a 22-year old Palestinian appeared in a video falsely claiming responsibility for the attack on 14 February 2005 in Beirut, Lebanon, that killed the former Lebanese Prime Minister, Mr Rafik Hariri and 21 others and injured 226 people. Shortly after the attack, the video was broadcast on Al-Jazeera. It also alleges that the Accused, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, under Mr Hassan Habib Merhi's supervision, participated in luring and abducting Mr Abu Adass. Specifically, Mr Oneissi introduced himself to Mr Abu Adass as 'Mohammed' at the beginning of January 2005 at the Arab University Mosque in Beirut, and asked Mr Abu Adass to teach him how to pray. They then met several times and on the morning of 16 January 2005, Mr Abu Adass left his home to meet 'Mohammed' and has been missing since.¹

2. The Sabra Defence, on the other hand, contends that Mr Abu Adass left his home on 16 January 2005 to wage jihad in Iraq with someone it describes as his close associate, Mr Khaled Taha.²

3. Following the close of the Prosecution's case on 7 February 2018,³ and an order by the Trial Chamber on 23 February 2018 under Rule 128 of the Special Tribunal's Rules of Procedure and Evidence⁴ to Defence counsel to file documents relating to a Defence case—such as witness and exhibit lists⁵—the Sabra Defence elected not to call a case. However, thereafter, in an application filed on 5 March 2018 counsel for Mr Sabra asked the Trial

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended consolidated indictment, paras 3 (b)-(d), 23, 28; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Prosecution's Submission of Updated Pre-Trial Brief pursuant to Rule 91(G)(i) and the Pre-Trial Judge's Order of 7 August 2013 and Decision of 16 August 2013, 23 August 2013 (a public redacted version was filed on 31 October 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 (confidential). Public redacted version was filed on 13 January 2014.

² E.g. 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 26, 51; 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.

³ Transcript of 7 February 2018, pp 68-69.

⁴ Rule 128 envisages the functions that the Trial Chamber may exercise after the closure of the Prosecution's case and upon a Defence election to present its case, such as requiring the Defence to file witness lists, exhibit lists, and other documents relating to the Defence case.

⁵ F3583, Scheduling Order to the Defence under Rule 128, 23 February 2018, para. 7.

Chamber to call four investigators as Trial Chamber witnesses, under Rule 165. They were, according to the Sabra Defence, involved in the investigation of Mr Abu Adass's disappearance, and thus could provide relevant and probative evidence about the Prosecution's investigatory failures into a 'significant lead', which contradicted its case.⁶ The Prosecution strongly opposed the motion.⁷

4. The Trial Chamber ordered the attendance under Rule 165 of Mr Michael Taylor,⁸ the Office of the Prosecutor's Chief of Investigations between 2010 and 2013.⁹ However, due to circumstances beyond his and the Trial Chamber's control he could not testify as anticipated in April and became unavailable to testify until the week of 25 June 2018.¹⁰

5. The Prosecution, in an application, filed only on 1 June 2018, seeks reconsideration, under Rule 140, of the Trial Chamber's decision to call Mr Taylor. It also asks the Trial Chamber to suspend its decision pending determination of the motion.¹¹ The Sabra Defence opposed the application,¹² and the Prosecution replied.¹³

⁶ F3600, Motion for Reconsideration of Sabra Defence Request Pursuant to Rule 165, 9 March 2018, para. 25; F3591, Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128 Order, 5 March 2018 (confidential, with confidential annexes A-B and public annex C), paras 16-17.

⁷ F3615, Prosecution Response to "Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128 Order", 4 April 2018 and F3609, Prosecution Response to Sabra "Motion for Reconsideration of Sabra Defence Request Pursuant to Rule 165", 26 March 2018.

⁸ Made on 12 April 2018 and notified to the Parties on 13 April 2018, noting that he was to testify on 23 April 2018—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).

⁹ See F3679, Prosecution Response to "Sabra Defence Request for Provision of Material Related to Michael Taylor", 5 June 2018, para. 5, which as a preliminary issue notes that 'Mr. Taylor was the Chief of Investigations from 1 April 2010 to 6 September 2013'.

¹⁰ See F3645, Decision on Oneissi Defence Rule 25 Motion for the Disqualification and Withdrawal of Presiding Judge Re, Judge Janet Nosworthy, and Judge Micheline Brady, 4 May 2018.

¹¹ F3674/COR, Corrected Version of "Prosecution Motion for Partial Reconsideration of the Decision", 1 June 2018 (confidential, with confidential amended annex A) ('Prosecution motion'); F3674, Prosecution Motion for Partial Reconsideration of the Decision, 29 May 2018 (confidential, with confidential annexes A-B). The Prosecution also filed public redacted versions.

¹² F3681, Sabra Defence Response to "Prosecution Motion for Partial Reconsideration of the Decision", 7 June 2018 (confidential, with confidential annex A) ('Sabra Defence response').

¹³ F3685, Prosecution Reply to Sabra Defence Response to "Prosecution Motion for Partial Reconsideration of the Decision", 12 June 2018 (confidential) ('Prosecution reply').

RELEVANT LEGAL PRINCIPLES

Rule 165

6. Under Rule 165, after hearing the Parties, the Trial Chamber may order *proprio motu* or at the request of a Party, the production of additional evidence. It may, after hearing the Parties, *proprio motu* summon witnesses and order their attendance.

Rule 140

7. The Trial Chamber may reconsider under Rule 140, *proprio motu* or at the request of a Party, a decision, other than a judgment or sentence, if necessary to avoid injustice. The Trial Chamber has consistently held that reconsideration of a decision is an exceptional remedy. It must not be used to redress ‘imperfections in a decision or to circumvent the unfavourable consequences of a ruling’. The Party seeking reconsideration bears the onus to demonstrate, on specific grounds, an injustice involving prejudice. If prejudice or injustice is shown, the Trial Chamber may reconsider its decision on grounds that include an error of law, abuse of discretion, or the existence of new facts or a material change in the circumstances subsequent to the decision.¹⁴

SUBMISSIONS

Prosecution’s motion

8. The Prosecution argues, first, that the Trial Chamber erred in law and in exercising its discretion to call Mr Taylor as a witness under Rule 165. The Trial Chamber neither specified how the evidence was relevant or probative nor why he is being called and how his testimony will assist it in determining an ‘unidentified’ material fact in issue.

9. Moreover, Mr Taylor has no first-hand knowledge of either Mr Taha or the Accused and their activities. The Trial Chamber found that Mr Taylor appears to be the most relevant witness with the necessary overview of the Prosecution’s investigations but this is

¹⁴ E.g. F3680, Decision Clarifying Decision of 30 November 2017 Admitting a UNIIC Memorandum (Exhibit 5D494) and Denying Prosecution Application for Partial Reconsideration, 6 June 2018, para. 6; F3459, Decision Clarifying Decision of 25 September 2017 Admitting Exhibit 5D251 MFI (Relevant to Mr Ahmed Abu Adass) and Denying Prosecution Application for Reconsideration, 6 December 2017, para. 8; F3345, Decision Denying Merhi Defence Application to Reconsider ‘Decision Clarifying Mr Gary Platt’s Area of Expertise’, 2 October 2107, para. 8; F2719, Decision on Ayyash Defence Motion for ‘Reissuance’ and Oneissi Defence Motion for Reconsideration of the Trial Chamber’s Decision of 29 July 2016, 14 September 2016, para. 10.

inconsistent with it ruling that the conduct of the Prosecution's investigation is not on trial. Furthermore, Mr Taylor was not involved in any legal assessment or determination as to furthering the inquiry relating to Mr Taha.

10. Second, the Trial Chamber did not have all relevant documents and information concerning the allegation that Mr Abu Adass left with Mr Taha on 16 January 2005. The Prosecution seeks reconsideration based upon the Trial Chamber now having a fuller, more accurate record. This information is contained in confidential amended annex A to the application, while confidential annex B addresses the items which the Sabra Defence alleges are related to Mr Abu Adass's disappearance and Mr Taha. This annex, in essence, is an annotated version of confidential annex B to the Sabra Defence's application under Rule 165¹⁵ addressing the listed items and adding missing information about each of them.

11. The Trial Chamber can now conclude that there is no basis for calling Mr Taylor who was not involved in assessing this evidence and can add nothing relevant. Nothing therefore warrants or justifies any further inquiry into the Prosecution's investigation.

12. The Sabra Defence has elected not to present a case. Hence, it has decided not to call as a witness a particular person whose statements the Prosecution had evaluated as unreliable. If the Trial Chamber is still interested in the Sabra Defence's allegations regarding Mr Taha, the Sabra Defence should call that person as a witness.

13. Reconsideration is therefore required to avoid injustice. Mr Taylor's expected testimony lacks relevance and *prima facie* probative value. It is prejudicial to the Prosecution to address and to potentially rebut undefined testimony. The Prosecution would be prevented from preparing for Mr Taylor's testimony and would not be in a position to determine whether rebuttal evidence is available and should be presented. Also, it is prejudicial and unfair to the Prosecution to have its conduct scrutinised without a lawful basis for this inquiry and to disprove unsupported allegations by the Defence raised through inadmissible material.¹⁶

¹⁵ See above, fn 6.

¹⁶ Prosecution motion, paras 4, 14-29, 44-47.

Sabra Defence's response

14. The Sabra Defence responds that the Prosecution failed to demonstrate either that the Trial Chamber erred in law or abused its discretion. These contentions are factually incorrect and undermined by the Prosecution's assertions. Thus, the requisite standard for reconsideration, which is an exceptional remedy, is not met.

15. The Trial Chamber set out the applicable standard for calling witnesses under Rule 165, provided its reasons for applying it to Mr Taylor's testimony and why he was selected from the proposed four investigators. It is apparent from the Prosecution's lengthy submissions seeking to justify the investigative steps taken in relation to Mr Abu Adass's disappearance that the Prosecution is apprised of both the relevance of Mr Taylor's evidence and the material issue concerning any investigative deficiencies in this area. The Prosecution repeats submissions from its responses to a previous Sabra Defence motion, in which the Sabra Defence requested reconsideration of its Rule 165 application to the Trial Chamber.¹⁷

16. The Prosecution failed to demonstrate the existence of new facts or a material change in the circumstances. It relies on documents which are not 'new'. Almost all pre-date 2010 and the Prosecution has had them for at least eight years. The Prosecution could have brought these documents to the Trial Chamber's attention in its responses to the Sabra Defence's Rule 165 application and fails to say why it did not. The Prosecution cannot engineer a request for reconsideration on the basis of submissions that should have been raised earlier.

17. The Sabra Defence had already brought 31 relevant documents to the Trial Chamber's attention, and it was within this context that the Trial Chamber ordered Mr Taylor's testimony. It has provided a 'preliminary list of materials' in its Rule 165 motion and has informed the Trial Chamber that it will provide further material to Mr Taylor, to the Trial Chamber, the Parties and the Legal Representatives of Victims. The Sabra Defence has

¹⁷ Sabra Defence response, paras 6-10 referring to F3615, Prosecution Response to "Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128 Order", 4 April 2018 and F3609, Prosecution Response to Sabra "Motion for Reconsideration of Sabra Defence Request Pursuant to Rule 165", 26 March 2018.

also asked the Trial Chamber to order the Prosecution to provide material related to Mr Taylor to assist the Trial Chamber's assessment of the testimony.¹⁸

18. The Prosecution's submissions reveal its disregard, without further investigation, of material which did not fit its own case theory. In particular, it was an investigative failure not to question a specific person, related to a Prosecution witness, about a source of certain information. This justifies the need for Mr Taylor's testimony. Prosecution investigators who have appeared as witnesses have stated that Mr Taylor acted as the central decision-maker in the investigation. If Mr Taylor cannot assist the Trial Chamber in explaining the steps the Prosecution took to eliminate Mr Taha's involvement in Mr Abu Adass's disappearance, this does not preclude the Trial Chamber from calling the Senior Prosecution counsel as a Chamber witness.

19. The Prosecution's application contains, inappropriately and unnecessarily for a reconsideration request, substantive submissions regarding Mr Taylor's testimony and raises 'serious concerns as to the undue influence on Mr Taylor's forthcoming testimony'.¹⁹ Ordinarily, it would be improper to raise such arguments in the presence of a witness in court, in particular, where the witness has a prior relationship with a Party. The Prosecution also fails to identify, on specific grounds, any actual injustice or prejudice that arises from the decision to hear Mr Taylor's testimony. It merely disagrees with the Trial Chamber's decision. The Prosecution may cross-examine Mr Taylor and make submissions about the evidence's weight. The Prosecution's application for suspensive effect of the decision is unsubstantiated, and given the Prosecution's failure to meet the standard for reconsideration—and—in the absence of a scheduled date for Mr Taylor's evidence—an order for suspensive effect is unnecessary.²⁰

Prosecution's reply

20. The Prosecution's reply addresses the Sabra Defence's allegation of undue influence and impropriety and that ordinarily it would be improper to raise this litigation in the presence of the witness in court. The Sabra Defence fails to substantiate this allegation, which should

¹⁸ Sabra Defence response, para. 13. F3667, Sabra Defence Request for Provision of Material Related to Michael Taylor, 22 May 2018 (public with confidential annexes A-D). Public redacted versions of the annexes were also filed.

¹⁹ Sabra Defence response, para. 18.

²⁰ Sabra Defence response, paras 5, 7, 10, 12, 14, 15, 17-19, 22.

be discouraged, particularly in light of the Trial Chamber's Presiding Judge's authorisation to provide Mr Taylor with the confidential version of the Prosecution's motion.²¹

DISCUSSION AND DECISION

21. The Trial Chamber's decision explicitly recognised that Mr Taylor's evidence must be relevant, with some probative value.²² The decision also stated that the Trial Chamber is calling Mr Taylor to assist it to determine 'whether there are reasonable inferences available from the evidence which are consistent with the innocence of the Accused'.²³ Given his former position as the Chief of Investigations, this provides the testimony with the necessary relevance and probative value.

22. The Trial Chamber's decision also explicitly stated that 'Neither the Prosecution nor the conduct of its investigation is on trial.'²⁴ The Prosecution's fears in this respect, repeated in this motion, are therefore unfounded.

23. In support of its reconsideration application the Prosecution has (belatedly) provided some additional facts in relation to Mr Taylor and its investigation relating to Mr Taha and Mr Abu Adass, having failed to provide this information to the Trial Chamber when it opposed the Sabra Defence's application that the Trial Chamber call four investigators under Rule 165. However, this new information does not convince the Trial Chamber that it should reconsider its decision to call Mr Taylor. The Trial Chamber is still of the view that Mr Taylor, as the Chief of Investigations during the relevant period may provide evidence that is relevant and probative of the issue of Mr Taha's potential involvement in Mr Abu Adass's disappearance.

24. Further, the Prosecution's submission that it is prejudiced because it cannot prepare to question Mr Taylor is misconceived. The Trial Chamber has already authorised the Parties to confer with Mr Taylor before he testifies and to provide him with any necessary information that is relevant to his testimony.²⁵

²¹ Prosecution reply, paras 1, 4-10.

²² Decision, para. 16.

²³ Decision, para. 22.

²⁴ Decision, para. 22.

²⁵ Decision, para. 23.

25. For the same reasons, the Trial Chamber finds that the Sabra Defence's concern regarding the Prosecution's alleged intention to exert undue influence on Mr Taylor's forthcoming testimony has no basis. The Presiding Judge of the Trial Chamber, after reviewing the proposed redactions to the Prosecution motion and considering the arguments raised by Prosecution and Defence counsel, authorised the Prosecution—notably before the Sabra Defence filed its response—to provide Mr Taylor with the confidential version of the Prosecution's motion, and the statements of two protected witnesses. The proposed redactions did not affect the substance of the motion, and Mr Taylor would have become aware of the redacted information from the witnesses' statements and other documents.²⁶

26. The Trial Chamber, therefore, agrees with the Prosecution that the Sabra Defence should not have made these unsubstantiated allegations, and reminds the Parties of their obligations under the Code of Professional Conduct,²⁷ in particular Article 27 stating that counsel 'shall not make any accusation of impropriety' against other counsel 'unless such accusation is well-founded'.

27. The Trial Chamber underlines that it does not believe that Mr Taylor's testimony can procedurally prejudice the Prosecution, a point which is implicitly recognised by its own submission that the Sabra Defence could itself call Mr Taylor as a witness. The Prosecution, in both scenarios—either Mr Taylor being called by the Trial Chamber or the Sabra Defence—may confer with Mr Taylor before he testifies *and* then cross-examine him. This cannot procedurally prejudice the Prosecution (nor any other Party).

28. For these reasons the Trial Chamber declines to reconsider its discretionary decision under Rule 165 to call Mr Taylor. It follows that the scheduling of Mr Taylor's evidence should not be suspended.

SCHEDULING MR TAYLOR'S EVIDENCE

29. The Trial Chamber has made the relevant inquiries of Mr Taylor as to his professional availability and will schedule his testimony for the week of Monday 25 June 2018, with the expectation that it should be concluded by Tuesday 26 June 2018.

²⁶ Exchange of emails on 31 May and 1 June 2018 between Prosecution counsel, counsel for Mr Sabra and the Trial Chamber's senior legal officer, copying the other Defence counsel and the Legal Representative of Victims.

²⁷ A Code of Professional Conduct for Counsel Appearing Before the Tribunal, 28 February 2011.

CLASSIFICATION

30. The Prosecution has filed a public redacted version of its motion. For the transparency of the proceedings, the Trial Chamber instructs the Registry to reclassify as public the Sabra Defence response and the Prosecution reply.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

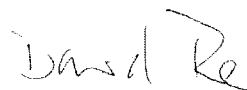
DISMISSES the Prosecution's motion;

SCHEDULES Mr Michael Taylor's testimony for Monday 25 June 2018; and

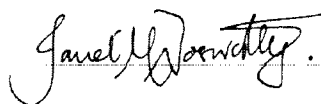
INSTRUCTS the Registry to reclassify from confidential to public F3681, Sabra Defence Response to "Prosecution Motion for Partial Reconsideration of the Decision", dated 7 June 2018, and F3685, Prosecution Reply to Sabra Defence Response to "Prosecution Motion for Partial Reconsideration of the Decision", dated 12 June 2018.

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

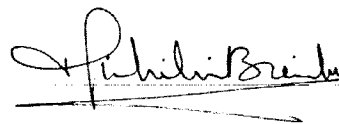
Leidschendam,
The Netherlands
12 June 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

