

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: 14 May 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 TO ADMIT THE STATEMENTS
OF WITNESSES PRH007, PRH115, PRH396 AND PRH661**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Legal Representatives of**Participating Victims:**

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

Counsel for Mr Salim Jamil Ayyash:

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

Counsel for Mr Mustafa Amine Badreddine:

Mr Antoine Korkmaz, Mr John Jones &
Mr Iain Edwards

Counsel for Mr Hassan Habib Merhi:

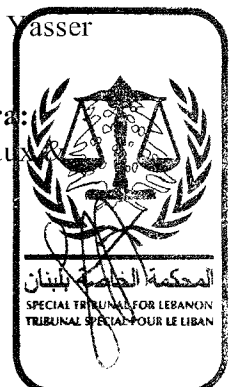
Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Khalil Jad

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux
Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution has new statements from four witnesses describing either the explosion that, on 14 February 2005, killed the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut, or relating to the purchase of the Mitsubishi Canter allegedly used in the attack. According to the Prosecution, two witnesses collected, or tried to collect, the videotape containing a claim of responsibility for the explosion. Another witness describes injuries suffered in the attack, and the fourth relates to the telephone number falsely given in purchasing the Mitsubishi Canter. Consequently, the Prosecution seeks leave to amend its exhibit list, and to admit into evidence, under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence, four statements from Witnesses PRH007, PRH115, PRH396 and PRH661.¹ Counsel for the Accused, Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra responded to the motion,² and the Prosecution replied to counsel for Mr Sabra's response.³

SUBMISSIONS

2. The Prosecution submits that the four new witness statements make previous witness statements compliant with the requirements of the relevant Practice Direction.⁴ These statements contain no new evidence, and Witnesses 007 and 115 clarify existing statements. Adding them to the exhibit list will therefore neither delay proceedings nor prejudice Defence preparations for trial.⁵ The Prosecution also requests their admission into evidence under Rule 155,⁶ on the basis that they are relevant, probative and reliable, and go to proof of matters other than the acts and conduct of the Accused as charged in the consolidated indictment.⁷

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1892, Prosecution Motion to Admit the Statements of PRH396, PRH007, PRH115 and PRH661, 1 April 2015, paras 1, 3.

² F1906, Badreddine Response to Prosecution Motion to Admit the Statements of PRH396, PRH007, PRH115 and PRH661, 15 April 2015; F1903, Merhi Defence Response to the "Prosecution Motion to Admit the Statements of PRH396, PRH007, PRH115 and PRH661", 14 April 2015; F1904, Oneissi Defence Response to the 'Prosecution Motion to Admit the Statements of PRH396, PRH007, PRH115 and PRH661', 14 April 2015; F1907, Corrected Version of 'Sabra Defence Response to Prosecution Motion to Admit the Statements of PRH396, PRH007, PRH115 and PRH661' of 15 April 2015, 20 April 2015.

³ F1919, Prosecution Reply to Sabra Defence Response to Prosecution Motion to Admit the Statements of PRH396, PRH007, PRH115 and PRH661, 21 April 2015.

⁴ Prosecution motion, para. 3; STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010.

⁵ Prosecution motion, paras 14, 15.

⁶ Rule 155 (A) states that '[s]ubject to Rule 158, the Trial Chamber may admit in lieu of oral testimony the evidence of a witness in the form of a written statement, or a transcript of evidence which was given by a witness in proceedings before the Tribunal, which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment'.

⁷ Prosecution motion, para. 1.

Witnesses 396 and 661

3. Witness 396 was injured in the explosion. He was in a room on the first floor of a hotel in the St. George area. The impact of the blast caused the glass windows to shatter, and as a result, he suffered internal bleeding.⁸ Other victims have already testified about the explosion and its effects.⁹ The witness's identity as an injured party is an agreed fact under Rule 122 and his evidence relates only to the impact of crimes upon victims.¹⁰ His new statement merely makes his previous statement compliant with the Practice Direction.¹¹

4. In January 2005, the Mitsubishi Canter allegedly used in the attack was purchased at a showroom in Tripoli. The purchasers gave Witness 661's telephone number to the dealer. Witness 661, however, did not know their names, nor why they used his number.¹² As the witness has no information regarding the vehicle's purchase, his oral testimony will not assist the Trial Chamber. Another, Witness PRH063, will testify in court about the purchase of this vehicle.¹³

5. Counsel for Mr Badreddine, Mr Merhi, Mr Oneissi and Mr Sabra either take no position or do not object to adding these statements to the exhibit list, or admitting them into evidence under Rule 155.¹⁴

Witnesses 007 and 115

6. Witness 007 worked for Al Jazeera television in Beirut on 14 February 2005. He was asked to collect the videotape containing the claim of responsibility for the attack, but did not. He describes the activities in the Al Jazeera offices that day, including the staffing and telephone operations, receiving a call claiming responsibility for the attack, and attempting to collect the videotape.¹⁵ The evidence is cumulative of that of Witnesses PRH006, PRH020 and PRH430, who will testify in court and may be cross-examined, meaning that the Defence will not be prejudiced in not cross-examining him.¹⁶

⁸ Prosecution motion, para. 4.

⁹ Prosecution motion, para. 13 (a).

¹⁰ Prosecution motion, para. 13 (a). Rule 122 states that '[t]he Prosecutor and the Defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or elsewhere is not contested, and, accordingly, a Chamber may consider such alleged fact as being proved, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims'.

¹¹ Prosecution motion, para. 11.

¹² Prosecution motion, para. 7.

¹³ Prosecution motion, para. 13 (c).

¹⁴ Badreddine Defence response, para. 2; Merhi Defence response, para. 2; Oneissi Defence response, para. 1; Sabra Defence response, para. 2.

¹⁵ Prosecution motion, para. 5.

¹⁶ Prosecution motion, para. 13 (b).

7. Witness 115 also worked for Al Jazeera and, on 14 February 2005, collected the videotape. His statement describes: working at the Al Jazeera office that day; its staffing and telephone operations; receiving information about three telephone calls claiming responsibility; collecting the videotape and describing the recovery location; text messages he sent and received; playing the videotape at the office and its subsequent television broadcast; the letter accompanying the videotape; and his mobile telephone number.¹⁷ This evidence is cumulative of that of Witnesses 006, 020 and 430 who will testify live. Therefore, according to the Prosecution, the rights of the Defence are not prejudiced by the admission of Witness 115's statement without cross-examination.¹⁸

8. Counsel for Mr Badreddine take no position on adding these statements to the exhibit list or on their admissibility.¹⁹ Counsel for Mr Merhi object to the admission under Rule 155, without cross-examination, of this evidence, characterizing the witnesses as key to the collection of the videotape. Moreover, their statements relate to the acts and conduct of the Accused, because the coordination of the false claim of responsibility and its transmission to Al Jazeera television is important evidence against Mr Merhi. Cross-examining other witnesses on the calls claiming responsibility for the attack will not compensate their inability to clarify, with these two witnesses, the circumstances of the videotape's delivery to Al Jazeera. The presence, and cross-examination, of both is necessary to demonstrate the weaknesses in the Prosecution case.²⁰

9. Counsel for Mr Oneissi object to the admission of the statements, arguing that the Trial Chamber should order that they testify in person.²¹ The consolidated indictment alleges that Mr Oneissi was watching the tree where the videotape was placed, when Witnesses 007 and 115 were there. Their evidence is important to the case against Mr Oneissi as they are the only two witnesses allegedly there at the time. They should therefore appear in court for cross-examination.²² Counsel reject the suggestion that this testimony is cumulative to the evidence of Witnesses 006, 020, and 430, as it is the only direct evidence on the videotape collection and is therefore not cumulative. The prejudice arising from not cross-examining Witnesses 007 and 115 would not be remedied by cross-examining Witnesses 006, 020, and 430.²³

¹⁷ Prosecution motion, para. 6.

¹⁸ Prosecution motion, para. 13 (b).

¹⁹ Badreddine Defence response, para. 2.

²⁰ Merhi Defence response, paras 3-5.

²¹ Oneissi Defence response paras 2, 7.

²² Oneissi Defence response, para. 3.

²³ Oneissi Defence response, para. 5.

10. Counsel for Mr Sabra oppose the admission of the statements into evidence, but if the Trial Chamber admits the statements, they request that the witnesses appear for cross-examination.²⁴ Counsel do not contest the relevance or probative value of the statements but submit that Rule 155 is inapplicable. Witnesses 007 and 115's evidence relates to the false claim of responsibility for the attack and the conspiracy to assassinate Mr Hariri,²⁵ and is 'intrinsically related to the specific allegations against the Accused'.²⁶ They reject the Prosecution's submission that the witnesses' evidence is cumulative of the evidence of other witnesses who will testify live, and that they do not need to be called because their evidence is hearsay.

11. In the alternative, if the two statements are admitted, the witnesses should be called for cross-examination. While the evidence of Witnesses 006, 020 and 430 only covers in part the issues that Witnesses 007 and 115 will address, the Prosecution's argument that the evidence is cumulative is irrelevant because the expected testimony is central to the charges against the Mr Sabra. The cross-examination of these two witnesses is appropriate because the evidence goes to a 'live' or 'critical' issue between the Parties.²⁷

12. They also argue that — if the statements are admitted without cross-examination — to obtain a full understanding of his evidence, Witness 115's other statements should be admitted into evidence.²⁸ The Prosecution replied, submitting that any Party may move to admit documents that are relevant and probative, and they do not have to be admitted into evidence only because other statements from the same witness have already been admitted.²⁹ Doing this would require the Trial Chamber to decide the relevance, probative value, and reliability of vast numbers of statements for which the purpose of admission is unclear.³⁰

13. Finally, counsel for Mr Sabra seek the disclosure of unredacted versions of three statements of Witnesses 007 and 115.³¹ As Rule 115 permits interim non-disclosure only, it is unclear why these statements remain redacted. The Prosecution replied that previous decisions have rendered this moot.³² The Trial Chamber recently ordered the Prosecution to review redactions of these witness statements

²⁴ Sabra Defence response, para. 2.

²⁵ Sabra Defence response, paras 5-7.

²⁶ Sabra Defence response, para. 11.

²⁷ Sabra Defence response, para. 15.

²⁸ Sabra Defence response, para. 20.

²⁹ Prosecution reply, para. 2.

³⁰ Prosecution reply, para. 4.

³¹ Sabra Defence response, para. 21.

³² Prosecution reply, para. 6.

authorised by the Pre-Trial Judge.³³ The Prosecution is currently reviewing whether redactions ordered remain necessary. No further order is therefore required.

DISCUSSION

14. The Trial Chamber may, in the interests of justice, allow a party to amend its exhibit list, but must balance the Prosecution's interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for trial. The evidence must be *prima facie* relevant and probative, and the Trial Chamber may consider general factors that include: (i) whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage; (ii) the stage of the proceedings; and (iii) whether granting the amendment would result in undue delay.³⁴ Procedural safeguards for admitting statements into evidence under Rule 155 include that a statement must meet the basic requirements for admission into evidence under Rule 149 (C) and, if going to the proof of the acts or conduct of the Accused, may not be admitted without cross-examination.³⁵

A. The exhibit list may be amended

15. The four statements of Witnesses 007, 115, 396, and 661, are already on the exhibit list and are *prima facie* relevant and probative. The new statements primarily replace and clarify existing statements, making them compliant with the Practice Direction. Any new material merely clarifies previous statements. Adding them to the exhibit list will neither delay the proceedings nor prejudice the preparation of the Defence for trial. The Trial Chamber is satisfied that adding the four statements to the exhibit list is in the interests of justice.

B. Admitting witness statements into evidence under Rule 155

i. Witnesses 396 and 661's statements are admissible under Rule 155

16. Witnesses 396 and 661's statements are cumulative of the statements of other witnesses. Their statements are relevant and probative, and therefore admissible under Rule 149 (C). Their evidence does

³³ Prosecution reply, paras 7-8, citing F1884, Order to the Prosecution on Redactions and Written Reasons for Decision on 'Sabra Urgent Request to Lift Redactions', 20 March 2015; STL-11-01/PT/PTJ, F816, Decision on Prosecution's Notice of Disclosure, Application to Authorize Necessary Redactions and Request for Extension of Time, 21 March 2013, paras 26-29; F1016, Decision on Prosecution's Application to Authorise Necessary Redactions dated 8 and 18 March 2013, 25 July 2013, paras 8-10.

³⁴ F1820, Decision on the Prosecution Motion for Admission under Rule 155 of Written Statements in Lieu of Oral Testimony relating to 'Red Network' Mobile Telephone Subscriptions, 19 January 2015, para. 5.

³⁵ STL-11-01/PT/TC F937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, para. 13; F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, paras 7-14.

not relate to the acts and conduct of the Accused. Their statements have sufficient indicia of reliability under Rule 155 (B) and the Practice Direction, and are therefore admissible into evidence without requiring the witnesses to attend court for cross-examination.

ii. Witnesses 007 and 115 must attend for cross-examination

17. The Trial Chamber is satisfied that the statements of Witnesses 007 and 115 are relevant and probative under Rule 149 (C), have sufficient indicia of reliability under both Rule 155 (B) and the Practice Direction, and are thus admissible. Other witnesses are expected to testify about the false claim of responsibility and the telephone calls to Al Jazeera. However, as their proposed evidence *may* go to proof of the acts and conduct of the Accused as charged in the consolidated indictment, their statements may be admitted under either Rule 155 (C) or Rule 156, and the Trial Chamber requires the Prosecution to make both witnesses available for cross-examination. No decision is therefore necessary on the request by counsel for Mr Sabra to admit Witness 115's other statements into evidence.

C. Disclosure of unredacted statements

18. Counsel for Mr Sabra also seek the disclosure of three unredacted statements of Witnesses 007 and 115. As the Prosecution, on the Trial Chamber's query, is reviewing whether the redactions are still required, the Trial Chamber will revisit this issue, if necessary, when the Prosecution has completed this review.³⁶

D. Confidentiality

19. The Prosecution requests maintaining the confidentiality of Witnesses 007, 115 and 661's identities and statements pending the Trial Chamber's decision on its motions for protective measures.³⁷ Although Witness 396 has not sought protective measures, the Prosecution submits that his statement requires redactions to protect the identity of third parties and his personal details.³⁸ The Trial Chamber therefore orders maintaining the confidentiality of the witnesses' identities and statements.

³⁶ Transcript of 4 May 2015, p. 35, lines 15-25, p. 102, lines 2-21.

³⁷ Prosecution motion, para. 16; F1922, Prosecution Motion for Protective Measures for PRH357, PRH149, PRH009, PRH075, PRH063 and PRH661, 23 April 2015; F1943, Prosecution Motion for Protective Measures for PRH006, PRH430, PRH018, PRH007 and PRH115, 11 May 2015.

³⁸ Prosecution motion, para. 16.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS leave to the Prosecution to amend its exhibit list to add the new statements of Witnesses PRH007, PRH115, PRH396 and PRH661, listed in Annex A attached to the Prosecution's motion;

DECLARES admissible under Rule 155 the statements of Witnesses PRH396 and PRH661;

DECLARES admissible either under Rule 155 (C) or Rule 156 the statements of Witnesses PRH007 and PRH115 and orders the Prosecution to make these witnesses available for cross-examination;

DECIDES that it will, at a suitable stage in the proceedings, formally admit the statements into evidence;

ORDERS that the statements of Witnesses PRH007 and PRH115 remain redacted pending the Prosecution completing its review of the redactions; and

ORDERS that Witnesses PRH007, PRH115, PRH396 and PRH 661's identities and statements remain confidential pending a decision on the Prosecution's motions for protective measures.

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

Leidschendam,

The Netherlands

14 May 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

