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 December 2016**
Original language:	**English**
Classification:	**Confidential**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

DECISION ADMITTING STATEMENTS OF WITNESS PRH103 UNDER RULE 158

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Milne

Head of Defence Office:
Mr François Roux

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 Dorothée Le Fraper du Hellen & Mr Jad 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 Guénaël Mettraux & Mr Geoffrey Roberts

INTRODUCTION AND BACKGROUND

1. The Prosecution has moved the Trial Chamber to receive into evidence, under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence, three statements of Witness PRH103, comprising a statement made to Lebanese investigating authorities in 2005 and two statements made to investigators of the United Nations International Independent Investigation Commission (UNIIIC).[1] The statements are relevant to a claim of responsibility for the assassination of the former Lebanese Prime Minister, Mr Rafik Hariri in Beirut on 14 February 2005, made by Mr Ahmed Abu Adass in a video and broadcast shortly after the attack. This is pleaded in the amended consolidated indictment.[2] Rule 158 allows a Chamber to receive the evidence of a witness who is 'unavailable'. The witness is living in a third State and is unwilling to testify.

2. The Defence of Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi, and Mr Assad Hassan Sabra opposed the motion, arguing that the witness is not unavailable and the documents should not be received into evidence.[3]

3. After receiving the motion, the Trial Chamber ordered the Prosecution to obtain further information in relation to the witness's personal circumstances; this was subsequently provided.[4] Counsel for Mr Oneissi responded to these further submissions, imputing bad faith to the Prosecution; and the Prosecution replied, submitting that Defence counsel had breached the relevant Code of Professional Conduct in making unfounded accusation.[5] The Prosecution also filed further submissions asking the Trial Chamber to consider filing a confidential decision, and to issue a redacted public version after hearing any Prosecution application for

[1] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2601, Prosecution Motion to Admit Two Statements and an Interview Transcript of PRH103, 25 May 2016, confidential.
[2] *See*, for example, F2720, Amended consolidated indictment, 12 July 2016, paras 23, 27-29 and 44.
[3] F2619, Mehri Defence Response to "Prosecution Motion to Admit Two Statements and an Interview Transcript of PRH103", 9 June 2016, confidential; F2621, Sabra Defence Response to "Prosecution Motion to Admit Two Statements and an Interview Transcript of PRH103", 9 June 2016, confidential with a confidential annex ('Sabra response'); F2622, Defence for Hussein Hassan Oneissi Response to the "Prosecution Motion to Admit Two Statements and an Interview Transcript of PRH103", Dated 25 May 2016, 9 June 2016, confidential with confidential annexes A to L, ('Oneissi response'); *see also* F2623, Prosecution Consolidated Reply to Sabra Defence and Oneissi Defence Responses to Prosecution Motion to Admit Two Statements and an Interview Transcript of PRH103, 14 June 2016, confidential ('Prosecution consolidated reply').
[4] F2627, Order to the Prosecution regarding a Witness, 28 June 2016, confidential (a public redacted version was filed on the same date); and F2740, Prosecution Further Submissions pursuant to the Order of 28 June 2016, 27 September 2016, confidential.
[5] F2773, Defence for Hussein Hassan Oneissi Response to the "Prosecution Further Submissions pursuant to the Order of 28 June 2016", Dated 27 September 2016, 12 October 2016, confidential ('Oneissi further response'); F2779, Prosecution Reply to Oneissi Defence Response to Prosecution Further Submissions, 14 October 2016, confidential ('Prosecution further reply').

protective measures in respect of the witness's identity.[6] In this submission, the Prosecution, upon the Trial Chamber's request, provided a statement from a Prosecution investigator, Mr Alasdair Macleod, concerning the circumstances of the witness's interview by the UNIIIC in May 2006.[7]

THE EVIDENCE

4. The amended consolidated indictment alleges that, between 22 December 2004 and 17 January 2005, Mr Oneissi and Mr Sabra, under the coordination of Mr Merhi, were responsible for locating a suitable individual to make a false claim of responsibility, on a video, for the attack against Mr Hariri. It further alleges that Mr Oneissi falsely called himself 'Mohammed' and befriended Mr Abu Adass, a young Palestinian man, at the Arab University Mosque of Beirut (the Al-houry Mosque).

5. Further, on 16 January 2005, Mr Abu Adass left his home with Mr Oneissi ('Mohammed'). The following day the Abu Adass family received a call from someone they believed to be Mohammed saying that he was with Mr Abu Adass and their vehicle had broken down near Tripoli. They received another call later claiming that Mr Abu Adass was going to jihad in Iraq and was not returning home. After the attack, on 14 February 2005, Mr Merhi, Mr Oneissi and Mr Sabra acted together to deliver a video of Mr Abu Adass falsely claiming responsibility for the attack, to Reuters and Al-Jazeera news networks in Beirut. It was then broadcast. Mr Abu Adass was never seen again by his family.

6. Witness 103, a Syrian national, was a work colleague of Mr Abu Adass who telephoned him and, several times, visited his home. Based on his telephone contacts, the witness was arrested in Beirut on 16 February 2005 and provided a short statement to the Lebanese investigating authorities. He told them that he had visited Mr Abu Adass about six times, the last time some days before Mr Abu Adass's disappearance.

7. Following his release from Lebanese custody, the witness returned to Syria where, on 21 July 2005, he was arrested and detained by the Syrian authorities. He was detained without charge or trial, it appears, until his release apparently sometime in 2012. On 1 December

[6] F2870, Prosecution Second Further Submissions pursuant to the Trial Chamber Request regarding PRH103, 5 December 2016, confidential.
[7] *See* transcript of 30 November 2016, pp 2-3, transcript of 1 December 2016, p. 67, and witness statement of Alasdair Macleod, 5 December 2016, ERN 60321122-60321125.

2005, investigators from the UNIIIC interviewed the witness at a hotel in Damascus. The Syrian authorities took him to the hotel. He provided a written witness statement.

8. The witness stated that he had visited Mr Abu Adass at his home seven or eight times, that Mr Abu Adass had told him about meeting someone called Mohammed at the mosque, who was sitting alone and did not join the prayers, that Mr Abu Adass could not drive and did not have a mobile telephone. He also described his interactions with Mr Abu Adass and his family. The witness explained that he did not inform the Lebanese authorities about Mohammed for fear that he would be 'liquidated'.

9. The UNIIIC investigators re-interviewed him, at the same hotel, on 22 May 2006. The four hours and sixteen minutes interview was audio-recorded. The witness was informed that the statement was being recorded and could be used in court proceedings and that if he chose to discuss his involvement in any criminal activity he had the right to be assisted by a lawyer of his choice. He did not have a lawyer present during the interview and informed the investigators that he did not think that he needed one as he was just a witness.

10. In the interview, Witness 103 informed the UNIIIC investigators that he had no idea of what had happened to Mr Abu Adass, he had met him two days before his disappearance, and that he assumed from the circumstances that Mr Abu Adass had left with Mohammed. He also described calls with Mr Abu Adass, and his (the witness's) contact with the Abu Adass family after the disappearance. The witness also had no knowledge of the video or that Mr Abu Adass would be in it; he had seen it on television and was shocked. As a result he left Lebanon out of fear that he himself could be accused because of his association with Mr Abu Adass.

11. While in Syrian custody he also provided statements to the Syrian Judicial Commission;[8] the Prosecution does not tender these into evidence, although the Defence of Mr Sabra seek to do so.

12. The witness's detention in Syria was the subject of international reports.[9] He was eventually released from Syrian detention in 2012, and left Syria for a third State.

[8] The Special Syrian Judicial Commission was established by Syrian President legislative decree on 29 October 2005, to deal with all matters relating to the United Nations International Independent Investigation Commission ('UNIIIC'); *see* Yearbook of the United Nations, 2005, Vol. 59, pp 557-558. *See also* F1901, Decision on Prosecution Motion to Amend its Exhibit List and Oneissi Defence Request to Stay the Proceedings, 13 April 2015, para. 25.

13. Mr Macleod, in a statement of 5 December 2016, stated of the UNIIIC interview of May 2006, that the witness initially appeared subdued and avoided eye contact, but after being given some food appeared more relaxed. Mr Macleod noticed no visible signs of physical abuse and the witness made no complaint that he had been physically abused. Had Mr Macleod any reason to suspect such abuse the interview would not have proceeded.

UNAVAILABILITY TO TESTIFY

14. In January 2016, Mr Macleod and another Prosecution investigator, Mr Toby Smith, visited the witness in the third State. He informed them that he had been severely mistreated during seven years of Syrian detention, including beatings, not being properly fed, being held in an underground cell without blankets, seeing people killed and raped in front of him and having prison guards threaten his life. Consequently, the witness was in bad health with detention-related injuries. He had had a 'nervous breakdown'.

15. The witness explained that he had escaped from Syria after his release from prison. He had been imprisoned in Syria only because of his contact with Ahmed Abu Adass. He did not wish to testify and wanted compensation from the Special Tribunal before he would speak to the investigators. He did not want anything to do with the Special Tribunal. Mr Smith provided a statement describing what the witness had told him.

16. The Special Tribunal does not have a relationship with the witness's country of residence that could compel him to testify, and, the Prosecution submits, any attempt to do this may damage his health.

SUBMISSIONS

17. There is no dispute that the evidence is relevant to the case.

Prosecution submissions

18. The Prosecution submits that the evidence is relevant and probative. The statements are reliable, and thus probative. The statement to the Lebanese authorities accorded with the

[9] The witness's detention was the subject of reports by the United Nations Human Rights Council's Working Group on Arbitrary Detention and the non-governmental human rights organisations, Human Rights Watch, Alkarama and Amnesty International. The United Nations Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 24/2010, A/HRC/WGAD/2010/24. *See also* UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum – Situation in Specific Countries Territories, A/HRC/11/41/Add.1, 19 May 2009, ERN D0487282-D0487494, paras. 301, 305. *See also* Human Rights Watch, "Syria: Free Man Falsely Held as Witness", 23 July 2010, ERN D0487279-D0487281, https://www.hrw.org/news/2010/07/23/syria-free-man-falsely-held-witness.

procedures used at the time. Further, the statement to UNIIIC of 22 May 2006—the transcript of the audio-recorded interview is tendered—corrected an incorrect telephone number in the first statement of 1 December 2005, the name of the witness's employer, and how many times he visited the Abu Adass family home.

19. The two UNIIIC statements were made with the assistance of interpretation and the investigators undertook normal procedures to ensure procedural fairness. The witness confirmed that the statements were voluntary and that he did not require legal assistance, and that his evidence was true to the best of his recollection.

20. The evidence is also corroborative of evidence the Trial Chamber has heard concerning the existence of a 'Mohammed' who met Mr Abu Adass in the university mosque in January 2005, that Mr Abu Adass had taught a young man how to pray there, and that on the day of his disappearance someone had called the Abu Adass family home saying that the car had broken down and they were going to bring Mr Abu Adass home later.

21. The evidence does not go to the acts or conduct of an Accused person because the witness only gives hearsay evidence of a conversation related to a person named Mohammed and he does not identify anyone as being that person. In any event, Rule 158 does not preclude the admission of evidence going to the acts and conduct of an Accused person.

22. The Prosecution also requests that the supporting material remain confidential to protect the witness's identity.

23. The Prosecution's further submissions stated that, at the Prosecution's request, officials of the third State had contacted the witness, but that he was still unwilling to testify. An annexed report from a State official detailed communications with the witness by that official, at the Special Tribunal's request. The Special Tribunal does not have a cooperation agreement with that State, and although technically it may be possible to seek one, the Prosecution did not wish to have the witness's testimony compelled.

Defence submissions

24. Counsel for Mr Merhi oppose the motion arguing that the witness is not unavailable, that he is simply unwilling to testify. The evidence is too crucial to the Prosecution's case to allow its admission without cross-examination.

25. Counsel for Mr Oneissi also oppose the motion, arguing that the witness was not unavailable, and had acted in bad faith. The witness did not wish to appear so as 'to avoid any implication in the disappearance of Ahmed Abu Adass and to conceal his involvement with jihadist terrorist cells in Lebanon…'. This submission is then further developed.[10] Further, serious matters relate to the witness's credibility and the probative value of the statements, meaning that the probative value of the statements is substantially outweighed by the need to ensure a fair trial.

26. Counsel for Mr Oneissi responded to the Prosecution's filing in response to the Trial Chamber's order of 28 June 2016 reiterating their arguments that, in light of the further information provided by the authorities of the third State, the witness was not truly unavailable. They sought an order from the Trial Chamber that the Prosecution provide an unredacted copy of the report from the third State official.

27. Counsel for Mr Sabra submitted that the witness was not unavailable within the meaning of Rule 158. An unavailable witness must, in the circumstances here, be a witness subject to interference. The witness must therefore testify orally, or, in the alternative the Trial Chamber must admit into evidence the statements insofar as they relate to five points: (i) that Mr Abu Adass did not know how to drive; (ii) that he had no mobile telephone; (iii) his character, work ethic, beliefs, etc; (iv) his family; and (v) his appearance in the video, plus the entirety of statements the witness made to Syrian and Lebanese authorities (as listed in paragraph 35 of the Defence response).

28. Defence counsel also described the reasons for the witness not wanting to testify as 'self-serving' and based merely upon the statement of a Prosecution investigator.[11] The witness's distress during the interview in January 2016 coincided with his being told that he could not get compensation from the Special Tribunal. Allowing a witness's testimony to be admitted under Rule 158 in these circumstances would create a dangerous precedent of allowing witnesses to hold the Special Tribunal to a state of pecuniary hostage.

Prosecution's reply

29. The Prosecution replied, arguing that the Oneissi Defence was attempting to discredit the witness by impermissibly attempting to use the seven documents as evidence without

[10] Oneissi response, paras 8-15.
[11] Sabra response, paras 24-25.

tendering them into evidence. Further, credibility is not a requirement for the admission into evidence of witness statements, as credibility is assessed at a later stage.[12] Admissibility is distinct from the weight that a Chamber may ultimately give the evidence.[13]

30. Further, Rule 158 did not limit when a witness was 'unavailable'. The Sabra Defence also had impermissibly sought to introduce evidence in a response without addressing its relevance or probative value.

RULE 158 – UNAVAILABLE WITNESSES

31. The Trial Chamber may admit into evidence the statement of a witness who is, for good reason, unavailable to testify. Rule 158[14] allows the Trial Chamber to receive into evidence a written statement or any other reliable record of what a person has said, written or otherwise expressed, or transcript or statement of a person who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify.

32. The Trial Chamber must be satisfied of the person's unavailability and find that the statement was reliable. In considering the application of Rule 149 (D), the Trial Chamber also needs to take into account whether the evidence goes to the acts and conduct of an accused person as charged in the indictment.

33. The Rule does not define 'for good reason otherwise unavailable to testify'. The Trial Chamber has previously held in interpreting this Rule—which differs in wording from its equivalents at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC)[15]—that statements need not be in the form prescribed by

[12] F2100, Decision on Prosecution Motion to Admit the Statements of Deceased Witness PRH045, 24 July 2015 ('Decision of 24 July 2015'), para. 16.
[13] F1890, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 27 March 2015 ('Decision of 27 March 2015'), paras 19, 23.
[14] Rule 158 (A) 'Evidence in the form of a written statement, any other reliable record of what a person has said, written or otherwise expressed, or transcript of a statement by a person who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rules 93, 123, 155, 156 and 157 if the Trial Chamber: (i) is satisfied of the person's unavailability; and (ii) finds that the statement, the record or the transcript is reliable, taking into account how it was made and maintained. (B) In considering the application of Rule 149 (D) to this Rule, the Chamber shall take into account whether the evidence in question goes to proof of acts and conduct of the accused as charged in the indictment.'
[15] ICTY Rule 92 *quinquies* (A) (ii), which allows the admission of written evidence where 'the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion'. Rule 68 (2) (c) of the ICC's Rules of Procedure and Evidence states, 'The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally'. An ICC Trial

Rules 155 and 156 and the relevant practice direction,[16] especially where the relevant statements were made or taken before the Special Tribunal's establishment. If one or more of the indicia of reliability is missing, the Trial Chamber may nonetheless admit the evidence but consider this when determining the ultimate weight to be given to the statement.[17]

34. The Trial Chamber is of the view that Rule 158 is necessarily broad in compass and may include the described circumstances of Witness 103. It is not confined to a witness who has been subject to interference.

35. The broad circumstances here include the combination of the witness's obvious trauma caused by his long detention in a Syrian prison without charge—which appears to relate to his 'connection' with this trial through Mr Ahmed Abu Adass—his unwillingness to testify, the lack of any cooperation agreement with the third State where he resides, and the public policy reasons inherent in not attempting to compel someone to testify in the described circumstances.

36. If his personal circumstances are accurately described by Mr Smith and the international reports—and the Trial Chamber has nothing before it to suggest otherwise—the witness could be considered to be someone 'who is for good reason otherwise unavailable to testify' within the meaning of Rule 158. That being the case, the Trial Chamber could receive his statements into evidence under Rule 158. However, doing so would inevitably diminish the weight that could be given to them.

37. The Defence submissions suggesting that the witness is acting in bad faith are speculative. The mere fact that this witness sought compensation does not lead to this conclusion. In the circumstances, it could be seen as a rational, although not necessarily legal, response to his long incarceration.

Chamber held that it did not consider its decision not to summon a witness to amount to him being 'unavailable' under that Rule; ICC, *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-1325, Decision on Prosecution application under Rule 68 (2) (c) of the Rules for admission of prior recorded testimony of Witness P-0039, 19 May 2016, paras 9-10.

[16] F1953, Decision on Prosecution Motion to Admit the Statements of Deceased Witnesses PRH249 and PRH093, 18 May 2015, para. 3; Decision of 24 July 2015, para. 3; Rule 155 Practice Direction: STL, 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, STL-PD-2010-02, 15 January 2010.

[17] Decision of 27 March 2015, para. 16.

38. The Trial Chamber is therefore satisfied that the witness is 'for good reason otherwise unavailable to testify' within the meaning in Rule 158. Rule 158 appears to be the only mechanism to receive his statements into evidence.

THE RELIABILITY OF THE STATEMENTS

39. The Trial Chamber has carefully examined the three statements and the relevant supporting material, including Mr Macleod's statement. The first statement was taken by Lebanese investigating officials on 16 February 2005. No specific challenge has been made to its reliability by the Defence. Although the witness was under arrest when he made it, he was apparently released shortly afterwards and nothing before the Trial Chamber casts doubt on its reliability. The Trial Chamber is therefore satisfied that it contains the necessary *prima facie* reliability to be probative and thus admissible. It may be admitted into evidence under Rule 158.

40. Counsel for Mr Oneissi pointed out that the Prosecution had withdrawn this statement from its exhibit list. The Prosecution acknowledged this and sought to have it reinstated to the exhibit list.[18] The Trial Chamber finds there is no prejudice to the Defence in permitting this reinstatement—the documents were disclosed in May 2012—and grants the Prosecution's request.

41. The witness was in Syrian custody when he made the other two statements, to the UNIIIC investigators, in December 2005 and May 2006. According to the Prosecution, the UNIIIC only became aware that he was in custody on the day of his interview on 1 December 2005. The statements were not made to the Syrian authorities while he was detained.

42. In January 2016, the witness described to Mr Smith and Mr Macleod how he had been mistreated while in Syrian detention. However, it is unclear when this occurred. According to the witness—via Mr Smith's supporting statement—he was detained for seven years, from July 2005 onwards. The Trial Chamber, however, has no positive evidence that the witness was mistreated before he made either statement to the UNIIIC investigators, nor when the mistreatment occurred. The witness has not provided his own statement to the investigators on this issue. The Trial Chamber does of course recognise that had the witness been mistreated while in custody *before* he gave his two statements to the UNIIIC, given that he was already detained, and had been taken out of detention to provide statements to international

[18] Oneissi response, footnote 1, and Prosecution consolidated reply, para. 12.

investigators, he may not necessarily have told them about his conditions of confinement. He may have been understandably reluctant to inform them about this. But the Trial Chamber has no evidence of this. The only evidence the Trial Chamber has is from Mr Macleod who states that he saw no evidence of physical abuse when he interviewed the witness in December 2005, and adds that he is not qualified to evaluate the witness's psychological state at that time.

43. Moreover, Defence counsel have made no specific submission that the statements were obtained in circumstances casting doubt on their reliability, such as duress, mistreatment, or that they were not voluntarily made. No specific submissions have been made under Rule 149 (D) or Rule 162 that they should be rejected for that reason.[19] In the second UNIIIC interview, there was a long discussion with the witness about whether he needed a lawyer. The witness decided, however, that as he was only a witness, he did not.

44. The Trial Chamber has examined the circumstances of the taking of both UNIIIC statements. Both were made in a hotel in Damascus with the assistance of an interpreter, and in them the witness acknowledged that he was telling the truth to the best of his recollection. Apart from the fact of his detention by the Syrian authorities, nothing in the conduct of the interviews appears to cast any doubt on the reliability of what was said. The witness provided far more information to the UNIIIC investigators—even while he was in Syrian detention—than he was prepared to give to the Lebanese authorities earlier in the same year. The Trial Chamber has considered this in determining whether the statements are sufficiently *prima facie* reliable to admit them into evidence.

45. The Trial Chamber has also carefully examined whether interviews were voluntary. The witness, in his UNIIIC interview and statement—taken with the assistance of interpretation—made the standard declaration that the statement was voluntary, he had not been forced to attend the interview, nor threatened, nor offered any inducements or promises, and that its content was true to the best of his knowledge and recollection. In the second, audio-recorded—and also made with the assistance of interpretation—he told the investigators that he came to the interview 'voluntarily without restraint or reward' and that 'certainly it was voluntarily', and he had no complaints about the way he had been treated by

[19] Rule 149 (D) provides that a 'Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'. Rule 162, 'Exclusion of certain evidence', provides '(A) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. (B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition on torture'.

the UNIIIC investigators before or after the interview. He specified, when asked, that he saw no reason why his lawyer should attend the interview. The Trial Chamber is satisfied from the text of the two documents that the witness voluntarily participated in the interviews and was aware of the requirement to speak the truth.

46. The Trial Chamber has also closely compared the content of the three statements and is satisfied that they are internally consistent. There is no apparent inconsistency between any of the statements, and in the first UNIIIC statement he clarified omissions and mistakes in his prior statement to the Lebanese authorities. And, as described, his latter two statements are far more comprehensive than his first statement.

47. The Trial Chamber is also satisfied, on balance, that the statements do not go directly to the acts and conduct of an accused person as charged in the amended consolidated indictment. The evidence is hearsay, allegedly from Mr Abu Adass himself, of his meeting with someone called Mohammed in the university mosque, but it does not identify any of the Accused as being that person. Witness 103 does not attribute the charged acts to Mr Oneissi. It is also largely corroborated by evidence that the Trial Chamber has already heard. This is something that also adds to its *prima facie* reliability. However, even if it did go to the acts or conduct of an accused person, here Mr Oneissi, the Trial Chamber is satisfied—because of its corroborative nature—that it could be admitted into evidence.

48. The circumstances of the taking of the statements do not impact on the requirements for admissibility, which are met, nor warrant their exclusion.[20] The Trial Chamber is therefore satisfied that the statements and the transcript may be admitted into evidence under Rule 158. However, the Trial Chamber stresses in the circumstances—and most specifically the inability of the Defence to cross-examine the witness—that, ultimately, it must carefully examine the weight to be given to the statements.

[20] Under Rule 149 (D) and Rule 162 (B), evidence that has been obtained under conditions of torture is to be excluded from admission. Article 15 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, provides that 'Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'. In making that determination, a court applies a 'real risk' standard of proof; *see* e.g. Extraordinary Chambers in the Courts of Cambodia (ECCC), *Co-Prosecutors v. Nuon and Khieu*, Decision on Objections to Documents Lists (Full Reasons), Case No. 002/19-09-2007-ECCC/SC, 31 December 2015, paras 55-56; ECCC, *Co-Prosecutors v. Co-Prosecutors v. Nuon and Khieu*, Case No. 002/19-09-2007/ECCC/TC, Decision on Evidence Obtained Through Torture, 5 February 2016, para. 33, and the international human rights law cases cited in these cases. The Trial Chamber has insufficient evidence to determine that there is a 'real risk' that Witness 103's evidence was obtained through the use of torture; and, moreover, no submission has been made that it was.

SABRA DEFENCE REQUEST TO RECEIVE FURTHER DOCUMENTS INTO EVIDENCE

49. Counsel for Mr Sabra also request the Trial Chamber to receive into evidence six other documents—statements made by the witness to Lebanese and Syrian officials. The Prosecution objected to the manner in which the admission was sought, and corrected the description of some documents.

50. Five of the six documents are the product of Syrian interrogations. The documents were most likely produced while the witness was in custody. However, despite this, neither the Prosecution nor Defence counsel have sought to cast doubt on their accuracy, reliability or voluntary nature.

51. Counsel acting for Mr Sabra appear to want the documents tendered to assist their case. Thus, in the circumstances, and in the interests of fairness and for a complete picture—and in the absence of any positive objections from any other Party—the Trial Chamber will admit into evidence five of the documents as described by counsel for Mr Sabra at paragraph 35 of their response, and as corrected by the Prosecution at paragraph 10 of the consolidated reply.

52. They are relevant to the Defence case and the Trial Chamber finds that they have sufficient probative value for the Defence case to be admissible, but as with the other statements, their weight will have to be carefully assessed in the absence of any questioning of the witness. These documents are statements of 22 July 2005, 8 November 2005, 14 January 2006, a report on interrogation by Syrian officials of 1 March 2006 and an undated statement of the witness.

53. The Trial Chamber will not receive into evidence the document described as a summary extract of the witness's statement to the Lebanese authorities of 16 February 2005; the full statement will be admitted into evidence as a Prosecution exhibit.

ONEISSI DEFENCE REQUEST FOR AN ORDER TO DISCLOSE REPORT

54. The Prosecution provided Defence counsel (and the Trial Chamber) with a redacted copy of a report from a third State official, dated 16 August 2016, relating to contact with the witness between 27 July and 10 August 2016. The name of the official and his or her duty

station and identifying details appear to have been redacted. Counsel for Mr Oneissi have sought an order to the Prosecution to disclose the report in an unredacted form.

55. The request, however, is unreasoned. The Trial Chamber sees no justification to make the order and the request is therefore denied.

FURTHER SUBMISSIONS IN RESPONSE TO TRIAL CHAMBER'S ORDER

56. In their response to the Prosecution's filing responding to the Trial Chamber's order of 28 June 2016, counsel for Mr Oneissi alleged that 'everything leads to believe that the Prosecution seeks to take advantage of the witness' obvious bad faith to excuse his appearance in person before the Tribunal and his cross-examination by the Defence'.[21]

57. The Prosecution objected, stating that these 'ill-considered and unfounded accusation of impropriety against Prosecution counsel breaches the Code of Professional Conduct',[22] and pointed out that the Trial Chamber had previously reminded counsel of their obligations under the Code.[23] The Trial Chamber agrees that the submission was unwarranted and no basis was advanced to make it. The Trial Chamber therefore *again* reminds counsel of their duties under the Code. With this in mind, the Head of Defence Office should monitor the content of filings to ensure that they do not breach the Code. In the Trial Chamber's view, Defence counsel should withdraw their offending submission.

CONFIDENTIALITY

58. This decision is filed confidentially to allow the Prosecution to file an application under Rule 133 for protective measures for the witness. Depending upon any decision under Rule 133, a redacted version may follow. In the interest of maintaining a public trial, the Parties are required to file redacted versions of their filings after the statements have been received into evidence, and the Trial Chamber has decided on any application for protective measures.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

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[21] Oneissi further response, para. 12.
[22] Prosecution further reply, para. 2, referring to STL, A Code of Professional Conduct for Counsel appearing before the Tribunal, 28 February 2011, articles 1 (a) – (c), 6 (e), 9, and 26-29.
[23] F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 pursuant to Rule 155, 12 July 2016, paras 21-24.

DECLARES admissible under Rule 158 the statements of Witness 103 of 16 February 2005, 1 December 2005 and the transcript of the audio-recorded interview of 22 May 2006—with the exception of the portions identified at paragraphs 7 and 8 of the Prosecution motion;

DECLARES admissible in the Defence case of Assad Hassan Sabra the statements of Witness 103 to Syrian authorities as described in paragraph 35 of the Sabra Defence response, namely, statements of 22 July 2005, 8 November 2005, 14 January 2006, a report on interrogation by Syrian officials of 1 March 2006 and an undated statement;

DECIDES that it will, at a suitable stage in the proceedings, formally admit these documents into evidence and assign them exhibit numbers;

PERMITS the Prosecution to restore the statement of 16 February 2005 to its exhibit list;

DENIES the request by counsel for Mr Hussein Hassan Oneissi to order the Prosecution to disclose an unredacted report, as described in paragraph 54;

ORDERS the Parties to file public redacted versions of their filings when the statements have been received into evidence, and after the Trial Chamber has decided any application for protective measures under Rule 133; and

AGAIN REMINDS DEFENCE COUNSEL of their duties under the Code of Professional Conduct for Counsel appearing before the Tribunal, 28 February 2011, and in particular, articles 1 (a) – (c), 6 (e), 9, and 26-29.

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

Leidschendam,
The Netherlands
12 December 2016

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy