

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: 28 April 2017

Original language: English

Classification: Public

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

**DECISION ON ‘PROSECUTION MOTION TO ADMIT
THE STATEMENT OF PRH024 UNDER RULE 158’ –
WITH PARTIALLY DISSENTING OPINION OF JUDGE DAVID RE**

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Mr Norman Farrell & Mr Alexander Milne

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Participating Victims:**
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Counsel for Mr Assad Hassan Sabra:
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INTRODUCTION AND BACKGROUND

1. The Prosecution seeks to have admitted into evidence the statement of a witness it submits is ‘unavailable’ to appear for cross-examination, as required by the Trial Chamber.¹
2. Witness PRH024, a relative of the Accused, Mr Assad Hassan Sabra, provides evidence about mobile telephones that the Prosecution attributes to Mr Sabra, including ‘Purple 018’. Specifically, in a 2010 statement to Prosecution investigators, he gave his own mobile numbers (one of which he shared with a family member), Mr Sabra’s number and those of other family members. The witness also provided information about Mr Sabra’s wife and the Sabra family address, and identified Mr Sabra from a photograph.²
3. The Prosecution alleges that the witness’ numbers and the Sabra family numbers were in contact with numbers it attributes to Mr Sabra, and that these numbers are therefore relevant to attributing three numbers to Mr Sabra. When interviewed by Prosecution investigators, however, the witness could not recall an SMS³ message sent in 2005 from his number to one that the Prosecution attributes to Mr Sabra.⁴
4. The witness was on the Prosecution’s witness list⁵ and, between January and April 2015, the Prosecution unsuccessfully attempted to contact him via telephone several times and repeatedly sought, through the Lebanese Prosecutor General’s Office, to secure the witness’ attendance at the Beirut Office for a further interview. The witness failed to attend scheduled interviews at the Beirut Office in February and April 2015.⁶
5. On 12 July 2016, on a Prosecution motion to admit the witness’ statement into evidence without cross-examination, the Trial Chamber decided, under Rule 155 (C) of the

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2977, Prosecution Motion to Admit the Statement of PRH024 under Rule 158, 6 February 2017 (confidential with confidential annex) (‘Prosecution motion’); F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 pursuant to Rule 155, 12 July 2016 (‘Decision of 12 July 2016’).

² Transcript of Audio Recording of Witness PRH024’s Interview, 21 October 2010, ERN 60185417_TS_D_AR_EN (‘Transcript of Witness 024’s interview’); Investigators Notes from Witness PRH024’s Interview, 21 October 2010, ERN 60185411-60185424D (‘Investigators notes from Witness 024’s interview’).

³ Short Message Service.

⁴ Transcript of Witness 024’s interview, pp 39-47; Investigators notes from Witness 024’s interview, at 60185424D, para. 20.

⁵ STL-11-01/PT/PTJ, F0534, Prosecution’s Submission pursuant to Rule 91, Annex B – Witness List, 15 November 2012 (confidential), p. 7, table entry no. 22; STL-11-01/T/TC, F1444, Prosecution Submission of Consolidated Indictment, Witness and Exhibit Lists, Annex C – Consolidated Witness List, 7 March 2014 (confidential), p. 5, table entry no. 29; F2626, Prosecution Notice of Updated Revised Witness List, Annex A – List of Remaining Witnesses as at 20 June 2016 (confidential), p. 2, table entry no. 13.

⁶ Statement of Witness PRH312, 22 March 2016, ERN 60316967-60316986, paras 9-15.

Special Tribunal's Rules of Procedure and Evidence, that his statement could be admitted into evidence but that he would have to be made available for cross-examination.⁷

6. The Prosecution then contacted the witness several times, via telephone and through the Lebanese authorities, to arrange his attendance for cross-examination via video-conference link from the Beirut Office. During these telephone conversations, the witness told a Prosecution investigator that he was unwilling to interact with the Special Tribunal until he had received clearance from the Hezbollah Security Committee, and that any requests from the Special Tribunal should be referred to the Committee or Mr Hajj Wafic Safa, the Head of Hezbollah's Central Unit for Liaison and Coordination.⁸ The witness also failed to attend the Beirut Office at the time designated for his cross-examination; this was even after the Lebanese Internal Security Forces, at the Prosecution's request, sought his attendance through the Central Security Committee of Hezbollah and the latter advised the Internal Security Forces that the witness had been informed of the time and date of the hearing. When contacted by a Prosecution investigator to confirm that he had been informed by the Committee of the date and time of the hearing, the witness stated that he had not.⁹

7. Consequently, on 28 September 2016, on a Prosecution motion, the Trial Chamber issued a summons requiring the witness to testify by video-conference link from the Beirut Office 'on 31 October 2016 or by 31 October'.¹⁰ As this date was approaching, and the Trial Chamber had yet to receive information on whether the summons had been served, on 27 October 2016 it authorised the Prosecution to contact the witness directly to secure his attendance.¹¹

8. That same day, the Registrar informed the Trial Chamber that the Lebanese Directorate General of Internal Security Forces had been unable to serve the summons on the witness. Specifically, the Lebanese authorities had unsuccessfully attempted to contact the witness via telephone and had attended his registered address, confirmed by the appropriate

⁷ Decision of 12 July 2016, disposition. Rule 155 allows the Trial Chamber to admit in lieu of oral testimony the evidence of a witness in the form of a written statement or transcript, which goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment; under Rule 155 (C), the Trial Chamber decides whether to require the witness to appear for cross-examination.

⁸ See e.g. Letter from the Lebanese Ministry of Justice to the Prosecutor of the Special Tribunal, 17 August 2010, ERN 60177667-60177668; in this letter, the Lebanese Public Prosecutor at the Court of Cassation refers to 'Mr Hajj Wafic Safa' as the 'head of the central unit for liaison and coordination in Hezbollah'.

⁹ Statement of Witness PRH312, 16 September 2016, ERN 60319886-60319889, paras 8-13.

¹⁰ F2743, Decision on Prosecution Application for a Summons to Appear for Witness PRH024 and Order Issuing a Summons for a Witness, 28 September 2016 (confidential) (annex A – Order Issuing Summons for a Witness), p. 1.

¹¹ F2795, Authorisation to Prosecution to Contact Witness PRH024, 27 October 2016 (confidential).

mukhtar (local mayor), but found no one at that address on whom to serve the summons. The *mukhtar* also stated that the witness did not live permanently at that address and had no further information on his whereabouts.¹²

9. The Prosecution then informed the Trial Chamber that the Lebanese Prosecutor General had informed it that the Lebanese General Directorate of General Security had no record of Witness 024's movement in or out of Lebanon between 1 August and 19 November 2016.¹³

10. Consequently, on 6 February 2017, the Prosecution moved the Trial Chamber to admit Witness 024's statement into evidence as an 'unavailable' witness, under Rule 158, without cross-examination, arguing that he 'can no longer with reasonable diligence be traced'.¹⁴ Counsel for Mr Sabra responded and the Prosecution replied.¹⁵

11. On 9 March 2017, the Trial Chamber asked the Prosecution to provide an 'update as to the witness's unavailability' and 'what, if any, further attempts have been made to locate the witness'.¹⁶ A Prosecution investigator, Witness PRH539, then unsuccessfully attempted to telephone the witness; a few minutes later, the witness returned the call from a landline number. He told the investigator that he is a member of Hezbollah and was unwilling to interact with the Special Tribunal without the permission of Mr Safa and the Hezbollah Security and Liaison Committee. He was only in Lebanon for two days, before returning to Syria, and he would change his mobile SIM card to prevent future contact with the Special Tribunal. The full content of this conversation was brought to the Trial Chamber's attention via Witness 539's statement, made and disclosed on 9 March 2017.¹⁷

12. Based on this information, the Trial Chamber, acting *proprio motu*, immediately issued another summons for Witness 024, requiring him to attend the Beirut Office on

¹² F2794, Registry Submission pursuant to Rule 48(C) in relation to the Service of the Summons to Appear for Witness PRH024, 27 October 2016 (confidential), para. 4 and annex A.

¹³ Case management meetings of 31 October 2016 and 14 December 2016; Email of 1 December 2016 from Prosecution Trial Counsel to Trial Chamber Legal Officer and the Parties and other participants.

¹⁴ Prosecution motion, para. 1.

¹⁵ F3007, Response to "Prosecution Motion to Admit the Statement of PRH024 under Rule 158", 21 February 2017 (confidential) ('Sabra response'); F3016, Prosecution Reply to Sabra Defence Response to Prosecution Motion to Admit the Statement of PRH024 under Rule 158, 27 February 2017 (confidential) ('Prosecution reply').

¹⁶ Transcript of 9 March 2017, pp 3-4.

¹⁷ Statement of Witness PRH539, 9 March 2017, ERN 60321720-60321723, paras 8-17. The statement was subsequently formally filed by the Prosecution on 15 March 2017, at the Trial Chamber's request; see Transcript of 13 March 2017, p. 2.

10 March 2017 at 9:00 a.m. (Beirut time) to testify via video-conference link.¹⁸ The summons was filed at 14:47 p.m. on 9 March 2017 (Central European time).

13. That same day, the Registry delivered the documents and ‘accompanying correspondence providing instructions’ to its officials in the Beirut Office. However, the designated Lebanese Government representatives could not meet with the Registry officials until 10 March 2017. The summons was hand delivered to them at 10:10 a.m. (Beirut time) on 10 March 2017.¹⁹ On 14 March 2017, the Registry informed the Trial Chamber that it had received no further information from the Lebanese Government regarding service of the summons on the witness, nor had its officers received responses to telephone inquiries made to the relevant Lebanese Government officials.²⁰ On 15 March 2016, the Prosecution filed further submissions regarding its request under Rule 158, in light of the new developments.²¹ The Sabra Defence declined to respond.²²

14. On 4 April 2017, the Registry filed further submissions forwarding correspondence dated 17 March 2017, received from the Lebanese Ministry of Justice, documenting the Directorate General of Internal Security Forces’ attempts to serve the second summons on the witness.²³ Specifically, the correspondence and attached documents detail how:

- (i) on 10 March 2017, the documents were received by the Ministry of Justice, which passed them on to the Prosecutor General, who then in turn passed them on to the Internal Security Forces; the latter confirmed receipt of the documents at 17:00 p.m.;

¹⁸ F3027, Order Issuing a Summons for a Witness, 9 March 2017 (confidential). The Trial Chamber also requested the Registry to file submissions on the service of the second summons and requested the Prosecution and the Defence to file further submissions with regard to the Prosecution’s request under Rule 158, in light of recent developments.

¹⁹ F3035, Registry Submission pursuant to Rule 48(C) in Response to the Trial Chamber’s Order of 13 March 2017, 14 March 2017 (confidential) (‘Registry submission of 14 March 2017’), paras 8-9. It was not specified in the submissions whether the delivery time of ‘10:10 a.m.’ refers to Beirut time or to Central European time.

²⁰ Registry submission of 14 March 2017, para. 9.

²¹ F3039, Prosecution Further Submissions to its Motion to Admit the Statement of PRH024 under Rule 158, 15 March 2017 (confidential). The Trial Chamber had requested Prosecution and Defence counsel to file such further submissions; *see* Transcript of 13 March 2017, pp. 2-3.

²² Email of 16 March 2017 from counsel for Mr Sabra to Trial Chamber Legal Officers.

²³ F3056, Addendum to “Further Registry Submission pursuant to Rule 48(C) in Response to the Trial Chamber’s Order of 13 March 2017”, 4 April 2017 (confidential with confidential annex A) (‘Addendum to Registry further submission of 29 March 2017’); *see also* F3056, Further Registry Submission pursuant to Rule 48(C) in Response to the Trial Chamber’s Order of 13 March 2017, 29 March 2017 (confidential with confidential annex A) (‘Registry further submission of 29 March 2017’).

- (ii) on 11 March 2017, the Internal Security Forces ascertained that the witness was not at his place of residence;
- (iii) on an unspecified date, the Internal Security Forces, after placing multiple calls to a telephone number belonging to the witness, ascertained that it was ‘constantly turned off’;
- (iv) as of 11 March 2017, the Internal Security Forces attempted to call the landline number from which the Prosecution investigator received Witness 024’s call on 9 March 2017, ascertaining that it immediately rejected calls from landlines and mobile telephones;
- (v) at an unspecified date, the Internal Security Forces asked the *mukhtar* of the witness’ village whether he knew who this landline number belonged to and who used it—he said that he did not know. The *mukhtar* advised that there was an internally operating telephone exchange in the village, but did not know whether this telephone number belonged to that exchange. The *mukhtar* also said that there was no way of verifying the number’s owner and user unless Ogero²⁴ was contacted and asked to provide such information. The Internal Security Forces refrained from taking this course of action in view of the confidential nature of the request for assistance, and noted on 16 March 2017 that, to date, it had been unable to get through to this telephone number; and
- (vi) at 12:00 p.m. on 13 March 2017, the Internal Security Forces went to the witness’ village to serve the documents on him in person, and ascertained that he was not in the village and that his residence was locked with no one inside. Officials then asked the *mukhtar* about the witness, who stated that he had not seen the witness in the village for a few months, particularly during local community events, and that the witness’ whereabouts and place of residence were not known to him.

15. On 13 April 2017, the Prosecution filed its second further submissions, detailing in particular the attempts made to call the landline number used by the witness to contact the Prosecution on 9 March 2017, following a 16 March 2017 Trial Chamber request to ascertain whether the Lebanese authorities had considered the location of this landline number when

²⁴ Ogero is the main operator of the fixed telecommunications network in Lebanon since 1972, and is the company responsible for the administration of telephone landlines and two prepaid calling card systems; F2894, Decision on the Admission of the Consolidated Ogero Statement, 7 December 2016, para. 3.

serving the second summons. In a 6 April 2017 statement, Prosecution investigator Witness PRH448 explained that, on 16 March 2017, he dialled the landline number and was initially unable to connect; on his fifth attempt, he heard an automated response in Arabic, French and English, stating that the number is incorrect. The Prosecution also states that ‘Ogero [...] could not provide an address’ for the landline number.²⁵

RULE 158 – ‘UNAVAILABLE PERSONS’

16. Under Rule 158, the Trial Chamber may receive into evidence the statement of a witness who is ‘unavailable’. Rule 158 provides:

(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.

17. The Trial Chamber has previously ruled on the unavailability of an untraceable witness, under Rule 158. The witness in question is of Syrian nationality, but had explained in his statement that he lives in Beirut. The Trial Chamber found that, in light of this fact and the instability in Syria, the Prosecution had been reasonable and diligent in its efforts to trace the witness by inquiring with the Lebanese authorities only about the witness’ whereabouts, and being informed that they have no information about the witness in question. Consequently, the Trial Chamber was satisfied of the witness’ unavailability.²⁶

²⁵ F3083, Prosecution Second Further Submissions to its Motion to Admit the Statement of PRH024 under Rule 158, 13 April 2017 (‘Prosecution second further submissions’), paras 1-2, 20-22; Statement of Witness PRH448, 6 April 2017, ERN 60322937-60322940

²⁶ F1890, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 27 March 2015, para. 17.

SUBMISSIONS

Prosecution motion

18. The Prosecution submits that the witness is ‘unavailable’ for cross-examination as he ‘can no longer with reasonable diligence be traced’, and argues that it was diligent in its attempts to trace him. Following the Trial Chamber’s 12 July 2016 decision requiring Witness 024 to be cross-examined, Prosecution investigator Witness PRH312 had a telephone conversation with the witness, who reiterated his unwillingness to interact with the Special Tribunal before receiving clearance from the Central Security Committee of Hezbollah. That was the Prosecution’s last contact with the witness, and previous attempts to meet with him had been unsuccessful.²⁷

19. Moreover, following the Trial Chamber’s 28 September 2016 decision issuing a summons to appear for the witness, the Lebanese authorities tried to contact or locate the witness, but were unsuccessful in serving the summons. Specifically, telephone contacts were unsuccessful and there was no one on whom to complete service at the witness’ confirmed address. Moreover, the *mukhtar*, while confirming the address as accurate, pointed out that the witness did not live there permanently and that he had no additional information on his location. The Prosecution also unsuccessfully attempted to contact the witness in order to facilitate his testimony, following the Trial Chamber’s authorisation to do so. Finally, in response to a Prosecution request for assistance, the Lebanese authorities stated that there was no recorded movement of the witness from or to the Lebanese territory between 1 August and 19 November 2016. Thus, Witness 024’s statement and related documents can be admitted under Rule 158.²⁸

20. The Trial Chamber has found Witness 024’s statement relevant and probative to attributing mobile telephone numbers to Mr Sabra, including ‘Purple 018’.²⁹ Cross-examination was ordered to address the Sabra Defence’s claim that part of the witness’ statement affects the Prosecution’s allegation that a SMS sent to ‘Purple 018’ from the witness’ telephone number was addressed to Mr Sabra, something which the witness says he cannot recall; however, the Trial Chamber may take the lack of cross-examination into account in determining the weight of that portion of the statement. Moreover, the Trial

²⁷ Prosecution motion, paras 2-3.

²⁸ Prosecution motion, paras 2-3.

²⁹ F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 pursuant to Rule 155, 12 July 2016 (‘Decision of 12 July 2016’), para. 30.

Chamber has already found that the statement contains the necessary indicia of reliability for admission under Rule 155, which equally applies for the requirements of Rule 158 (A) (ii). Finally, Rule 158 (B) is inapplicable as the Trial Chamber found that the witness' evidence goes to proof of matters other than the acts and conduct of the Accused as charged in the indictment.³⁰

Sabra Defence response

21. Counsel for Mr Sabra take no position on Witness 024's unavailability, but oppose the Prosecution's request, arguing that the circumstances underlying the Trial Chamber's decision on cross-examination have not changed. In their submission, the witness' evidence remains so critical to the Prosecution's case against Mr Sabra that it would be unduly prejudicial to admit his statement without cross-examination. Contrary to the Prosecution's contention, the Trial Chamber is not seized only of the issue of his unavailability. Rather, it must consider the general admissibility requirements under Rule 149 (C) and (D), including whether the evidence's probative value is substantially outweighed by the need to ensure a fair trial, as held in *Tolimir* before the International Criminal Tribunal for the Former Yugoslavia (ICTY). Moreover, when determining whether the statement should be excluded under Rule 149 (D), the Trial Chamber must consider, as held in *Prlić*, whether the statement goes to the Accused's acts and conduct or involves critical evidence.³¹

22. The Trial Chamber required Witness 024's cross-examination because his evidence is critical to the Prosecution's attribution of three numbers to Mr Sabra. The evidence of three other witnesses, relevant to the attribution of Purple 018 to Mr Sabra, was admitted without cross-examination, in particular because this evidence was mostly cumulative of Witness 024's evidence, whereby the Defence could 'properly test the credibility and reliability of Witness 024'.³² The Prosecution's request under Rule 158 neither negates the evidence's significance nor automatically removes the circumstances necessitating cross-examination. As held in *Karemera*, an International Criminal Tribunal for Rwanda case, there

³⁰ Prosecution motion, paras 4-7.

³¹ Sabra response, paras 2-8, citing ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Prosecution's Motion for Admission of Evidence pursuant to Rule 92 quater, 25 November 2009, para. 28 and fn. 61; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement pursuant to Rule 92 quater of the Rules (Hasan Rizvić), 14 January 2008, para. 13 and fn. 15.

³² Decision of 12 July 2016, para. 43.

is no legal basis to lower the threshold applicable under Rule 155 (C) for the admission of statements, simply because a witness becomes unavailable.³³

23. Moreover, Witness 024's cross-examination has become even more critical. First, the Trial Chamber admitted into evidence the statements of three witnesses on the conditional basis that Witness 024 would be called for cross-examination and later admitted into evidence the statements of four other witnesses on the understanding that it had ordered the cross-examination of Witness 024, the only remaining witness who could be cross-examined on the attribution of the "alleged Sabra phones". Second, the Prosecution intends to withdraw the only two remaining witnesses able to testify directly on the attribution of numbers to Mr Sabra. Third, the Defence has repeatedly elected not to oppose the admission, under Rule 154,³⁴ of evidence pertaining to the attribution of numbers to Mr Sabra, on the express condition that it would test the reliability and credibility of this attribution through witnesses who could give first-hand testimony, in particular the admission of 11 written records whose accuracy would have been challenged during Witness 024's cross-examination. It would thus be unfair to admit Witness 024's statement under Rule 158, as it would prevent the Defence from effectively challenging 58 exhibits already on the case record following its conditional lack of formal objection, and because the Defence has made tactical decisions relying on the Trial Chamber's ruling.³⁵

24. Finally, the Defence will have no further opportunity to test the core facts of the Prosecution's case against Mr Sabra. Of the 11 witnesses relied on in Prosecution analyst Mr Andrew Donaldson's attribution report,³⁶ seven have had their evidence admitted without cross-examination, and another three have been or will be withdrawn. If Witness 024's evidence is admitted without cross-examination, the Defence will be unable to challenge any other witness with direct knowledge of both the SMS of 20 January 2005 sent to Purple 018

³³ Sabra response, paras 9-14.

³⁴ Rule 154 states that: 'Subject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149 (C) and (D).'

³⁵ Sabra response, paras 15-18.

³⁶ Report of Andrew Donaldson, Evidence of Telephone Attribution – Assad Hassan Sabra, Version 3, 13 November 2015, ERN D0481216-D0481351. A telephone attribution report examines evidence regarding the attribution of one or more mobile telephone numbers to one or more of the Accused or Mr Mustafa Amine Badreddine; *see* F1852, Decision on Prosecution Motion to Add Four Items to the Exhibit List, 13 February 2015, para. 11, fn. 22.

and the reliability of the Prosecution's attribution of third party contacts and its geographical profiling of the mobiles allegedly used by Mr Sabra.³⁷

25. This cannot be properly tested through alternative oral evidence, for instance through Mr Donaldson's testimony, as his evidence is strictly limited to describing the sources relied on and the Prosecution's attribution methodology. He cannot confirm first-hand the accuracy of the attribution of telephone numbers to Mr Sabra or to others, or the reliability of the SMS of 20 January 2005.³⁸

26. The Prosecution seeks to lead untested evidence to corroborate already admitted untested evidence, contrary to ICTY case law. The Trial Chamber must ensure that findings which are indispensable for a conviction do not rest solely or decisively on untested evidence, and must actively prevent the Prosecution from inundating it with critical material which will remain unchallenged and therefore have minimal evidentiary value.³⁹

Prosecution reply

27. The Prosecution submits that the evidence's importance to its case and the Trial Chamber's previous order for cross-examination do not require the statement's exclusion under Rule 149 (D), but rather they affect its weight. Rule 158 (B) requires the nature of the evidence to be taken into account when it goes to the Accused's acts and conduct; even then, this does not bar admission. The Trial Chamber has already determined that Witness 024's evidence does not go to the Accused's acts and conduct. The nature of his evidence and the fact that he cannot be traced for cross-examination are factors to consider when assessing the evidence's weight, on which the Sabra Defence will be allowed to make submissions at the appropriate stage, thereby ensuring a fair trial.⁴⁰

28. According to the Prosecution, the ICTY and ICTR case law cited in the response⁴¹ does not support the Sabra Defence's arguments. In the *Prlić* and *Tolimir* decisions, ICTY Chambers admitted the evidence of deceased witnesses, some of which went to the respective accused's acts and conduct, and stated that the lack of cross-examination would go to the evidence's weight. The *Karemera* decision directly contradicts these ICTY decisions by

³⁷ Sabra response, paras 19-20.

³⁸ Sabra response, para. 21.

³⁹ Sabra response, paras 22-23, citing ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015, para. 1226.

⁴⁰ Prosecution reply, paras 1, 3-4.

⁴¹ Sabra response, fns 5-6, 14-15.

declining to admit into evidence the statement of a deceased witness who had previously been required to attend for cross-examination. However, the analysis in *Karemera* is sparse and conflicts with *Prlić* regarding the autonomy of the rule governing the admission into evidence of the statements of unavailable witnesses. The Prosecution argues that a different assessment is necessary under Rule 158 compared to Rule 155. An unavailable witness cannot be cross-examined, so making this a requirement under Rule 158 would limit its applicability to situations where no cross-examination is sought. The assessment under Rule 158 remains rigorous by requiring the witness' unavailability and the evidence's reliability.⁴²

29. The Sabra Defence also incorrectly represents the Trial Chamber's decisions on the admission of the evidence of seven witnesses because: (i) it fails to substantiate its claim, regarding the 12 July 2016 decision, that the admission into evidence of three witness' statements was conditional on Witness 024's cross-examination; and (ii) while the Trial Chamber acknowledged, in its 22 September 2016 decision, that Witness 024's cross-examination was required, it declined to defer the admission into evidence of two other witnesses' evidence until after Witness 024's cross-examination, and observed that the Sabra Defence did not seek to cross-examine the remaining two witnesses.⁴³

30. Counsel for Mr Sabra may still interview or call the three witnesses whom the Prosecution intends to withdraw. Furthermore, its tactical decisions to withhold objections to 58 previously tendered exhibits in reliance on Witness 024's attendance, the Sabra Defence could have raised objections to the evidence, if warranted, while awaiting Witness 024's cross-examination. It has not cited any legal support for its conditional lack of objection to these admitted exhibits, nor identified the 58 exhibits in question; in any event, this condition is not endorsed in any of the admissibility decisions.⁴⁴ Finally, the Sabra Defence has not shown that Witness 024 can give 'first-hand and direct testimony' on these 58 exhibits.⁴⁵

31. The Prosecution also objects to the Sabra Defence filing its response a day late, without the Trial Chamber's permission or an explanation.⁴⁶

⁴² Prosecution reply, paras 5-7.

⁴³ Prosecution reply, para. 8.

⁴⁴ Referring to the decisions listed in Sabra Response, fn. 22.

⁴⁵ Prosecution reply, paras 1, 9-12.

⁴⁶ Prosecution reply, para. 2.

Prosecution's first and second further submissions

32. In the first of its further submissions, the Prosecution maintains its original submissions regarding Witness 024's unavailability and sets out the attempts made to date to make him available for cross-examination. Moreover, it suggests that the Trial Chamber could enquire whether the address associated with the landline number used by the witness on 9 March 2017, previously unknown to the Prosecution, was considered by the Lebanese authorities when attempting to serve the 9 March 2017 summons. If this was not done, the Trial Chamber could consider further steps, such as issuing another summons to be served at that address.⁴⁷

33. In the second of its further submissions, the Prosecution maintains its position that it has been diligent in attempting to trace the witness. It sets out its unsuccessful attempts to date, and details the actions taken following the 16 March 2017 Trial Chamber request to ascertain whether the Lebanese authorities had considered, when serving the second summons, the location of the landline number used by the witness to contact the Prosecution on 9 March 2017.⁴⁸

DISCUSSION

34. The Trial Chamber has already decided that the witness' evidence is relevant, and there is no issue regarding its probative value and therefore its admissibility under Rule 149 (C).⁴⁹ The Trial Chamber has also determined that the statement goes to proof of matters other than the Accused's acts and conduct as charged in the amended consolidated indictment.⁵⁰ Therefore, the issue for determination is whether Witness 024 is 'unavailable', as 'untraceable', under Rule 158.

35. The Trial Chamber, by majority, is satisfied that Witness 024 is unavailable under Rule 158, as all diligent steps to trace him have been taken by the Prosecution, as the Party seeking admission of his statement into evidence, and by the Trial Chamber acting on the Prosecution's motion and of its own volition (*proprio motu*). The admission of a statement into evidence under Rule 158 does not require that the witness is *permanently* unavailable.⁵¹

⁴⁷ Prosecution further submissions, paras 2, 4-18.

⁴⁸ Prosecution second further submissions, paras 1-22.

⁴⁹ Decision of 12 July 2016, para. 30.

⁵⁰ Decision of 12 July 2016, paras 32-35.

⁵¹ ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Decision Admitting the Prior Statements of Ljubiša Petković pursuant to Rule 92 *quater* of the Rules, 6 November 2008 ('Šešelj Decision'), p. 3.

Therefore, the Prosecution's ability to continue to seek his attendance for cross-examination at some unknown point in the future, or the Trial Chamber's ability to continue to issue summonses for his attendance, do not bar the admission of his statement into evidence at this advanced stage of the proceedings.

36. Witness 024's unwillingness to appear for cross-examination is clear. On each of the numerous occasions when the Prosecution contacted him following his initial interview, the witness stated that he is unwilling to interact with the Special Tribunal unless this is cleared by Mr Safa or Hezbollah's Security Committee. This has been the witness' consistent position over a number of years, most recently expressed on 9 March 2017. In addition, when the 'necessary' clearance was sought by the Lebanese judicial authorities and apparently granted by Hezbollah's Security Committee, the witness stated that he had not been contacted by the Committee and subsequently failed to attend the Beirut Office at the required time. However, the witness' unwillingness to appear for cross-examination does not in itself satisfy the unavailability requirement under Rule 158.

37. Rather, the Trial Chamber finds the following factors determinative of Witness 024's unavailability by reason of being untraceable. First, the Trial Chamber has already issued two summonses for his attendance for cross-examination, one on the Prosecution's motion and one acting *proprio motu*, neither of which has been successfully served. Regardless of whether this was due to delays or deficiencies in the various service attempts, the salient fact is that both the Prosecution and the Trial Chamber diligently attempted to secure the witness' attendance for Defence cross-examination. In these circumstances, it is reasonable to conclude that attempts to serve any future summonses would be equally unsuccessful, making this avenue for securing the witness' attendance effectively exhausted, unless circumstances change substantially in the near future.

38. Second, the evidence suggests that, in all likelihood, the witness no longer lives at his registered address in Lebanon, or at the very least that this is no longer his habitual residence. Rather, he may live or be based in Syria. No further information is available regarding his address or whereabouts outside of Lebanon, and it seems unlikely that further information would be forthcoming in the near future. This supports the finding that it is unlikely that the witness would be traced in the near future for the purpose of being served with a summons to appear or otherwise compelled or convinced to appear for cross-examination.

39. Third, although until recently the Prosecution could contact the witness with reasonable success via telephone, his most recent conversation with a Prosecution investigator suggests that this will no longer be the case. On 9 March 2017, the witness said that he would dispose of his mobile SIM card to avoid being contacted by the Special Tribunal. When subsequently attempting to call this number, the Lebanese authorities ascertained that it was not operating; the same was true of the landline from which the witness' call of 9 March 2017 was made. This suggests that the witness is most likely not contactable on these two telephone numbers.

40. In light of these circumstances, the Trial Chamber—by majority, with Judge Re dissenting on this issue—is satisfied that Witness 024 cannot with reasonable diligence be traced and is therefore unavailable within the meaning of Rule 158. His statement can therefore be admitted into evidence. Nevertheless, should he become available during the course of the trial, he must appear for cross-examination by the Defence. For this reason, the Prosecution must continue, with the assistance of the Lebanese Government, its diligent efforts to secure the witness' attendance during the course of the trial.⁵²

41. Regarding the Sabra Defence's arguments on the prejudicial effect of the lack of cross-examination for Witness 024, the Trial Chamber agrees with the Prosecution's assessment that, if the absence of cross-examination of a witness were to be considered a bar to the admission of that witness' statement under Rule 158, the rule would be rendered almost entirely ineffectual. Rather, the rule's rationale clearly encompasses the admission into evidence of statements without cross-examination. In accordance with ICTY case law, the absence of cross-examination in the context of Rule 158 will go to the statement's weight, but does not bar its admission under this rule.⁵³

42. The Sabra Defence also raises its inability to cross-examine any witnesses in relation to certain pieces of evidence. Again, the Defence's inability to test certain evidence through cross-examination goes to that evidence's weight. Any prejudice potentially arising from this inability to test the evidence is addressed by the general evidentiary principle that a conviction

⁵² *Šešelj* Decision, p. 4; ICTY, *Prosecutor v. Đorđević*, IT-0587/1-T, Transcript of 28 October 2009, pp 9325-9327.

⁵³ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Public Redacted Version of "Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence pursuant to Rule 92 *quater*", Filed Confidentially on 18 December 2008, 19 February 2009, para. 46.

cannot rest solely or decisively on insufficiently corroborated untested evidence.⁵⁴ The Trial Chamber is always mindful of the need to ensure a fair trial, as provided under Article 16 of the Special Tribunal's Statute. However, it remains satisfied that, in the circumstances of this request and in light of the above-mentioned principle, the admission of Witness 024's statement would not result in prejudice to the Accused amounting to a breach of his fair trial rights.

PROTECTIVE MEASURES

43. The Prosecution argues that it cannot currently submit a request for protective measures for Witness 024 as it is unable to verify whether he requests them. During its most recent conversation with the witness, on 9 March 2017, the Prosecution was again unable to verify this. However, as he has previously voiced concern to a Prosecution investigator about his name being made public in the media, it would be prudent, and in line the Trial Chamber's previous decisions, to maintain the provisional measures already granted by the Trial Chamber.⁵⁵ Moreover, the witness's evidence raises security concerns as it relates to one of the Accused, which has been a factor in granting protective measures. Finally, maintaining the existing order will not prejudice the Accused's rights, as the Defence was notified of the witness' identity and evidence.⁵⁶

44. The Sabra Defence made no submissions on this point. The Trial Chamber sees no reason to depart, at this time, from the provisional order protecting the witness's identity and identifying information.⁵⁷ It reiterates that the Prosecution should inform the Trial Chamber of whether the witness requests protective measures, once the Prosecution can verify this with him.⁵⁸

CONFIDENTIALITY

45. The Prosecution submits that this motion and its earlier motion requesting a summons to appear for Witness 024, both filed confidentially, can be filed publicly if redactions are made. Moreover, the Trial Chamber's decision in court maintaining the confidentiality of

⁵⁴ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 53.

⁵⁵ Decision of 12 July 2016, para. 44.

⁵⁶ Prosecution motion, paras 8-12; Prosecution further submissions, paras 3, 19-20.

⁵⁷ Decision of 12 July 2016, para. 44.

⁵⁸ Decision of 12 July 2016, para. 44, disposition.

annex A to the Prosecution's motion for the admission of Witness 024's statement under Rule 155 should apply to annex A to this motion, as they contain identical information. Finally, the confidentiality of the supporting material for this motion and for the motion seeking a summons for Witness 024 should be maintained until the Trial Chamber decides otherwise, after hearing from the Prosecution; the confidentiality of this material is necessary to facilitate the transfer of information between the Prosecution and the Lebanese authorities.⁵⁹ The Sabra Defence does not oppose the reclassification of its response to 'Public'.⁶⁰

46. Public redacted versions of the Prosecution's reply and first and second further submissions are possible if the witness' identity and identifying information are redacted; however, the materials supporting the Rule 158 request—including various statements, Requests for Assistance and responses thereto—should remain confidential.⁶¹ The Registry states that its submissions are filed confidentially because the fillings and documents to which they refer are confidential.⁶²

47. The Trial Chamber is satisfied that annex A to the Prosecution's motion should remain confidential, for the reasons set out in the oral decision on the classification of annex A to the Prosecution's motion for the admission of Witness 024's statement under Rule 155.⁶³ The Trial Chamber is also satisfied that the materials submitted by the Prosecution in support of its present motion and its motion for a summons should remain confidential; the matter can be revisited if the issue of Witness 024's evidence arises again in the future. Moreover, although the Sabra Defence does not object to its response being reclassified as 'Public', the telephone numbers mentioned throughout the filing should be redacted, so that only the last three digits of each are used in the public version. Finally, the annexes to the Registry's submissions which contain confidential information should be redacted.

48. To maintain the public nature of the trial, the Trial Chamber orders the Registry and the Parties to file public redacted versions of the submissions underlying this decision, and

⁵⁹ Prosecution motion, paras 13-15.

⁶⁰ Sabra response, para. 24.

⁶¹ Prosecution reply, para. 13; Prosecution further submissions, para. 21; Prosecution second further submissions, para. 24.

⁶² Registry submission of 14 March 2017, para. 11; Registry further submission of 29 March 2017, para. 4; Addendum to Registry further submission of 29 March 2017, para. 4.

⁶³ Oral Order, Transcript of 21 July 2016, pp 82-83.

orders the Prosecution to file a public redacted version of its motion for a summons for Witness 024.

DISPOSITION

FOR THESE REASONS, the Trial Chamber, with Judge Re partially dissenting on whether the requirements of Rule 158 have yet been satisfied:

DECLARES admissible, under Rule 158, the statement of Witness PRH024 as an unavailable witness;

DECIDES that it will, at a suitable stage of the proceedings, admit the statement into evidence and allocate an exhibit number to it;

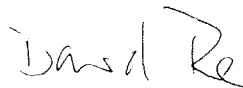
GRANTS the Prosecution's request to maintain the confidential status of annex A to its motion and of the material submitted in support of its motion; and

ORDERS the Registry and the Parties to file public redacted versions of their submissions.

Judge Re appends a partially dissenting opinion.

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

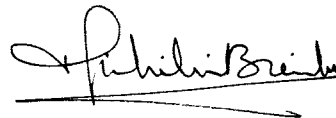
Leidschendam,
The Netherlands
28 April 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

PARTIALLY DISSENTING OPINION OF JUDGE DAVID RE

1. Under Rule 158 of the Rules of Procedure and Evidence, a witness who ‘can no longer with reasonable diligence be traced’ may be declared ‘unavailable’ to testify. The witness’s statement may then be received into evidence without an opposing party questioning the witness.

2. This entails consequences for both the Party wishing to cross-examine the witness and that calling the witness. The cross-examining Party cannot confront or put its case to the witness. This inevitably reduces the weight that a Chamber can give to the evidence, thus potentially disadvantaging the case of the Party calling the witness.

3. The evidence before the Trial Chamber reveals the steps taken by both the Special Tribunal’s Office of the Prosecutor and the Lebanese Government to trace Witness PRH024. While these efforts were substantial, I am not yet convinced that the ‘reasonable diligence’ requirement of the rule has been fully satisfied.

4. The Trial Chamber has twice issued summonses to secure his attendance for cross-examination by video-conference link from the Special Tribunal’s Beirut office. Both attempts were unsuccessful. On the second occasion—a summons issued on Thursday 9 March 2017—ordering his attendance on Friday 10 March 2017 at 10 a.m. Beirut time, the relevant Lebanese authorities did not attempt to serve the summons on the witness, by visiting his registered home address, until the afternoon of the following day, Saturday 11 March 2017. He was not at home.

5. The relevant evidence in relation to the service of the second summons is that: (i) the witness has told the Prosecution that he will only testify with the permission of Mr Hajj Wafic Safa, the Head of Hezbollah’s Central Unit for Liaison and Coordination, or the Hezbollah Security Committee; (ii) on 9 March 2017, he told a Prosecution investigator who telephoned him that he was a Hezbollah member and was only in Lebanon for two days before ‘returning’ to Syria; (iii) the Lebanese Internal Security Forces (i.e. the police) could not find him at his home on 11 March 2017; (iv) on 13 March 2017 the *mukhtar* (mayor) of the witness’s village told the police that that the witness had not been seen in the village for a few months; and (v) he is now apparently uncontactable by telephone (landline or mobile).

6. In relation to the attempted service of the first summons in Lebanon for the witness's testimony on 31 October 2016, there were no official records of his entering or leaving Lebanon in the period 1 August to 19 November 2016.

7. The witness's present whereabouts are therefore unknown to the Prosecution and, it appears, the relevant Lebanese authorities.

8. The evidence of the attempted service of the second summons—which required the witness's appearance on a specified date, and had expired before its service was attempted—is, in my view, insufficient to satisfy the requirement of 'reasonable diligence'. This is because the Trial Chamber has no evidence that the Lebanese Government has taken steps beyond attempting to telephone the witness, and going to his residence, but *after the summons had expired*. This is in circumstances in which the witness has stated that an additional step was required before he would testify. There is also no evidence that the witness knows that the summons was issued.

9. Unlike in domestic cases, almost all witnesses who give evidence in courts and tribunals using international criminal law procedural law must travel from another country, or testify via video-conference link. International criminal law procedural case law therefore requires a Chamber to take all reasonable and necessary steps before abandoning attempts to secure the attendance of a witness.⁶⁴ The interests of justice require that the Trial Chamber attempt every reasonable measure to assist a party in putting evidence relevant to its case before the Trial Chamber. Here, it is the Defence of the Accused, Mr Assad Hassan Sabra, that requires such assistance.

10. In my view, therefore, an additional step is required to satisfy this requirement, namely, that before the Trial Chamber can be satisfied that the witness can no longer with 'reasonable diligence be traced', another, but a general, summons should be issued for the witness to appear at a date to be confirmed. The order and summons should request the Government of the Lebanese Republic to take all necessary steps, including liaising with any bodies necessary, to secure the witness's testimony.

⁶⁴ See, for example, the analysis of the ICTY Appeals Chamber in *Prosecutor v. Haradinaj*, IT.04-84-A, Judgement, 19 July 2010, paras 14-49, on what a Trial Chamber should do to exhaust all steps to call witnesses who are located in another country. These may include issuing further summonses or rescheduling testimony to accommodate changing situations.

11. If this additional step produces no results *and* the witness's whereabouts are still unknown, in my opinion, the witness may then be declared unavailable under Rule 158 and his statement received into evidence. In the absence of cross-examination, the Trial Chamber would have to very carefully assess its probative value.

12. For these reasons, I would defer a final decision under Rule 158 and I respectfully dissent from the decision to receive his statement into evidence *now* as an unavailable witness. Nothing will be lost by taking this additional step and, I believe, the interests of justice will be furthered.

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

Leidschendam,
The Netherlands
28 April 2017

David Re

Judge David Re

