

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:** 20 October 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

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**DECISION DENYING PROSECUTION MOTION FOR PROTECTIVE  
MEASURES FOR WITNESS PRH103**

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**Office of the Prosecutor:**

Mr Norman Farrell &amp; Mr Alexander Hugh Milne

**Counsel for Mr Salim Jamil Ayyash:**

Mr Emile Aoun, Mr Thomas Hannis &amp; Mr Chad Mair

**Legal Representatives of  
Participating Victims:**

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

**Counsel for Mr Hassan Habib Merhi:**

Mr Mohamed Aouini, Ms Dorothee Le Fraper du Hellen &amp; Mr Jad Youssef Khalil

**Counsel for Mr Hussein Hassan Oneissi:**

Mr Vincent Courcelle-Labrousse, Mr Yasser Hassan &amp; Ms Natalie von Wistinghausen

**Counsel for Mr Assad Hassan Sabra:**

Mr David Young, Mr Geoffrey Roberts &amp; Ms Sarah Bafadhel



## **INTRODUCTION**

1. Witness PRH103, a Syrian national, was a work colleague of Mr Abu Adass, who the Prosecution alleges appeared in a video that falsely claimed responsibility for the attack in Beirut on 14 February 2005 that targeted the former Prime Minister of Lebanon, Mr Rafik Hariri, and claimed his life and many others.<sup>1</sup> In December 2016, the Trial Chamber found that Witness 103 was unavailable to testify within the meaning of Rule 158 of the Special Tribunal's Rules of Procedure and Evidence, declared his witness statements admissible under Rule 158, and admitted three of the statements into evidence.<sup>2</sup>

2. The Prosecution requests protective measures equivalent to closed session for the witness under Rule 133, 'Measures for the Protection of Victims and Witnesses', to maintain the confidentiality of his identity, his evidence and involvement in the proceedings. The Prosecution further requests the variation of paragraphs 8 and 9 of the Directions on the Conduct of Proceedings, Guidelines on the Conduct of Proceedings, and specifically that the Parties not be required to read into the court record summaries of the witness's statements.<sup>3</sup> Counsel for three of the Accused, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, object to the Prosecution motion.<sup>4</sup>

## **THE LEGAL PRINCIPLES**

3. Article 16 (2) of the Statue of the Special Tribunal provides that, '[t]he accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses'.

4. Rule 133 provides, relevantly, that:

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016, paras 23, 27-29.

<sup>2</sup> F2901, Decision Admitting Statements of Witness PRH103 under Rule 158, 12 December 2016 (confidential) ('Rule 158 Decision'); transcript of 13 December 2016, pp 23-26. Rule 158 allows a Chamber to receive the evidence of a witness who is 'unavailable'; defined as a witness 'who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally'. The three witness statements tendered by the Prosecution were admitted into evidence as exhibits P1774, P1775 and P1776. The Trial Chamber has not yet assigned exhibit numbers to the five witness statements tendered by the Sabra Defence.

<sup>3</sup> F2900, Prosecution Motion for Protective Measures for PRH103, 9 December 2016 (confidential with confidential annex) ('Prosecution motion'), paras 1-2, 23, 28.

<sup>4</sup> F2902, Merhi Defence Response to the "Prosecution Motion for Protective Measures for PRH103", 13 December 2016 (confidential) ('Merhi Defence response'); F2906, Response to Prosecution Request for Protective Measures for PRH103, 14 December 2016 (confidential) ('Sabra Defence response'); F2907, Defence for Hussein Hassan Oneissi Response to the "Prosecution Motion for Protective Measures for PRH103" Dated 9 December 2016, 14 December 2016 (confidential) ('Oneissi Defence response').

(A) The Trial Chamber may, *proprio motu* or at the request of a Party, the victim or witness concerned, the Victims' Participation Unit or the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Party requesting the Trial Chamber to order protective measures shall seek to obtain the consent of the person in respect of whom the protective measures are sought.

5. Rule 136 provides that all proceedings before a Chamber, other than its deliberations, shall be held in public, unless otherwise decided by the Chamber after hearing the Parties.

6. The Trial Chamber will grant protective measures case-by-case, on the basis of persuasive evidence for each application, and only when it is satisfied that such measures will not prejudice the right of the Accused to a fair trial.<sup>5</sup>

7. According to paragraphs 8 and 9 of the Guidelines, summaries of witness statements found admissible under Rules 155, 156, or 158 must be read into the court record and disclosed to the opposing Party, the Trial Chamber, and the Legal Representatives of the Victims. These administrative guidelines are intended to supplement the Special Tribunal's Statute and Rules and may be varied if required by the interests of justice.<sup>6</sup>

## **SUBMISSIONS**

### *Prosecution motion*

8. The Prosecution submits that there is a real risk to the privacy and security of the witness and his family. On 21 July 2005, Syrian authorities arrested the witness and detained him without charge or trial for seven years. While detained, he witnessed and suffered mistreatment.<sup>7</sup> The Syrian authorities also subjected a member of the witness's extended family to abuse until he promised to bring the witness to them. Public awareness of the witness's identity will renew attention on him and his family. It may have an adverse effect on his employment possibilities and may traumatise him again. Members of the witness's family who may be living in Syria and Lebanon may face negative repercussions if public awareness

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<sup>5</sup> F2467, Decision on Prosecution Motion for Protective Measures for Witness PRH273, 25 February 2016, para. 5.

<sup>6</sup> F1326, Directions on the Conduct of the Proceedings, para. 1; Guidelines on the Conduct of Proceedings, 16 January 2014, paras 8-9.

<sup>7</sup> The United Nations Human Rights Council's Working Group on Arbitrary Detention and three non-governmental human rights organisations, Human Rights Watch, Alkarama and Amnesty International, have issued reports regarding the witness's detention. See Prosecution motion, paras 8-9; Rule 158 Decision, paras 7, 12.

of his witness status is renewed. The Prosecution acknowledges that although the witness and his family are known to have lived in Syria, it cannot confirm which family members are still there.

9. The Prosecution argues that less restrictive measures cannot adequately address these security and privacy concerns because the witness's evidence is unique to him. Significant aspects of his evidence have been publicised together with his name, and therefore the nature of his evidence will reveal his identity. Furthermore, the requested protective measures will not prejudice the Accused's right to a fair trial because Defence counsel were notified of the witness's identity and his evidence, which enabled them to investigate the witness and prepare submissions related to his evidence.

10. The Prosecution sought the witness's consent to the protective measures, but the witness has not responded. As the witness is an unavailable witness, he is correspondingly unavailable for the purpose of seeking his consent. Rule 133 (B) does not require the requesting party *to obtain* the consent of the witness, rather it 'shall seek to obtain the consent'.

11. At the Prosecution's invitation, the Special Tribunal's Victims and Witnesses Unit ('VWU') reviewed the material supporting the Prosecution motion and provided a memorandum supporting the Prosecution's application for protective measures. The VWU submits that, due to limited time, it was not in a position to contact the witness and therefore was unable to corroborate the information the witness provided to the Prosecution.<sup>8</sup>

#### *Defence responses*

12. Counsel for Mr Merhi, Mr Oneissi and Mr Sabra argue that the Prosecution has not provided sufficient evidence to demonstrate that there is currently a real objective risk to the security and privacy of the witness or his family. The witness has moved to another State and considerable time has passed since his detention and mistreatment. The witness did not express fear for his security when he recently met with Prosecution investigators, Mr Toby Smith (Witness PRH550) and Mr Alasdair Macleod (Witness PRH486). Counsel for Mr Sabra submit that the VWU report annexed to the Prosecution motion does not contain any evidence to corroborate the Prosecution motion. Counsel for Mr Oneissi further request the Trial Chamber to hear a representative of the VWU about the basis of the assessment.

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<sup>8</sup> Prosecution motion, paras 3, 5-20, 22; annex A.

13. The Prosecution has failed to obtain the witness's consent. Counsel for Mr Merhi note that the French version of Rule 133 (B) explicitly requires that the witness consents to the protective measures and submit that this version is 'more consonant with the spirit of the Statute and Rules', as witnesses must generally consent to variations in their protective measures.<sup>9</sup> They note that Rule 133 (J) provides that varying protective measures in subsequent proceedings requires the consent of the protected witness or in the alternative, that such variation is justified by exceptional circumstances without the consent of the witness. However, Rule 133 (B) provides for no such exception when the Trial Chamber initially grants protective measures. Counsel for Mr Oneissi argue that the questions posed to the witness do not seek his consent, and the Prosecution erroneously interprets that he agreed to protective measures based on his unavailability. Counsel for Mr Oneissi refer to a decision in the *Bagosora* case before the International Criminal Tribunal for Rwanda where the Trial Chamber did not decide on the request for closed session until it heard from the witness on the nature of his security concerns.<sup>10</sup> Counsel for Mr Sabra argue that the witness was contacted by representatives from the Special Tribunal recently and the witness had ample opportunity to respond to the requests for consent for protective measures, yet he did not respond.

14. Defence counsel further argue that the Prosecution cannot confirm if any member of the witness's family still lives in Lebanon or Syria. The Prosecution submission that public attention will aggravate the witness's trauma is not supported by medical documentation. Similarly, the witness's difficulty in finding work for the same reason is based on assumptions.

15. Defence counsel submit that granting the witness protective measures equivalent to closed session would adversely affect the Accused's right to a fair trial. The witness refused to participate in the proceedings and the Defence cannot cross-examine him. Counsel for Mr Oneissi reiterate that the witness's evidence goes directly to the acts and conduct of the Accused, Mr Oneissi. The public will not learn about the evidence related to the false claim of responsibility and will not be afforded an opportunity to understand the Oneissi Defence case in this regard.

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<sup>9</sup> The French version of Rule 133 (B) provides that: 'La partie qui demande à la Chambre de première instance d'ordonner des mesures de protection doit obtenir l'assentiment de la personne à l'égard de laquelle lesdites mesures sont sollicitées.'

<sup>10</sup> ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Requests to Hear Testimony in Closed Session, 18 October 2006, para. 1.

16. Alternatively, counsel for Mr Oneissi and Mr Sabra would agree to less restrictive measures being granted to the witness, such as referring to the witness by pseudonym.

17. Counsel for Mr Oneissi also oppose the request to vary the Guidelines with regard to reading the summaries of the witness statements into the record. They argue that the Prosecution did not provide any legal basis for this request and note that varying the Guidelines would also prevent reading the summaries of the admissible witness statements tendered by the Sabra Defence into the record.<sup>11</sup>

### **DISCUSSION**

18. The Trial Chamber must balance the principle of maintaining public proceedings under Rule 136 with the appropriate measures for the privacy and protection of witnesses under Rule 133 (A), provided that the measures are consistent with the rights of the Accused.<sup>12</sup>

19. Granting closed session is an extraordinary measure. The Trial Chamber will only permit such a measure if there is a real, objectively justifiable risk to the privacy or security of the witness or his family, provided that the Accused's fair trial rights are not violated and that a less restrictive protective measure cannot adequately address the witness's legitimate concerns. This applies equally to protective measures equivalent to closed session, such as those the Prosecution requests for the witness.

20. The Trial Chamber has carefully reviewed the Prosecution's motion, the accompanying annex, the supporting materials and the Defence responses. The Trial Chamber is not satisfied that the witness's circumstances warrant protective measures equivalent to closed session.

21. Undoubtedly, the witness has suffered from his reportedly arbitrary detention for seven years in a Syrian prison. However, following his release, he and his close family members moved to another country. The Trial Chamber notes the Prosecution's submissions in relation to potential threats against the witness's family members who continue to reside in Syria and Lebanon and that a member of the witness's extended family was allegedly arrested by Syrian authorities in 2005, but the Prosecution and the VWU could not confirm that the

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<sup>11</sup> Merhi Defence response, paras 2, 6-16; Oneissi Defence response, paras 2, 13-18, 21-33; Sabra Defence response, paras 10-12, 17-20, 23-26, 28, 30, 32-34, 39-41.

<sup>12</sup> See, for example, decision delivered in court, transcript of 12 December 2016, pp 8-10.

witness has family currently living in Syria or Lebanon.<sup>13</sup> In its assessment, the VWU relied on the witness's statements from 2005, a report from the authorities of the country where he lives, and statements of Prosecution investigators from 2016. In the absence of contacting the witness, the VWU report does not offer additional support to the Prosecution's application. As the VWU clearly outlines the basis of its analysis, it is unnecessary to hear its representative on this matter, as proposed by counsel for Mr Oneissi.

22. Regarding the witness's consent, the Prosecution sent him a letter on 4 July 2016 advising him that it intended to request protective measures. He never responded. The Trial Chamber is not convinced by the Prosecution argument that the witness is unavailable for the purposes of seeking his consent. On the contrary, the Trial Chamber considers the witness's lack of communication regarding whether he requires protective measures, much less consents to their imposition, a significant factor suggesting he does not consent to such measures.

23. The Trial Chamber also notes the difference between the French and English texts of Rule 133 (B), requiring, respectively, that the requesting party *obtain* the witness's consent as opposed to *seeking* it. Rule 6 of the Rules states that in case of discrepancy between the Arabic, English and French texts of the Rules, the version which is more consonant with the spirit of the Statute and of the Rules shall prevail.

24. The Trial Chamber is not entirely convinced by the Merhi Defence argument that the French text of Rule 133 (B) is more consonant with the spirit of the Statute *and* the Rules as provided in Rule 6, as counsel only refer to one sub-paragraph (J) of Rule 133. This sub-paragraph is relevant only to the variation of protective measures previously granted to a victim or witness and does not encompass the overall context of the 'spirit of the Statute and the Rules'. It is a highly specific provision that cannot be taken out of context. In any case, the Trial Chamber will deny the Prosecution's request for protective measures for the witness, rendering this argument moot.

25. In addition, the Prosecution has not provided the Trial Chamber with evidence of its concerns regarding the witness's security and privacy or of the potential detrimental effects to the witness's employment possibilities. Finally, the Prosecution has not provided any recent information with respect to whether the witness's family members are even in Syria, and it

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<sup>13</sup> See Prosecution motion, para. 9; annex A, para. 10.

has not provided an objective basis for determining whether they may face negative repercussions if it is publicly known that the witness provided a statement to the United Nations International Independent Investigation Commission (UNIIC).

26. It is also already publicly known that the witness gave statements to the UNIIC and to Lebanese and Syrian authorities. Moreover, he has made it clear that he does not want to have anything to do with the Special Tribunal. He has not consented to the Special Tribunal receiving his statement into evidence.<sup>14</sup> The witness will not testify publicly, as the Trial Chamber has received his evidence in writing pursuant to Rule 158. As such, the Trial Chamber considers that the content of the witness's evidence is already available to the public and the fact that it will be public that he provided statements to the UNIIC does not present any additional reason to grant protective measures.

27. The Trial Chamber considers that the Prosecution has not provided sufficient evidence to demonstrate a real objective risk to the privacy and security of the witness and his family and therefore, in balancing the fair trial rights of the Accused, including the right to a public hearing, it denies the Prosecution's request for protective measures for the witness. Witness 103's identity and his evidence shall be made public.

28. The Prosecution's request to vary paragraph 8 of the Guidelines—in order not to read summaries of the witness's statements into the court record in open session—is rendered moot by the Trial Chamber's decision not to grant protective measures to the witness.

### **CONFIDENTIALITY**

29. The Rule 158 Decision was filed confidentially to allow the Prosecution to file an application for protective measures for the witness.<sup>15</sup> The Trial Chamber finds that now that it has denied the Prosecution request for protective measures for the witness, there is no reason for the Rule 158 Decision to be confidential. The Trial Chamber therefore orders that the Rule 158 Decision be reclassified as public and that the Parties file public redacted versions of their filings, including any annexes.<sup>16</sup>

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<sup>14</sup> See Rule 158 Decision, para. 15.

<sup>15</sup> See Rule 158 Decision, para. 58.

<sup>16</sup> See also Rule 158 Decision, Disposition, where the Trial Chamber ordered 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.



**DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

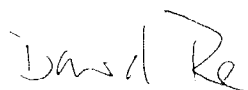
**DENIES** the Prosecution motion for protective measures for Witness PRH103;

**ORDERS** the Rule 158 Decision to be reclassified as public; and

**ORDERS** the Prosecution and Defence counsel to file public redacted versions of their filings and any annexes thereto.

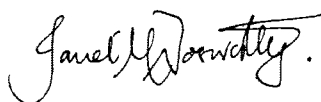
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,  
The Netherlands  
20 October 2017



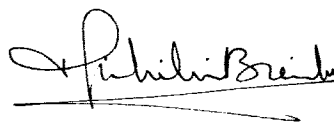
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Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

