



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: 13 December 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ADMITTING INTO EVIDENCE
STATEMENTS OF WITNESS PRH056 UNDER RULE 158**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Hugh Milne

**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 Youssef 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 Geoffrey Roberts & Ms Sarah Bafadhel



INTRODUCTION AND BACKGROUND

1. The Prosecution alleges that the Accused, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, chose Mr Ahmed Abu Adass, a person of Palestinian origin, as a suitable individual to appear in a video-recorded false claim of responsibility for the attack¹ on the former Lebanese Prime Minister, Mr Rafik Hariri, on 14 February 2005 in Beirut.² According to the Prosecution, in early January 2005, Mr Oneissi, introduced himself to Mr Abu Adass as ‘Mohammed’ at the Arab University Mosque of Beirut, also known as ‘the Al-Houry Mosque’, and asked Mr Abu Adass to teach him how to pray. The Prosecution further alleges that subsequently the two met on several occasions and that on the morning of 16 January 2005 Mr Abu Adass left his home to meet with ‘Mohammed’ and has since been missing.³ The Trial Chamber has already admitted evidence in support of these allegations.⁴

2. The Prosecution seeks the admission into evidence of five statements of Witness PRH056 as statements of an unavailable person under Rule 158 of the Special Tribunal’s Rules of Procedure and Evidence.⁵ The statements relate to Mr Abu Adass, including his meeting and interactions with ‘Mohammed’ and his subsequent disappearance.⁶ The Oneissi and Sabra Defence oppose the Prosecution’s application with counsel for

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential) (‘Amended consolidated indictment’), para. 4.

² The attack killed Mr Hariri and 21 other persons, and injured 226 persons. See STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1492, Second Decision on Agreed Facts under Rule 122, 11 April 2014, disposition, recording these as facts that the Trial Chamber may accept as being proved at trial.

³ Amended consolidated indictment, paras 3 (b)-(d), 23 (d), 28; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Prosecution’s Submission of Updated Pre-Trial Brief Pursuant to Rule 91(G)(i) and the Pre-Trial Judge’s Order of 7 August 2013 and Decision of 16 August 2013, 23 August 2013 (confidential), Annex A – Prosecution’s Updated Pre-Trial Brief dated 23 August 2013, paras 8, 62, 112, 114, 117, 122-123, 148.

⁴ See e.g. exhibits P596, P597, P760, P762, 4D213, P761.1, 4D212, P807, 5D239, 4D241, P763.

⁵ On the prerequisites of Rule 158, see below, para. 33.

⁶ F3389, Annex A, Five Statements of PRH056 sought to be admitted under Rule 158, 27 October 2017 (confidential) containing a table listing: witness statement of PRH056, 13 April 2005 and 18 July 2005 (ERN L0005303-L0005318_D_EN); witness statement of PRH056, 8 July 2005 (ERN 300142-300150); witness statement of PRH056, 5 May 2006 (ERN 207605-207617); witness statement of PRH056, 7-8 June 2007 (ERN 60034933-60034986); witness statement of PRH056, 1 July 2010 (ERN 60147225-60147249).

Mr Sabra requesting, in the alternative, the admission of ten other documents related to the same witness. The Prosecution has replied, and the Sabra Defence has filed a sur-reply.⁷

Prosecution's previous application for the admission of the statements into evidence

3. Originally, the Prosecution requested the admission of Witness 056's five statements into evidence under Rule 156,⁸ which would have required making the witness available for cross-examination by Defence counsel and the Legal Representatives of Victims and for questioning by the Trial Chamber. The Prosecution also requested protective measures for the witness.⁹ Responding to the Rule 156 motion, the Sabra Defence requested the Trial Chamber to admit all statements of Witness 056 rather than only the five which the Prosecution requested.¹⁰

Trial Chamber's previous findings on the admissibility of the statements

4. In its decision of 29 September 2015 on the Prosecution Rule 156 application, the Trial Chamber found that the statements are relevant and probative and that, because the witness would be cross-examined, inconsistencies in the statements would not prevent their admission into evidence. It declared the five statements of Witness 056 admissible, with the exception of the parts concerning the direct observations of and interactions with the person

⁷ F3447, Sabra Sur-Reply to Prosecution Reply to Sabra Defence Response to Prosecution Renewal of Application Under Rule 158 in Respect of a Witness, 1 December 2017 (confidential) ('Sabra Defence sur-reply'); F3431, Prosecution Reply to Sabra Defence Response to Prosecution Renewal of Application under Rule 158 in Respect of Witness PRH056, 27 November 2017 (confidential with confidential annex) ('Prosecution reply'); F3411, Sabra Defence Response to "Prosecution Renewal of Application under Rule 158 in Respect of Witness PRH056", 13 November 2017 (confidential with confidential annexes) ('Sabra Defence response'); F3411, Annex A to Sabra Defence response (confidential); F3410, Response to the Prosecution Renewal of Application under Rule 158 in Respect of Witness PRH056, 13 November 2017 (confidential) ('Oneissi Defence response'); F3389, Prosecution Renewal of Application under Rule 158 in Respect of Witness PRH056, 27 October 2017 (confidential with confidential annex) ('Prosecution motion').

⁸ Rule 156 governs the admission of written statements and transcripts of a witness testimony *in lieu* of examination in chief. It states that, '[s]ubject to Rule 158, the Trial Chamber may admit the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal that goes to proof of the acts and conduct of the accused as charged in the indictment, only if the following conditions are satisfied: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness's declaration and what the witness would say if examined.'

⁹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2141, Prosecution Motion to Admit the Statements of PRH087 and PRH056, 27 August 2015. *See also* F2138, Prosecution Motion for Protective Measures for PRH056, PRH087 and PRH402, 24 August 2015 (public with confidential annex).

¹⁰ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2189, Sabra Defence Response to Prosecution Motion to Admit the Statements of PRH087 and PRH056, 10 September 2015, para. 12; F2189, Annex A to Sabra Defence Response to Prosecution Motion to Admit the Statements of PRH087 and PRH056, 10 September 2015, listing 14 statements of Witness PRH056.

described as ‘Mohammed’. The Trial Chamber held that it would be assisted by hearing the witness’s evidence on these points during the witness’s examination in court. Given that Witness 056 was to appear and testify, and be available for cross-examination, the Trial Chamber decided that no decision was necessary on the Sabra Defence application to admit into evidence the witness’s other statements. It also granted the requested protective measures.¹¹

5. Subsequently, following several unsuccessful attempts by the Prosecution to contact and to secure Witness 056’s attendance in court, the witness refused to appear and testify. The Trial Chamber also received a medical certificate that the witness is permanently unfit to be questioned, and hence to attend court.

6. In a separate application, predating the present Prosecution motion, whereby the Sabra Defence requested the admission of documents relating to Mr Abu Adass, among the material sought into admission were three Witness 056’s statements. The Trial Chamber deferred a decision on these statements,¹² pending further submissions from the Parties on the admission of the Prosecution’s five statements—the subject of the present Prosecution motion. Among the ten documents, listed in annex A to its response to the present Prosecution motion, the Sabra Defence has now resubmitted for admission two of these statements¹³ and has provided an alternative version (an alternative translation) of the third statement.¹⁴

SUBMISSIONS

Prosecution motion

7. The Prosecution submits that all avenues for securing the witness’s testimony have been explored without success. It does not expect the Sabra Defence to oppose the statements’

¹¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2224, Corrected Version of ‘Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087’ of 29 September 2015, 5 October 2015 (‘Decision of 29 September 2015’), paras 14, 20, disposition; Oral Decision Granting Protective Measures for Witnesses PRH056, PRH087 and PRH402, transcript of 17 September 2015, pp 42-45.

¹² F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 (‘Decision of 25 September 2017’), paras 13-14, disposition.

¹³ ERN 300213-300214 and ERN 60006275-60006280_D_EN.

¹⁴ The originally submitted statement was ERN L0016644-L0016647_D_EN, the alternative version of the same statement is ERN 50012160-50012163_D_EN.

admission into evidence, as in its own evidential motions counsel for Mr Sabra referred to these statements as already admitted or declared admissible.¹⁵

8. Witness 056 is unavailable to testify due to medical incapacity. In any event, regardless of the medical documents, Witness 056 is unavailable because other possibilities for obtaining the witness's testimony have been exhausted. Witness 056 is 'for good reason otherwise unavailable to testify' under Rule 158, which the Trial Chamber has interpreted broadly.¹⁶

9. The Trial Chamber has previously found that Rule 158 encompasses the admission of statements into evidence without cross-examination, and has admitted into evidence the statement of another unavailable witness who, like Witness 056, was originally required to attend for cross-examination. The absence of cross-examination does not bar the statements' admission under Rule 158, but may be considered when assessing their weight. Moreover, the Trial Chamber decided not to admit into evidence certain portions of Witness 056's statements in the context of a Rule 156 application. The five statements are now subject to a different admissibility analysis due to the witness's unavailability; the lack of cross-examination may go to the weight of the five statements.¹⁷

10. In its Rule 156 application, the Prosecution submitted that parts of the five statements concern the 'acts and conduct of the accused'. However, in light of the Trial Chamber's recent clarification of the definition of this phrase, the Prosecution now submits that the statements do not go to proof of the acts and conduct of the Accused as charged in the indictment. In any event, as the Trial Chamber has previously held, this factor does not bar the statements' admission under Rules 158 (B) and 149 (D). Witness 056's statements' probative value is not substantially outweighed by the need to ensure a fair trial. The nature of the witness's evidence and the lack of court appearance may be considered when assessing the statements' weight.¹⁸

11. The Trial Chamber has already determined that Witness 056's five statements are relevant and have probative value, and found that the witness provides important evidence.

¹⁵ Prosecution motion, paras 5-14.

¹⁶ Prosecution motion, paras 15-18.

¹⁷ Prosecution motion, paras 19-21.

¹⁸ Prosecution motion, paras 22-23.

The statements have sufficient indicia of reliability based on how they were made and maintained. Documents tendered under Rule 158 do not need to be in the form prescribed by the Practice Direction on Taking Depositions and Witness Statements for Admission in Court¹⁹ and Rules 155-156, which merely provide useful guidance. While four of the five statements were taken before the Special Tribunal's establishment, the five statements generally contain the elements set out in Rule 155²⁰ and the Practice Direction. The absence of one or more indicia of reliability would not bar admission, but could be taken into consideration in assessing the statements' weight.²¹

Oneissi Defence response

12. The Oneissi Defence submits that the medical certificate does not provide good reason for the witness's unavailability and the Trial Chamber must rule on this matter. The Trial Chamber's broad view of Rule 158 should be revisited in light of established international criminal case law setting out an 'objective unavailability' test. Moreover, the circumstances of Witness 056's medical examination are questionable and the medical certificate does not state that the witness cannot testify.²²

13. Witness 056's evidence is not *prima facie* reliable and, since it goes to issues that are essential to the Prosecution's case, should not be admitted into evidence untested. The Defence has previously highlighted inconsistencies between the witness's statements, including one which the Prosecution has selectively not tendered. In addition, the circumstances in which the statements were obtained raise serious concerns. If the statements are admitted under Rule 158, the witness cannot be questioned on these circumstances or confronted with the inconsistencies between the statements or with the declarations of other persons of interest, which the Prosecution has disclosed but selectively chosen not to include in its witness and exhibit lists. The Trial Chamber's previous findings

¹⁹ STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155.

²⁰ Rule 155 governs the requirements for admission of written statements and transcripts *in lieu* of oral testimony.

²¹ Prosecution motion, paras 24-27.

²² Oneissi Defence response, paras 4-12.

that the inconsistencies do not bar admission because the witness will be cross-examined are not applicable in the context of Rule 158.²³

14. Exceptions to the usual presentation of evidence in court must not infringe the Defence's rights where 'a conviction is based solely or in a decisive manner, on the depositions of a witness that the accused has had no opportunity to examine or have examined'. This witness's evidence is so important that it is likely to be determinative of the outcome of the case and the Trial Chamber is in a position to make this assessment given the advanced stage of the Prosecution's case. Although it later revised its position, the Prosecution initially conceded that parts of the statements go to proof of the acts and conduct of the Accused as charged, and, given the particulars of the Prosecution's case against Mr Oneissi, it seems obvious that this evidence necessarily concerns his acts and conduct. The statements are also tendered in support of other parts of the Prosecution's theory, where the only other evidence are the statements of two witnesses admitted under Rule 158 and therefore untested. The Trial Chamber had said that it would be assisted by hearing certain parts of Witness 056's evidence in court, and the Pre-Trial Judge had assessed the witness's evidence as 'particularly important' regarding certain parts of the Prosecution's case. The witness's evidence lacks *prima facie* reliability, and it cannot be properly tested by measures other than through cross-examination. Therefore, the prejudicial effect of admitting the statements into evidence would seriously outweigh the probative value of the witness's evidence, particularly in an *in absentia* trial.²⁴

Sabra Defence response

15. The Sabra Defence submits that its previous references to the five statements in other motions do not constitute an agreement to their admission into evidence. It opposes the statements' admission under Rule 158 or, in the alternative, requests the concurrent admission of ten additional documents related to the witness and 224 other documents which it had intended to put to the witness during cross-examination.²⁵

²³ Oneissi Defence response, paras 13-17.

²⁴ Oneissi Defence response, paras 18-25.

²⁵ Sabra Defence response, paras 1-6, request for relief.

16. The medical certificate does not show that the witness is unavailable within the meaning of Rule 158 and the relevant international criminal case law. Given the importance of the witness's evidence to its case, the Prosecution should have made all diligent efforts to secure the witness's testimony.²⁶

17. The five statements are inherently unreliable. The Trial Chamber made its finding that the inconsistencies in the five statements would not bar their admission into evidence in the context of Rule 156, where the witness would be cross-examined; that finding is therefore no longer applicable. Four of the five statements do not meet the requirements of Rule 155 and the Practice Direction and, while this is not required under Rule 158, the Prosecution has previously opposed the admission of non-compliant statements under Rule 154 without cross-examination; the present situation is analogous. The five statements contain internal inconsistencies pertaining to critical facts in the Prosecution's case, and are not corroborated by any evidence which has been tested by the Defence. The statements of two other witnesses testifying on the same issues—which the evidence of Witness 056 directly contradicts on crucial points—were also admitted under Rule 158. Given the Prosecution's withdrawal of two further witnesses, the Defence has no further opportunity to test these inconsistencies. The lack of Witness 056's cross-examination renders the five statements unreliable and further diminishes the weight of the other related statements admitted under Rule 158.²⁷

18. The probative value of Witness 056's evidence is substantially outweighed by the need to ensure a fair trial. The Prosecution's Rule 156 application states that the witness's evidence goes to the acts and conduct of the Accused as charged, but the Prosecution now seeks to assert the opposite in light of a recent Trial Chamber's decision. However, this recent decision does not negate the Trial Chamber's explicit findings that Witness 056's evidence, as well as that of another witness dealing with issues which Witness 056 also addresses, did go to the acts and conduct of the Accused as charged.

19. The Prosecution's attempt to mischaracterise the evidence would fundamentally violate the Accused's rights and undermine the purpose of the Rule 158 (B) test. In addition, the totality of the witness's evidence is significant to the Prosecution's core allegations and to

²⁶ Sabra Defence response, paras 7-15.

²⁷ Sabra Defence response, paras 16-22.

the Defence's ability to challenge inconsistencies in the Prosecution's case, and Rule 150 (J) obliges a Party to put the nature of its case to a witness. The Defence has already outlined its case regarding the disappearance of Mr Abu Adass and has identified specific lines of questioning, in particular directly testing inconsistencies in Witness 056's evidence, both internally and with regard to material which is already in evidence or which has yet to be admitted.

20. The lack of cross-examination means that the Defence can neither put these contradictions to the witness, nor confront the witness on potentially exculpatory material points. As the Trial Chamber recently barred the Defence from tendering evidence which is significant to any Rule 167 litigation, 'the Defence will have to spend an inordinate amount of time and resources to secure the admission of evidence which directly contradicts series of untested statements admitted into evidence'. The admission of Witness 056's statements will completely eradicate the Defence's opportunity to properly challenge core aspects of the Prosecution's case, which goes beyond the determination of the weight to be given to the five statements and affects the Trial Chamber's ability to properly assess other witnesses' untested statements.²⁸

21. In the alternative, the Sabra Defence requests the admission of ten additional documents related to Witness 056 and 224 other documents. The Trial Chamber has previously found it helpful to admit into evidence witnesses' additional statements, enabling it to establish the truth of relevant events. By only tendering five of fifteen statements given by Witness 056, the Prosecution is 'attempting to shield material evidence from the Trial Chamber' on the same issues addressed in the five tendered statements.

22. The Trial Chamber's previous finding that the admission of additional Witness 056's statements was unnecessary, as the witness would appear for cross-examination, is no longer applicable in light of the current Prosecution motion. As the Trial Chamber found that no decision on the admission of these additional statements was necessary, no reconsideration request is required. Reconsideration is, however, warranted under Rule 140 to avoid injustice by allowing the Trial Chamber to assess the entirety of the witness's evidence and reduce the

²⁸ Sabra Defence response, paras 23-33.

prejudice to the Defence, and in light of the new fact or material change of circumstances of the Prosecution's failure to secure the witness's attendance for cross-examination.²⁹

23. In the absence of cross-examination, the Trial Chamber should admit all related documents to reduce the undue prejudice of admitting the five tendered statements into evidence under Rule 158. The related documents are not tendered for the truth of their contents, but as a way to assess the witness's credibility. The fact that the Prosecution has not been able to cross-examine the underlying sources of the documents is a matter of their weight, and the Prosecution did not object to their relevance and probative value when they were previously tendered by the Defence.³⁰

Prosecution reply

24. The Prosecution opposes the admission into evidence of the ten additional documents and notes that the Trial Chamber has already summarily denied the admission into evidence of the 224 other documents. In addition, the Prosecution submits that the Sabra Defence's response breaches the Code of Professional Conduct for Counsel Appearing before the Tribunal in two instances.³¹

25. The Sabra Defence failed to make sufficient submissions on the admissibility of the ten additional documents under Rules 149 (C) and 158 and ignored the Trial Chamber's previous guidance on filing of supporting annexes. The Sabra Defence failed to demonstrate that these additional documents are *prima facie* reliable. Moreover, the Sabra Defence tendered only the English translations of eight of the ten documents and failed to tender the original language versions. The Sabra Defence also failed to extract Witness 056's statements from larger documents that also contain statements of other individuals.³²

26. Moreover, the Sabra Defence failed to show that each of the ten documents is relevant and has probative value. It merely made generic submissions about the documents providing context, identifying inconsistencies in the evidence and assessing the witness's credibility, some of which do not apply to all of the tendered documents. It also incorrectly claimed that

²⁹ Sabra Defence response, paras 34-38.

³⁰ Sabra Defence response, paras 39-43.

³¹ Prosecution reply, paras 1-2.

³² Prosecution reply, paras 3-5, 9.

each of the ten documents relates to issues which the Prosecution had previously identified as issues, to which Witness 056's evidence is relevant. Finally, the tenth document (a letter) tendered by the Sabra Defence is in fact a witness statement in accordance with the Trial Chamber's case law.³³

27. In addition, the Prosecution submits that the Sabra Defence response breaches the Code of Professional Conduct on two occasions, by making unfounded submissions ascribing ill-intent or bad faith to the Prosecution, specifically by stating that the Prosecution is attempting to: (i) mischaracterise Witness 056's evidence as not going to proof of the acts and conduct of the Accused as charged; and (ii) shield evidence from the Trial Chamber which goes directly to the witness's credibility. The Trial Chamber has already warned the Sabra Defence twice about the language it uses in its filings and its duties under the Code.³⁴

Sabra Defence sur-reply

28. The Sabra Defence disputes the Prosecution's allegations that its response violated the Code of Professional Conduct, arguing that its assertions do not automatically ascribe ill-intent to the Prosecution and, in any event, its contentions regarding the Prosecution were well-founded. In particular, the Prosecution has as a matter of fact changed its characterisation of Witness 056's evidence and is objectively seeking to prevent the witness's additional evidence from being admitted. Moreover, the provisions of the Code of Professional Conduct on which the Prosecution relies are too general to form a legal basis for its allegations.³⁵

29. The relationship between the Defence and the Prosecution had been cordial and constructive and the Defence taking a contrary position to that of the Prosecution is a function of their respective roles in the proceedings and does not indicate a lack of professional courtesy or civility. Furthermore, the Prosecution has itself recently made similar allegations against the Defence. Although the Defence did not agree with these allegations, it avoided alleging violations of the Code of Professional Conduct, as this would not contribute to the administration of justice or the spirit of cooperation between the Parties.³⁶

³³ Prosecution reply, paras 11-16.

³⁴ Prosecution reply, paras 17-21.

³⁵ Sabra Defence sur-reply, paras 1-6.

³⁶ Sabra Defence sur-reply, paras 7-10.

Confidentiality

30. The Prosecution undertakes to file a public redacted version of the confidential Prosecution motion and its annex in due course and requests the Trial Chamber to maintain their confidentiality. It reiterates this position in its reply.³⁷

31. The Oneissi Defence filed its response confidentially, but made no submissions on classification. The Sabra Defence requests the reclassification of its confidential response to public, as redacting the witness's pseudonym and gender would be inconsistent with existing public filings and would render any decision in the current litigation incomprehensible to the public. Moreover, the Sabra Defence submits that its confidential sur-reply contains no confidential information and can be reclassified as public.³⁸

LEGAL BASIS

32. Rule 149 (C) sets forth the basic requirements for admission of evidence. It grants authority to the Trial Chamber to admit any relevant evidence which it deems to have probative value. Rule 149 (D) provides authority to the Trial Chamber to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

33. Rule 158 governs the admission of the evidence of an 'unavailable person', that is, 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. The admission of such evidence is subject to certain conditions. Under Rule 158 (A) (i)-(ii), the Trial Chamber must be satisfied of the person's unavailability and must also find that the statement is reliable, taking into account how it was made and maintained. Rule 158 (B) provides that the Trial Chamber, in considering the application of Rule 149 (D), which grants it the discretionary power to exclude evidence, shall take into account whether the evidence in question goes to proof of acts and conduct of the accused as charged in the indictment. Evidence under Rule 158 could be provided in the form of a written statement, any other reliable record of what the person has said, written or otherwise expressed, or a transcript of a statement, whether or not it is in the form prescribed by the Rules.

³⁷ Prosecution motion, paras 28-30; Prosecution reply, para. 22.

³⁸ Sabra Defence response, paras 44-46; Sabra Defence sur-reply, para. 11.

34. The Trial Chamber has addressed in earlier decisions the specific requirements under Rule 158 for the admission of the evidence of unavailable persons.³⁹ These findings are applicable here.

DISCUSSION AND DECISION

Witness 056's unavailability

35. The Trial Chamber finds that Witness 056 is 'for good reason otherwise unavailable to testify orally' within the meaning of Rule 158 (A), third proposition, for a number of reasons.

36. First, the Trial Chamber has explored and exhausted all existing possibilities to secure Witness 056's *viva voce* (live) testimony. All efforts and attempts in this respect remained unsuccessful.

37. Moreover, rather than being merely unwilling to cooperate and testify, the witness is objectively prevented from doing so and is thus 'for good reason otherwise unavailable to testify'. Although, as the Trial Chamber has previously held, this wording of Rule 158 is broader than the corresponding part of the provision at the International Criminal Tribunal for the former Yugoslavia (ICTY)—Rule 92 *quater* of the ICTY's Rules of Procedure and Evidence⁴⁰—the ICTY's case law may still provide useful guidance in interpreting a person's unavailability under Rule 158's third proposition.⁴¹ The Trial Chamber has agreed with and followed the 'objective unavailability' test, which the ICTY has consistently applied.⁴²

38. The Trial Chamber carefully examined the medical certificate and related documentation, according to which the witness is permanently unfit to be questioned due to a medical condition. Consequently, the witness suffers from an established medical condition,

³⁹ See e.g., F3473, Decision Admitting Witness PRH028's Statement Pursuant to Rule 158 and Granting Provisional Protective Measures, 8 December 2017 ('Decision of 8 December 2017'), para. 8; F3371, Decision Admitting into Evidence the Audio Recordings and Transcripts of the Prosecution Interview of Mr Wissam Al-Hassan (Witness PRH680) Under Rule 158 and Three Related Documents Under Rule 154, 20 October 2017 ('Decision of 20 October 2017'), paras 51-52; F3107, *Corrected Version of* "Decision on 'Prosecution Motion to Admit the Statement of PRH024 Under Rule 158' - with Partially Dissenting Opinion of Judge David Re" dated 28 April 2017, 1 May 2017, paras 16-17.

⁴⁰ Rule 92 *quater* provides for the admission of the evidence of a person who has 'died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally'.

⁴¹ F3017, Decision Admitting Witness PRH 437's Statements Under Rule 158 and Granting Protective Measures, 28 February 2017 ('Decision of 28 February 2017'), para. 12.

⁴² Decision of 28 February 2017, para. 12 and fn. 13, referring to relevant ICTY case law.

which affects their capability to testify. This is in line with the ICTY's case law, according to which if a bodily or mental condition impacts a witness's ability to testify, it renders the witness unavailable under ICTY's Rule 92 *quater*.⁴³

39. Contrary to the Defence's submissions, the Trial Chamber sees no valid reason to question the accuracy or reliability of the medical certificate and related documentation. Upon consideration of all of the factors, discussed above, the Trial Chamber is satisfied that Witness 056 is objectively incapable of attending a court hearing and testifying and is thus 'unavailable' for the purposes of Rule 158. Consequently, the first condition for admitting Witness 056's evidence under Rule 158 is met.

Relevance, reliability and probative value of the five statements tendered by the Prosecution

40. The Trial Chamber has already found that the five statements of Witness 056 tendered by the Prosecution are relevant to and probative of the disappearance of Mr Abu Adass and his video-taped claim of responsibility.⁴⁴ Hence, the Trial Chamber has determined that these statements satisfy the basic requirements for admission of evidence under Rule 149 (C).

41. However, the Trial Chamber found these statements admissible within the context of Rule 156, as the witness was expected to appear in court and testify. The Trial Chamber specifically stated that it would be assisted by hearing Witness 056's evidence concerning the witness's direct observations and interactions with the person called 'Mohammed', who the Prosecution alleges was Mr Oneissi. Accordingly, the Trial Chamber did not consider these parts of the statements to be admissible under Rule 156 *in lieu* of the witness's examination in court.⁴⁵

⁴³ See e.g., ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Prosecution's Motion to Admit the Evidence of Witness No.39 Pursuant to Rule 92 *quater*, 7 September 2011, para. 28 and fn. 43 (referring to 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. 48, according to which 'the individual in question is objectively unable to attend a court hearing, either because he is deceased or because of physical or mental impairment'), para. 29 (referring to ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 *quater*, 24 July 2008, para. 15, distinguishing between an 'emotional state' of the witness and an established 'mental condition' and emphasising that only the latter would render the witness unavailable to give oral testimony, hence, 'objectively unavailable') and para. 30, distinguishing circumstances that constitute 'objective unavailability' from those that do not.

⁴⁴ Decision of 29 September 2015, para. 14.

⁴⁵ Decision of 29 September 2015, paras 14-17.

42. However, circumstances have changed since the Trial Chamber issued its decision under Rule 156, where it considered certain parts not to be admissible while awaiting the witness's live testimony. Witness 056's is no longer available to testify, including on the specific points in the statements concerning the witness's direct observations and interactions with the person called 'Mohammed'. This change of circumstances, which entails also the different legal basis for the Prosecution's application to admit the statements into evidence, necessitates that the Trial Chamber determine if the discrete parts it previously declined to admit under Rule 156 are admissible in light of the prerequisites of Rule 158.

43. The Trial Chamber finds that the parts of the witness's account containing direct observations and information on interactions with the person called 'Mohammed' are relevant to and probative of the allegations in the amended consolidated indictment concerning Mr Abu Adass meeting and interacting with 'Mohammed'. Hence, these parts of the witness's statements also meet the basic requirements for admission under Rule 149 (C). Consequently, Witness 056's five statements are relevant and have some probative value in their entirety.

44. Next, the Trial Chamber must assess the reliability of the statements under Rule 158 (A) (ii)⁴⁶ taking into account how they were made and maintained. Previously, the Trial Chamber has determined that statements and documents tendered under Rule 158 need not be in the form prescribed by Rules 155 and 156, which govern the admission into evidence of written statements and transcripts *in lieu* of oral testimony or examination in chief.⁴⁷ Similarly, the Practice Direction relating to Rules 123, 155 and 157 does not apply to documents and statements tendered under Rule 158. However, although not strictly applicable to admission of evidence of unavailable persons, the Practice Direction and Rule 155 provide useful guidance in the assessment of reliability under Rule 158 (A) (ii).

45. The manner in which the five witness statements were made provides sufficient indicia of their *prima facie* reliability under Rule 158 (A) (ii). The statements are dated and note the name of the witness and the interviewer, all of whom signed each page. The witness statements contain either a warning of the consequences of providing a false statement, or the

⁴⁶ In its decision under Rule 156 of 29 September 2015 the Trial Chamber did not address the reliability of the five statements.

⁴⁷ Decision of 8 December 2017, para. 9; Decision of 20 October 2017, para. 58; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2100, Decision on Prosecution Motion to Admit the Statements of Deceased Witness PRH045, 24 July 2015 ('Decision of 24 July 2015'), para. 3.

witness's solemn declaration to speak the truth and or a witness acknowledgement of the truthfulness of their contents.⁴⁸ The statements were read out to the witness, who approved and signed them.⁴⁹ Those statements that were taken with the assistance of an interpreter are signed by the interpreter.⁵⁰

46. Upon careful consideration of the witness's statements, on their own and taken together, the Trial Chamber has not detected any manifest internal inconsistencies in the statements or between them. On the contrary, the witness's recollections concerning the period and the circumstances in which Mr Abu Adass met and interacted with 'Mohammed', and disappeared, are consistent throughout the five statements. In the course of the interviews, the witness explained the facts experienced personally⁵¹ and also clearly stated the limitations to the witness's knowledge and or recollections. When the witness was uncertain about specific facts, this was acknowledged during the respective interview.⁵² Accordingly, the Trial Chamber finds that the statements are *prima facie* reliable, taking into account how they were made and maintained, together with the lack of manifest inconsistencies within or between them.

47. As regards the witness's alleged lack of credibility, the Trial Chamber reiterates that credibility concerns the weight and not the *prima facie* reliability or probative value of a witness's evidence. The Trial Chamber's earlier findings and references to relevant international precedent are applicable here.⁵³

48. Having determined the relevance, *prima facie* reliability and probative value of Witness 056's statements, the Trial Chamber must assess, in accordance with Rule 158 (B), whether the need to ensure a fair trial under Rule 149 (D) substantially outweighs the

⁴⁸ Witness statement of 13 April 2005, p. L0005303; witness statement of 7 July 2005, pp 2, 7; witness statement of 5 May 2006, p. 3; witness statement of 7-8 June 2007, p. 3; witness statement of 1 July 2010, pp 2, 20.

⁴⁹ Witness statement of 13 April 2005, pp L0005313, L0005317; witness statement of 7 July 2005, p. 7; witness statement of 5 May 2006, p. 6; witness statement of 7-8 June 2007, p. 20; witness statement of 1 July 2010, p. 20.

⁵⁰ Witness statement of 7 July 2005; witness statement of 5 May 2006; witness statement of 7-8 June 2007; witness statement of 1 July 2010.

⁵¹ See e.g. witness statement of 7-8 June 2007, p. 11, where the witness says 'I could tell because there is ...'

⁵² See e.g. witness statement of 7-8 June 2007, p. 11, where the witness says 'I am not sure if this was the same ...'

⁵³ Decision of 20 October 2017, paras 68-69.

probative value of this evidence. The Trial Chamber has the discretionary power under Rule 149 (D) to exclude the evidence, if it determines this to be the case.

49. In considering the application of Rule 149 (D) to Rule 158, the Trial Chamber must assess whether the evidence goes to proof of acts and conduct of the Accused as charged in the amended consolidated indictment. The Trial Chamber has held in earlier decisions that to determine whether a statement goes to proof of the acts and conduct of the Accused, each separate piece of evidence must be assessed on its own merits and in light of the circumstances.⁵⁴

50. Having examined the witness's statements, the Trial Chamber finds that they do not directly go to proof of acts or conduct of the Accused as charged in the amended consolidated indictment. The witness's account contains information concerning Mr Abu Adass's meeting and interactions with a person, who presented himself as 'Mohammed', and Mr Abu Adass's disappearance, without, however, identifying or in any other way linking any of the Accused to 'Mohammed'. The evidence is hearsay and does not identify Mr Oneissi as 'Mohammed'.

51. Furthermore, as the Trial Chamber has previously held, even if a statement goes to proof of acts or conduct of the Accused, Rule 158 (B) does not bar its admission into evidence if its probative value is not substantially outweighed by the need to ensure a fair trial.⁵⁵ Although counsel for the Accused cannot cross-examine Witness 056, this does not automatically warrant exclusion of the witness's evidence under Rule 149 (D).⁵⁶ The Trial Chamber will carefully consider the lack of cross-examination of the witness at a later stage of the proceedings when assessing the weight it will give to the five statements in light of the totality of the evidence in the case. In this respect, the Trial Chamber notes that Witness 056's statements are not the only evidence admitted concerning Mr Abu Adass, the

⁵⁴ Decision of 20 October 2017, para. 79. *See also* STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2258, Decision on Prosecution Motion for the Admission of Evidence Related to the Locations of Residences Associated with the Accused, 9 October 2015, para. 64.

⁵⁵ Decision of 20 October 2017, para. 84; Decision of 28 February 2017, para. 17; Decision of 24 July 2015, para. 15.

⁵⁶ This is evident from the regime for admission of evidence under Rule 158 and its equivalent provisions before other international criminal courts and tribunals. *See* Decision of 20 October 2017, para. 85 and *fn*s 103-104, referring to relevant international precedent and previous case law of the Trial Chamber. *See also* Decision of 28 February 2017, paras 17-18.

circumstances surrounding his meeting and interactions with a person, who presented himself as ‘Mohammed’, and Mr Abu Adass’s subsequent disappearance.⁵⁷

Relevance, reliability and probative value of the material sought into admission by the Sabra Defence

52. The Trial Chamber previously declined to admit into evidence other statements of Witness 056 tendered by the Sabra Defence, finding this additional evidence to be unnecessary in light of the witness’s expected appearance in court and the possibility of cross-examination. However, given that the witness is now unavailable, the Trial Chamber will follow the approach which it has adopted in similar circumstances when the Defence has tendered additional statements of a witness, in response to the Prosecution tendering statements of the same witness.⁵⁸ The Trial Chamber is inclined to admit the material tendered by the Sabra Defence, subject to the admissibility requirements of relevance, *prima facie* reliability and probative value, to the extent it may prove helpful in providing context, identifying inconsistencies in the witness’s evidence and further assisting the Trial Chamber’s assessment of the witness’s credibility.

53. The Trial Chamber will therefore consider next the admissibility of the ten documents tendered by the Sabra Defence, as listed in annex A of its response. The Trial Chamber will assess this material under Rules 149 (C) and 158 with the same scrutiny that it applied to the five statements tendered by the Prosecution.

54. The first two documents listed in annex A to the Sabra Defence response⁵⁹ are statements of Witness 056 containing accounts related to Mr Abu Adass and concern, among other things, the circumstances surrounding his meeting and interactions with ‘Mohammed’ and his subsequent disappearance. Therefore, the Trial Chamber finds that the two statements are relevant and probative of these alleged facts and may thus be helpful to provide context and contribute to the assessment of the witness’s credibility at a later stage of the proceedings. As regards their reliability, the Trial Chamber notes that the two statements form part of a

⁵⁷ See e.g. Decision of 25 September 2017. See also above, para. 1, fn. 4.

⁵⁸ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1890, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 27 March 2015, para. 26.

⁵⁹ ERN 50008250-50008253_U_EN and ERN 50008269-50008270_U_EN.

longer document, entitled 'Police Report'.⁶⁰ This report is dated, signed and stamped by the investigative authorities who conducted the interview. It also contains information on the context in which the statements were made, how they were made, and that Witness 056 was informed of their rights.⁶¹ All these factors taken together confer on the statements sufficient indicia of *prima facie* reliability and probative value for their admission into evidence, under Rule 158.

55. Similarly, the third⁶² and fourth documents⁶³ are statements of Witness 056 relating to the same circumstances surrounding Mr Abu Adass and are thus relevant. However, these two statements (as well as the previous version of the third statement, which was submitted with a slightly different translation)⁶⁴ suffer from identical shortcomings which affect their reliability and thus probative value. They appear to be extracts of a longer document from the Lebanese investigation case file, the date of which is, however, unknown. Neither of the two statements bears a signature, stamp or any other sign of authenticity, which could confer on them some indicia of reliability, as required by Rule 158 (A) (ii). Consequently, although these statements are relevant, they are presently unreliable. The Trial Chamber therefore declines to admit the third and fourth statements into evidence, but could reconsider its findings if the Sabra Defence establishes their provenance.

56. The fifth document⁶⁵ contains a complete record of a witness statement of Witness 056 concerning the same circumstances surrounding Mr Abu Adass. It is therefore relevant and may provide context and assist the Trial Chamber's assessment of the witness's credibility. The witness statement displays the date, time and place of the interview. It also contains an acknowledgement of the witness's oath to speak the truth.⁶⁶ The statement was read out to the witness, who approved it and signed each page. The Trial Chamber finds that these factors provide sufficient indicia of *prima facie* reliability and probative value for the admission of this witness statement into evidence.

⁶⁰ ERN 50008244-50008273_U_EN.

⁶¹ ERN 50008245 and ERN 50008250 (pp 5 and 10 of the report).

⁶² ERN 50012160-50012163_D_EN.

⁶³ ERN 50012169-50012170_D_EN.

⁶⁴ See above, para. 6.

⁶⁵ ERN L0008183-L0008191_D_EN.

⁶⁶ ERN L0008183.

57. Although the sixth document⁶⁷ is a statement of Witness 056 which formally satisfies the reliability criterion under Rule 158 (A) (ii), it does not contain any information related to Mr Abu Adass's interactions with 'Mohammed', his disappearance or any other fact alleged in the amended consolidated indictment. It is as such of limited relevance and has no probative value. Consequently, the Trial Chamber will not admit it into evidence.

58. The seventh document⁶⁸ is a statement of Witness 056 relating to Mr Abu Adass, the circumstances surrounding his interactions with 'Mohammed', and his subsequent disappearance, and it is therefore relevant. Still, this statement suffers from shortcomings which affect its reliability and thus probative value. Other than a date, it provides no information which could identify the context in which this interview was taken, how it was taken, who took the statement or where it was taken. Consequently, it lacks any indicia of reliability to meet the requirement of Rule 158 (A) (ii). Hence, this statement is unreliable and, ultimately, inadmissible.

59. The eighth document⁶⁹ is an internal memorandum, concerning the witness and discussing, in particular, specific information and material that the witness provided. Although this document satisfies the reliability criterion under Rule 158 (A) (ii), it does not contain any information related to Mr Abu Adass's interactions with 'Mohammed', his disappearance or any other fact alleged in the amended consolidated indictment. It is therefore of limited relevance and has no probative value. The Trial Chamber will not admit it into evidence.

60. The ninth document⁷⁰ is a statement of Witness 056, which relates to Mr Abu Adass and concerns, among other things, the circumstances surrounding his interactions with 'Mohammed' and his subsequent disappearance. Hence, the statement is relevant and probative of these alleged facts. It also provides context and may contribute to the assessment of the witness's credibility. This statement is an extract of a longer document, which seems to contain the statements of at least one other individual. The extract with Witness 056's statement provides the date and time of the interview. It also contains information on the

⁶⁷ ERN L0008157-L0008157_D_EN.

⁶⁸ ERN 50011295-50011301.

⁶⁹ ERN 300213-300214.

⁷⁰ ERN 60006275-60006280_D_EN.

context in which the statement was made and states that Witness 056 was informed of their rights.⁷¹ The statement was read out to the witness, who approved it and signed each page. Each page is also signed by the interviewer and the supporting staff, present at the interview. All of these factors provide indicia of *prima facie* reliability and probative value sufficient for the admission of the statement into evidence.

61. The tenth document⁷² is a letter containing information which is only remotely, if at all, relevant to Mr Abu Adass. It mainly discusses assumingly personal circumstances of Witness 056 and other information, which is largely irrelevant to any of the factual allegations in the amended consolidated indictment. Furthermore, the letter is undated and unsigned. The name of the purported author, which is typed, appears to be misspelled and is different from the name by which the witness is identified in the statements. Consequently, the Trial Chamber finds that the letter is inadmissible as irrelevant, unreliable and having no probative value.

62. In light of the above, the Trial Chamber determines that the first, second, fifth and ninth statements, as listed in annex A to the Sabra Defence response, are admissible, under Rule 158, and declines to admit the rest of the material tendered by counsel for Mr Sabra.

63. The Trial Chamber again reminds the Parties of their obligations under the Code of Professional Conduct,⁷³ in particular, Article 1 (a) requiring counsel to conduct themselves ‘professionally and in accordance with the law, rules and ethics of the legal profession’. Further, Article 6 (e) of the Code of Professional Conduct requires counsel to engage with all counsel, in particular, opposing counsel ‘in a civil manner including when faced with disagreement’. Under Article 26 of the Code of Professional Conduct, counsel ‘shall avoid ill-considered’ criticism of the conduct of other counsel. Similarly, by virtue of Article 27 of the Code of Professional Conduct, counsel ‘shall not make any accusation of impropriety’ against other counsel ‘unless such accusation is well-founded’.

⁷¹ ERN 60006275.

⁷² ERN 60002041-60002043_D_EN.

⁷³ See *similarly*, 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.

CONFIDENTIALITY

64. To ensure publicity and transparency of the proceedings, this decision is classified as public, although it discusses confidential information and filings, which are currently classified as confidential. The references to the confidential information are, therefore, kept to a minimum.

65. The Trial Chamber orders the Prosecution, counsel for Mr Oneissi and counsel for Mr Sabra to file public redacted versions of their filings and urges them to cooperate so as to reach agreement in this respect.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 158, the five statements of Witness PRH056, tendered by the Prosecution, and four of the statements, tendered by the Sabra Defence, identified in paragraphs 54, 56 and 60 of this decision;

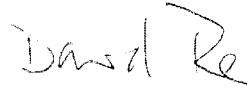
DECIDES that, at a suitable stage of the proceedings, it will formally admit these statements into evidence;

DECLINES to admit into evidence the other documents proposed by the Sabra Defence; and

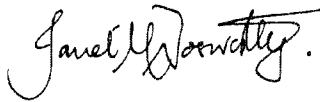
ORDERS the Prosecution, counsel for Mr Oneissi and counsel for Mr Sabra to file public redacted versions of their filings.

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

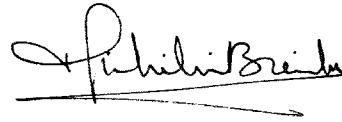
Leidschendam,
The Netherlands
13 December 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

