



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:** 30 July 2019

**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 GRANTING PROTECTIVE MEASURES TO WITNESS PRH028 AND  
DENYING PROTECTIVE MEASURES TO WITNESS PRH024**

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**Office of the Prosecutor:**  
Mr Norman Farrell & Mr Nigel Povoas

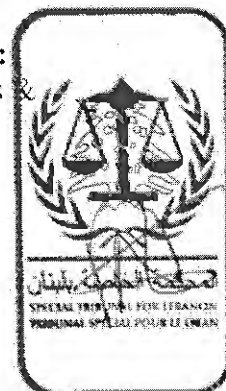
**Counsel for Mr Salim Jamil Ayyash:**  
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Mr Chad Mair

**Legal Representatives of  
Participating Victims:**  
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& Ms Nada Abdelsater-Abusamra

**Counsel for Mr Hassan Habib Merhi:**  
Mr Mohamed Aouini & 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

*Witness PRH028*

1. Witness PRH028 is related to the Accused, Mr Hassan Habib Merhi. He provided a statement about mobile numbers allegedly used by Mr Merhi and the Accused, Mr Samil Jamil Ayyash, and the former Accused, Mr Mustafa Amine Badreddine. On 31 January 2017, on the Prosecution's request, the Trial Chamber decided to admit his statement into evidence under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence.<sup>1</sup>
2. The Trial Chamber made its admission contingent upon the witness appearing for cross-examination by the Merhi Defence under Rule 155 (C).<sup>2</sup> The Prosecution then unsuccessfully attempted to contact Witness 28 to ensure his testimony before the Trial Chamber. The Trial Chamber also issued a summons for his appearance in court.<sup>3</sup>
3. On 8 December 2017, on the Prosecution's application, the Trial Chamber decided to admit Witness 28's statement into evidence under Rule 158 as an 'unavailable' witness.<sup>4</sup> It found that the witness could no longer with reasonable diligence be traced, but that he must appear for cross-examination should he become available during trial, and ordered that the Prosecution continue its efforts to secure his attendance.<sup>5</sup> The Trial Chamber also granted Witness 28 provisional protective measures under Rule 133. It asked the Prosecution to inform it if the witness requested protective measures, should it be able to verify this with the witness as required by Rule 133 (B).<sup>6</sup>
4. Under Rule 133 (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,

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2963, Decision on the Prosecution Motion to Admit Ten Witness Statements relating to Salim Jamil Ayyash and Hassan Habib Merhi and to Admit One Exhibit, 31 January 2017 ('Decision of 31 January 2017'), paras 4, 24, 26, disposition; F2963, Addendum to the 'Decision on the Prosecution Motion to Admit Ten Witness Statements Relating to Salim Jamil Ayyash and Hassan Habib Merhi and to Admit One Exhibit' of 31 January 2017, 1 February 2017. Rule 155 allows the Trial Chamber to admit into evidence the written statement of a witness in lieu of oral testimony, if certain conditions are satisfied.

<sup>2</sup> Rule 155 (C) allows the Trial Chamber to call for cross-examination a witness whose statement has been admitted in lieu of examination in chief. Decision of 31 January 2017, para. 29.

<sup>3</sup> These attempts to bring the witness before the Special Tribunal are detailed in F3473, Decision Admitting Witness PRH028's Statement Pursuant to Rule 158 and Granting Provisional Protective Measures, 8 December 2017 ('Decision of 8 December 2017'), paras 2-7, 15-17.

<sup>4</sup> Rule 158 permits the admission into evidence of written statements 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 in person, if certain conditions are satisfied.

<sup>5</sup> Decision of 8 December 2017, paras 18-22, disposition.

<sup>6</sup> Decision of 8 December 2017, para. 31, disposition.

provided that the measures are consistent with the rights of the accused.’ A Party requesting an order for protective measures has to seek to obtain the consent of the person in respect of whom it seeks protective measures under Rule 133 (B).

5. In June 2018, the Prosecution managed to call Witness 28, but the Merhi Defence informed the Trial Chamber that it no longer wished to cross-examine him.<sup>7</sup> On 13 July 2018, the Trial Chamber formally admitted his statement into evidence under Rule 155.<sup>8</sup> The Trial Chamber noted that the witness’s provisional protective measures ‘continue until the Prosecution has informed the Trial Chamber whether the witness requires them.’<sup>9</sup>

#### *Witness PRH024*

6. Witness PRH024 provided evidence about mobiles that the Prosecution attributes to the Accused, Mr Assad Hassan Sabra, and the Sabra family address. He also identified Mr Sabra from a photograph. On 12 July 2016, the Trial Chamber found the witness’s statement admissible under Rule 155 but ordered, pursuant to Rule 155 (C), that the Prosecution make him available for cross-examination.<sup>10</sup> It ordered that his identity and identifying information provisionally remain confidential.<sup>11</sup>

7. After multiple attempts by the Prosecution to secure Witness 24’s attendance—which included the Trial Chamber issuing summonses for his attendance in court on a specified day—the Trial Chamber on 1 May 2017, and by majority, found that he could not with reasonable diligence be traced and admitted his statement under Rule 158.<sup>12</sup> It held that the witness must appear for cross-examination should he become available during the trial, and that the Prosecution must continue its diligent efforts to secure his attendance.<sup>13</sup> The Prosecution has since provided periodic updates on its efforts to find the witness.<sup>14</sup>

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<sup>7</sup> F3708, Decision Noting the Admission into Evidence of Witness PRH028’s Statement under Rule 155 and Revoking a Summons for the Witness to Appear, 13 July 2018 (‘Decision of 13 July 2018’), para. 4.

<sup>8</sup> Decision of 13 July 2018, para. 5.

<sup>9</sup> Decision of 13 July 2018, para. 6.

<sup>10</sup> F2644, Decision on Prosecution Motion to Admit the Statements of Witness PRH024, PRH069, PRH106 and PRH051 pursuant to Rule 155, 12 July 2016 (‘Decision of 12 July 2016’), paras 28, 39, 40, disposition.

<sup>11</sup> Decision of 12 July 2016, para. 44.

<sup>12</sup> 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 (‘Decision of 1 May 2017’), paras 6-15, 40, disposition.

<sup>13</sup> Decision of 1 May 2017, para. 40; F3516, Order relating to Sabra Defence Observations on ‘Prosecution Update regarding PRH024 pursuant to the Order of 14 September 2017’, 12 January 2018, para. 1.

<sup>14</sup> See F3331, Prosecution Update regarding PRH024 pursuant to the Order of 14 September 2017, 19 September 2017 (confidential); F3539, Prosecution Update regarding PRH024 pursuant to the Order of 12 January 2018, 26 January 2018; F3691, Prosecution Update regarding PRH024 and PRH028, 20 June 2018 (confidential).

8. Cognizant that the protective measures of both Witness 28 and Witness 24 are only provisional, the Trial Chamber on 8 April 2019 invited the Prosecution's submissions on how it intends to proceed.<sup>15</sup> On 25 April 2019, the Prosecution filed a motion seeking permanent protective measures for Witness 28.<sup>16</sup> It updated the Trial Chamber on its efforts to find Witness 24 and asked it to maintain his provisional protective measures.<sup>17</sup> The Legal Representatives of Victims did not object to the motion.<sup>18</sup> No Defence counsel responded.

### **DECISION**

#### *Witness 28*

9. A Prosecution investigator, Mr Erich Karnberger, telephoned Witness 28 on 12 April 2019.<sup>19</sup> The witness told him that 'he does not want to have his name mentioned anywhere in the court proceedings at all.'<sup>20</sup> He is concerned about his safety and the negative effect on his personal and professional life of being associated with the Special Tribunal.<sup>21</sup> The Prosecution submits that Witness 28 'implicitly consented' to protective measures by requesting that his name remain confidential.<sup>22</sup>

10. Witness 28 has consistently expressed concern about his and his family's safety, as well as the negative impact disclosure of his association with the Special Tribunal could have on his business and personal life.<sup>23</sup>

11. The Trial Chamber is satisfied that these concerns, combined with the witness's desire not to have his name mentioned 'anywhere in the court proceedings at all', are tantamount to his consent to permanent protective measures. In any event, the Trial Chamber has previously

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<sup>15</sup> Email of 8 April 2019 from the Trial Chamber's senior legal officer to the Prosecution, Defence and Legal Representatives of Victims.

<sup>16</sup> F3767, Prosecution Request for Permanent Protective Measures for PRH028 and Update regarding PRH024, 25 April 2019 ('Prosecution motion').

<sup>17</sup> Prosecution motion; F3767, Addendum to Prosecution Request for Permanent Protective Measures for PRH028 and Update regarding PRH024, 29 April 2019.

<sup>18</sup> F3768, Response of the Legal Representative of Victims to the Prosecution Request for Permanent Protective Measures for PRH028 and Update regarding PRH024, 2 May 2019, para. 4.

<sup>19</sup> Prosecution motion, paras 1, 6.

<sup>20</sup> Witness statement of Erich Karnberger, dated 15 April 2019 (confidential), para. 14. This was disclosed to the Trial Chamber, the Parties and the Legal Representatives of Victims on Legal Workflow after the motion was filed. *See also* Prosecution motion, paras 6, 8.

<sup>21</sup> Witness statement of Erich Karnberger, para. 15; Prosecution motion, paras 6, 8.

<sup>22</sup> Prosecution motion, para. 9.

<sup>23</sup> Exhibit P2126 (Transcript of audio recording of witness interview of PRH028, 2 June 2010) (confidential), pp 3-5, 8; Witness statement of Gregory Purser, dated 3 May 2017 (confidential) (previously disclosed to the Trial Chamber, the Parties and the Legal Representatives of Victims on Legal Workflow), paras 9-11; Witness statement of Erich Karnberger, paras 9 (f), 14-15.

held that Rule 133 (B) only requires the Prosecution to seek to obtain a witness's consent for protective measures and not necessarily to obtain it.<sup>24</sup>

12. As the circumstances previously found to warrant provisional protective measures under Rule 133 (A) remain unchanged—namely, the witness's expressed concerns for his and his family's safety, that he is related to Mr Merhi and knows Mr Ayyash, and gives evidence relating to the attribution of mobiles to both Accused and Mr Badreddine<sup>25</sup>—and the requirements of Rule 133 (B) are satisfied, the Trial Chamber grants the Prosecution's request for permanent protective measures for Witness 28.

#### *Witness 24*

13. The Prosecution submits that since its last update to the Trial Chamber it sent three further requests for assistance to the Lebanese Government to search for Witness 24's name in its border entry and exit records.<sup>26</sup> According to the responses to the Prosecution's requests, Lebanon has no record of Witness 24 returning to Lebanon between 19 March 2018 and 17 April 2019.<sup>27</sup> The Prosecution therefore asks the Trial Chamber to maintain the provisional protective measures, as it cannot verify whether the witness requires them.<sup>28</sup>

14. The Trial Chamber has no information suggesting that Witness 24 would face any threat to his security or privacy should he be publicly identified. It is therefore not satisfied of the need for protective measures under Rule 133. Further, the Trial Chamber sees no reasonable prospect that the witness will be found before issuing its judgment. It has no information on whether the witness seeks protective measures and his consent under Rule 133 (B) cannot be sought. The Trial Chamber emphasises the public nature of these proceedings as well as the need for the matter to be settled at this late stage of the trial proceedings.

15. The Trial Chamber accordingly declines to maintain Witness 24's provisional protective measures and decides that his name may be made public.

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<sup>24</sup> See Decision of 8 December 2017, para. 30; F3366, Decision Denying Prosecution Motion for Protective Measures for Witness PRH103, 20 October 2017, paras 23-24.

<sup>25</sup> See Decision of 8 December 2017, paras 23-26, 29.

<sup>26</sup> Prosecution motion, paras 3, 14-15.

<sup>27</sup> Prosecution motion, paras 13-15; Addendum to Prosecution motion, para. 1.

<sup>28</sup> Prosecution motion, paras 3, 16.

**DISPOSITION**

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

**DECLINES** to continue the protective measures ordered for Witness PRH024 on 12 July 2016;

**GRANTS** permanent protective measures for Witness PRH028; and

**ORDERS** that:

- (i) the identity of the witness must remain confidential;
- (ii) the witness must be referred to by pseudonym in all public hearings and public documents;
- (iii) any documents that are disclosed to the public and information which may identify him as a witness at trial shall be redacted to protect the witness's identity;
- (iv) no person, including members of the media and third parties who become aware of the identity of the witness and his involvement in these proceedings may disclose information protected by these orders; and

**REAFFIRMS** that a knowing violation of this order may result in prosecution under Rule 60 *bis*.

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

Leidschendam,  
The Netherlands  
30 July 2019

*David Re*

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Judge David Re, Presiding

*Janet Nosworthy*

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Judge Janet Nosworthy

*Micheline Braidy*

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Judge Micheline Braidy

