



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE TRIAL CHAMBER**

**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:** 11 May 2016

**Original language:** English

**Type of document:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH  
MUSTAFA AMINE BADREDDINE  
HASSAN HABIB MERHI  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

**CORRECTED VERSION OF DECISION ON PROSECUTION MOTION FOR THE  
ADMISSION OF STATEMENTS BY WITNESS PRH707  
AND ON AYYASH DEFENCE MOTION TO STRIKE THE PROSECUTION REPLY**

**Office of the Prosecutor:**

Mr Norman Farrell, Mr Graeme Cameron  
& Mr Alexander Milne

**Legal Representatives of Victims:**

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

**Counsel for Mr Salim Jamil Ayyash:**

Mr Eugene O'Sullivan, Mr Emile Aoun &  
Mr Thomas Hannis

**Counsel for Mr Mustafa Amine Badreddine:**

Mr Antoine Korkmaz, Mr Iain Edwards &  
Ms Mylène Dimitri

**Counsel for Mr Hassan Habib Merhi:**

Mr Mohamed Aouini, Ms Dorothée Le Fraper  
du Hellen & Mr Jad Khalil

**Counsel for Mr Hussein Hassan Oneissi:**

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

**Counsel for Mr Assad Hassan Sabra:**

Mr David Young, Mr Guénaël Mettraux &  
Mr Geoffrey Roberts



## INTRODUCTION

1. Witness PRH707, a Prosecution witness, is in mid-testimony, after testifying for nine days in examination-in-chief before the Trial Chamber. The witness is the officially designated representative of Alfa, one of the two Lebanese mobile telecommunication service providers. The Prosecution—relying upon Article 21 of the Special Tribunal’s Statute, and Rules 149 (C), 155 (C) and 156 of the Special Tribunal’s Rules of Procedure and Evidence—is seeking the admission into evidence of three statements made by the witness in 2015 and 2016.<sup>1</sup> In the alternative, the Prosecution requests the Trial Chamber to admit specific paragraphs of the statements into evidence.<sup>2</sup>
2. Counsel for the Accused, Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi, and Mr Assad Hassan Sabra responded to the motion.<sup>3</sup> The Prosecution filed a consolidated reply to the Defence responses,<sup>4</sup> after obtaining leave from the Trial Chamber to exceed the time and word limit for replies.<sup>5</sup> The Defence for Mr Sabra sur-replied.<sup>6</sup> Counsel for Mr Ayyash—joined by counsel for Mr Merhi and Mr Badreddine—also filed a motion to strike the Prosecution’s consolidated reply,<sup>7</sup> to which the Prosecution responded.<sup>8</sup>

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<sup>1</sup> STL-11-01/T/TC, *Prosecution v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2450, Prosecution Motion for the Admission of Witness Statement signed by Witness PRH707, 12 February 2016.

<sup>2</sup> Prosecution motion, paras 35 and 38.

<sup>3</sup> F2471, Ayyash Defence Response to “Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707”, 26 February 2016; F2472, Badreddine Defence Response to “Prosecution Motion for the Admission of Witness Statement signed by Witness PRH707”, 26 February 2016; F2470, Sabra Defence Response to “Prosecution Motion for the Admission of Witness Statement Signed by PRH707”, 26 February 2016; F2476, Adjunction de la défense de Merhi aux réponses des défenses d’Ayyash et Badreddine à la “Prosecution Motion for the Admission of Witness Statement Signed by Witness PRH707”, 29 February 2015; F2474, Defence for Hussein Hassan Oneissi Joinder to “Ayyash Defence Response to ‘Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707’” dated 26 February 2016.

<sup>4</sup> F2488, Consolidated Prosecution Reply to Defence Responses to “Prosecution Motion for the Admission of Witness Statements signed by Witness PRH707”, 11 March 2016.

<sup>5</sup> F2482, Decision on Urgent Prosecution Request for Extension of Word and Time Limits for Consolidated Reply, 4 March 2016; F2478, Urgent Prosecution Request for an Extension of Time and Word Limit in Relation to its Consolidated Reply to the Defence Responses to the Prosecution Motion for the Admission of Witness Statement signed by PRH707, 1 March 2016.

<sup>6</sup> F2493, *Sur-Reply* to the Consolidated Prosecution Reply to Defence Responses to “Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707”, 16 March 2016.

<sup>7</sup> F2492, Motion to Strike the “Consolidated Prosecution Reply to Defence Responses to ‘Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707’”, 15 March 2016; F2505, Adjunction de la défense de Merhi à la requête aux fins de retrait de la “Consolidated Prosecution Reply to Defence Responses to ‘Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707’”, 18 March 2016; F2494, Badreddine Defence Joinder to Ayyash Defence Motion to Strike the “Consolidated Prosecution Reply to Defence Responses to ‘Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707’”, 16 March 2016.

<sup>8</sup> F2512, Prosecution Response to Ayyash Defence Motion to Strike Consolidated Reply, 22 March 2016; Email from Trial Chamber’s Legal Officer to the Parties, 18 March 2016.

3. The issue for determination is whether the Trial Chamber should receive the three statements into evidence either in part or in whole.

### **PROCEDURAL HISTORY**

4. In June 2015, the Lebanese Ministry of Telecommunications designated Witness 707, as the authorised representative for the telecommunications provider Alfa, to testify before the Special Tribunal about the company's business records and practices.<sup>9</sup> The Trial Chamber, on 11 December 2015, granted the Prosecution leave to add his name to the Prosecution's witness list.<sup>10</sup>

5. On 8 January 2016, the Prosecution emailed Defence counsel, informing them that it intends to ask Witness 707 to adopt his three statements and their annexes during his testimony, and then tender them into evidence.<sup>11</sup> Counsel for Mr Ayyash replied on 13 January 2016, stating that this meant that the witness would be a 'Rule 156 witness', and asking when the Prosecution intended to make an application under that Rule.<sup>12</sup>

6. Rule 156, titled 'Written Statements and Transcripts in lieu of Examination-in-chief', allows for the admission of a witness's written evidence going to proof of the acts and conduct of the accused as charged in the indictment, if the witness is present in court, available for cross-examination and questioning by the Judges, and attests that the written statement accurately reflects his or her declaration and what the witness would say if examined.

7. The Prosecution replied, stating that it had no such intention, since its reading of Rule 156 excluded the provision's application to witnesses who would be testifying *viva voce*.<sup>13</sup>

8. During its examination-in-chief of the witness, over two weeks in January and February 2016,<sup>14</sup> however, the Prosecution decided to seek the admission into evidence of the three witness statements. Prosecution argued that the statements do not substitute for the witness's live testimony, but because of the particular complexity and breadth of his evidence, would help the Trial

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<sup>9</sup> Transcript of 29 January 2016, pp. 50-51 and 105.

<sup>10</sup> F2376, Decision on Prosecution Motion to Add Witness PRH707 to its Witness List, 11 December 2015.

<sup>11</sup> Transcript of 29 January 2016, p. 58; Ayyash response, para. 7.

<sup>12</sup> Transcript of 29 January 2016, p. 60.

<sup>13</sup> Transcript of 10 February 2016, pp 4-5.

<sup>14</sup> Transcripts of 29 January 2016, 9 February 2016, 10 February 2016, 11 February 2016, 12 February 2016, 15 February 2016, 16 February 2016, 17 February 2016 and 18 February 2016.

Chamber.<sup>15</sup> As a result of Defence objections to admission of the statements, the Trial Chamber instructed the Prosecution to file a written application under the appropriate Rule, to which Defence counsel could make reasoned responses.<sup>16</sup>

## SUBMISSIONS

### **A. Prosecution**

9. The Prosecution requests the Trial Chamber to admit into evidence three witness statements, and their annexes, made by Witness 707 as Alfa's designated company representative. The statements concern the generation, business use, and storage of call data records, cell site data, and subscriber records by Alfa, and are probative of the reliability of Alfa's records and data.<sup>17</sup> As an alternative to admitting the statements in their entirety into evidence, the Prosecution requests the Trial Chamber to admit the specific paragraphs of the statements as notified to the Defence and addressed with the witness in court. These are:<sup>18</sup>

- (i) from the statement dated 11 November 2015: paragraphs 1-16, 22, 29-54, 58, 59 (D), 62, 72, 75, 90-96, 105, 111, 116, 120-128, 132-134, 140-143, 146, 151-152, 155, 157-160, 162-164, 166-171, 178-179, 181-199, 201-257, 260-286, 292-298, and all the annexes to that statement;
- (ii) from the statement dated 29 December 2015: paragraphs 1-10, 12-14, 20-22, and all annexes to that statement; and
- (iii) from the statement dated 25 January 2016: paragraphs 1-11, 17-23, 25-27.

10. The Trial Chamber has the discretion, under Article 21 of the Statute and Rules 149 (C) and (F), to admit the three statements or the identified specific paragraphs into evidence as complementary and supplementary to Witness 707's oral evidence. This will promote the efficient presentation of technical evidence by saving the Special Tribunal's resources. The Rules do not expressly contemplate the proposed approach, but it is a well-established principle of international

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<sup>15</sup> Transcript of 29 January 2016, p. 54.

<sup>16</sup> Transcript of 10 February 2016, pp. 18-19.

<sup>17</sup> Prosecution motion, paras 17-19.

<sup>18</sup> Prosecution motion, paras 35 and 38.

criminal law that the Rules are not exhaustive as to the measures the Trial Chamber may take in conducting the proceedings.<sup>19</sup>

11. In the alternative, the Prosecution requests the Trial Chamber to admit the statements or the specific paragraphs into evidence, under Rules 155 (C) and 156, *in lieu of* oral testimony. Witness 707 has appeared before the Trial Chamber and is available for cross-examination and questioning by the Judges. Neither Rule 155 nor 156 expressly prohibits combining the oral examination-in-chief of a witness and the admission of a written statement of the same witness.<sup>20</sup>

12. Further, since the witness could orally provide the entirety of the evidence in the statements, neither approach would prejudice the Defence nor result in additional or different evidence. The Trial Chamber will receive the same evidence either through this proposed approach or only through oral testimony. The only questions are the form and the amount of court time required to receive the evidence. Because of the excessive length of hearing the entirety of Witness 707's evidence orally, the Prosecution proposes the admission into evidence of the statements or the identified specific paragraphs. Moreover, the Defence's ability to cross-examine Witness 707 on the statements or the specific paragraphs, and anything he says during the hearings, is unaffected by the proposed approach.<sup>21</sup>

### **B. Defence of Mr Ayyash and Mr Oneissi**

13. Counsel for Mr Ayyash, joined by counsel for Mr Oneissi,<sup>22</sup> contest the motion on procedural and substantive grounds. They argue firstly that they did not receive adequate notice of the Prosecution's intention to tender the witness's statements into evidence. They point out that while he was added to the Prosecution's witness list as a live witness, his statements were not concurrently added to the Prosecution's exhibit list. Therefore, until the Prosecution's email of 8 January 2016, the Defence did not know of the Prosecution's intention to tender the witness's statements in addition to calling him as a witness.<sup>23</sup>

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<sup>19</sup> Prosecution motion, paras 20-26.

<sup>20</sup> Prosecution motion, paras 27-32.

<sup>21</sup> Prosecution motion, paras 6-11.

<sup>22</sup> Oneissi response, para. 2.

<sup>23</sup> Ayyash response, paras 6-7.

14. Moreover, the Prosecution's oral application for admission of statements on the day of the witness's appearance rather than earlier, as is usually the case with requests to admit witness statements, disadvantaged the Defence, particularly given the complexity of the evidence—as is illustrated by the length of the Prosecution's motion.<sup>24</sup>

15. Counsel also submit that no valid reason exists for the Trial Chamber to resort to any discretionary authority under Article 21 of the Statute to admit the statements, as proposed by the Prosecution. The Rules governing the modes of testimony are clear and do not suffer from any *lacunae* that require turning to the Statute in this manner.<sup>25</sup> A witness may testify only orally or pursuant to other Rules listed in Rule 149 (F) (namely, Rules 93, 123, 125, 155, 156, 157 and 158) as the list of Rules 'is a closed list and covers a wide range of options for a calling party'.<sup>26</sup> Since the witness has already testified for nine days in examination-in-chief, the portions of his statements that have been covered during these nine days should not be admitted again.<sup>27</sup>

16. Moreover, the substance of the statements is inadmissible because their contents are unreliable. They contain 'multiple levels of unsourced hearsay', in reference to information collected by the witness from various departments and employees of Alfa.<sup>28</sup> In addition, the statements refer to or annex documents that are incorrectly described as business records, or the reliability and probative value of which were not adequately justified by the Prosecution.<sup>29</sup>

### C. Defence of Mr Badreddine

17. Counsel for Mr Badreddine also oppose the motion, arguing that both legal bases proposed by the Prosecution constitute unjustified departures from the Rules. Witness 707's statements do not meet the threshold of *prima facie* reliability for admission into evidence because they are largely based on hearsay evidence which results from the manner in which the statements and annexes were compiled.<sup>30</sup> Further, Witness 707, during his examination-in-chief, repeatedly demonstrated his inability to provide information regarding the reliability of much of the information contained in the

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<sup>24</sup> Ayyash response, para. 22.

<sup>25</sup> Ayyash response, paras 13-19.

<sup>26</sup> Ayyash response, para. 14.

<sup>27</sup> Ayyash response, para. 19.

<sup>28</sup> Ayyash response, paras 44-46; *See also* Ayyash response, paras 33-37.

<sup>29</sup> Ayyash response, paras 38, 53-55.

<sup>30</sup> Badreddine response, paras 5-23.

statements and annexes. This prejudices the Accused in that it deprives counsel of the ability to cross-examine Witness 707 and to thoroughly test the reliability of the evidence that the Prosecution is seeking to have admitted.<sup>31</sup>

18. Counsel also submit that the Trial Chamber should defer any decision on the admissibility of cell site evidence until the Prosecution has led sufficient evidence regarding the provenance of the underlying data. This is because the Trial Chamber deferred its decision on the admissibility of call sequence tables until the Prosecution had called ‘at least one witness who could provide information on the provenance of the underlying call data records’.<sup>32</sup> Further, the Presiding Judge had said that ‘the Chamber decided that the Trial Chamber would not be admitting or considering the admission of [cell site evidence] until [the Trial Chamber has] heard evidence from a witness such as [Witness 707]’.<sup>33</sup>

#### **D. Defence of Mr Sabra**

19. Unlike counsel for Mr Ayyash, Mr Badreddine and Mr Merhi who object to all three statements in their entirety, the Defence of Mr Sabra object to the admission into evidence of only certain paragraphs in the statements and annexed documents. Counsel object, based on the relevance of those paragraphs and documents to the case against Mr Sabra, to the admission of:<sup>34</sup>

- (i) from the statement dated 11 November 2015: paragraphs 25-28, 57, 59, 62, 64-65, 79, 82-87, 108-109, 121, 126, 129-131, 161-163, 164-166, 168-169, 171, 174, 177, 178-179, 181-193, 196-199; and annexes which are parts of Exhibits P777 MFI, P770 MFI, P778 MFI, P775 MFI, P779 MFI, and P776 MFI;
- (ii) from the statement dated 29 December 2015: paragraphs 13-20;
- (iii) from the statement dated 25 January 2016: paragraphs 12-16; and annexes 2D73, P781 MFI; and

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<sup>31</sup> Badreddine response, paras 24-37.

<sup>32</sup> F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL’s Prosecution, 6 May 2015, para. 115.

<sup>33</sup> Transcript of 12 February 2016, p. 9; Badreddine response, para. 4.

<sup>34</sup> Sabra response, paras 2-3, 32, 50 and 58. The Sabra response incorrectly refers to the statement of 25 January 2016 as the statement of 25 January 2015.

(iv) Additional annex: P780 MFI.

20. Counsel for Mr Sabra attach to their submission two charts detailing their objections to each paragraph and annexed document.<sup>35</sup>

21. They also argue that the Trial Chamber should dismiss the Prosecution's alternative requested relief of only admitting parts of Witness 707's statements for failing to explain why selected paragraphs ought to be admitted, as opposed to the entire statements.<sup>36</sup>

22. In relation to the proposed evidence, they submit that the witness's evidence is substantially unreliable, because he was not employed by Alfa in the period relevant to the indictment and therefore has little or no personal knowledge of the company's business practices, or Alfa's responses to requests for information from the United Nations Independent International Investigation Commission or the Prosecution during that time.<sup>37</sup> Inconsistencies exist between his statements and his oral testimony as a result of the statements and annexes relying on anonymous and unattributed hearsay. The information and documents come from various unknown persons across various divisions of the company rather than the witness himself.<sup>38</sup>

23. Finally, they contest the qualification of certain documents as 'business records' on the basis that the term is used too liberally and incorrectly.<sup>39</sup> All these factors greatly reduce the probative value of the witness's evidence, and disproportionately prejudice the rights of the accused. If the Trial Chamber dismisses the motion, in whole or in part, counsel propose that the Prosecution be required to complete its examination-in-chief on any remaining issues before the Defence starts cross-examination.<sup>40</sup>

#### **E. Prosecution's reply**

24. In its consolidated reply, the Prosecution addresses what it considers new issues in the Defence responses. It contests the Defence allegation that the Prosecution motion is untimely and causing a delay in the proceedings, and argues that it was at the Defence's own request that the

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<sup>35</sup> Sabra response, Annexes A and B.

<sup>36</sup> Sabra response, paras 8-11.

<sup>37</sup> Sabra response, paras 13-21.

<sup>38</sup> Sabra response, paras 26-27.

<sup>39</sup> Sabra response, paras 33-42.

<sup>40</sup> Sabra response, para. 56.



written application was made.<sup>41</sup> The Prosecution also takes issue with the Defence characterising its argument on the use of Article 21 of the Statute as an attempt to fill a *lacuna* in the Rules, since it considers it to be merely an interpretation of the existing legal provisions.<sup>42</sup>

25. Moreover, the Prosecution disagrees with the Defence's arguments on the admission of hearsay in international criminal proceedings, and refers to case-law from this and other international criminal courts and tribunals holding that hearsay evidence is admissible, and that the weight attributed to it is assessed in light of all the evidence.<sup>43</sup> The Prosecution addresses, in detail, what it argues are inaccurate characterizations by the Defence of the witness's evidence.<sup>44</sup> The Prosecution attaches to its reply two charts detailing its response to Defence objections to each paragraph and annexed document.<sup>45</sup>

#### **F. Sur-reply by the Sabra Defence**

26. Counsel for Mr Sabra filed a sur-reply in light of a witness statement disclosed by the Prosecution to the Defence on 4 March 2016 on behalf of Ogero, the Lebanese landline communications provider, and annex the statement.<sup>46</sup>

27. This statement, they argue, illustrates how the Prosecution should have compiled Witness 707's statements. The change in the format and methodology of the Ogero statement shows the Prosecution's *post facto* realisation of its error in not interviewing the various anonymous sources of information consulted by Witness 707 at Alfa.<sup>47</sup> In contrast, the Ogero statement groups the evidence of five separate individual witnesses, each one being identified by name and interviewed separately regarding his or her area of knowledge within the company.<sup>48</sup>

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<sup>41</sup> Prosecution consolidated reply, paras 4-9.

<sup>42</sup> Prosecution consolidated reply, paras 10-13.

<sup>43</sup> Prosecution consolidated reply, paras 14-20

<sup>44</sup> Prosecution consolidated reply, Annexes A and B.

<sup>45</sup> Sabra response, Annexes A and B.

<sup>46</sup> Sabra sur-reply, para. 3 and Annex A.

<sup>47</sup> Sabra sur-reply, para 4.

<sup>48</sup> Sabra sur-reply, para. 5.

## DISCUSSION

### **A. Can a Party supplement or replace oral evidence with a written statement?**

28. A Chamber may receive the evidence of a witness orally or in written form. But can it receive the evidence of a witness both orally and in writing? The answer is ‘yes’.

29. Article 21(3) of the Statute specifies that a Chamber ‘may receive the evidence of a witness orally or, where the interests of justice allow, in written form’. It does not state that the admission of evidence is confined to one or the other.

30. Rule 149 (F) provides, relevantly, that a Chamber ‘may receive the evidence of a witness orally, or pursuant to Rules ...155, 156...’. So, does this mean that a Party must strictly elect one or the other route and that no mixing is possible? And could strictly confining it to one or other—in effect forcing a Party to make a strict election—lead to an injustice? The answers to these questions, respectively, are ‘no’ and ‘yes’.

31. Rule 155 (C) allows the Trial Chamber to admit into evidence the written statement of a witness whose evidence does not go to the acts and conduct of the accused, while also requiring the witness to appear for cross-examination. Rule 156 then applies. Rule 156 permits the receipt into evidence in lieu of oral evidence, of a written statement or transcript of evidence, going to the proof of the acts or conduct of an accused, (i) if the witness is present in court; (ii) is available for cross-examination and questioning by Judges; and (iii) attests that the statement accurately reflects his declaration of what he would say if examined.

32. The Trial Chamber has previously determined the procedural safeguards for admitting statements into evidence under Rule 155. These allow it to receive written testimony in lieu of live oral testimony in the courtroom. In particular, a statement must meet the basic requirements for admission into evidence under Rule 149 and, if going to proof of the acts or conduct of the Accused, may not be admitted without cross-examination.<sup>49</sup> Neither Rule 155 nor 156 proscribes combining oral examination-in-chief of a witness and admission of a written statement of the same witness. The

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<sup>49</sup> STL-11-01/PT/TC, F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, para. 13; F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, paras 7-14; STL-11-01/T/TC, F1785, Decision on the Prosecution Motion for Admission Under Rule 155 of Written Statements in Lieu of Oral Testimony Relating to Rafik Hariri’s Movements and Political Events, 11 December 2014, para. 3.

Trial Chamber has consistently declared admissible witness statements under Rule 155 (C) or Rule 156 either when the Prosecution called witnesses to testify or the Trial Chamber itself required the Prosecution to make witnesses available for cross-examination.<sup>50</sup>

33. Contrary to the submissions of counsel for Mr Badreddine, declaring admissible, under Rule 155 (C) or Rule 156, statements made by a witness who will testify in person does not constitute unjustified departure from the Rules. Both Rules apply to Witness 707: Rule 155 (C) applies because this witness appears for cross-examination while the Prosecution seeks the admission of his statement; Rule 156 applies to Witness 707's evidence insofar as it goes to the acts and conduct of the Accused as charged in the consolidated indictment. The 'in lieu' requirement of both these provisions does not render them inapplicable in relation to Witness 707. The Prosecution adequately distinguished between leading Witness 707's oral testimony and the selected paragraphs it intends to put to the witness so that he can adopt them under Rule 156 (A) (iii).

34. The Trial Chamber has also adopted what counsel for Mr Ayyash termed 'a hybrid approach',<sup>51</sup> in which the uncontested parts of a witness's statement are tendered under Rule 155 while the contested parts are led orally. Counsel for Mr Ayyash do not oppose this but submit that the evidence must be carefully delineated. Indeed, this is consistent with the wording of Rule 155 (C) which permits the receipt into evidence of a statement or transcript 'in whole or in part'.

35. The Prosecution here have proposed a fourth 'hybrid' approach that would allow a Party to tender a witness statement in its entirety—after a witness has made the appropriate declaration under Rule 156—and also have the witness testify about the same (or other) subject-matter.

36. The Rules of Procedure and Evidence, according to Rule 3 (A), are interpreted—in descending order—according to the principles of interpretation in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), international standards on human rights, the general principles of international criminal law and procedure and, as appropriate, the Lebanese Code of Criminal Procedure.

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<sup>50</sup> F1949, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH007, PRH115, PRH396 and PRH661, 14 May 2015, para. 17; F2035, Decision on Prosecution Motion to Admit the Statements of Witness PRH424, 30 June 2015, para. 13; F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 51.

<sup>51</sup> Ayyash response, paras 30-31.

37. So long as the appropriate safeguards of the right to a fair trial are maintained, no principle of international human rights law or of international criminal law and procedure appears to prevent a Chamber from allowing a witness to testify orally in addition to admitting witness statements into evidence, according to either Article 21 (3) or Rule 149 (F).

38. The Trial Chamber has twice done this without objection from the Parties, and at the request of both Prosecution and Defence counsel.<sup>52</sup> It has also received witness statements into evidence during the cross-examination of witnesses, either by the Defence reading onto the record the relevant portions of the statement, or the Trial Chamber receiving the statement into evidence, or both.<sup>53</sup> Rule 149 (F) could not operate to prevent an opposing Party (i.e. the Party not calling the witness) from tendering a witness statement during cross-examination to impeach a witness, for example, by showing a prior inconsistent statement or to demonstrate unreliability or a lack of credibility. If it did, it would breach international standards in human rights, as reflected at Article 16 (4) (e) of the Statute, which provides that in the determination of any charge against him, an accused is entitled to examine, or have examined, the witnesses against him. There is no difference, in principle, between reading the content of a witness statement onto the transcript of the court record, or receiving it as a documentary exhibit on the court record. The content and substance is the same.

39. The general principles of international criminal law procedural law plainly allow a Chamber to receive evidence in a manner which, even if not expressly provided for in the Rules, is consistent with the objects and purposes of the Statute and the fundamental principles of justice.<sup>54</sup>

40. Strictly interpreting Article 21 (3) and Rule 149 (F) in the manner suggested by counsel for Mr Ayyash could lead to an injustice by preventing counsel for a Party from properly putting their case. In the Trial Chamber's view, Rule 149 (F) cannot preclude a Party from calling evidence orally but also seeking to lead evidence from a witness by tendering a statement. If this occurs in examination-in-chief, the witness should normally make a declaration under Rule 156 as to the

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<sup>52</sup> For example, statement of Spartak Mrktchyan, admitted as exhibit P578, transcript of 14 September 2015, p. 21, and statement of Andrew Fahey, admitted as exhibit P595, transcript of 17 September 2015, pp. 8-10.

<sup>53</sup> Witness hearing record of Ghassan Ben-Jeddo, admitted as exhibit 5D169, transcript 10 of July 2015, pp. 15 and 20; Witness investigation record for Witness PRH006, admitted as exhibit 5D163, transcript of 24 June 2015, pp. 23 and 90; Statement by Witness PRH115 to the Lebanese Internal Security Forces dated 16 April 2005, admitted as exhibit 5D164, and Notes of the interview of Witness 115 with the UNIIIC dated 12 March 2005, admitted as exhibit 5D165, transcript of 8 July 2015, pp. 2, 17-18.

<sup>54</sup> Prosecution motion, para. 21 and related footnotes.

accuracy of the statement and that it is the evidence that the witness would give if asked, although if uncontested, this may not be necessary.

41. Counsel for Mr Ayyash also relied upon a decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Galić*, holding that a party ‘cannot be permitted to tender a written statement given by a prospective witness to an investigator of the OTP under Rule 89(C) in order to avoid the stringency of Rule 92bis’. The equivalent Rules at the Special Tribunal are Rules 149 (D) and 155. This, however, is not the situation here. Witness 707 has made the relevant declaration under Rule 156 and is present in the court-room for questioning by the Parties and the judges.

42. The Trial Chamber therefore finds that it is permissible for a Party to supplement or replace parts of a witness’s oral evidence with a prior written statement that the witness adopts under Rule 156 (A) (iii). In some circumstances, such as where the statement or its relevant portions are uncontested, it could be received into evidence under Rule 155.

**B. Should the three statements be received into evidence in their entirety?**

43. The next issue is whether the Trial Chamber should allow the Prosecution to tender the three statements in their entirety into evidence. The short answer is in the negative. The witness has testified at length about numerous matters already covered in the three statements; the first is of 56 pages, with 20 annexes, and the second and third each comprises nine pages, with annexes. At this point, the Trial Chamber does not see the need to receive repetitive evidence on the same points, even if differently expressed.

44. The Trial Chamber does not believe that receiving the three statements into evidence, now, would greatly assist it in determining the relevant issues. Considering that the Prosecution has led a significant part of Witness 707’s testimony and that the witness has attested under Rule 156 (A) (iii) that the paragraphs put to him by the Prosecution accurately reflect his declaration and what he would say if examined, it is unnecessary to admit all three statements in their entirety.

45. For these reasons the Trial Chamber will not receive the three witness statements into evidence in their entirety. Had the Prosecution made a timely application under Rule 155 or 156, before the witness testified, and such as to allow the Defence to respond and for the Trial Chamber to issue a reasoned decision, the Trial Chamber may have made a different decision. But, after hearing nine days of evidence, it is too late to do this.

### C. Should parts of the statements, and their annexes, be received into evidence?

46. The Trial Chamber, for the reasons noted above, may allow a witness to testify and, additionally, receive a prior witness statement into evidence, either in whole or in part. Having decided not to receive the three statements into evidence, the next issue is whether the Trial Chamber should receive portions of the statements and their annexes into evidence.

47. During Witness 707's nine days of testimony (to date), the Prosecution combined oral testimony with identifying and putting to the witness, under Rule 156 (A) (iii), some paragraphs from the statements the subject of this motion. The witness attested that those paragraphs accurately reflect his declaration and what he would say if examined. Once adopted by the witness, the Trial Chamber, pending this decision, marked these paragraphs for identification. The Trial Chamber took no decision as to whether the proposed paragraphs are admissible or will be admitted into evidence under Rule 155 (C) or Rule 156 until hearing from the Defence.

### D. Objection as to hearsay

48. Defence counsel have objected to the admission into evidence of portions of the statements that they consider to be hearsay or 'double hearsay', arguing generally that this makes cross-examination difficult if not impossible. In essence, they challenge the reliability of the evidence contained in the contested portions of the statements.

49. Rule 149 (C) permits the Trial Chamber to admit any relevant evidence which it deems to have probative value. The Rules of Procedure and Evidence and the Statute contain no prohibition against the admission of hearsay evidence, nor do they distinguish between various forms of hearsay evidence.<sup>55</sup> The general principles of international criminal law procedural law, as reflected in the practice of other international criminal courts and tribunals since 1994, allow hearsay evidence but with the rider that its weight must be assessed in light of the totality of the evidence.<sup>56</sup> In

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<sup>55</sup> F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, para 30.

<sup>56</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Admissibility of Four Documents, 20 January 2011, paras 28-29; *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on the Prosecution Motion for Admission of Prior Recorded Testimony of Witness P-02 and Accompanying Video Excerpts, 27 August 2010, para. 18; ICTY, *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasovic, 26 August 2005, para. 18; ICTY, *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Decision on Prosecution's Motion for Provisional Admission of Witness Statements Under Rule 92bis dated 13 October 2004, 15 December 2004, para. 9; ICTR, *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-T, Decision on

international criminal law proceedings, there is no bar on receiving hearsay evidence, first-hand or otherwise. The normal principles of relevance and deemed probative value apply to hearsay evidence.

50. The Trial Chamber has previously held, in applying the general principles of international criminal law case-law, that a party need not show definite proof of reliability or probative value when requesting the admission of evidence. Sufficient indicia of reliability is all that is required; the probative value of a document is distinct from the question of weight that the Trial Chamber may ultimately give it.<sup>57</sup> This applies equally to hearsay evidence. The Trial Chamber may admit the evidence and thereafter, after hearing from the Parties, determine the weight, if any, to give to it.

#### **E. Relevance and probative value of the statements and annexes**

51. The Trial Chamber, having reviewed the paragraphs from Witness 707's statements selected by the Prosecution, and the annexes, is satisfied that they are relevant to Alfa's generation of, business use, and storage of call data records, cell site data, and subscriber records. This is not contested. The Trial Chamber, however, is also satisfied that they have probative value, especially as to the reliability of Alfa's records and data.

52. Although counsel for Mr Ayyash, Mr Badreddine and Mr Sabra correctly state that showing *prima facie* relevance and probative value is necessary to admit, in whole or in part, Witness 707's statements, they have not addressed that the general principles of international criminal law procedural law do not recognise any strict and fixed set of mandatory criteria or indicia of reliability in relation to the Trial Chamber's discretion to admit any relevant and probative evidence. Domestic laws—such as the US Federal Rules of Evidence, referred to by counsel for Mr Ayyash—are binding on neither the Parties nor the Chambers of the Special Tribunal. Binding the Trial Chamber would undermine its judicial discretion to admit evidence at trial.

53. The Trial Chamber has carefully noted the objections by Defence counsel based on reliability and in particular as to whether the witness should be permitted to testify about matters that are not strictly within his personal knowledge. The Trial Chamber is well aware of the limitations of Witness

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Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions against the Prosecution and for Exclusion of Evidence Outside the Scope of the Indictment, 19 October 2006, para. 17.

<sup>57</sup> F1308, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps and 3-D Models, 13 January 2014, para. 8.

707's knowledge, and in particular of Alfa's business practices before he was employed there, and of technical issues that others have assisted him with.

#### **F. Business records and testimony by a company representative**

54. The Trial Chamber has been unable to find any international criminal law case-law relating to the reception into evidence of corporate business records. This is unsurprising given the subject matter of most international criminal law proceedings. The available case-law relates to 'letters, minutes, transcripts of parliamentary speeches, maps, decrees, situation reports, internal and external communications of international organizations, and NGOs, films, videotapes, written and audio records of intercepted conversations, media reports, contemporaneous diaries, and forensic, medical and autopsy reports'.<sup>58</sup>

55. In many national legal systems business records are considered to be those produced by an organisation in the normal course of its business. In some legal systems that have a general prohibition on using hearsay evidence, business records are an exception, meaning that the maker of the record does not need to testify as to its authenticity.<sup>59</sup> Business records are considered to have the necessary indicia of reliability if produced in the normal course of business of the relevant organisation or workplace. Records expressly produced by a business for the purposes of litigation may be treated differently. But because of this, the maker of the record is more likely to be available to testify, than for records produced in the normal course of business, by say, a large corporation, such as Alfa. Business records, by their very nature, are produced by different company officials, in differing capacities and in differing sub-departments. They may be automatically generated, like, for example, telephonic call data records. And the larger the corporation and the more complex the issues at hand, self-evidently, the greater the potential for a diversity of sources for the records.

56. This is normal in litigation involving businesses, civil or criminal, and especially in large and complex cases. In these types of cases—involving a large number of documents and issues, connected with occurrences from over a decade ago—finding the originators of many of the records

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<sup>58</sup> Goran Sluiter, Hakan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappala (eds), *International Criminal Procedure: Principles and Rules*, Oxford University Press, p. 1081.

<sup>59</sup> In Canada: *Canada Evidence Act* (R.S.C., 1985, c. C-5), s. 30. In Australia: *Evidence Act 1995*, s. 69. In the United Kingdom: *Criminal Justice Act 2003*, s. 117. In the United States: *Federal Rules of Evidence 2015*, Rule 803 (6). See also, e.g., *R. v. Wilcox*, 2001 NSCA 45, para. 53; *Forbes Engineering (Asia) Pte Limited v. Forbes (No4)*, [2009] FCA 675, paras 100 and 102; *R v. Horncastle*, [2009] UKSC 14, para. 35.



will be an impracticality bordering on the impossible. In these circumstances a court can but receive the best available evidence, and, at a later point, attribute to it the appropriate weight.

57. The Trial Chamber also recognises that Witness 707 has relied upon records that he did not produce and upon information given to him by other employees and other departments in Alfa. The witness, however, is testifying as a corporate witness, giving mixed evidence as to matters within his own personal knowledge and technical expertise, and of matters that he has been informed of. He is not a company representative whose role is confined to producing records.

58. In these circumstances there is nothing unusual about such a witness having a limited capacity to provide answers to matters outside his direct knowledge. Most of the evidence contained in the witness's statements and annexes is derived from Alfa's business records produced in the normal course of business and not for the purposes of litigation.

59. It follows that the mere fact that the documents have been produced by someone else in the company does not make the paragraphs proposed for admission into evidence and the annexes to the witness's statements inadmissible or inherently unreliable. The Trial Chamber is satisfied that Alfa's suitably qualified personnel, using a range of data from relevant sources, provided the witness with the information in his three statements that is outside of his personal knowledge.

#### **G. Annexes to the statements**

60. The same reasoning applies in relation to the annexes to Witness 707's statements, consisting of business records, extracts from business records and other documents produced by Alfa. Requiring the tendering Party to satisfy the Trial Chamber that, to admit these documents, a more burdensome test applies to them would be inconsistent with its earlier decision on the admission of evidence and the practice of international courts and tribunals.

61. The Trial Chamber, consistent with its established practice,<sup>60</sup> will also allow the Prosecution to tender into evidence any annexes to Witness 707's statements that form an inseparable and indispensable part of his testimony. The Trial Chamber will hear any further specific objections to any portions of the statements at the time of their attempted tender into evidence.

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<sup>60</sup> See *e.g.*, F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, paras 7-14

62. The annexes can be categorised into five categories:

(1) The **first category** consists of documents that have already been admitted into evidence, specifically, the following annexes from the statement of 11 November 2015:

- Dictionary provided to Alfa by the vendor for MSCs (annex 6, exhibit P772);
- Bulk call data records for the period of 1 January 2006 to 31 December 2007 (annex 7 (1), exhibit P774);
- Call data records for the period of 1 January 2006 to 31 December 2007 (annex 7 (2), exhibit P774);
- Call data records later than August 2004 (annex 8 (2), exhibit P771); and
- Screenshot of the content of the DVD provided by Alfa in response to request for assistance 2010/RFA0162 (annex 12 (b), exhibit P783).

(2) The **second category** is composed of documents that have been marked for identification pending further evidence or submission. All of these documents, save one, are annexes to the statement of 11 November 2015:

- Logical schematic of the Alfa network in 2004 and 2005 (annex 4, exhibit P773 MFI);
- Explanation about cell PHENMB1 (annex 5, exhibit P777 MFI);
- Call data records prior to August 2004 (annex 8 (1), exhibit P770 MFI);
- Alfa response about cell tower information (annex 13, exhibit P778 MFI);
- Excel spreadsheet relative to cell coverage files for Alfa cell tower information (annex 14 (2), exhibit P775 MFI);
- Coverage maps for Lebanon and the greater Beirut area in May 2007 (annex 16 (b), exhibit P779 MFI);
- Clarification on correct azimuth degree for 20 Alfa sectors and correct location for 7 towers (annex 19, exhibit P776 MFI); and

- Excel document showing credit remaining at the time of deactivation for listed telephones on dates of interest (annex B of the statement of 25 January 2016, exhibit P784 MFI).

(3) The **third category** is of business records produced in the normal course of Alfa's business. These have not been admitted into evidence yet and include management agreements and commercial distribution contracts. Some of these appear to be automatically generated documents, such as lists of unauthorised points of sale for Alfa telephone lines. Specifically, these documents, all of which are annexed to the statement of 11 November 2015, are:

- A management agreement between Lebanon and Consortium Detecon International of 11 June 2004 (annex 2);
- Alfa subscriber records (annexes 10, 11 and 12 (a));
- Alfa contract with Jibayat (annex 21);
- Alfa distribution contract with Celltec (annex 24);
- Alfa distribution contract with Libatel (annex 25);
- Alfa distribution contract with Centrale d'entreprise publique et privée (annex 26);
- Alfa distribution contract with Power Group (annex 27);
- Alfa distribution contract with EDFC (annex 28);
- Alfa distribution contract with As-Tech (annex 29);
- Alfa distribution contract with Telia (annex 30);
- Alfa distribution contract with AXXSS (annex 31);
- Alfa distribution contract with Teleserve Plus (annex 32);
- Alfa distribution contract with OMTS (annex 33);
- Alfa distribution contract with E-Charge (annex 34);
- Alfa distribution contract with Total (annex 35);

- Alfa distribution contract with Cash United Services (annex 36);
- Alfa distribution contract with Feghali Telecom (annex 37);
- Alfa distribution contract with LMC Stores (annex 38);
- Alfa distribution contract with Power cell.com (annex 39);
- Alfa distribution contract with Sbeiti Establishment (annex 40);
- Alfa distribution contract with Khalil Fattal et Fils, including Alliance (annex 41);
- List of unauthorised points of sale for Alfa telephone lines in East Beirut (annex 42);
- List of unauthorised points of sale for Alfa telephone lines in West Beirut (annex 43);
- List of unauthorised points of sale for Alfa telephone lines in South Beirut (annex 44);
- List of unauthorised points of sale for Alfa telephone lines in North Beirut (annex 45);
- List of unauthorised points of sale for Alfa telephone lines in Metn-Kesrwan (annex 46);
- List of unauthorised points of sale for Alfa telephone lines in Chouf (annex 47);  
and
- List of unauthorised points of sale for Alfa telephone lines in Beqaa (annex 48).

(4) The **fourth category** of documents is those produced by Alfa for the Special Tribunal, notably, for the purpose of investigation or litigation. These are all, save two, annexed to the statement of 11 November 2015:

- Alfa's explanation on internal clock timings for call data records, sent to the Special Tribunal's Prosecutor in response to a request for information (annex 9);
- Excerpt from a statement relating to cell tower information (annex 14 (1));

- The shape files for Alfa cell sectors (annexes 15, 16(a) (1) and 16 (a) (2));
- The explanation of Cell Global Identity of Alfa cells (annexes 16 (c) (1) and (2));
- List of 16 cells and explanation about discrepancies in cell IDs (annexes 16 (d) and (e));
- Azimuth values and details of specific cell sectors (annex 17);
- Clarification and information on cell sector MOVPIK1, including information on its location (annex 18); and
- The explanation of ‘delivery receipt’ messages in SMS content messages (annex 20);
- Explanation about calls routed to interactive Voice Response (annex 22 (1));
- Explanation about discrepancies found in call data records for two telephone numbers (annex 23 (2));
- List of materials reviewed by Witness 707 with a view to confirming provenance (annex A to the statement of 25 January 2016); and
- Document showing MSCs linked to cell sites as per Alfa’s 2007 records (annex C to the statement of 25 January 2016).

(5) The **fifth category** consists of miscellaneous documents annexed to the statement of 11 November 2015, such as requests for assistance sent to the Government of the Lebanese Republic by the United Nations International Independent Investigation Commission and the Special Tribunal’s Prosecutor, and government communications, namely:

- Letter from the Lebanese Minister of Telecommunications appointing the witness as the duly authorised representative of Alfa (annex 1);
- 2009 and 2010 government decisions regarding MIC1 being managed by ORASCOM Telecom Holding (annex 3);
- UNIIC request for assistance number 146, dated 3 September 2008 (annex 22 (2)); and

- Special Tribunal request for assistance 2013/RFA0090/LEB/TiH dated 9 August 2013 (annex 23 (1)).

63. This decision need deal only with documents in the third, fourth and fifth categories, namely, annexes 2, 9, 10, 11, 12 (a), 15, 16 (a) (1), 16 (a) (2), 16 (c) (1), 16(c) (1), (16 (c) (2), 16 (d), 16 (e), 17, 18, 20, 21, 22 (1), 23 (2), 24 to 48, to the witness's statement of 11 November 2015; annex 1 of his statement of 29 December 2015; and annex C of his statement of 25 January 2016.

64. The documents in the **third category** described above, are business records that appear to have been produced in the normal course of Alfa's business. This gives them the *prima facie* reliability for admission into evidence. Unless specific objections are made in relation to individual documents, they may be admitted into evidence. The Trial Chamber will decide the admission of any document objected to after hearing any specific Defence objections to it.

65. Those in **category 4**, likewise, are business records, but generated upon request of the Special Tribunal's Office of the Prosecutor or the UNIIC. The Trial Chamber has permitted the witness to obtain further information from Alfa personnel on one annex, namely, the shape files for Alfa cell sectors (annexe 15 to the statement of 11 November 2015).<sup>61</sup> A decision on admission into evidence will therefore be deferred pending further evidence from the witness on this document.

66. The Trial Chamber is satisfied from the evidence provided by the witness that the remaining documents falling within this category are *prima facie* admissible as corporate business records, even if prepared for the purposes of litigation in the widest sense, namely, being provided to investigatory authorities such as the UNIIC and the Office of the Prosecutor, or to Prosecution counsel for use in court. The Trial Chamber will hear any further specific further objection to any document at the point of their tender into evidence. If necessary, the Trial Chamber may order additional evidence before admitting any documents in this category into evidence.

67. The **fifth category** of documents contains some documents that are *prima facie* inherently reliable by virtue of their legal identity, such as the Prosecution's and UNIIC's requests for

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<sup>61</sup> F2546, Order allowing Witness PRH707 to obtain information in relation to 6 issues, 12 April 2016.

assistance sent to Alfa (contained in annexes 7 (1), 7 (2), 22 (2) and 23 (1)).<sup>62</sup> These legal documents contain the necessary indicia of reliability to be *prima facie* admissible into evidence.

#### **H. List of specific paragraphs contested by the Defence of Mr Sabra**

68. Counsel for Mr Sabra object to the admission into evidence only of some of the paragraphs of the three witness statements, as listed in the Prosecution's motion, and also to some annexes. The annexes have been dealt with above. The objectionable paragraphs are:

- (i) from the statement of 11 November 2015: paragraphs 59 (D), 62, 121, 126, 161-164, 166, 168-169, 171, 178-179, 181-193, and 196-199; and annexes which are parts of Exhibits P777 MFI, P770 MFI, P778 MFI, P775 MFI, P779 MFI, and P776 MFI;
- (ii) from the statement of 29 December 2015: paragraphs 13-14 and 20; and
- (iii) Annexes 2D73 and P781 MFI to the statement of 25 January 2016; and
- (iv) Annex: P780 MFI.

69. Consequently, counsel for Mr Sabra do not object to the admission into evidence of:

- (i) from the statement dated 11 November 2015: paragraphs 1-16, 22, 29-54, 58, 59 other than sub-letter (D), 72, 75, 90-96, 105, 111, 116, 120, 122-125, 127-128, 132-134, 140-143, 146, 151-152, 155, 157-160, 162-163, 167-170, 194-195, 201-257, 260-286, 292-298, and all the annexes to that statement other than are parts of Exhibits P777 MFI, P770 MFI, P778 MFI, P775 MFI, P779 MFI, and P776 MFI;
- (ii) from the statement dated 29 December 2015: paragraphs 1-10, 12, 21-22, and all annexes to that statement; and
- (iii) from the statement dated 25 January 2016: paragraphs 1-11, 17-23, 25-27.

70. The Trial Chamber has found very useful both the chart produced by counsel for Mr Sabra and that produced by the Prosecution, adding an explanatory column to that of the Sabra Defence. The overlap between those paragraphs the Prosecution seeks to tender and those that the Sabra

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<sup>62</sup> The responses, as noted above, fall into category 4.

Defence objects to is of only 28 paragraphs.<sup>63</sup> The contested paragraphs relate to various topics, including:

- Alfa's practices, and specific examples, in 2004-2005 in relation to direct retry feature of the Alfa network (paragraphs 59 and 62 from the statement of 11 November 2015);
- Alfa's practices, and specific examples, in 2004-2005 in relation to vendors' read-only access to call data records (paragraphs 121 and 126 from the statement of 11 November 2015);
- Alfa's practices, and specific examples, in 2005, 2007 and 2010 in relation to the generation of cell tower information such as azimuth values and geographic coordinates (paragraphs 162 and 163 from the statement of 11 November 2015);
- Alfa's practices, and specific examples, in 2005, 2007 and 2010 in relation to the generation of cell coverage files (paragraphs 164, 166, 168-169 and 171 from the statement of 11 November 2015); and
- Changes observed in 2005 and 2010 in the Cell Global Identity for Alfa cells and the Cell ID (paragraphs 178-179 from the statement of 11 November 2015).

71. As noted, the Trial Chamber has also permitted the witness to obtain further information from Alfa personnel in relation to the following paragraphs contested by Defence counsel, including those acting for Mr Sabra. If there is any overlap between these matters and the contested paragraphs, the Trial Chamber will hear further evidence before deciding whether to receive the evidence.

72. The mere fact that a witness testifying for a corporation does not have personal knowledge of the matters to which they are testifying—but can provide evidence based upon reviewing company records and practices, and obtaining information from other company personnel—does not prevent them from giving that evidence.

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<sup>63</sup> These are paragraphs 59 (D), 62, 121, 126, 162-164, 166, 168-169, 171, 178-179, 181-193, 196-199.



73. The evidence in the contested paragraphs is relevant to the allegations in the consolidated indictment. It also has probative value. The Trial Chamber is not satisfied that the paragraphs so lack the indicia of reliability as not to be *prima facie* reliable.

74. The Trial Chamber, however, appreciates the limitations of the evidence that Witness 707 can give about Alfa's practices before he was employed there—and hence the constraints on the Defence to challenge the evidence through this witness. The Trial Chamber will therefore hear any further necessary submissions before admitting the contested paragraphs into evidence. And, if they are admitted into evidence, the Trial Chamber will exercise the appropriate caution in carefully assessing its weight at the relevant time. Further, admitting the proposed paragraphs into evidence would not prevent Defence counsel from presenting their own evidence as to the flaws in Witness 707's evidence.

75. The proposed paragraphs—as referred to above—and the annexes attached to Witness 707's statement are therefore *prima facie* admissible under Rule 155 (C) or 156. However, to avoid any possible prejudice to the Defence, the Trial Chamber will take no final decision regarding their admission into evidence until the conclusion of the witness's evidence and after hearing from Defence counsel.

#### **I. Defence motion to strike the Prosecution reply and Prosecution's response**

76. Counsel for Mr Ayyash, joined by counsel for Mr Merhi and Mr Badreddine, sought to 'strike' the consolidated Prosecution reply.<sup>64</sup> Counsel submit that none of the issues addressed in the Prosecution reply are new issues addressed for the first time in the Defence responses. The Prosecution is 'attempting to create new issues' in order to provide additional arguments in support of its original motion. The Prosecution reply exceeds the scope of replies permitted by the Trial Chamber and should therefore be struck.<sup>65</sup>

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<sup>64</sup> F2492, Motion to Strike the "Consolidated Prosecution Reply to Defence Responses to 'Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707'", 15 March 2016; F2505, Adjonction de la défense de Merhi à la requête aux fins de retrait de la "Consolidated Prosecution Reply to Defence Responses to 'Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707'", 18 March 2016; F2494, Badreddine Defence Joinder to Ayyash Defence Motion to Strike the "Consolidated Prosecution Reply to Defence Responses to 'Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707'", 16 March 2016.

<sup>65</sup> Ayyash motion to strike, paras 4-11.

77. The Prosecution responded that some of the issues addressed in the Prosecution reply constitute new issues addressed for the first time in the Defence responses, while other issues concern inaccurate or incomplete factual assertions in the Defence responses. Even if such assertions are not new issues themselves, the Prosecution submits that it should be permitted to correct the record in such circumstances. This assists the Trial Chamber to avoid rendering a decision on the basis of an incorrect or partial understanding of the relevant facts.<sup>66</sup>

78. The Trial Chamber has carefully reviewed the substantive submissions of counsel for Mr Ayyash to strike the consolidated Prosecution reply, and the consolidated reply itself. It is significant that the Sabra Defence did not seek to strike the Prosecution reply. In fact, the Prosecution's consolidated reply attaches two detailed charts detailing its response to Defence objections to each paragraph and annexed document.<sup>67</sup> As noted above, the submissions in the consolidated Prosecution reply, and the sur-reply by counsel for Mr Sabra, are extremely helpful to the Trial Chamber's understanding of the matter.

79. Arguably, however, the Prosecution should have made some of its submissions in its original motion, but what is of importance is that the Trial Chamber now has these submissions and that the Defence has responded. In the exercise of its discretion, the Trial Chamber therefore allows the consolidated Prosecution reply and, by extension, the Sabra Defence sur-reply, and rejects the Defence motion to strike. The Trial Chamber sees some merit in the Defence arguments that some submissions did not strictly arise from the response, however, 'striking', presumably meaning 'disregarding' a filing is a discretionary, but drastic, measure.

80. The Trial Chamber, however, again reminds the Parties of its previous instruction that replies should be confined to new issues that have arisen in a response.<sup>68</sup>

### **CONFIDENTIALITY**

81. Because they contain confidential witness information, some of the submissions made by the Parties, or their annexes, were filed confidentially. The Trial Chamber reiterates the public nature of

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<sup>66</sup> F2512, Prosecution Response to Ayyash Defence Motion to Strike Consolidated Reply, 22 March 2016.

<sup>67</sup> Prosecution consolidated reply, Annexes A and B.

<sup>68</sup> Transcript of 2 December 2013, p. 26.

these proceedings and orders the Parties, if they have not done so already, to file public redacted versions of their submissions and any annexes, or to have them reclassified as public.

### DISPOSITION

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

**DENIES** the Prosecution motion to admit into evidence in their entirety the three witness statements signed by Witness PRH707 and dated 11 November 2015, 29 December 2015 and 25 January 2016;

**DECLARES** admissible under Rule 155 (C) or Rule 156 the paragraphs listed at paragraph 38 of the Prosecution's motion—subject to any conditions described in this decision—but defers their admission into evidence pending further submission and, where necessary, further evidence;

**DECLARES** *prima facie* admissible the annexes to the three witness statements—subject to the conditions described in this decision—but defers their admission into evidence pending further submission and, where necessary, further evidence;

**DISMISSES** the motion by counsel for Mr Salim Jamil Ayyash to strike the consolidated Prosecution reply; and

**ORDERS** the Parties, if they have not done so, to file public redacted versions of their submissions and any annexes, or to have them reclassified as public.

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

Leidschendam,  
The Netherlands  
11 May 2016

*David Re*

\_\_\_\_\_  
Judge David Re, Presiding

*Janet Nosworthy*

\_\_\_\_\_  
Judge Janet Nosworthy

*Micheline Braidy*

\_\_\_\_\_  
Judge Micheline Braidy

