

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:** 12 July 2016

**Original language:** English

**Type of document:** Public

**THE PROSECUTOR**

v.

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

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**DECISION ON PROSECUTION MOTION TO ADMIT THE STATEMENTS OF  
WITNESSES PRH024, PRH069, PRH106 AND PRH051 PURSUANT TO RULE 155**

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**Office of the Prosecutor:**

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Mr Geoffrey Roberts



## INTRODUCTION

1. The Prosecution seeks the admission into evidence, under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence, of four statements by Witnesses PRH024, PRH069, PRH106 and PRH051. The statements relate to the attribution of three telephone numbers to the Accused, Mr Assad Hassan Sabra.<sup>1</sup> Counsel for Mr Sabra opposed the motion, requesting the Trial Chamber to order the witnesses to testify orally or, in the alternative, to have them called for cross-examination pursuant to Rule 155 (C).<sup>2</sup> The Prosecution filed a reply addressing new issues raised in the response.<sup>3</sup>

## SUBMISSIONS

### **A. Prosecution submissions**

2. The Prosecution submits that the witness statements are relevant to the case and have probative value.<sup>4</sup> In particular, the proposed evidence supports the attribution of one Purple mobile telephone number and two mobile telephone numbers to Mr Sabra, as pleaded at paragraphs 18 and 19 (d) of the consolidated indictment and paragraph 55 of the updated pre-trial brief,<sup>5</sup> as well as the attribution of telephone numbers in contact with those three telephone numbers attributed to Mr Sabra. These witnesses are individuals with a personal and intimate knowledge of the Accused.

3. Based on the information stored in their mobile telephones,<sup>6</sup> all the witnesses provide telephone numbers—mostly mobile—of individuals close to Mr Sabra, who had contact with one or

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2534, Prosecution Motion to Admit the Statements of PRH024, PRH069, PRH106 and PRH051, pursuant to Rule 155, 4 April 2016 (confidential with confidential Annexes A, B, C and D), para. 1.

<sup>2</sup> F2557, Sabra Defence Response to "Prosecution Motion to Admit the Statements of PRH024, PRH069, PRH106 and PRH051, pursuant to Rule 155", 18 April 2016 (confidential), para 57.

<sup>3</sup> F2567, Prosecution Reply to the Sabra Defence Response to "Prosecution Motion to Admit the Statements of PRH024, PRH069, PRH106 and PRH051, pursuant to Rule 155", 22 April 2016 (confidential), para. 1.

<sup>4</sup> Prosecution motion, para. 5.

<sup>5</sup> The Prosecution alleges that Mr Sabra is the user of 'Purple 018'. In its updated pre-trial brief, it submits that two subsequent telephones, directly attributed to Mr Sabra or his family, were compared with the profile of 'Purple 018' and provide support for the attribution of this telephone to Mr Sabra.

<sup>6</sup> With the exception of Witness 106, the Prosecution submits that the witnesses provided certain telephone numbers also based on their recollection. *See* Prosecution motion, paras 6, 10, 13, 16. Witness 024, at the interview with the Prosecution's investigators, had a handset and SIM card subscribed to another individual, which the witness occasionally used. Witness 024 also provided his own mobile telephone number—of which he was the user until some months before the interview.

more telephone numbers attributed to him.<sup>7</sup> Additionally, Witnesses 024 and 069 provide a specific telephone number for Mr Sabra (mobile telephone 657). Witness 106 provides this same telephone number as that of Mr Sabra's wife. The witnesses' self-attributed numbers had contact with one or all three numbers attributed to Mr Sabra.<sup>8</sup> Finally, all witnesses identified Mr Sabra in a photograph, and provided an address or area where he lived.

4. The Prosecution submits that the statements do not go to the acts and conduct of the Accused as charged in the consolidated indictment, as they only provide information relevant to attributing mobile telephone numbers to Mr Sabra. It also submits that the evidence of these witnesses is generally cumulative to documentary evidence already submitted or to be submitted by the Prosecution.<sup>9</sup> Under Rule 155 (A) (i) (a), the cumulative nature of the evidence refers to oral testimony of similar facts, which has been given or will be given by other witnesses. However, the existence of cumulative documentary evidence may also be a factor favouring admission, as the list of factors favouring admission under Rule 155 (A) (i) is not exhaustive.

5. Further, there is no overriding public interest in the evidence being presented orally and the interests of justice and a fair and expeditious trial exceptionally warrant the admission of the witness statements without cross-examination. Moreover, the Defence can explore the details related to the attribution process when Mr Andrew Donaldson (Witness PRH230)—who relies upon the evidence of these witnesses in the Sabra attribution report—testifies.

6. The Prosecution acknowledges that the statements do not fully comply with the Practice Direction for the Admissibility of Witness Statements under Rule 155 but submits that their departures from the Practice Direction are minor and that the statements present the necessary indicia of reliability. It made numerous attempts to meet the witnesses to remedy these departures, and

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<sup>7</sup> Prosecution motion, paras 6, 8, 10-11, 13-14, 16, 18. The Prosecution refers, for this purpose, to the report on 'Evidence of Telephone Attribution' for Assad Hassan Sabra (Sabra attribution report).

<sup>8</sup> Prosecution motion, paras 6-7, 10-11, 13-14, 16, 18. In support of this proposition, the Prosecution refers again to the Sabra attribution report. With regard to Witness 024, both his telephone number and the telephone number attributed to himself and another individual had contacts with all three telephone numbers attributed to Mr Sabra during the material time.

<sup>9</sup> Prosecution motion, paras 20, 23; Confidential Annex D. For each telephone number attributed through the statements, the cumulative evidence is listed in Confidential Annex D, where the Prosecution also identifies the passages, in the Sabra attribution report, mentioning the relevant telephone numbers.

issued requests for assistance to the Government of Lebanon for that purpose, but the witnesses failed to attend any meeting.<sup>10</sup>

7. As the Prosecution was unsuccessful in its attempts to re-interview the witnesses, it was unable to ask whether they sought protective measures under Rule 133. Until this issue is resolved, it asks under Rules 133 (A) and (B)—independent of the witnesses’ requests—that their identities and identifying information remain confidential. The Prosecution submits that it will file a public redacted version of the motion, and requests that the confidential status of the annexes be maintained.

## **B. Defence submissions**

8. Counsel for Mr Sabra oppose the admission of the statements into evidence, arguing that admission under Rule 155 would compromise the Accused’s right to a fair trial. The requirements of Rule 155 are not met. The proposed evidence goes to the acts and conduct of Mr Sabra because it is pivotal to the attribution of ‘Purple 018’ to him—and is, moreover, the ‘only oral testimony’ on this issue—and therefore also pivotal to the Prosecution’s case against Mr Sabra, which is premised on it.<sup>11</sup> Counsel for Mr Sabra cite a previous decision of the Trial Chamber admitting the statement of Witness PRH078, as supporting this argument.<sup>12</sup> In the case of Mr Sabra, there is no evidence of ‘acts and conduct’ *per se*, as evidence consists exclusively of telephone attribution, telephone location and telephone movements.<sup>13</sup>

9. In addition, the complete lack of any additional oral testimony on the proposed evidence cannot favour the admission of the written evidence under Rule 155 (A) (i),<sup>14</sup> and a reasonable chamber cannot base a conviction or core findings on un-challenged, uncorroborated evidence.

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<sup>10</sup> Prosecution motion, para. 29; Confidential Annex B.

<sup>11</sup> Sabra response, paras 4, 7-8, 17, 26, 37. Counsel for Sabra also state that Witness PRH079 could also testify about the attribution of ‘Purple 018’. Sabra response, paras 30, 37.

<sup>12</sup> Sabra response, para. 10, *referring to* F2292, Decision on Prosecution Motion for the Admission into Evidence under Rule 155 of the Statements of Witnesses PRH078, PRH550 (Toby Smith) and PRH678, 29 October 2015 (Decision of 29 October 2015). Counsel for Mr Sabra underline that the relationship of the witness with Mr Ayyash was more remote, yet the Trial Chamber found that it may amount to acts and conduct of the Accused.

<sup>13</sup> Sabra response, para. 9. Counsel for Mr Sabra also argue that attribution evidence cannot be compared to ‘crime-base evidence’, for whose admission a rule on the admission of written statements as evidence in lieu of oral testimony was first introduced in international criminal proceedings. *See* Sabra response, para. 11.

<sup>14</sup> Sabra response, para. 35. In particular, counsel for Mr Sabra claim that the evidence of Witness 024 is ‘exclusive’ in relation to a range of third party contacts, and most importantly, with regard to his own number, from which an SMS was sent to ‘Purple 018’. Sabra response, para. 36.

Moreover, other factors also militate against admission, namely: (i) an overriding public interest in the evidence being presented orally, given its ‘unique nature and importance’ coupled with the fact that none of the witnesses has testified before the Tribunal;<sup>15</sup> and (ii) the fact that the prejudicial effect of admitting the evidence in writing outweighs its probative value, as the defence would be barred from assessing the credibility of the witnesses.

10. The proposed evidence is crucial for several reasons, as it pertains to (i) the attribution of a range of telephone numbers to third party contacts of the alleged three numbers of Mr Sabra, relied upon by the Prosecution to attribute those numbers to him, including ‘Purple 018’. In particular, the attribution of four of these telephone numbers—due to the frequency of contacts with the telephone numbers allegedly attributed to Mr Sabra—is significant;<sup>16</sup> (ii) the direct attribution of a mobile telephone to Mr Sabra and/or his wife, which is also ‘overtly relied upon’; (iii) the geographical location of Mr Sabra’s residence, relevant to verify the cell towers most frequently used by the telephone numbers in support of their attribution; and (iv) an SMS (a text message) sent to ‘Purple 018’ by a telephone number attributed to Witness 024, on which the Prosecution ‘heavily relies’—according to counsel for Mr Sabra—to attribute ‘Purple 018’ to Mr Sabra.<sup>17</sup> Counsel for Mr Sabra submit that the translation and interpretation of the expression used in the SMS is controversial and uncertain as to the exact nature of the relationship, and questioned by Witness 024 himself in his statement. The relevance of the proposed evidence is increased by the fact that none of these witnesses, or any other Prosecution witnesses, recognise ‘Purple 018’ as a number used by Mr Sabra.

11. On this basis, counsel for Mr Sabra submit that the evidence must be presented orally, and the credibility and reliability of the proposed witnesses must be subject to testing through cross-examination by the Defence.<sup>18</sup> In particular, with regard to Witness 024’s evidence, the Prosecution must call him to testify if it intends to dispute and challenge the portion of the witness’s evidence which—according to counsel for Mr Sabra—undermines the Prosecution’s theory relating to the SMS.

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<sup>15</sup> Sabra response, paras 4, 41-42, relying on the following case-law of the International Criminal Tribunal for the former Yugoslavia: *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution’s Motion for Admission of Written Evidence pursuant to Rules 92 BIS and 94 BIS, 7 July 2010, paras 81, 140.

<sup>16</sup> Sabra response, paras 13-17; Confidential Annex to Sabra response.

<sup>17</sup> Sabra response, paras 15, 22.

<sup>18</sup> Sabra response, paras 6, 12, 20-21, 26, referring to ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002 (*Galić Decision*), para. 13.

12. In addition, counsel for Mr Sabra relies on case law of the International Criminal Tribunal for the former Yugoslavia, in *Galić*, to argue that, in consideration of the ‘close proximity’ of the proposed witnesses to Mr Sabra, it would not be fair to the Accused to permit the evidence to be given in written form.<sup>19</sup>

13. The Prosecution’s submissions that Mr Donaldson—who relies on the proposed evidence—will testify ‘cannot be made to fit into a fair and adversarial trial’, as he cannot testify to the credibility or reliability of any of these witnesses.<sup>20</sup> Counsel for Mr Sabra submit that the Prosecution bases its case only on the testimony of its own investigators, ‘in complete ignorance of its mandate to assist the Tribunal in establishing the truth’, and attempts ‘to prevent the Defence from testing the underlying key evidence’ and the Trial Chamber from benefitting from this exercise.<sup>21</sup> They add that Prosecution investigators or analysts having previously testified before the Trial Chamber adopted a ‘negative, uncooperative and unhelpful attitude’, and ‘cannot be regarded as witnesses of truth but as partisan witnesses’.<sup>22</sup> Further, the Prosecution has not demonstrated that the admission of the evidence in written form is indispensable to avoid an unnecessary delay in the proceedings.

14. Finally, counsel for Mr Sabra submit that they have not opposed several Prosecution motions for admission of written records for certain telephone numbers attributed by these witnesses under the express condition that they be given the opportunity to verify their ‘credibility and reliability’ through the witnesses.<sup>23</sup>

15. In the alternative to their request that the witnesses be ordered to testify orally, counsel for Mr Sabra submit that the interests of justice and the demands of a fair and expeditious trial require that the proposed witnesses appear for cross-examination. They rely on previous Trial Chamber decisions allowing for cross-examination, under Rule 155 (C), on the basis of the nature of the evidence of a witness or where counsel provided cogent reasons for cross-examination.<sup>24</sup> The

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<sup>19</sup> Sabra response, para. 28.

<sup>20</sup> Sabra response, para. 43.

<sup>21</sup> Sabra response, paras 44-45.

<sup>22</sup> Sabra response, para. 46. Counsel for Mr Sabra specifically refers to two Prosecution witnesses. *See* Sabra response, fn. 40.

<sup>23</sup> Sabra response, para. 39.

<sup>24</sup> Sabra response, para. 54, referring to, respectively, F2297, Decision on Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155 and Documents pursuant to Rule 154, 2 November 2015 (Decision of 2 November 2015); and the Decision of 29 October 2015.

Defence submits that it is irrelevant whether or not the Prosecution is currently in a position to contact these witnesses.

16. Defence counsel also submit that there is no valid reason to keep the motion and response confidential and they should be re-classified as public, due to the nature of their content and their relevance to the present proceedings.

### **C. Prosecution reply**

17. The Prosecution addresses four arguments which it considers new issues raised in the Defence response.

18. First, concerning the categorization of the evidence by counsel for Mr Sabra as going to the acts and conduct of the Accused, it contests the argument that the significance of the evidence—which it acknowledges—could ‘elevate that evidence to being “acts and conduct” of the Accused’.<sup>25</sup> All the evidence could be so categorized and the distinction in Rule 155 would be redundant. Even if the Defence is correct in asserting that ‘there is no evidence of acts and conduct *per se*’ in respect of Mr Sabra, attribution evidence does not change ‘to fill that gap’.<sup>26</sup>

19. The Prosecution also submits that the Defence’s reliance upon the absence of alternative oral evidence as a factor weighing in favour of the rejection of the application lacks legal support and should be disregarded. It further contests the argument that the proximity of the proposed witnesses to the Accused—the fact that the witnesses were extremely close—constitutes another reason for rejecting the Rule 155 motion. Moreover, the Prosecution challenges the Defence’s linking of the admissibility of other evidence to the Prosecution’s intention to call or not certain witnesses, which it defines as an improper attempt to control or limit the presentation of the Prosecution’s case, with no legal basis.

20. Finally, it complains that the Defence allegations against the Prosecution descended into invective and inappropriate commentary against two Prosecution witnesses, which should be deprecated. It qualifies this as unprofessional.

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<sup>25</sup> Prosecution reply, para. 4.

<sup>26</sup> Prosecution reply, para. 5.

*Code of Professional Conduct for Counsel Appearing before the Tribunal*

21. The Trial Chamber agrees with the Prosecution submissions that counsel for Mr Sabra went beyond the boundaries of reasoned argument and adopted offensive language towards the Prosecution and its witnesses. It notes that counsel has accused the Prosecution of being ‘in complete ignorance of its mandate to assist the Trial Chamber in establishing the truth’ and of ‘attempting to prevent the Defence from testing the underlying key evidence (and the [Trial] Chamber from benefitting from such a challenge)’. Furthermore, referring to a Prosecution investigator and a Prosecution analyst who have testified before the Trial Chamber, counsel stated that that they adopted a ‘negative, uncooperative and unhelpful attitude’ and concluded that ‘they cannot be regarded as witnesses of truth but as partisan witnesses’.

22. The Trial Chamber reminds Defence counsel that Article 1 of the Code of Professional Conduct for Counsel Appearing before the Tribunal requires counsel to ‘conduct himself or herself professionally and in accordance with the law, rules and ethics of the legal profession’. This Code, in its Article 6 (e), also requires counsel to ‘engage with all Counsel, and in particular opposing Counsel, in a civil manner including when faced with disagreement’. Furthermore, under Article 26 of the Code, counsel ‘shall avoid ill-considered’ criticism of the conduct of other counsel, and in particular, pursuant to Article 27, ‘Counsel shall not make any accusation of impropriety against other Counsel unless such accusation is well-founded’.

23. With regard to the language used to address the witnesses, one of whom is in mid-testimony, the Trial Chamber observes that, under Article 6 (g) of the Code, Counsel must treat all witnesses with courtesy and respect, and never *abuse*, intimidate or harass a witness.

24. The Trial Chamber therefore reminds Defence counsel of their duties under the Code and counsels them to avoid breaching it.

**DISCUSSION**

25. In earlier decisions, the Trial Chamber 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>27</sup> These principles are applicable here.

**A. Preliminary issue: departures from the Practice Direction for the admissibility of witness statements under Rule 155**

26. The Prosecution raised the issue in its motion. The Defence does not challenge the admissibility of the statements on this ground.

27. The statements of Witnesses 024, 069, and 051 are transcriptions of audio-recorded interviews with Prosecution's investigators and therefore they were not put in a written form in accordance with Annex A of the Practice Direction.<sup>28</sup> However, the information required by Article 2 of the Practice Direction is contained in the transcript of the interview and the attached documents. Further, the fact that a statement contains the full transcript of the original audio-recorded interview adds to its reliability.<sup>29</sup>

28. Therefore, and notwithstanding some other minor deviations,<sup>30</sup> the Trial Chamber finds that each statement substantially complies with the relevant Practice Direction and contains the indicia of reliability necessary for admission into evidence under Rule 155.

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<sup>27</sup> F2311, Decision on Prosecution Motion for the Admission under Rule 155 of the Statements of Witnesses PRH371 (Helena Habraken) and PRH698 (Nivole Blanch), 9 November 2015 (Decision of 9 November 2015), para. 13; F1785, Corrected Version of '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' of 11 December 2014, 13 January 2015, para. 3; STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013 (Decision of 20 December 2013), paras 7-14; STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013 (Decision of 30 May 2013), para. 13.

<sup>28</sup> 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, 15 January 2010.

<sup>29</sup> Decision of 2 November 2015, para. 20.

<sup>30</sup> The other deviations consist in the fact that (i) the witnesses were not provided with the text of the Rules on contempt of the Tribunal and false testimony under solemn declaration, and that (ii) Witness 106's statement fails to mention the witness's former occupation. However, with regard to the first discrepancy, the Trial Chamber has previously found that the failure to provide the witnesses with copies of these provisions are effectively remedied by the witnesses acknowledging—like in this case—the consequences of making a false statement. As to the second discrepancy, failing to list a witness's former occupation is a minor breach that can be safely disregarded for the purposes of establishing a statement's reliability. See F1869, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH082, PRH041 and PRH459, and to Amend the Rule 91 Exhibit List, 27 February 2015, paras 7, 9; F1371, Second Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 30 January 2014, paras 15, 26; Decision of 30 May 2013, para. 27.

## **B. Relevance and probative value**

29. In the consolidated indictment, and its updated pre-trial brief, the Prosecution alleges that Mr Sabra is the user of ‘Purple 018’, which is one of a group of three purple telephone numbers allegedly used to coordinate the false claim of responsibility for the attack of 14 February 2005.<sup>31</sup>

30. The Trial Chamber finds the four witness statements relevant and probative to attributing to Mr Sabra (and/or his wife) the use of one specific mobile telephone number, attributing other telephone numbers allegedly in contact with telephone numbers attributed to Mr Sabra, and therefore, ultimately, attributing mobile telephone numbers to him, including ‘Purple 018’. The proposed evidence is therefore clearly both relevant and has probative value.

## **C. Whether the statements go to proof of a matter other than the acts and conduct of the Accused as charged in the consolidated indictment**

31. The Sabra Defence argues that the proposed evidence goes to the acts and conduct of Mr Sabra by virtue of its pivotal nature, because the entire case is based on the ability of the Prosecution to establish that he used ‘Purple 018’.<sup>32</sup>

32. The Prosecution acknowledges the significance of the evidence but argues that this cannot elevate the proposed evidence as going to proof of the acts and conduct of the Accused. The Trial Chamber agrees with the Prosecution’s submissions. Under Rule 155 (A), a Trial Chamber may admit a written statement into evidence in lieu of oral testimony if it ‘goes to proof of a matter other than *the acts and conduct* of the accused as charged in the indictment’. Therefore, ascertaining whether the evidence concerns the acts and conduct of the accused serves the purpose of establishing whether the requirement in Rule 155 (A) is satisfied. The nature of the evidence as pivotal or not to the Prosecution case may be relevant, instead, to the subsequent determination, by the Trial Chamber, on whether the maker of the statement should appear for cross-examination or the evidence should be admitted in written form at all.<sup>33</sup>

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<sup>31</sup> Consolidated indictment, para. 15 (e); Prosecution’s updated pre-trial brief, dated 23 August 2013, para. 55. The five interconnected groups of mobile telephones allegedly involved in the attack on 14 February 2005 have been colour-coded for ease of reference. *See* consolidated indictment, para. 15.

<sup>32</sup> Sabra response, paras 7-8.

<sup>33</sup> *See* Decision of 20 December 2013, para. 9; *Galić* Decision, para. 13; ICTY, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva*

33. ICTY Trial Chambers have consistently held that the phrase ‘acts and conduct’ is a plain expression and should be given its ordinary meaning: the deeds and behaviour of the accused. It should not be extended by fanciful interpretation.<sup>34</sup> According to an SCSL Trial Chamber, this phrase should not be expanded to include all information that goes to a critical issue in the case.<sup>35</sup>

34. The Trial Chamber has previously found statements relating to the attribution of telephone numbers to the Accused admissible under Rule 155, as pertaining to evidence going to proof of a matter other than the acts and conduct of the accused as charged in the consolidated indictment.<sup>36</sup> It has held that ‘[e]stablishing that a person used a particular telephone number does not, of itself, go to the acts and conduct of an Accused person’.<sup>37</sup> The proposed evidence also pertains to the attribution of telephone numbers. The requirement under Rule 155 (A) is therefore met.

35. Furthermore, the fact that evidence of acts and conduct may be circumstantial, and concern telephone movements or location—as argued by counsel for Mr Sabra—does not alter the character of attribution-related evidence for the purpose of admissibility under Rule 155.

**D. Whether the evidence should be presented orally or whether cross-examination should be ordered**

36. In *Galić*, the ICTY Appeals Chamber considered the ‘proximity to the accused of the acts and conduct [...] described in the written statement’ as one of the factors relevant to the determination of whether the evidence should be given in written form or the witness should appear for cross-examination.<sup>38</sup> The Sabra Defence’s reliance on that case, however, is misplaced. The ICTY Appeals Chamber considered the relevance of the ‘proximity to the accused’ in the very different situation of written statements going to proof of the acts and conduct of a subordinate of the accused or of some

*Voce* Testimony pursuant to Rule 92 *bis*, 12 September 2006 (*Popović* Decision), paras 8, 15-16; ICTY, *Prosecutor v. Slobodan Milošević*, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92BIS, 21 March 2002, paras 24-25.

<sup>34</sup> *Popović* Decision, para. 10.

<sup>35</sup> SCSL, *Prosecutor v. Sesay, Kallon, and Gbao*, SCSL-04-15-T, Decision on Defence Application for the Admission of Witness Statement of DIS-129 under Rule 92*bis* or, in the alternative, under Rule 92*ter*, 12 March 2008, p. 3.

<sup>36</sup> F2304, Decision on Prosecution Motion to Admit the Statements of PRH081, PRH071, PRH050, PRH086, PRH312 and PRH539, and to Admit 37 Documents Related to the Insurance Policies of Salim Ayyash, 4 November 2015, para. 15; F2297, Decision of 2 November 2015, para. 21; Decision of 29 October 2015, disposition.

<sup>37</sup> F2062, Decision on ‘Prosecution Motion for the Admission of Locations Related Evidence’, 9 July 2015, para. 39.

<sup>38</sup> See *Galić* Decision, para. 13 (emphasis added).

other person for whose acts and conduct the accused is charged with responsibility.<sup>39</sup> Its argument is not analogous here.

37. Counsel for Mr Sabra state, on one hand, that the proposed witnesses are the only ones capable of testifying to the attribution of ‘Purple 018’, but on the other, that Witness 079 could also testify to this. The Prosecution does not contest the absence of alternative oral evidence, and does not take a position on the issue of the possible oral evidence of Witness 079, who is on the Prosecution’s witness list. The Trial Chamber will make its determinations on the basis of the Parties’ submissions.

38. The Trial Chamber agrees with the Prosecution that the absence of alternative oral evidence on similar facts is not a reason, of itself, for rejecting an application under Rule 155. However, it may be a factor—like the existence of cumulative documentary evidence—that it may consider in assessing whether a written statement should be admitted into evidence or whether cross-examination is justified.<sup>40</sup>

39. In this case, the Trial Chamber finds that the proposed evidence goes to a live and important issue between the Parties: the attribution to Mr Sabra of ‘Purple 018’. This is a factor which makes it appropriate to require cross-examination.<sup>41</sup>

40. In consideration of the Defence’s claim that a portion of Witness 024’s statement puts into question the Prosecution’s allegation that the SMS sent to ‘Purple 018’ from his telephone number was addressed to Mr Sabra, the Trial Chamber agrees with counsel for Mr Sabra that cross-examination would specifically be justified with regard to this witness. The witness apparently does not remember the user of ‘Purple 018’ (and the addressee of the message) or having sent the relevant SMS.<sup>42</sup> This may limit the probative value of his oral testimony on that specific aspect. In the exercise of its discretion, however, pursuant to Rule 155 (C), the Trial Chamber orders the Prosecution to make Witness 024 available for cross-examination according to Rule 156.

41. Witness 024 has provided all four telephone numbers whose attribution is underlined by the Defence as being more significant due to the frequency of their contacts with the telephone numbers

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<sup>39</sup> See *Galić* Decision, paras 13-15.

<sup>40</sup> See Decision of 29 October 2015, paras 8, 17.

<sup>41</sup> See *similarly* Decision of 9 November 2015, para. 20. See also Decision of 20 December 2013, para. 9, and decisions referenced therein.

<sup>42</sup> See Transcript of Audio Recording of Witness Interview of Witness 024, pp 39-47.

allegedly attributed to Mr Sabra. Furthermore, he has also provided all the telephone numbers of the identified third party contacts listed in Annex D (with the exception of the self-attributed numbers of Witnesses 069, 106 and 051)—while Witnesses 069, 106 and 051 have provided only some of them.<sup>43</sup>

42. For these reasons, the proposed evidence of these three witnesses can be considered as mostly cumulative of Witness 024's evidence. Their statements may therefore be admitted under Rule 155, without cross-examination.

43. This will allow the Defence to properly test the credibility and reliability of Witness 024.

### **CONFIDENTIALITY**

44. The Trial Chamber grants the Prosecution's request that the witnesses' identities and identifying information remain provisionally confidential. The Trial Chamber reiterates the public nature of these proceedings and orders: (i) the Parties to file public redacted versions of their submissions and—unless the Prosecution files submissions on the issue of their confidential status within ten days—of the annexes; and (ii) the Prosecution to inform the Trial Chamber whether the witnesses request protective measures, once it is able to verify this with them.

### **DISPOSITION**

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

**DECLARES** admissible under Rule 155 (C) the statement of Witness PRH024—and the related documents listed in Annex A of the motion—and requires the Prosecution to make him available for cross-examination under Rule 156;

**DECLARES** admissible under Rule 155 the statements of Witnesses PRH069, PRH106 and PRH051—and their related documents listed in Annex A;

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<sup>43</sup> The Trial Chamber notes that, in his statement, Witness 024 also provides the telephone number of the individual named in the last row, on page 5, of Confidential Annex D, even if this is not acknowledged in the Prosecution motion or the Annex (*see* Transcript of Audio Recording of Witness Interview of Witness 024, pp 58-59). Further, in Annex D, Witness 024 is not listed as having provided the number of the individual named in the last row of page 2, even if this is correctly acknowledged in the Prosecution motion (para. 6).

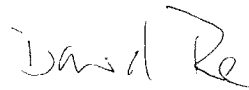
**DECIDES** that it will, at a suitable stage in the proceedings, formally admit the statements into evidence;

**ORDERS** the Parties to file public redacted versions of their submissions and—unless the Prosecution files submissions on the issue of their confidential status within ten days—of the annexes; and

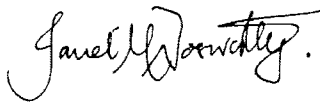
**ORDERS** the Prosecution to inform the Trial Chamber whether the witnesses seek protective measures, once it is able to verify this with them.

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

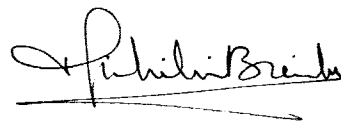
Leidschendam,  
The Netherlands  
12 July 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

