

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 31 January 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON THE PROSECUTION MOTION TO ADMIT TEN WITNESS
STATEMENTS RELATING TO SALIM JAMIL AYYASH AND HASSAN HABIB
MERHI AND TO ADMIT ONE EXHIBIT**

Office of the Prosecutor:
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Milne

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad 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. The Prosecution seeks the admission into evidence, under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence, of witness statements relating to the Accused, Mr Salim Jamil Ayyash, and Mr Hassan Habib Merhi. It also seeks the admission of one exhibit—a set of Lebanese customs documents—under Rule 154 and their addition to its Rule 91 exhibit list.¹ Counsel for Mr Ayyash and Mr Merhi responded to the motion.²

TEN WITNESS STATEMENTS AND CUSTOMS DOCUMENTS

2. The statements are from ten individuals: Witnesses PRH250, PRH028, PRH276, PRH535, PRH270, PRH511, PRH281, PRH248, PRH488 and PRH591. Eight statements are from witnesses who are relatives of Mr Ayyash; acquainted with Mr Ayyash and/or his family members; or acquainted with persons who are linked to Mr Ayyash and/or his family. The remaining two statements are from current and former staff members of the Office of the Prosecutor.

3. Witness PRH520 is a distant relative of Mr Ayyash. His statement provides familial information concerning Mr Ayyash and self-attributes a telephone number; attributes another to a member of Mr Ayyash's family, and another to Witness PRH276,³ a business associate of Witness PRH520.

4. Witness PRH028's statement confirms his acquaintance with Mr Ayyash and his family, Mr Ayyash's work, and that the witness is a family member of Mr Merhi. He self-attributes a telephone number; attributes another to his own wife, two numbers to the witness' factory, another number to an individual from his village, and another to a member of the Lebanese Parliament.

5. Witness PRH276 is acquainted with Mr Ayyash. His statement describes Mr Ayyash's work and other persons related to or acquainted with Mr Ayyash, including Witnesses

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2926, Prosecution Motion to Admit Ten Witness Statements pursuant to Rule 155, which relate to the Accused Ayyash, and one of whom also relates the Accused Merhi; and to Admit One Exhibit pursuant to Rule 154, 28 December 2016 (confidential with confidential annexes A-E).

² F2939, Réponse de la défense de Merhi à la requête du procureur F2926 pour l'admission d'une déclaration de témoin liée à Hassan Habib Merhi, 16 January 2017 (confidential); F2940, Ayyash Defence Response to Prosecution Motion to Admit Ten Witness Statements Pursuant to Rule 155 and One Exhibit Pursuant to Rule 154, 16 January 2017 (confidential).

³ This number is identical to the number later self-attributed by Witness PRH276, however the name is spelt differently in Prosecution's submission. See Prosecution motion, paras 7 and 11.

PRH047, PRH058 and PRH096; the Prosecution no longer intends to call the latter as a witness.⁴ He self-attributes a telephone number and attributes another to the former witness.

6. Witness PRH535's statement describes his business association with Witness 96, through whom he bought a car from Mr Ayyash. He attributes a number Witness 96.

7. The statement of Witness PRH270 describes his work and self-attributes a telephone number; he attributes another number to Witness PRH520, one of his clients, and another to Witness 96.

8. Witness PRH511's statement discusses his work and attributes a telephone number to Witness 58 and two telephone numbers to Witness PRH008, who were two of his customers.

9. Witness PRH281 co-owns a car showroom. His statement attributes a telephone number to Witness 58, one of his customers.

10. Witness PRH248 is an executive manager of a company. His statement attributes a telephone number to Witness PRH033—a long-term customer of the witness—and another two numbers to a company owned by Witness 33.

11. Witness PRH448 is an investigator working in the Office of the Prosecutor of the Special Tribunal. His statement describes calls made by the witness, with an interpreter, to three telephone numbers in March, November and December 2014 and in January and June 2015. On each occasion, the persons who received the call on each of the three telephone numbers confirmed their identities as either Witness PRH050,⁵ Witness 47, or Witness PRH119.

12. Witness PRH591 is a former investigator of the Office of the Prosecutor of the Special Tribunal. In March 2010 she contacted a telephone number and spoke to Witness 33.

13. Finally, the customs documents are from the Lebanese Republic Ministry of Finance—Customs Directorate and the Port of Beirut, concerning the importation of a Dodge Durango by Mr Ayyash in April 2005, with Witness 270 acting as the customs broker.

⁴ Witness PRH096 was removed from the Prosecution's witness list pursuant to F1344, Decision Authorising the Prosecution to Amend its Witness and Exhibit Lists, 24 January 2014. *See also* F1273, Prosecution Submission Pursuant to Rules 91(G)(ii) and (iii), 18 December 2013 (public with confidential annexes A-F), Annex A – List of Withdrawn Witnesses, line 89.

⁵ The statement spells the name of this individual differently to the Prosecution's submission (*see* Prosecution motion, para. 23).

SUBMISSIONS

Prosecution motion

14. The Prosecution's case is that four personal mobile phone (PMP) numbers (PMP 165, PMP 935, PMP 091, and PMP 170) are attributable to Mr Ayyash and two landline numbers are attributable to Mr Ayyash and his family during periods relevant to the attack of 14 February 2005 which killed former Prime Minister Mr Rafik Hariri and others. These PMPs co-locate⁶ and share contacts with mobile phones that belong to the various colour-coded telephone networks allegedly used in the preparation of the attack, namely, Yellow 669, Yellow 294, Blue 233, Blue 322, Red 741, and Green 300.⁷

15. The documents sought to be admitted under Rule 155 are relevant and probative as the ten statements assist in attributing the personal mobile and landline numbers to Mr Ayyash by attributing third party phone numbers that were in contact with the personal mobile numbers and with Yellow 669, and by describing the relationship between the persons to whom the third party numbers have been attributed and Mr Ayyash. Witness 28's statement also relates to the attribution of phone numbers to Mr Merhi and his family.⁸

16. The statements do not concern the acts and conduct of the accused and are *prima facie* reliable. They fulfil the Rule 155 criteria and conform to the Rule 155 Practice Direction⁹ in all but two instances. The first is Witness 276's statement, which does not contain his signature on one page, the interpreter certification. The witness lives in Côte d'Ivoire and therefore no attempt was made to re-interview him to remedy the minor breach. The second is Witness 28's statement—in the form of an audio-recorded interview—where he refused to sign the witness acknowledgement and did not receive a copy of Rules 60 *bis* and 152. These breaches were overcome by the recording of the interview which the Trial Chamber can listen to; by the notice given to the witness at the beginning of the interview as to the consequences

⁶ 'The technique of "co-location" consists of deducing from the fact that, when mobile telephones are used within the same geographical areas, recorded by cell-towers, at the same date and in the same period of time as other telephones and they do not communicate with each other, one and the same person is the use of these phones': STL-11-01/I/PTJ, Decision Relating to the Examination of the Indictment of 10 June 2011 issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011, fn. 43.

⁷ Prosecution motion, para. 4.

⁸ Prosecution motion, para. 5. *See also* paras 7-25. The tendered evidence is part of, or in addition to, the evidence relied upon by Mr Andrew Donaldson (PRH230) in attributing phone numbers to Mr Ayyash and his family in his attribution report (D0506541-D0507009): Prosecution motion, para. 6.

⁹ 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, STL-PD-2010-02, 15 January 2010.

of providing false evidence; and the witness' own words during the interview. Three unsuccessful attempts were made to remedy the breaches, as outlined in the witness statement of Mr Erich Karnberger (Witness PRH312), a Prosecution investigator, in Annex C to the Prosecution's motion.¹⁰

17. There is no overriding public interest for the evidence to be presented orally and the interests of justice and a fair and expeditious trial exceptionally warrant their admission without cross-examination. Mr Donaldson's (Witness PRH 230) Ayyash Attribution Report relies upon parts of the evidence of nine of the ten witnesses and the Defence may cross-examine him on his reliance on them.¹¹

18. Concerning the set of customs documents whose admission is sought under Rule 154, they establish that Witness 270 was the customs broker for Mr Ayyash in April 2005. They were created during the ordinary course of business and have the necessary indicia of reliability. They are relevant, probative and reliable. In addition, although the customs documents are extracted from a larger collection of documents that are already on the exhibit list and previously disclosed to the Defence, their separate addition to the Prosecution's Rule 91 exhibit list, should the Trial Chamber deem it necessary, is sought for ease of reference and allows only the correct and relevant portions of exhibits to be tendered. It is with good cause and would not prejudice the fair trial rights of the accused or cause undue delay.¹²

Defence response

19. Counsel for Mr Merhi opposes the admission of Witness 28's statement—which, according to the Prosecution, assists in attributing telephone numbers to Mr Merhi—without giving the Defence an opportunity to cross-examine the witness. While Witness 28 self-attributes a telephone number, he also stated that it was regularly used by other persons. This is not explored any further in the audio-recorded interview. Witness 28's assertion that he did not recognize some of the telephone numbers attributed by the Prosecution to Mr Merhi and to his family—despite his familial connection to Mr Merhi—was similarly not explored by way of additional questions.¹³

¹⁰ Prosecution motion, paras 27-29.

¹¹ Prosecution motion, paras 30-31.

¹² Prosecution motion, paras 33-34.

¹³ Merhi response, paras 3-4.

20. Further, Witness 28's evidence is not merely confined to the attribution of telephone numbers, but also relates to the narrative linked to the evidence of Mr Gary Platt (Witness PRH 147), a Prosecution expert, and thus the 'chronological' aspect of the case. It suggests that Witness 28 was involved in the conspiracy, making his statement all the more important. The admission of Witness 28's statement without the calling of the witness would cause prejudice to the Defence since it provides incomplete information and does not, on its own, assist the Trial Chamber in its quest for the truth. This prejudice cannot be overcome except with cross-examination, as no other source is able to provide the missing information.¹⁴

21. Counsel for Mr Ayyash submit that, although the Prosecution has the right to present its case as it sees fit, the Defence is concerned that the Prosecution is choosing not to present the best available, or most relevant, evidence—particularly those of specific third party contacts—under the guise of 'streamlining' its case. This is a matter that the Trial Chamber may wish to take into account when making its assessment of the totality of the evidence. While the Ayyash Defence does not require Witnesses 28, 520, 276, 535, 270, 511, 281 and 248 for cross-examination, it supports the Merhi Defence's request to cross-examine Witness 28 and urges the Trial Chamber to ascertain the reliability of his statement in light of the breaches of the Rule 155 Practice Direction.¹⁵

22. As to the statements of Witnesses 448 and 591, the Ayyash Defence objects to the Prosecution's use of their own staff to corroborate and create 'evidence' on the attribution of telephone numbers. Rather than calling certain individuals that Witness 448 identifies in his statement, the Prosecution instead presents the investigator's statement which only confirms that on certain days in 2014 persons identifying themselves as these individuals answered the relevant phone numbers. As for a third individual identified by Witness 448, this evidence is unnecessary as evidence confirming his phone number has already been admitted in this case. The same concerns are expressed with respect to the statement of Witness 591, and it contains irrelevant information. Finally, the Ayyash Defence does not oppose the admission of the customs documents under Rule 154.¹⁶

¹⁴ Merhi response, paras 5-6.

¹⁵ Ayyash response, paras 3-5. The Ayyash Defence takes no issue with the minor breaches of the Rule 155 Practice Direction with respect to Witness 276's statement: Ayyash response, fn. 6.

¹⁶ Ayyash response, paras 6-10.

DISCUSSION

Admission of ten witness statements under Rule 155

23. The Trial Chamber has previously identified the procedural safeguards for admitting statements under Rule 155 into evidence. These allow the Trial Chamber to receive written testimony in lieu of live oral testimony. In particular, the 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.¹⁷ These apply here.

24. Trial Chamber has carefully reviewed each of the ten statements sought to be admitted. It is satisfied that they are relevant and probative to the attribution of specific mobile telephone numbers to the Accused, Mr Ayyash and in one instance to Mr Merhi.

25. The Prosecution alleges that five interconnected groups of mobile telephones were responsible for, and involved in, the killing of former Lebanese Prime Minister, Mr Rafik Hariri, and others on 14 February 2005 in Beirut.¹⁸ The evidence relates to the attribution of third party phone numbers which were in contact with Yellow 669 and certain personal mobile phone numbers which, the Prosecution claims, co-locate and share contacts with mobiles attributed to Mr Ayyash in the Yellow, Blue, Red and Green networks, namely Yellow 669 and 294, Blue 233 and 322, Red 741 and Green 300. In addition, the statement of Witness 28 relates to the attribution of third party numbers which were in contact with Purple 3575231 and other non-network phones that the Prosecution attributes to Mr Merhi and his family, as well as phone numbers attributed to Mr Mustafa Amine Badreddine, a former accused and named co-conspirator.¹⁹ The attribution of mobile numbers to the various Accused is an integral part of the Prosecution's case and the statements assist the Prosecution in this endeavor in relation to Mr Ayyash and Mr Merhi.

¹⁷ See 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 13-14; STL-11-01/T/TC, 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, 11 December 2014, 13 January 2015, para. 3; F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 5; F2311, Decision on Prosecution Motion for the Admission under Rule 155 of the Statements of Witnesses PRH371 (Helena Habraken) and PRH698 (Nicole Blanch), 9 November 2015, para. 13; F2635, Decision on Prosecution Motion for the Admission Under Rule 155 of the Statement of Witness PRH696, 12 July 2016, para. 6; F2644, Decision on Prosecution Motion to Admit the Statements of Witness PRH024, PRH069, PRH106 and PRH051 Pursuant to Rule 155, 12 July 2016, para. 25.

¹⁸ See generally F2720, Amended Consolidated Indictment, 12 July 2016, para. 14.

¹⁹ Prosecution motion, para. 10(i)-(vi).

26. The Trial Chamber is also satisfied that the ten witness statements are *prima facie* reliable and do not concern the acts and conduct of the Accused as charged in the amended consolidated indictment. The witness statements contain the requisite indicia of reliability as they meet the requirements set out in the Rule 155 Practice Direction, with the exception of the statements of Witnesses 276 and 28 as identified by the Prosecution. With regard to these, the Trial Chamber is satisfied that, in this instance, they are still nonetheless *prima facie* reliable. Witness 276 merely failed to sign one page of his statement. This breach is so minor as to not affect the reliability of the statement in its entirety. With respect to Witness 28, the Trial Chamber is satisfied that the Prosecution took reasonable measures to attempt to re-interview the witness and that the breaches were alleviated by the content of the interview (i.e. the notice given to him by the investigators and the witness' own assertion regarding the truthfulness of his statement) as well as the existence of the audio recording itself which verifies the statement's accuracy. Thus, despite the breaches of the Rule 155 Practice Direction, the Trial Chamber is of the view that the statement is still *prima facie* reliable.

27. The Trial Chamber dismisses counsel for Mr Ayyash's objection to the Prosecution's use of its own investigators to provide evidence on the attribution of telephone numbers. The relevance, probative value, and *prima facie* reliability of the statements of Witnesses 448 and 591 have been made out here. Yet, the Ayyash Defence prefers the evidence of other witnesses. However, as rightly acknowledged by the Defence, the Prosecution is entitled to present the evidence which it deems to be necessary to prove their case in a manner of its choosing. It is not the Ayyash Defence's preference which governs this matter. Further, there is no rule in international criminal law procedural law which dictates that the Prosecution is unable to call its own investigators to provide evidence—corroborating evidence or otherwise. Thus, the Prosecution may call its own staff members to testify on issues relevant to the proceedings as it has done on numerous occasions through this trial. The Prosecution is not generating evidence in the form of investigator's statements. That being said, the weight to be attached to these statements, when other more pertinent evidence has not been submitted, is a matter to be dealt with at a later stage.

28. Further, the Ayyash Defence has not substantiated its assertion that, in relation to the statement of Witness 448, the evidence of an individual 'wherein he confirms his own number, has already been admitted in this case'.²⁰ No reference has been provided which may

²⁰ Ayyash response, para. 7.

show that this evidence has indeed already been admitted. Similarly, no reference or further elaboration is provided for the assertion that the statement of Witness 591 ‘contains information which appears to be irrelevant to the present proceedings’.²¹ It is incumbent upon the Party challenging the admission of evidence to fully substantiate their arguments. These submissions are therefore dismissed.

29. However, the Trial Chamber agrees with the Merhi Defence that, in light of the evidence contained in Witness 28’s statement and the identified matters, he should be called for cross-examination. The issues pointed out by the Merhi Defence constitute substantiated reasons warranting the attendance of this witness for cross-examination. The admission of this statement is contingent on his appearance to testify.

Admission of one exhibit under Rule 154 and amendment of Rule 91 exhibit list

30. The Trial Chamber has also previously identified the applicable principles and procedural safeguards concerning the admission of documents under Rule 154 or ‘from the bar table’. The material must be relevant and probative, and its probative value must not be outweighed by the need to ensure a fair trial.²² Definite reliability is unnecessary; *prima facie* reliability is sufficient.²³ In addition, how and where each document or record fits into the tendering party’s case must be clearly explained.²⁴ The weight that the Trial Chamber may ultimately give to the material is separate and distinct from its probative value. These also apply here.

31. The Trial Chamber has reviewed the proposed exhibit which is a set of customs documents. The Trial Chamber is satisfied that it is relevant in attributing a non-network telephone number, PMP 935 and PMP 091 to Mr Ayyash as it assists in establishing that Witness 270 was the customs broker for Mr Ayyash in April 2005 when a vehicle was imported by the accused into Lebanon. In turn, Witness 270’s number, according to the

²¹ Ayyash response, para. 8.

²² See 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 (‘CST decision’), paras 66, 111; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015 (‘Mobile documents decision’), para. 33; F1781, Corrected Version of “Decision on Prosecution Motion to Admit into Evidence Geographic Documents” of 8 December 2014, 10 December 2014, para. 4.

²³ F1308, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014 (‘Visuals decision’), para. 8; F1350, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014 (‘Victims decision’), para. 7; Mobile documents decision, para. 33; CST decision, para. 111.

²⁴ CST decision, para. 111; Mobile documents decision, para. 33; Victims decision, para. 7; Visuals decision, para. 6.

Prosecution, was in contact with the above non-network and personal mobile numbers during the time in which the Prosecution attributes them to Mr Ayyash.

32. The set of documents are *prima facie* reliable as they are from the Lebanese Republic Ministry of Finance—Customs Directorate and the Port of Beirut. The Trial Chamber has previously ruled on the admissibility of official Lebanese records, finding that such documents are *prima facie* reliable.²⁵ These principles apply here and the proposed exhibit is *prima facie* reliable and contains the necessary probative value for admission into evidence.

33. As to the addition of the exhibit to the Rule 91 exhibit list, the Trial Chamber notes that although it is an extract from a larger document, the larger documents is not already on the Prosecution's Rule 91 exhibit list. However, in the circumstances, the extract's admission would not prejudice the Defence. The extract has already been disclosed by the Prosecution, considered by the Defence in drafting the responses, and its admission is not opposed. The addition of the exhibit to the Rule 91 exhibit list is therefore granted.

CONFIDENTIALITY

34. The Prosecution requests the Trial Chamber to maintain the confidential status of its motion and annexes until it decides otherwise either pursuant to a Prosecution motion or after hearing from the Prosecution, as they contain information regarding the identity and personal information of third party individuals.²⁶ Neither the Merhi nor the Ayyash Defence object. However, they inform the Trial Chamber that they are prepared to file public redacted versions of their respective filings.²⁷

35. The Trial Chamber reiterates that in these proceedings confidentiality is the exception, not the rule. However, considering the content of the Prosecution's motion and annexes, the Trial Chamber is satisfied that the motion and annexes A, B, C, D, and E should remain confidential together with the Merhi and Ayyash Defence responses, until it decides otherwise. Nevertheless, in the interests of transparency, the parties are ordered to file public redacted versions of their motions and responses.

²⁵ F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 33; F2857, Decision on Prosecution Motion to Admit Passport Applications, 25 November 2016, paras 10-12; F2899, Decision on Prosecution Motion for the Admission of Records Received from the Traffic, Truck, and Vehicle Management Authority, 9 December 2016, paras 22-23.

²⁶ Prosecution motion, para. 35.

²⁷ Merhi response, para. 8; Ayyash response, para. 11.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible under Rule 155 the statements of Witnesses PRH250, PRH276, PRH535, PRH270, PRH511, PRH281, PRH248, PRH488 and PRH591;

DECLARES admissible under Rule 155 (C) the statement of Witness PRH028 and requires the Prosecution to make him available for cross-examination under Rule 156;

DECLARES the customs documents admissible under Rule 154;

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

GRANTS the Prosecution's request to amend its Rule 91 exhibit list;

ORDERS the Prosecution to file a public redaction version of its motion, and counsel for Mr Merhi and Mr Ayyash to file public redacted versions of their responses; and

MAINTAINS the confidentiality of the Prosecution's annexes, until otherwise ordered.

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

Leidschendam,
The Netherlands
31 January 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

