



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

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

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

Registrar: Mr Daryl Mundis

Date: 30 November 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING AYYASH DEFENCE APPLICATION TO ADMIT INTO
EVIDENCE WITNESS STATEMENTS TENDERED DURING THE CROSS-
EXAMINATION OF PROSECUTION ANALYST ANDREW DONALDSON**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Hugh Milne

**Legal Representatives of
Participating Victims:**

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

Counsel for Mr Salim Jamil Ayyash:

Mr Emile Aoun, Mr Thomas Hannis & Mr Chad Mair

Counsel for Mr Hassan Habib Merhi:

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

Counsel for Mr Hussein Hassan Oneissi:

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

Counsel for Mr Assad Hassan Sabra:Mr David Young, Mr Geoffrey Robert
Ms Sarah Bafadhel

INTRODUCTION

1. The Prosecution's case against the four Accused, Mr Salim Jamil Ayyash, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, relies upon it proving beyond reasonable doubt that they, and the former Accused, Mr Mustafa Amine Badreddine, used specified mobile telephones in the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut, Lebanon, on 14 February 2005. Specifically, the Prosecution alleges that Mr Ayyash used a series of mobiles and a handset that was integrated in his BMW car.¹

2. In response to evidence tendered by the Prosecution regarding Mr Ayyash's alleged ownership of the BMW, counsel for Mr Ayyash tendered under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence² two witness statements, by Witnesses PRH331 and PRH682, as being relevant to the BMW's ownership. On 16 December 2016, the Trial Chamber denied admission into evidence of these two statements. The Trial Chamber considered in particular that the Prosecution, which objected to their admission, would be forced to decide whether to cross-examine the witnesses without knowing where the evidence fits into the Ayyash Defence case. The Trial Chamber held that in circumstances where a Party resists, during its case, the submission of witness statements under Rule 155 by the other Party the witness statements most properly belong in the moving Party's case.³

3. On 25 September 2017, the Trial Chamber issued a decision on a Sabra Defence motion for admission of documents into evidence from the bar table, admitting 49 documents into evidence and denying the admission into evidence of the remaining 79 documents, including all witness statements. The Trial Chamber held that the Sabra Defence should not have tendered the witness statements under Rule 154 (which applies to documents) and that the Trial Chamber could not *proprio motu* receive them into evidence under Rule 155. The Trial Chamber noted that the witnesses were not on any Party's witness list. It also considered that it may be unfair to force the Prosecution to elect whether to cross-examine a witness at this stage of the trial, and that cross-examination by the Prosecution of Defence witnesses

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 14-19; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077/A01, Prosecution's Updated Pre-Trial Brief, dated 23 August 2013, 23 August 2013 (confidential), para. 50.

² See below, para. 8.

³ F2909, Decision on Salim Jamil Ayyash's BMW and Mobile Numbers and Ayyash Request Regarding Witnesses PRH331 and PRH682, 16 December 2016 ('Decision of 16 December 2016'), paras 1-2, 19-20, disposition.

during its own case would amount to a departure from the sequence of evidence presentation prescribed by Rule 146 (B).⁴

4. Prosecution analyst Andrew Donaldson (Witness PRH230) provided analytical opinion evidence attributing usage of the mobiles to Mr Ayyash. To prove that he was using the specified mobiles and the BMW handset, Mr Donaldson prepared an ‘attribution’ report analysing and linking many pieces of Prosecution evidence to Mr Ayyash.⁵

5. Mr Donaldson then testified as a *viva voce* (live) witness. During his cross-examination on 6 October 2017 the Ayyash Defence retendered the two statements of Witnesses 331 and 682 into evidence, again under Rule 155. They were marked for identification as exhibits 1D450 (statement of Witness 331) and 1D451 (statement of Witness 682). The Prosecution objected to their admission.⁶

6. On 16 and 17 October 2017, the Ayyash Defence presented Mr Donaldson with 12 statements of 11 witnesses, namely Witnesses PRH008, PRH025, PRH033, PRH047, PRH055, PRH058, PRH096, PRH119, PRH328, PRH350 and PRH429. Mr Donaldson had used these statements as source material in earlier versions of his attribution report relating to Mr Ayyash. He removed them from his final report as the Prosecution had decided not to use the statements. The Ayyash Defence submitted that these witness statements contradicted the Prosecution’s theory regarding Mr Ayyash’s use of mobiles. The Ayyash Defence tendered the statements into evidence under Rule 155, and they were marked for identification as exhibits 1D455 (statement of Witness 8), 1D456 (statement of Witness 25), 1D457 (statement of Witness 33), 1D458 (statement of Witness 58), 1D459 (statement of Witness 47), 1D460 (statement of Witness 429), 1D461, 1D461.1 (statements of Witness 96), 1D462 (statement of

⁴ F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 (‘Decision of 25 September 2017’), paras 1-2, 83-93, disposition.

⁵ See exhibit P02026.1 MFI.

⁶ Transcript of 6 October 2017, pp 31-32, 43, 47-48. See F3397, Prosecution Response to “Ayyash Defence Further Submissions on the Admission of Prosecution Witness Statements Marked for Identification during the Cross-Examination of Mr. Andrew Donaldson”, 1 November 2017 (‘Prosecution Response’), paras 4, 41; F3381, Ayyash Defence Further Submissions on the Admission of Prosecution Witness Statements Marked for Identification during the Cross-Examination of Mr. Andrew Donaldson, 25 October 2017 (confidential with confidential annexes A-B) (‘Further Defence Submissions’), para. 63.

Witness 55), 1D463 (statement of Witness 350), 1D464 (statement of Witness 119) and 1D465 (statement of Witness 328). The Prosecution again objected to their admission.⁷

7. The Trial Chamber ordered, on 17 October 2017, the Parties to file written submissions on the admissibility of these witness statements. The Ayyash Defence was to file its application by 25 October 2017, the Prosecution to file its response by 1 November 2017, followed by a reply, if any, by 3 November 2017. The Trial Chamber specified, on 19 October 2017, that the Ayyash Defence written application should also cover exhibits 1D450 MFI and 1D451 MFI and explain where these fit into its case.⁸ The application and response were filed as ordered.⁹ The Ayyash Defence did not file a reply.

THE LEGAL PRINCIPLES

8. Rule 155 allows under certain conditions written witness statements and transcripts to be admitted into evidence in lieu of oral testimony, i.e. without cross-examination.

9. Rule 146 (B) provides that, unless the Trial Chamber directs otherwise in the interests of justice, evidence at trial shall be presented in the following sequence: (i) Prosecution evidence; (ii) evidence called by the Trial Chamber at the request of victims participating in the proceedings; (iii) Defence evidence; (iv) Prosecution rebuttal evidence; (v) rebuttal evidence called at the request of victims participating in the proceedings; and (vi) Defence rejoinder evidence.

10. Tendering evidence during cross-examination does not in principle alter this sequence.¹⁰ However, a variation of the sequence set out in Rule 146 (B) is required if the tendered evidence is a witness statement and the Trial Chamber allows cross-examination of the witness.¹¹ The Trial Chamber has held that where a Party resists, during its case, the submission of witness statements under Rule 155 by the other Party the statements most properly belong in the moving Party's case. Rules 112 and 128 provide for the Defence to disclose its case to the Prosecution *after* the close of the Prosecution's case and a Defence election of whether to present a Defence case. It may therefore be unfair to the Prosecution to

⁷ Transcript of 17 October 2017, pp 28-29, 34-35; transcript of 16 October 2017, pp 28, 33-35, 38, 41-45. *See* Further Defence Submissions, paras 1-2, 63, confidential annex A; Prosecution Response, paras 1, 41. The reference to exhibit 1D454 MFI in Further Defence Submissions, para. 63, appears to be a clerical error.

⁸ Transcript of 19 October 2017, p. 42; transcript of 17 October 2017, pp 7-8, 83-84.

⁹ *See* Further Defence Submissions; Prosecution Response.

¹⁰ Decision of 25 September 2017, paras 109-111.

¹¹ Decision of 16 December 2016, para. 17. *See* Decision of 25 September 2017, paras 82, 92, 100.

admit into evidence witness statements tendered by the Defence under Rule 155 during the Prosecution's case, over its opposition, as the Prosecution would be forced to elect whether to cross-examine a witness without knowing where the evidence fits into the Defence's case. To prevent procedural unfairness the Trial Chamber could vary the order of receiving evidence while ordering appropriate disclosure of the Defence case to the Prosecution.¹²

11. A Chamber may, under Rule 140, '*proprio motu* or at the request of a Party, reconsider a decision, other than a judgment or a sentence, if necessary to avoid injustice'. Reconsideration is an exceptional remedy, and the Rule must not be used to redress 'imperfections in a decision or to circumvent the unfavourable consequences of a ruling'. The party seeking reconsideration must demonstrate on specific grounds an injustice that involves prejudice. If prejudice or injustice is shown, reconsideration may be granted on grounds that include an error of law, abuse of discretion, or the existence of new facts or a material change in the circumstances.¹³

SUBMISSIONS

Ayyash Defence submissions

12. With regard to the relevance, probative value and *prima facie* reliability of exhibits 1D450 MFI and 1D451 MFI (statements of Witnesses 331 and 682), the Ayyash Defence refers to the submissions it made when it first tendered these statements.¹⁴

13. Mr Donaldson strengthened the case for admission by emphasising the value of this evidence, and his cross-examination showed where the evidence fits into the Prosecution case and the Ayyash Defence theory. The statements comply with all the requirements of Rule 155 and do not go to the acts and conduct of the Accused.¹⁵ The Ayyash Defence is not seeking reconsideration of the decision of 16 December 2016, which merely denied admission of the witness statements 'at this point'. Were the test for reconsideration to apply, it would be met in light of Mr Donaldson's new evidence about the witness statements.¹⁶

¹² Decision of 16 December 2016, paras 19-20. *See also* Decision of 25 September 2017, para. 90.

¹³ F3345, Decision Denying Merhi Defence Application to Reconsider 'Decision Clarifying Mr Gary Platt's Area of Expertise', 2 October 2017, para. 8 with further references.

¹⁴ Transcript of 6 October 2017, pp 34-35, referring to 'F2800', 'F2835'.

¹⁵ Further Defence Submissions, para. 57; transcript of 19 October 2017, p. 41; transcript of 6 October 2017, p. 34.

¹⁶ Transcript of 6 October 2017, pp 40-41. *See also* Further Defence Submissions, para. 56.

14. Turning to the 12 other witness statements,¹⁷ their relevance is that the witnesses, who knew Mr Ayyash and or were in contact with mobile and landline numbers attributed to him, spoke about their telephone habits and numbers and about whether Mr Ayyash used the numbers that the Prosecution attributed to him.¹⁸ The statements are probative of the identity of the user(s) of those telephones.¹⁹ Disclosure under Rule 128 would add nothing to the repeatedly stated Defence theory that the Prosecution's evidence does not prove beyond reasonable doubt that Mr Ayyash used any of the telephones that the Prosecution attributes to him.²⁰ The statements have sufficient indicia of *prima facie* reliability, despite most of the statements containing minor breaches of the requirements pursuant to Rule 155. These defects are similar to those in other witness statements that the Trial Chamber has previously admitted into evidence.²¹ The statements do not go to the acts and conduct of the accused and do not warrant cross-examination.²²

15. The 12 witness statements are still on the Prosecution exhibit list. The 11 witnesses are still on the Prosecution witness list as Rule 155 witnesses, save for Witnesses 96 and 350 who are no longer on the Prosecution witness list and Witness 55 who is a *viva voce* witness.²³ Since the witness statements were taken by the Prosecution and are still on its exhibit list, the witnesses should be properly construed as Prosecution rather than Defence witnesses. Moreover, Mr Donaldson relied on these witness statements in previous versions of his Ayyash attribution report.²⁴ The Trial Chamber's decision of 25 September 2017 can be distinguished as it denied admission into evidence of witness statements tendered under Rule 154, the majority of which are from witnesses who were never included on the Prosecution's witness list.²⁵ No variation of the sequence of presentation of evidence under Rule 146 (B) is required because the witness statements were tendered in cross-examination.²⁶

¹⁷ Further Defence Submissions, paras 7-8; transcript of 16 October 2017, pp 41-42, 44-45.

¹⁸ Further Defence Submissions, paras 11-12, 15, 23, 26, 28, 30, 32, 34, 36-37, 39, 41, 43, 46, 49-50, 52, confidential annex B; transcript of 16 October 2017, pp 33-34, 38-39, 41-42. Some of the witness statements are also relevant to Mr Ayyash's Hajj attendance. Further Defence Submissions, paras 26, 28, 30, 32.

¹⁹ Further Defence Submissions, paras 11-12; transcript of 16 October 2017, pp 33-34, 38-39, 41-42.

²⁰ Further Defence Submissions, paras 13-15.

²¹ Further Defence Submissions, paras 17-20, 29, 31, 33, 35, 38, 40, 42, 48, 51, 53. Only exhibit 1D462 MFI (statement of Witness 55) complies fully with the requirements. Further Defence Submissions, para. 45.

²² Further Defence Submissions, paras 23-24; transcript of 16 October 2017, pp 33-34, 41-42. The Prosecution's listing of witnesses under Rule 155 demonstrates that it did not intend to call them as *viva voce* witnesses. Further Defence Submissions, para. 16.

²³ Further Defence Submissions, paras 1, 4-5, 16, 21; transcript of 16 October 2017, pp 41, 43-46.

²⁴ Further Defence Submissions, paras 6, 21, 27, confidential annex B; transcript of 16 October 2017, pp 33-34, 41-42.

²⁵ Further Defence Submissions, para. 22.

²⁶ Further Defence Submissions, para. 25.

16. Counsel for Mr Ayyash tender all of the witness statements in their entirety, so as to provide context and to allow the Trial Chamber to assess the overall credibility of the witnesses. However, counsel are prepared to extract and tender only the parts of the statements relied on in court, should the Trial Chamber prefer that.²⁷ Counsel also provide, but do not tender, two additional statements, of Witnesses 55 and 350, in case the Trial Chamber would wish to admit them into evidence for contextual purposes.²⁸

Prosecution's submissions

17. The Prosecution maintains the objections it raised when counsel for Mr Ayyash initially tendered Witnesses 331's and 682's statements, now marked for identification as exhibits 1D450 and 1D451.²⁹ The Ayyash Defence in effect seeks reconsideration of the decision of 16 December 2016, without addressing any of the requirements of the reconsideration test.³⁰

18. In seeking to tender the 12 other witness statements during the Prosecution case, the Ayyash Defence runs foul of the Trial Chamber's decisions of 16 December 2016 and 25 September 2017.³¹ The Ayyash Defence has not shown that it is in the interests of justice to vary the Rule 146 (B) sequence of presentation of evidence.³² The Defence argument that no such variation is required because the witness statements were tendered in cross-examination is without merit because the Defence failed to explain or provide a legal basis for its argument and because Mr Donaldson cannot address the admissibility of the statements of other witnesses, and notably cannot speak to the truth of their contents.³³ The Prosecution's preliminary view is that it would want to cross-examine the witnesses, but it would be unfair to force it to make this determination at the present time because the Ayyash Defence has not

²⁷ Further Defence Submissions, paras 58-60. *See also* transcript of 6 October 2017, pp 38-39.

²⁸ Further Defence Submissions, paras 44, 47.

²⁹ Transcript of 19 October 2017, pp 40-41; transcript of 6 October 2017, p. 32. *See also* transcript of 19 October 2017, p. 42; transcript of 6 October 2017, pp 36-39, 41-43. The statements of Witnesses 331 and 682 are not currently on the Prosecution witness list. Prosecution Response, para. 13. The Prosecution also relies on its submissions on the remaining witness statements. Prosecution Response, para. 32. *See also* transcript of 16 October 2017, p. 35.

³⁰ Prosecution Response, paras 4, 31-36; transcript of 6 October 2017, pp 35-37.

³¹ Prosecution Response, paras 5, 22; transcript of 17 October 2017, pp 1-2.

³² Prosecution Response, paras 1-3, 5, 14-15, 17-22.

³³ Prosecution Response, paras 6-9; transcript of 17 October 2017, pp 2-3.

fully explained its case.³⁴ The Prosecution may wish to cross-examine a witness to impugn him or to put his evidence in context.³⁵

19. While the 11 witnesses were or are on the Prosecution witness list, the Prosecution has notified the Defence that it does not intend to call them.³⁶ These witnesses are Defence witnesses as it is the Defence who relies on them and tenders their statements.³⁷ The continued presence of some of the witness statements on the Prosecution exhibit list does not make them exclusive or permanent Prosecution exhibits. The fact that the statements were taken by Prosecution investigators says nothing about whether they are Prosecution or Defence evidence. Mr Donaldson relied on these statements in past versions of his attribution report, but the Prosecution does not rely on those past versions, which are therefore not part of the Prosecution's case.³⁸ Finally, the Prosecution takes no position on the reliability of the statements.³⁹

20. The Prosecution objects to any of the witness statements being tendered in part because having the full statements in evidence enhances the Trial Chamber's and the Parties' ability to understand and evaluate the witness' evidence.⁴⁰

DISCUSSION

21. In the decision of 16 December 2016, the Trial Chamber analysed the procedural difficulty of receiving into evidence witness statements proposed by the Defence under Rule 155 during the Prosecution's case. It concluded that it would not receive into evidence 'at this point' the statements of Witnesses 331 and 682, which are now marked for identification as exhibits 1D450 and 1D451. In the disposition, the Trial Chamber dismissed the request to admit the statements under Rule 155 'at this stage of the trial'.⁴¹ In other words, the Trial

³⁴ Prosecution Response, paras 23-29; transcript of 17 October 2017, pp 5-6; transcript of 16 October 2017, p. 35. The Prosecution also contends that the equal application of the Rules to the Prosecution and the Defence requires that disclosure to the Prosecution allow for significant time to assess whom to cross-examine. Prosecution Response, para. 24. *See also* Prosecution Response, para. 29.

³⁵ Transcript of 17 October 2017, pp 5-6. *See also* Prosecution Response, para. 27.

³⁶ Prosecution Response, paras 10, 28; transcript of 17 October 2017, pp 5-6, 8-9; transcript of 16 October 2017, pp 35-36.

³⁷ Prosecution Response, paras 10-11; transcript of 17 October 2017, p. 5. The Prosecution notes that the Ayyash Defence considers Witness 96 to be a Prosecution witness even though he was formally withdrawn from its witness list. Prosecution Response, para. 12. *See also* Prosecution Response, para. 11.

³⁸ Prosecution Response, paras 13-15. *See also* Prosecution Response, para. 16.

³⁹ Prosecution Response, para. 30. *See* transcript of 17 October 2017, p. 8.

⁴⁰ Prosecution Response, para. 30.

⁴¹ Decision of 16 December 2016, paras 19-21, disposition. *See also* Decision of 16 December 2016, para. 22.

Chamber dismissed the Ayyash Defence's attempt to tender Witnesses 331's and 682's statements into evidence during the Prosecution's case.

22. By retendering the same statements under the same rule during the same stage of the trial, the Ayyash Defence is in effect seeking reconsideration of that decision. However, counsel for Mr Ayyash fail to address the requirements for obtaining reconsideration.⁴² The Trial Chamber will therefore not entertain the application.

23. With regard to the other 12 witness statements, the situation is similar to that in the decision of 16 December 2016. The Ayyash Defence advances no arguments that would distinguish that decision and in fact does not even mention it in this context. Yet, the similarities abound. First, although the witnesses are still on the Prosecution witness list as Rule 155 witnesses,⁴³ the Prosecution has informed the Ayyash Defence that it no longer intends to call them.⁴⁴ This is sufficient notice to the Defence that the witnesses' evidence is no longer part of the Prosecution's case.

24. Second, the Ayyash Defence is tendering written statements during the Prosecution's case under Rule 155 in circumstances where the Prosecution may seek to cross-examine the witnesses. Third, the Prosecution objects to having to decide whether it would wish to cross-examine the witnesses before receiving disclosure of the Ayyash Defence case.⁴⁵ The Trial Chamber cannot exclude that the Prosecution would, once it knows the full Defence case, have a legitimate reason to cross-examine a witness even if the same witness was previously included on the Prosecution's list of Rule 155 witnesses. In these circumstances, the Trial Chamber held in the decision of 16 December 2016 that the witness statements most properly belong in the Ayyash Defence's case.⁴⁶

25. At that time, the Ayyash Defence submitted that it did not consider the two witnesses, whose statements it sought to tender, to be Defence witnesses.⁴⁷ The Trial Chamber was 'not

⁴² See above, para. 11.

⁴³ F2626, Annex A – List of Remaining Witnesses as at 20 June 2016, 20 June 2016 (confidential). However, as correctly noted by the Ayyash Defence, Witnesses 96 and 350 are no longer included on the Prosecution witness list and Witness 55 is a *viva voce* witness. See above, para. 15. This merely weakens the Ayyash Defence argument.

⁴⁴ See above, para. 19; Decision of 16 December 2016, paras 2, 15.

⁴⁵ See above, paras 14-15, 18-19; Decision of 16 December 2016, paras 4, 15-16, 19.

⁴⁶ Decision of 16 December 2016, para. 20.

⁴⁷ F2800, Ayyash Defence Response to "Prosecution Motion to Admit the Statements of PRH385, PRH304, PRH258, PRH112, PRH034 and PRH550, and to Admit Ten Exhibits Related to a BMW Owned by Mr. Ayyash pursuant to Rules 154 and 155" and Request for the Admission of Two Witness Statements pursuant to Rule 155, 31 October 2016, para. 3.

convinced that it should vary the order for the sequence of calling witnesses for these two particular witnesses, and hence call Defence witnesses during the Prosecution's case'.⁴⁸ Shorthand expressions such as 'Defence witnesses' should not, however, be understood to mean that a witness 'belongs' exclusively to any party. The common law rule that there is 'no property in a witness' has been accepted by international criminal courts and tribunals.⁴⁹ The Trial Chamber agrees with this interpretation of the role and status of witnesses in international criminal proceedings.

26. Where the Prosecution has stated that it does not intend to call a given witness, even if that witness formally remains on its witness list, and the Defence wishes to obtain evidence from that witness, it can seek to bring that evidence before the Trial Chamber as part of its case.⁵⁰ Accordingly, the Trial Chamber is not persuaded by the Ayyash Defence's argument that the 11 witnesses should be properly construed as 'Prosecution' witnesses. The fact that the witness statements were tendered in cross-examination does not affect this analysis, as Mr Donaldson was not the author of the statements and could neither adopt nor confirm their contents.⁵¹ Nor is it significant that Mr Donaldson relied on the witness statements in past versions of his report. Counsel for Mr Ayyash, as they were entitled to, cross-examined Mr Donaldson on his earlier reliance on these statements.⁵² Finally, the argument that disclosure under Rule 128 would merely repeat information already provided is not persuasive as the Ayyash Defence has not provided the details of its case as would be required in disclosure

⁴⁸ Decision of 16 December 2016, para. 17.

⁴⁹ ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-T, Decision on Milan Lukić's Motion to Compel Disclosure of Contact Information and on the Prosecution's Urgent Motion to Compel Production of Contact Information, 30 March 2009, paras 25, 54; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, para. 26; ICTR, *The Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 7; SCSL, *Prosecutor v. Sam Hinga Norman et al.*, SCSL-04-14-T, Decision on Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses, 20 June 2006, para. 17; ICTY, *Prosecutor v. Mile Mrkšić*, IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, para. 15.

⁵⁰ ICTR, *The Prosecutor v. Laurent Semanza*, ICTR-97-20-T, Decision on the Defence Motion for Orders Calling Prosecution Witness VZ Listed in Prosecution Witness List of November 2000; Prosecution Witness VL, VH and VK Listed in Supporting Material to the Third Amended Indictment to Testify; in the Alternative Admit the Statements of the Said Witnesses in Unredacted Form in Evidence in the Interest of Justice pursuant to Rules 54, 68 and 98 of the Rules of Procedure and Evidence, 6 September 2001, para. 9. See ICTY, *Prosecutor v. Sefer Halilović*, IT-01-48-T, Decision on Prosecution's Motion to Vary Its Rule 65 *ter* Witness List, 7 February 2005, p. 6.

⁵¹ Transcript of 17 October 2017, pp 12-24, 30-33, 35-37, 40-61, 63-67, 70-75, 77-82; transcript of 16 October 2017, pp 27-33. See, e.g., ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on Guidelines for the Admission of Evidence through Witnesses, 19 May 2010, para. 25.

⁵² See above, para. 6.

under Rules 112 and 128. The Ayyash Defence pre-trial brief, by contrast, is quite succinct in this regard and merely contests the Prosecution's case in general terms.⁵³

27. In these circumstances, the Trial Chamber finds that the 12 witness statements most properly belong in the Ayyash Defence's case. Counsel for Mr Ayyash have not made an application to vary the sequence of presentation of evidence under Rule 146 (B) and the Trial Chamber declines to do so *proprio motu*. Nor have counsel invited the Trial Chamber to admit the evidence under Rule 165 and the Trial Chamber is not currently in a position to admit the evidence under this rule, as it requires that the Parties first be heard.⁵⁴ For these reasons, the Trial Chamber will not receive the witness statements into evidence under Rule 155 at this point.

28. This conclusion must however be contextualised. The Prosecution's case has been drastically reduced over time. When the Prosecution filed its first witness and exhibit lists on 15 November 2012, it intended to call 557 witnesses and tender 13,170 exhibits.⁵⁵ When the Trial Chamber received the case file on 25 October 2013, the lists had been reduced to 540 witnesses and approximately 8,338 exhibits.⁵⁶ Since then, the Prosecution's constant review of its evidence and the Trial Chamber's case management have further reduced the size of the case. Now, towards the end of the Prosecution's case, approximately 2,434 Prosecution exhibits have been admitted into evidence and approximately 289 Prosecution witnesses have provided evidence. Inevitably, the Defence was going to object to some of these reductions.

29. The Trial Chamber is sensitive to these concerns. It has examined the 12 witness statements. They are relevant to and have probative value for the Prosecution case. On one view, they contain material that could assist the Defence. The Trial Chamber, subject to receiving further submissions, may exercise its powers under Rule 165 in relation to these statements at a suitable point in the trial, such as at the close of the Prosecution's case. If it did—and if relevant to any case called by the Accused—the Ayyash Defence may be required to provide full particulars as to how the statements are relevant to any Defence case. If the

⁵³ STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0634, Public Redacted Version of: Ayyash Defence Pre-trial Brief, 17 January 2013. See also STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1182, Redacted Version of the Corrected Version of the Pre-Trial Judge's Report Prepared Pursuant to Rule 95 (A) of the Rules of Procedure and Evidence, 11 December 2013 ('Pre-Trial Judge Report'), para. 34.

⁵⁴ See Decision of 16 December 2016, paras 18, 22; transcript of 17 October 2017, p. 7.

⁵⁵ STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0534, Prosecution's Submission Pursuant to Rule 91, 19 November 2012 (public redacted with confidential annexes A-I), duplicate paras 4.

⁵⁶ Pre-Trial Judge Report (original version filed on 25 October 2013), para. 152.

Prosecution consents to their admission into evidence without cross-examination, the Trial Chamber will admit them into evidence under Rule 155.⁵⁷

CONFIDENTIALITY

30. The Ayyash Defence refers to all witnesses by their pseudonyms only, as the Prosecution has expressed concern over their identities being made public in the absence of hearing from the witnesses on any protective measures sought. Annexes A and B to the Further Defence Submissions are filed confidentially as they refer to content in confidential lists of the Prosecution.⁵⁸ According to the Prosecution, confidentiality is required in order to ensure that the security and privacy of the witnesses are maintained until it is confirmed by the Ayyash Defence that it does not seek protective measures. In addition, not advising and asking the witnesses about protective measures may prejudice the Prosecution's right of cross-examination if it results in their refusing to attend court. Some of the witnesses have requested or may request protective measures.⁵⁹

31. The Ayyash Defence filed a public redacted version of its confidential written submissions, with minimal redactions.⁶⁰ The confidential annexes contain information revealing the identity of the witnesses. The Prosecution's response is filed publicly.⁶¹ The confidential annex to the response contains information revealing the identity of the witnesses and information about whether the witnesses had requested protective measures or would likely do so. In these circumstances, the Trial Chamber is satisfied that the present classification of all the relevant filings and their annexes is justified and maintains the confidentiality of the annexes.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Ayyash Defence application to admit the tendered witness statements into evidence under Rule 155 at this stage of the trial.

⁵⁷ See Decision of 16 December 2016, paras 21-22.

⁵⁸ Further Defence Submissions, paras 61-62.

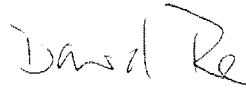
⁵⁹ Prosecution Response, paras 37-40, confidential annex A. The Prosecution requests that the Trial Chamber maintain the confidentiality of the annex until it decides otherwise, either upon motion of the Prosecution or after having given the Prosecution the opportunity to be heard on the issue. Prosecution Response, para. 40.

⁶⁰ See Further Defence Submissions.

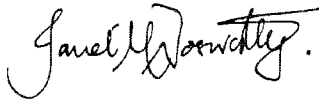
⁶¹ See Prosecution Response.

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

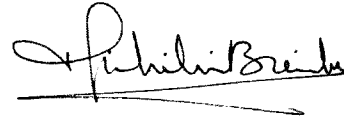
Leidschendam,
The Netherlands
30 November 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

