



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: 13 December 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION TO ADMIT TWO DOCUMENTS
AND ONE WITNESS STATEMENT AND FOR PROTECTIVE MEASURES
FOR WITNESS PRH088**

Office of the Prosecutor:Mr Norman Farrell & Mr Alexander Hugh
Milne**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**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 Roberts &
Ms Sarah Bafadhel

INTRODUCTION

1. In the amended consolidated indictment, the Prosecution alleges that five interconnected groups of mobile telephones were involved in the assassination of the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005. For ease of reference, the Prosecution refers to each of these groups of telephones by a colour, namely: the ‘red network’, the ‘green network’, the ‘blue network’, the ‘yellow network’, and the ‘purple telephones’.¹

2. The Prosecution seeks the admission into evidence, under Rules 154 and 155 of the Special Tribunal’s Rules of Procedure and Evidence, of two documents and a witness statement for Witness PRH088. The items were referenced as underlying sources in Mr Gary Platt’s (Witness PRH147) expert report on network analysis (exhibit P796). Although the items are on its Rule 91 exhibit list, the Prosecution overlooked tendering them in its previous motions relating to the admission of the underlying sources from Mr Platt’s report. The Prosecution submits that the documents are relevant to identify the registered subscribers of (i) a landline with which a mobile referred to as ‘Yellow 763’ was in contact multiple times and (ii) a mobile referred to as ‘Blue 428’. The witness statement is relevant to identify a landline number that was in contact with a mobile referred to as ‘Red 636’.²

3. The Prosecution also requests protective measures for Witness 88, under Rule 133, to maintain the witness’s confidential identity.³

4. Counsel for the Accused did not respond to the motion.

THE LEGAL PRINCIPLES

Admission of evidence under Rules 154 and 155

5. Rule 149 (F) provides that the Trial Chamber may receive the evidence of a witness orally or, pursuant to, among other rules, Rules 155, 156 and 158 in written or other form. Admission of evidence under these Rules is discretionary.

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016, paras 14-15.

² F3425, Prosecution Motion to Admit Two Documents pursuant to Rule 154, One Witness Statement pursuant to Rule 155 and Protective Measures for PRH088’s [sic] pursuant to Rule 133, 24 November 2017 (confidential with confidential annexes A-C) (‘Prosecution motion’), paras 1, 3, 7-10, 17-18, annexes A and B.

³ Prosecution motion, para. 5.

6. Similarly, Rule 154 provides that the Trial Chamber ‘may admit evidence in the form of a document or other record’. The Trial Chamber has previously identified the applicable principles and procedural safeguards concerning the admission of documents under this Rule (i.e. ‘from the bar table’). They must be relevant and probative (Rule 149 (C)) and their probative value must not be substantially outweighed by the need to ensure a fair trial (Rule 149 (D)). *Prima facie* reliability is sufficient, and the tendering party must clearly explain how and where each document fits into its case. The weight ultimately given to the material is separate and distinct from its probative value.⁴

7. In relation to the admission of witness statements under Rule 155, the Trial Chamber has determined the procedural safeguards for their admission in previous decisions. These allow the Trial Chamber to receive written statements in lieu of oral testimony in the courtroom.⁵

8. The Rule 155 Practice Direction⁶ requires Rule 155 statements to include, among other things, a witness information sheet, signatures, the witness’s acknowledgement of the truthfulness and voluntariness of his or her statement, and an interpreter certification (where the assistance of an interpreter is required). The Practice Direction is aimed at assisting in determining the indicia of reliability which make a statement *prima facie* reliable and therefore of some probative value, if relevant. The Trial Chamber has determined the

⁴ See STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1308, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, paras 6, 8; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1350, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, para. 7; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, F1781, Corrected Version of “Decision on Prosecution Motion to Admit into Evidence Geographic Documents” of 8 December 2014, 10 December 2014, para. 4; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 33; 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 UNHCR and STL’s Prosecution, 6 May 2015, paras 66, 111; STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2899, Decision on the Prosecution Motion for the Admission of Records Received from the Traffic, Truck, and Vehicle Management Authority, 9 December 2016, para. 16; F2963, Decision on the Prosecution Motion to Admit Ten Witness Statements Relating to Salim Jamil Ayyash and Hassan Habib Merhi and to Admit One Exhibit, 31 January 2017, para. 30.

⁵ See STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, 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; F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, paras 7-14; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1785/COR, 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.

⁶ 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.

applicable principles when statements which do not comply with the Practice Direction may nevertheless be admitted into evidence.⁷

Protective measures

9. Article 16 (2) of the Statute of the Special Tribunal provides that '[t]he accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses'.

10. Rule 133 provides, relevantly, that:

(A) The Trial Chamber may, *proprio motu* or at the request of a Party, the victim or witness concerned, the Victims' Participation Unit or the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Party requesting the Trial Chamber to order protective measures shall seek to obtain the consent of the person in respect of whom the protective measures are sought.

11. The Trial Chamber will grant protective measures case-by-case, on the basis of persuasive evidence for each application, and only when it is satisfied that such measures will not prejudice the rights of the Accused to a fair trial.⁸

DOCUMENTS

Prosecution submissions

12. The Prosecution seeks the admission into evidence of two documents—a subscriber note and a subscriber record—under Rule 154. First, the Prosecution tenders a subscriber note which identifies the registered subscriber of a landline telephone as Protel Company LLC. Yellow 763 was in contact with this telephone five times between July and December 2004, and Mr Platt gave evidence that all 14 mobiles in the yellow network and Blue 428 were in contact with other landline numbers subscribed to this company. The subscriber note is therefore relevant to and probative of Protel Company LLC being a common contact to the yellow and blue network phones.⁹

⁷ See Decision of 30 May 2013, paras 22-31.

⁸ F2467, Decision on Prosecution Motion for Protective Measures for Witness PRH273, 25 February 2016, para. 5.

⁹ Prosecution motion, paras 7-8, annex A.

13. The second document is a subscriber record which identifies the registered subscriber of Blue 428, one of the mobiles in the blue network which was set-up in December 2003 and topped up on a monthly basis for almost one year before being used in the initial preparatory stages of the plan to attack Mr Hariri on 14 February 2005. It is relevant to show that Blue 428 was purchased in a manner to protect the identity of its user and that therefore the named subscriber in the subscriber record was not the real user of the mobile.¹⁰

14. The Prosecution submits that both documents are reliable as they were produced by a Prosecution analyst by extracting the subscriber information for each relevant number from the OGERO and Alfa subscriber databases. This information was provided by the companies in electronic format in response to a Prosecution request for assistance to authorities of the Lebanese Government and was compiled in the ordinary course for billing purposes. A Prosecution analyst verified the extracted information by copying it into a Word document and comparing it to the original content.¹¹

15. Finally, the Prosecution argues that the admission of the documents would not prejudice the fair trial rights of the Accused as the documents have been disclosed to the Defence and their relevance is known.¹²

Discussion and decision

16. The documents the Prosecution proposes for admission are relevant because the attribution of mobiles to the Accused is a central aspect of the Prosecution's case as alleged in the amended consolidated indictment. The Trial Chamber has previously admitted into evidence, pursuant to Rule 154, subscriber notes that were extracted from databases provided to the Prosecution by Lebanese communication service providers and the Lebanese Ministry of Telecommunications.¹³ Similarly here, the subscriber note and subscriber record are extracted from databases provided by OGERO and Alfa and were handed over to the Prosecution. The Trial Chamber finds that they therefore have probative value and possess sufficient indicia of *prima facie* reliability for admission into evidence under Rule 154.

¹⁰ Prosecution motion, paras 9-11.

¹¹ Prosecution motion, paras 12-14.

¹² Prosecution motion, para. 15.

¹³ See STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2818, Decision on Prosecution Rule 154 Motion for the Admission of Documents Relating to Telephone Subscriber Records from the Ogero Company, 7 November 2016, para. 19, disposition; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, F2297, Decision on Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155 and Documents pursuant to Rule 154, 2 November 2015, para. 51, disposition.

WITNESS STATEMENT AND PROTECTIVE MEASURES

Prosecution submissions

17. The Prosecution seeks the admission into evidence of Witness 88's witness statement pursuant to Rule 155. The statement is relevant to identify a landline number, from which a call was made to Red 636 on one occasion on 12 February 2005 which only lasted nine seconds. The Prosecution contends that the duration of the call suggests that it was a misdial and therefore is relevant to support its case that the red network was a '100% closed user group'.¹⁴

18. The statement possesses the requisite indicia of reliability. Although it pre-dates the Rule 155 Practice Direction, the statement fulfils the general requirements of Rule 155 (B), namely that it is signed and notes the date, time and place and the persons present during the interview. The witness produced identification, and although he did not receive a copy of Rules 60 *bis* and 152, he was made aware that he could be prosecuted for giving false information and he signed a witness acknowledgement.¹⁵

19. The statement does not go to the acts and conduct of the Accused as charged in the amended consolidated indictment. There is no overriding public interest for the statement to be presented orally and the interests of justice and a fair and expeditious trial exceptionally warrant the admission of the statement without cross-examination pursuant to Rule 155 (C).¹⁶

20. Finally, the Prosecution submits that publicly disclosing Witness 88's identity would raise security concerns for him and his family due to the location of his work and residence. In addition, public disclosure may also have a negative impact on the witness's employment and business. The particular personal circumstances warranting protective measures are described in a confidential Prosecution witness statement.¹⁷ The Prosecution accordingly requests that the witness's identity remain confidential; that he only be referred to by a pseudonym in public hearings and documents; that any documents disclosed to the public are redacted to protect his identity; that his image and voice are distorted and unrecognizable if publicly broadcast; and that the media and any third parties be prohibited from disclosing his

¹⁴ Prosecution motion, paras 16-18, annex B.

¹⁵ Prosecution motion, para. 19.

¹⁶ Prosecution motion, paras 20-21.

¹⁷ ERN 60326393-60326396. *See* Prosecution motion, paras 27-28.

identity, whereabouts and information which may identify him, unless that information has been publicly disclosed by the Special Tribunal.¹⁸

21. Finally, the Prosecution submits that granting protective measures for Witness 88 would not prejudice the rights of the Accused as the Defence have been notified of the witness's identity and evidence pursuant to the Rules.¹⁹

Discussion and decision

22. The Trial Chamber considers that Witness 88's statement²⁰ is relevant to the Prosecution's case regarding the red network. The statement complies with the requirements of Rule 155 (B) and the Rule 155 Practice Direction, although the statement pre-dates it. It therefore bears sufficient indicia of reliability and has some probative value. It also does not concern the acts and conduct of the Accused as charged in the amended consolidated indictment. As such, the Trial Chamber finds that Witness 88's statement is admissible pursuant to Rule 155.

23. In relation to the request for protective measures, the Trial Chamber has reviewed the Prosecution's submissions and the information contained in the Prosecution witness statement detailing Witness 88's concerns, and notes the lack of objection from the Defence. The Trial Chamber is satisfied that the conditions set out in Rule 133 are met. The requested protective measures are appropriate and justified for the witness, with one exception, namely the measure of distorting and altering of the witness's publicly broadcasted images and voice. As the witness is not required to appear for cross-examination, this measure is unnecessary. The Trial Chamber is also satisfied that granting the protective measures will not prejudice the rights of the Accused to a fair trial as the witness's identity and evidence have been disclosed to the Defence.

CONFIDENTIALITY

24. The Prosecution submits that its motion and annexes contain confidential information regarding the identity and personal details of numerous third party individuals and requests that the Trial Chamber maintain the confidential status of the motion and annexes until

¹⁸ Prosecution motion, paras 23-24, 26.

¹⁹ Prosecution motion, para. 25.

²⁰ ERN 60008423-60008428.

hearing from the Prosecution regarding lifting their confidentiality. The Prosecution submits that it will file a public redacted version of its motion in due course.²¹

25. In light of granting protective measures for Witness 88, the Trial Chamber orders the Prosecution to file public redacted versions of its motion and the annexes thereto, where possible.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 154, the two documents listed in annex A to the Prosecution motion and, under Rule 155, the witness statement listed in annex B to the Prosecution motion, and decides that it will, at a suitable stage in the proceedings, admit these documents into evidence;

GRANTS the Prosecution motion for protective measures for Witness PRH088;

ORDERS that:

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

REAFFIRMS that a knowing violation of this order may result in prosecution under Rule 60 *bis*;²² and

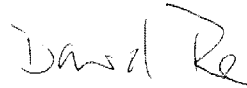
ORDERS the Prosecution to file public redacted versions of its motion and annexes, where possible.

²¹ Prosecution motion, para. 29.

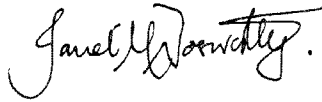
²² Punishable by a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.

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

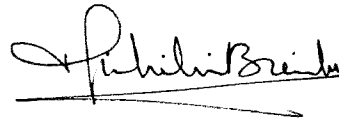
Leidschendam,
The Netherlands
13 December 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

