



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: 22 June 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING SABRA DEFENCE MOTION UNDER RULE 165
IN RELATION TO MR ANDREW DONALDSON (WITNESS PRH230)**

Office of the Prosecutor:
Mr Norman Farrell & Mr Nigel Povoas

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Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
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Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Youssef Khalil

Counsel for Mr Hussein Hassan Oneissi:
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Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Geoffrey Roberts &
Ms Sarah Bafadhel



INTRODUCTION AND BACKGROUND

1. In the amended consolidated indictment, the Prosecution alleges that five interconnected mobile telephone groups—colour-coded as ‘red’, ‘green’, ‘blue’ and ‘yellow’, operating in four closed networks, and, additionally one group of ‘purple’ mobiles—were involved in planning, preparing and executing the attack that resulted in Mr Rafik Hariri’s death in Beirut on 14 February 2005. The ‘purple’ phones, a group of three mobiles, were used to coordinate a false claim of responsibility for the attack. The Prosecution alleges that the Accused, Mr Assad Hassan Sabra, was involved in the preparatory acts, the dissemination of the statements falsely ascribing responsibility for the attack, and was the user of one of the three ‘purple’ mobile phones, with the number 3419018 (Purple 018).¹

2. Prosecution analyst Mr Andrew Donaldson (Witness PRH230) provided analytical opinion evidence attributing mobile numbers, including Purple 018, to Mr Sabra.² During his cross-examination by counsel for Mr Sabra, the Trial Chamber received into evidence, as an *aide-memoire*, a list prepared by the Sabra Defence of 24 Prosecution witnesses in relation to the use of Purple 018.³ Four witness statements from this list have already been admitted into evidence as Prosecution exhibits.⁴ According to the Sabra Defence, the remaining 20 statements are from witnesses whose numbers were in contact with Purple 018 who failed to attribute this number to Mr Sabra.⁵

3. Another aspect of Mr Donaldson’s cross-examination by counsel for Mr Sabra was related to the efforts made to investigate whether Purple 018 may have had different users, other than Mr Sabra. The Lebanese Internal Security Forces (ISF) initially attributed Purple 018 to a person with the given name ‘Asaad’.⁶ Defence counsel referred to him as ‘alternative user 1’, and submitted that he shared a similar profile to Mr Sabra.⁷ The Trial Chamber has

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 3 (c), 14-15, 18, 19 (d); STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Prosecution’s Submission of Updated Pre-Trial Brief Pursuant to Rule 91 (G) (i) and the Pre-Trial Judge’s Order of 7 August 2013 and Decision of 16 August 2013, 23 August 2013 (public with confidential annexes A-B), annex A, para. 55; STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2125, Public Redacted Version of Prosecution Motion for the Admission of CSTs and SMS CSTs Related to the Accused Assad Hassan Sabra, 7 October 2016, paras 2-3.

² Exhibit P1953.1, ‘Evidence of Telephone Attribution – Assad Hassan Sabra’, Version 5, dated 14 December 2017.

³ Transcript of 28 September 2017, p. 30; exhibit 5D412.

⁴ Exhibits P1151 (Audio-recorded interview of Witness PRH051), P2103 (Audio-recorded statement of Witness PRH024), P1156 (Witness Statement of Witness PRH449), and P1822 (Witness Statement of Witness PRH299).

⁵ See, e.g., transcript of 28 September 2017, pp 29-35.

⁶ See exhibits 5D413, 5D414, 5D415.

⁷ See, e.g., transcript of 28 September 2017, p. 91; transcript of 29 September 2017, p. 22.

admitted several documents on which counsel for Mr Sabra cross-examined Mr Donaldson, including unsigned memoranda by United Nations International Independent Investigation Commission investigators, on information received from the ISF between November 2008 and January 2009 in relation to attributing Purple 018 to ‘alternative user 1’,⁸ and an investigator’s note Mr Donaldson wrote on 2 November 2012, stating that the ISF subsequently revised this attribution to Mr Sabra.⁹

4. Counsel for Mr Sabra also showed Mr Donaldson responses from the Lebanese telecommunication service providers, Alfa, MTC/Touch and Ogero, and the Lebanese Ministry of Interior and Municipalities, Directorate General of *Sûreté Générale* to requests for assistance demonstrating the lack of official records under ‘alternative user 1’s name.’¹⁰ These documents however bore different spellings of his given name. So the Sabra Defence requested renewed searches from Alfa, MTC/Touch, Ogero, and the *Sûreté Générale*, and additionally from the Lebanese Ministry of Finance with the corrected spelling of the name, and received five documents in response.

5. The Trial Chamber, on 20 December 2017, denied the admission into evidence of the 20 witness statements, under Rule 155 of the Special Tribunal’s Rules of Procedure and Evidence,¹¹ tendered by the Sabra Defence during the Prosecution case, with the Prosecution objecting to their admission and asserting its intention to cross-examine the 20 witnesses.¹² It has also dismissed a Sabra Defence application, under Rule 154,¹³ for the admission of the five responses ‘from the bar table’, filed one day before the close of the Prosecution case,¹⁴ on a procedural basis that the material tendered most properly belonged in a Defence case.¹⁵ The Prosecution repeatedly asserted its intention to cross-examine the 20 witnesses.

⁸ See, e.g., exhibits 5D413, 5D414, 5D415, 5D416. See transcript of 28 September 2017, pp-65-111.

⁹ Exhibit 5D418.

¹⁰ Exhibits 5D402, 5D419, 5D420, 5D421, 5D422.

¹¹ Rule 155 provides that, subject to Rule 158, the Trial Chamber may admit in lieu of oral testimony the evidence of a witness in the form of a written statement, or a transcript of evidence which was given by a witness in proceedings before the Tribunal, which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

¹² F3498, Decision Denying Sabra Defence Motion to Admit into Evidence Twenty Witness Statements, 20 December 2017 (‘Decision of 20 December 2017’).

¹³ Rule 154 provides that, subject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149 (C) and (D).

¹⁴ The Prosecution closed its case on 7 February 2018. See transcript of 7 February 2018, p. 69. The Sabra Defence filed its application on 6 February 2018, which was distributed the following day.

¹⁵ Decision Dismissing Four Sabra Defence Motions, F3559, F3561, F3591 and F3595, and Orders to the Sabra Defence (‘Decision of 8 March 2018’). See transcript of 8 March 2018, pp 9-15.

6. On 7 February 2018, the Prosecution formally closed its case and the Sabra Defence thereafter notified the Trial Chamber that it elected not to present a case.¹⁶

7. The Sabra Defence now requests the Trial Chamber to order the production of the 20 witness statements and the five responses as additional evidence under Rule 165¹⁷ and admit these into evidence under Rule 149 (C).¹⁸ On the Trial Chamber's order, the Sabra Defence provided a table outlining the relevance and probative value in relation to each of the 20 witness statements.¹⁹ The Prosecution responded opposing the motion.²⁰

SUBMISSIONS

Sabra Defence submissions

8. The Sabra Defence, relying on case law of the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), submits that a Party may request the Trial Chamber to order the production of additional evidence, and the Trial Chamber may order 'either Party or a victim participating in the proceedings' to produce additional evidence. The determinative factor is whether the Trial Chamber considers the material necessary for its determination of the truth.²¹

9. The Sabra Defence maintains that it is not obliged to present a positive Defence case for this material to be considered by the Trial Chamber because the 20 witness statements and the five responses pertain to the reliability and assessment of Mr Donaldson's testimony and formed part of his cross-examination. The Defence also relies on a decision of an ICTR Trial

¹⁶ Transcript of 7 February 2018, p. 69; transcript of 22 March 2018, p. 4.

¹⁷ Rule 165 provides that, after hearing the Parties, the Trial Chamber may, *proprio motu* or at the request of a Party, order either Party or a victim participating in the proceedings to produce additional evidence. It may, after hearing the Parties, *proprio motu* summon witnesses and order their attendance.

¹⁸ F3649, Sabra Defence Request Pursuant to Rule 165 in Relation to PRH230, 7 May 2018 (public with confidential annexes) ('Defence motion'). The statements listed in annex A are the same as the statements tendered in F3409, Sabra Motion to Admit Twenty Statements Pursuant to Rule 155, 13 November 2017. Rule 149 (C) provides that a Chamber may admit any relevant evidence which it deems to have probative value.

¹⁹ F3653, Order to Sabra Defence to Provide Information on the Relevance and Probative Value of 20 Intended Rule 165 Witness Statements, 8 May 2018, paras 3-4; F3654, Provision of Amended Annex A Pursuant to "Order to Sabra Defence to Provide Information on the Relevance and Probative Value of 20 Intended Rule 165 Witness Statements", 9 May 2018 (public with confidential annex A) ('Provision of amended annex A').

²⁰ F3670, Prosecution Response to "Sabra Defence Request Pursuant to Rule 165 in Relation to PRH230", 23 May 2018 (public with confidential annexes) ('Prosecution response').

²¹ Defence motion, paras 12-15, referring to ICTY, IT-95-5/18-T, *Prosecutor v. Karadžić*, Decision on the Accused's Motion for Order to Obtain Witness Statements and Testimony from National Courts, 12 January 2011 ('*Karadžić* decision'); ICC, ICC-01/05-01/08, *Prosecutor v. Bemba*, Public Redacted version of "Second decision on issues related to the closing of the case", 18 October 2013 ('*Bemba* decision of 18 October 2013').

Chamber to argue that the requesting Party does not need to demonstrate that it has exhausted all avenues before seizing the Trial Chamber under Rule 165.²²

10. As mentioned above, Mr Donaldson prepared an analytical report which concluded that Mr Sabra was the user of Purple 018. According to the Sabra Defence, the 20 statements show that *at least* twenty individuals failed to attribute Purple 018 to Mr Sabra, which, as the Trial Chamber has found, may contain material that could assist it in assessing the Prosecution case.²³ The statements are relevant to assessing Mr Donaldson's methodology in compiling his attribution report²⁴ in relation to Mr Sabra which did not explain the selectivity in omitting reference to these witness statements. This is material to assessing his final conclusion excluding that Purple 018 was used by someone other than Mr Sabra.²⁵

11. The five responses from the Lebanese telecommunications service providers and authorities show that Mr Donaldson did not diligently investigate and exclude 'alternative user 1' as a possible user of Purple 018. These documents, at the very least, highlight the risks and limitations of attributing a mobile number in the absence of any direct evidence.²⁶

12. The admission of this material will not cause any undue prejudice to the Prosecution as the material formed part of Mr Donaldson's cross-examination. In particular he had an opportunity to comment on why he did not include the witness statements in his final report. The five responses supplement exhibits used during his cross-examination. The Prosecution has failed to substantiate its earlier requests to cross-examine the 20 witnesses. Moreover, the absence of cross-examination is a factor affecting the weight of the statements. Any concerns regarding the compliance of the statements with the Rule 155 Practice Direction is overcome by the other indicia of reliability contained in each statement.²⁷

²² Defence motion, paras 16-18, referring to ICTR, *Prosecutor v. Simba*, ICTR-01-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004 ('*Simba* decision').

²³ Defence motion, para. 7, referring to the Trial Chamber's decision of 20 December 2017, at para. 19.

²⁴ Exhibit P1953.1.

²⁵ Defence motion, paras 7-8.

²⁶ Defence motion, paras 9-11.

²⁷ Defence motion, paras 19-23. See 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. The Practice Direction provides the pre-conditions for admitting statements into evidence under the Rule 155. The Practice Direction supplements Rule 155 and is directed at ensuring that, in circumstances in which the right to cross-examine is curtailed, witness statements have the indicia of reliability necessary to admit them into evidence under Rule 155. The Trial Chamber decides whether it can receive into evidence a statement that does not comply with the Practice Direction. 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, paras 20-28, in which the Trial Chamber

Prosecution response

13. The Prosecution responds that the 25 documents have already been produced, within the meaning of Rule 165, when the Defence submitted these documents to the Trial Chamber in the current and previous motions. The purpose of Rule 165 is, however, the production of ‘additional evidence’. On this basis, the ICC, ICTY and ICTR case law relied on by the Sabra Defence is distinguishable from the facts here.²⁸

14. The Sabra Defence incorrectly characterised the Trial Chamber decision, that it may exercise its discretion under Rule 165 in relation to the 20 statements, as a direction about Rule 165. To the contrary, the Trial Chamber held that these statements most properly belong in the Sabra Defence’s case.²⁹

15. A Trial Chamber’s order under Rule 165 to present evidence in support of the Sabra Defence case would unduly prejudice the Prosecution because, without presenting a case itself, the Sabra Defence avoids, among other things, complying with its disclosure obligations under Rules 112 and 128.³⁰ Moreover, the Defence’s submission—that admitting the material will not prejudice the Prosecution because it formed part of Mr Donaldson’s cross-examination and he had an opportunity to comment on them—is incorrect.³¹

16. Rule 165 is not a rule for admission of evidence, and Rule 149 (C) concerns only the principles to admit evidence. The 20 witness statements are subject to Rule 155, a *lex specialis*³² provision governing the admission of witness statements, as held by the Trial Chamber, and the five responses are subject to Rule 154. Any material produced under Rule 165 would need to comply with these Rules for their admission. The Defence, in fact, seeks the reconsideration of the Trial Chamber’s decisions rejecting the admission of this material, but fails to address the requirements for reconsideration under Rule 140.³³

found that, in appropriate circumstances, non-compliant statements could be admitted as evidence under Rule 154.

²⁸ Prosecution response, paras 5-9.

²⁹ Prosecution response, paras 10-12.

³⁰ Rule 112 (A) states disclosure obligations for the Defence that arise “[a]t the end of the Prosecutor’s case, following a Defence election to present its case”. Rule 128 envisages the functions that the Trial Chamber may exercise after the closure of the Prosecution’s case and upon a Defence election to present its case, such as requiring the Defence to file witness lists and exhibit lists.

³¹ Prosecution response, paras 13-14.

³² ‘*Lex specialis*’ refers to a law that governs a specific subject matter which, generally, excludes or modifies the application of a general rule on the same matter.

³³ Prosecution response, paras 17-21. Under Rule 140, a Chamber may, *proprio motu* or at the request of a Party, reconsider a decision, other than a judgement or sentence, if necessary to avoid injustice.

17. The Sabra Defence did not demonstrate the relevance and probative value of the 25 items. It failed to show that 18 of the witnesses should reasonably be expected to know Mr Sabra or his mobile number. For example, five of the witnesses relate to telephones that operated as public payphones, and two of the witnesses were only secondary contacts of numbers that were in contact with Purple 018. Furthermore, none of the five responses to the requests for assistance connect Purple 018 to ‘alternative user 1’ or support the attribution of Purple 018 to ‘alternative user 1’. The Prosecution takes no position as to the *prima facie* reliability of the material tendered for admission. Finally, the Prosecution wishes to cross-examine the 20 witnesses and claims that it would be unfair to force it to make this determination before the Sabra Defence has fully explained its case and complied with its disclosure obligations.³⁴

DISCUSSION AND DECISION

18. Rule 165 provides that, ‘After hearing the Parties, the Trial Chamber may, *proprio motu* or at the request of a Party, order either Party or a victim participating in the proceedings to produce additional evidence. It may, after hearing the Parties, *proprio motu* summon witnesses and order their attendance’. The Sabra Defence disclosed the 25 documents to the Prosecution and the Legal Representatives of Victims, and the Trial Chamber has examined them. The Trial Chamber agrees with the Prosecution that the material has already therefore been produced within the meaning of Rule 165 and it does not constitute ‘additional evidence’.

19. The ICC, ICTY and ICTR decisions that the Sabra Defence uses in support of its Rule 165 application, are, as submitted by the Prosecution, distinguishable. One ICC *Bemba* decision concerns the reopening of the case to recall a witness where ‘fresh’ evidence not previously before the court related to that witness.³⁵ In another *Bemba* decision, the Trial Chamber considered, but did not rule on, whether to request the submission of additional material which had been discussed at trial but not submitted for admission into evidence.³⁶ With regard to the remaining ICTY and ICTR decisions, under their equivalent Rules,³⁷ the

³⁴ Prosecution response, paras 22-31.

³⁵ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Second Redacted version of “Decision on ‘Prosecution’s Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169’ (ICC-01/05-01/08- 3138-Conf-Red) and ‘Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08- 3139-Conf)’” of 2 October 2014, 11 December 2014, paras 25-30.

³⁶ *Bemba* decision of 18 October 2013, paras 19, 22.

³⁷ Rule 98 of the Rules of Procedure and Evidence of the ICTY and ICTR provides: ‘A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.’

material was neither in the possession of the requesting Party nor in the possession of the Party requested to produce it.³⁸

20. The Sabra Defence states that it submits, under Rule 165, the 25 documents for admission into evidence ‘in accordance with the Trial Chamber’s directions’.³⁹ The Trial Chamber however specifically held, in its decision of 20 December 2017, that at an appropriate time during the proceedings, such as the closure of the Prosecution’s case, and after receiving further submissions, the Trial Chamber *may* exercise its discretion under Rule 165 in relation to the 20 statements. But, contrary to the Sabra Defence’s contention, this is neither a ruling nor a direction. The Trial Chamber did not state that it would admit the 20 witness statements into evidence. As stressed in its 20 December 2017 decision, this is in the Trial Chamber’s discretion.

21. The Trial Chamber also emphasised that, generally, in the Special Tribunal’s adversarial proceedings, each Party conducts its own investigations and presents its own case by calling witnesses and tendering documents to support its case, and that the Trial Chamber, *additionally*, and under Rule 165, may order either Party to produce additional evidence and call witnesses.⁴⁰ The Trial Chamber, in its previous decisions, stressed that the 25 documents most properly belong in the Sabra Defence’s case.⁴¹ Allowing the Sabra Defence to rely on its own choice not to present a case, under Rule 128, as a basis for requesting the Trial Chamber to order, under Rule 165, the production of this material would therefore be inconsistent with the object and purpose of Rule 165.

22. The Sabra Defence’s argument that the admission of the 20 witness statements and the five responses would not unduly prejudice the Prosecution—as they were referenced in the *aide-memoire*,⁴² formed part of Mr Donaldson’s cross-examination and he had the opportunity to comment upon them—is not persuasive. Mr Donaldson was not questioned on the 20 statements and the Trial Chamber attached no significance to the Sabra Defence’s

³⁸ ICTR, *Prosecutor v. Karera*, ICTR-01-74-T, Decision on Defence Motion for Additional Disclosure (Rule 98), 1 September 2006, paras 1-3, 6, in particular fn. 5; *Karadžić* decision, paras 1, 5, 11-12; *Simba* decision, paras 1, 5, 10.

³⁹ Sabra Defence motion, para. 3, referring to Decision of 20 December 2017, para. 19.

⁴⁰ F3646, Decision Partly Granting Sabra Defence Application and Ordering the Attendance of a Former Prosecution Investigator to Testify under Rule 165, 13 April 2018 (‘Decision of 13 April 2018’), para. 15. In this decision, the Trial Chamber decided to call Mr Taylor, the Prosecution’s former Chief of Investigations to testify.

⁴¹ Decision of 20 December 2017, para. 18; Decision of 8 March 2018.

⁴² Exhibit 5D412.

claim that these statements underlie the *aide-memoire*. Further, counsel for Mr Sabra did not explain the relevance and probative value of this exhibit.⁴³

23. The Sabra Defence relies on Rule 149 (C) as the legal basis for admitting this material into evidence, while recognising that the reliability of the 20 statement is subject to the Rule 155 Practice Direction. Rule 149 (C), however, only outlines the principles for admitting evidence in that it must be relevant and probative. Further, as observed by the Prosecution, the Trial Chamber repeatedly held that Rules 155, 156 and 158 are the *lex specialis* provisions governing the admission of witness statements.⁴⁴ The Sabra Defence makes no reference to the two decisions where the Trial Chamber determined that witness statements produced under Rule 165 would be admitted into evidence under Rule 155.⁴⁵ The proper legal basis for admitting the 20 statements and the five responses to requests for assistance are Rules 155 and 154, respectively, in a Defence case.

24. The Parties also differ as to whether, without the Sabra Defence presenting its own case, a Trial Chamber order under Rule 165 to produce the 25 documents would unduly prejudice the Prosecution. Here again, the Trial Chamber previously held that if it were to exercise its discretion under Rule 165—and if relevant to any case called by the Accused—the Defence may be required to provide full particulars as to how the tendered witness statements are relevant to any Defence case.⁴⁶

⁴³ Decision of 20 December 2017, para. 17.

⁴⁴ See, e.g., F3571, Written Reasons for Admitting into Evidence Twenty Two Documents upon the Sabra Defence Application, 15 February 2018, para. 12; F3444, Decision Partly Granting Fifth Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – The False Claim of Responsibility, 30 November 2017, para. 24. Rule 156 provides that, subject to Rule 158, the Trial Chamber may admit the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal that goes to proof of the acts and conduct of the accused as charged in the indictment, only if the following conditions are satisfied: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness's declaration and what the witness would say if examined. Rule 158 provides that, evidence in the form of a written statement, any other reliable record of what a person has said, written or otherwise expressed, or transcript of a statement by a person who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rules 93, 123, 155, 156 and 157 if the Trial Chamber: (i) is satisfied of the person's unavailability; and (ii) finds that the statement, the record or the transcript is reliable, taking into account how it was made and maintained. In considering the application of Rule 149 (D) to this Rule, the Chamber shall take into account whether the evidence in question goes to proof of acts and conduct of the accused as charged in the indictment.

⁴⁵ 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'), para. 22; F3441, Decision Denying Ayyash Defence Application to Admit into Evidence Witness Statements Tendered During the Cross-Examination of Prosecution Analyst Andrew Donaldson, 30 November 2017 ('Decision of 30 November 2017'), para. 29.

⁴⁶ Decision of 30 November 2017, para. 29.

25. With respect to the Prosecution's request to cross-examine the 20 witnesses, the Trial Chamber acknowledged the procedural difficulties that could result in the Prosecution being forced to elect whether to cross-examine witnesses without knowing where the evidence fits into the Defence case. It also acknowledged the potential unfairness to the Prosecution in forcing it to elect, during the presentation of its own case, whether to seek to cross-examine a witness without having the Defence's witness list, the relevant particulars under Rule 128. The Trial Chamber also held that, where a Party is resisting the admission of statements under Rule 155 during its case, it would appear that the witness statements most properly belong in the moving Party's case.⁴⁷ Those principles equally apply here. Even if the Trial Chamber considered the legal basis for the Sabra Defence's motion as Rule 155 and or Rule 154, the Rules do not provide for the Sabra Defence to seek the admission of witness statements under Rule 155 after objection to their admission, and in circumstances in which it has elected not to call a case. The Trial Chamber, consistent with its decisions of 16 December 2016 and 20 December 2017,⁴⁸ therefore rejects the admission of the 20 statements under Rule 154.

26. The Trial Chamber ordered the attendance of the former senior Prosecution investigator, Mr Michael Taylor, under Rule 165 (and dismissed the Sabra Defence's application to call three other investigators), specifically holding that it did not objectively accept that the Sabra Defence could not call former Prosecution investigators to testify in its own case.⁴⁹ The Trial Chamber here also sees no reason why the Sabra Defence could not have called the witnesses who made the 20 statements in its own Defence case.

27. In these circumstances, the Trial Chamber is unconvinced that, in the exercise of its discretion, using its powers under Rule 165 to order, on its own volition, the production of the 20 witness statements and five responses as additional evidence—and admit them into evidence—is appropriate or would be in the interests of justice.

28. The Trial Chamber therefore need not assess the relevance and probative value of the tendered material. Nor is there any need for the Trial Chamber to consider the Prosecution's submission that the Sabra Defence's motion is essentially a request for reconsideration under Rule 140.

⁴⁷ Decision of 16 December 2016, paras 19-20; *see also* Decision of 30 November 2017, para. 24.

⁴⁸ Decision of 16 December 2016, paras 19-20; Decision of 20 December 2017, para. 15.

⁴⁹ Decision of 13 April 2018, paras 19, 24.

CONFIDENTIALITY

29. The Sabra Defence filed three annexes confidentially as they contain confidential information regarding the identity of non-witness third parties.⁵⁰ The annexes to the Prosecution's response are also filed confidentially to ensure the privacy and security of witnesses. The Prosecution adds that premature publication of the annexes may prejudice its right of cross-examination and may result in them refusing to attend court if required.⁵¹ This decision, however, has made this argument redundant. Proceedings before the Special Tribunal are public by nature. Confidentiality is the exception, not the rule. The Trial Chamber therefore orders the Sabra Defence and the Prosecution to file public redacted versions of the annexes to their filings.

DISPOSITION

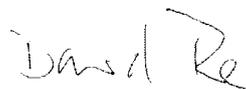
FOR THESE REASONS, the Trial Chamber:

DISMISSES the Sabra Defence motion; and

ORDERS the Sabra Defence and the Prosecution to file public redacted versions of the annexes to their filings.

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

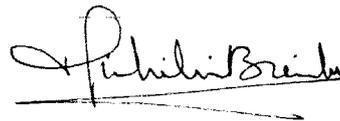
Leidschendam,
The Netherlands
22 June 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy



⁵⁰ Defence motion, para. 24; Provision of amended annex A, para. 3.

⁵¹ Prosecution response, paras 33-34.