

**BEFORE 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:** 28 April 2016

**Filing Party:** Defence Counsel - Sabra

**Original language:** English

**Classification:** Public

**PROSECUTOR**

v.

**SALIM JAMIL AYYASH**  
**MUSTAFA AMINE BADREDDINE**  
**HASSAN HABIB MERHI**  
**HUSSEIN HASSAN ONEISSI**  
**ASSAD HASSAN SABRA**

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**SABRA DEFENCE RESPONSE TO “PROSECUTION MOTION FOR THE  
ADMISSION OF WITNESS STATEMENT SIGNED BY PRH705”**

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Mr Norman Farrell

**Counsel for Mr Salim Jamil Ayyash:**  
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Mr Thomas Hannis

**Defence Office:**  
Mr François Roux

**Counsel for Mr Mustafa Amine Badreddine:**  
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**Legal Representatives of  
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Mr Peter Haynes, Mr Mohammad F. Mattar  
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**Counsel for Mr Assad Hassan Sabra:**  
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Mr Geoffrey Roberts



## I. Introduction

1. The Prosecution seeks the admission of the entirety of PRH705's four witness statements and corresponding annexes.<sup>1</sup> In the alternative, the Prosecution seeks the admission of selected paragraphs from the Statements as well as all Annexes as listed in its relief.<sup>2</sup> The Prosecution relies upon Rules 149 (C) and Rules 149 (F) as well as Rules 155 (C) and 156 stating that the Statements are "complementary and supplementary evidence to PRH705's coming oral evidence".<sup>3</sup>
2. The Defence objects to the admission of the paragraphs contained in the Statements as well as selected documents set out in the Annexes, as the Prosecution has provided no information to the Trial Chamber as to the relevance and probative value of this evidence. As such they should not be admitted in accordance with Article 21 of the Statute and Rule 149 (D) of the Rules of Procedure and Evidence.

## II. Law

3. The Trial Chamber has held that "so long as the appropriate safeguards of the right to a fair trial are maintained, no principle of international human rights law or of international criminal law and procedure appears to prevent a Chamber from allowing a witness to testify orally in addition to admitting witness statements into evidence, according to either Article 21(3) or Rule 149(F)."<sup>4</sup> It has also held that "the general principles of international criminal procedural law [...] plainly allow a Chamber to receive evidence in a manner which, even if not expressly provided for in the Rules, is consistent with the objects and purposes of the Statute and the fundamental principles of justice."<sup>5</sup>

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<sup>1</sup> STL, Prosecutor v. Ayyash et al., F2450, Prosecution Motion for the Admission of the Witness Statement signed by PRH705, 18 April 2016 ("Request"). This includes ERN: D0481354-D0481426 ("17 November 2015 Statement"), ERN: D0482048-D0480254 ("16 December 2015 Statement"), ERN: 60316084-60316090 ("3 February 2016 Statement") and ERN: 60316201-60316210 ("26 February 2016 Statement") (collectively "Statements") as well as ERN: D0481427-D0481772, ERN: D0481773-D0482047 and ERN: D0482048-D0482454 ("Annexes 1 to 58 to 17 November 2015 Statement"); (collectively "Annexes").

<sup>2</sup> Request, par. 19.

<sup>3</sup> Ibid, par. 2.

<sup>4</sup> STL, Prosecutor v. Ayyash et al., F2552, Decision on Prosecution Motion for the Admission of Statements by Witness PRH707 and on Ayyash Defence Motion to Strike the Prosecution Reply, 15 April 2016, par 37 ("PRH707 Decision").

<sup>5</sup> Ibid, par 39.

4. The Trial Chamber has the discretion to exclude evidence “if its probative value is substantially outweighed by the need to ensure a fair trial” pursuant to Article 21 of the Statute and may exclude evidence “gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules” pursuant to Rule 149(D).

### III. Submissions

#### A. Admission of statements in their entirety

5. The Trial Chamber has previously rejected the Prosecution Motion to admit three statements of PRH707 in their entirety, in large part due to the Prosecution’s failure to make a timely application under Rule 155 or 156, before the witness testified.<sup>6</sup> The Chamber also held that admitting their evidence in whole would mean the Chamber having to receive repetitive evidence on the same points, even if differently expressed.<sup>7</sup>
6. The Prosecution has filed the Request in relation to the Statements in advance of PRH705’s testimony to alleviate the Chamber’s concerns in relation to the timeliness of the application. However, as the Prosecution fully intends to lead substantial portions of the evidence of PRH705 orally as well as through the admission of the Statements, the same issue will arise of the Chamber being faced with voluminous repetitive evidence.
7. Admitting the statements in their entirety and simultaneously leading lengthy and detailed evidence on many of the very same topics would further clog an already congested trial record. While the Trial Chamber is not prevented by the rules of international criminal procedure from permitting the Prosecution to lead the same evidence orally and in writing, trial management and ensuring the good administration of justice militate in favour of requiring the Prosecution to identify specific paragraphs that it intends to tender in writing and for the Chamber to only admit these paragraphs where relevant and probative.
8. The two situations where evidence should be led orally when the statement of a

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<sup>6</sup> Id., par 45.

<sup>7</sup> Id., par 43.

witness has also been admitted for the truth of its contents are as follows.

9. Firstly, when the specific evidence will simply not be led orally, it is appropriate that such evidence may be admitted as long as the criteria of Rule 155 are met.
10. Secondly, it is arguable that evidence may be led orally and the relevant written paragraphs addressing the same topic may also be admitted for the truth of their contents, where it is so technically complex that the use of diagrams or specific technical language is easier to present in writing than orally.
11. Outside of these specific situations, when a witness is testifying, no blanket admission of his written statements should be permitted.

**B. Relevance and probative value of selected paragraphs of statements**

12. In its PRH707 Decision, the Chamber declared the specific paragraphs identified and tendered by the Prosecution as “*prima facie* admissible under Rule 155(c) or 156” but further held that it would “take no final decision regarding their admission into evidence until the conclusion of the witness’s evidence and after hearing from Defence counsel.”<sup>8</sup> In so doing, the Trial Chamber had recognised that “showing *prima facie* relevance and probative value is necessary to admit, in whole or in part, Witness 707’s statements.”<sup>9</sup>
13. It is self-evident therefore, that the burden remains squarely on the party seeking to admit evidence under Rules 155(c) and 156, to demonstrate that each and every paragraph of the applicable statements, and the attached annexes are relevant to, and probative of, the allegations in the consolidated indictment.
14. The Prosecution has failed to satisfy this burden in relation to the Statements. The Prosecution’s entire submissions in relation to their relevance and probative value are contained within the assertion that:

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<sup>8</sup> Id., par 75.

<sup>9</sup> Id., par 52.

“[T]he Statements concern Touch’s network, and its business practices and records, including, in particular, the generation, business use and storage of call data records, cell site data and subscriber records.”<sup>10</sup>

15. The Prosecution proceeds to assert that it relies on “Touch business records and data in support of its case, so evidence that is relevant to and probative of the reliability of Touch’s records and data is relevant and probative evidence in this case.”<sup>11</sup>
16. No specific mention is made of exactly which parts of the Prosecution case the Statements of PRH705 support by reference to the particular paragraphs of the operative indictment or Prosecution pre-trial brief. Nor is there an explanation as to which part of each statement relates to each of the subject areas described. For example, no information is provided as to which paragraphs relate to the storage of call data records. Without this information, the Trial Chamber will be unable to give anything more than a superficial assessment of the relevance of this evidence.
17. Similarly, the Prosecution simply “notes that [the Statements] contain the necessary indicia of reliability [and] [...] are the culmination of a process of information gathering from Touch, and combine material and information received from Touch in response to Requests for Assistance and at several interviews.”<sup>12</sup> Alerting the Chamber to the fact that the evidence was obtained and provided by a committee from Touch, where various information providers were not even mentioned in the Statements contrary to good practice in collecting such statements,<sup>13</sup> cannot prove reliability even to a *prima facie* standard.
18. These collective bald assertions in the Request fail to satisfy the Prosecution’s burden of demonstrating to the Trial Chamber why each and every paragraph of the Statements is relevant and probative. Instead, they appear to be an attempt to unfairly shift the burden on to the Defence to identify the specific reasons why each specific paragraph should not be admitted.

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<sup>10</sup> Request, par 6.

<sup>11</sup> Ibid.

<sup>12</sup> Id., par 7.

<sup>13</sup> STL, Prosecutor v. Ayyash et al., F2493, *Sur-Reply to the Consolidated Prosecution Reply to Defence Response to “Prosecution Motion for the Admission of Witness Statements Signed by Witness PRH707”*, 16 March 2016.

19. If, as the Chamber appears to seek, the Defence is required to include its arguments as to why each paragraph is not relevant and probative in this Response, it will be doing so in a vacuum, without the prior benefit on the Prosecution's submissions on this issue. In light of the prior actions in relation to PRH707, upon receipt of the response, the Prosecution will then undoubtedly seek to then reply to each Defence argument, as it did in its Reply to the Defence's Response on PRH707, when it could and should have included each of these submissions in its Request, as recalled by the Trial Chamber.<sup>14</sup> This is despite the clear reminder issued to the Parties of the previous instruction of the Trial Chamber that replies should be confined to new issues that have arisen in a response.<sup>15</sup>
20. In these circumstances, due to the complete absence of justification as to the relevance and probative value by the Prosecution, the Request should be dismissed *in limine*.
21. In the alternative, the Prosecution should be required to refile the Request with an attached annex specifying why each and every paragraph in the Statements is relevant and probative, including reference to exactly which issues in the indictment each relates.
22. This could be refiled together with the further information provided by PRH705. As the Prosecution is well aware and for the Chamber for whom it is "obvious"<sup>16</sup>, the issue of who provided PRH705 with the information about which he is testifying is a live and central issue in relation to the admission of his evidence as it was in relation to PRH707. In this regard, the Prosecution was requested by the Trial Chamber in relation to the evidence given by PRH705, to go "back to the witness and ask [...] the witness to tell you the source for any of those paragraphs that you are asking to be received into evidence, that's on the list of separate paragraphs in lieu of the entire statement, where it's not already specified, and to find out the provenance of the information, too."<sup>17</sup> As of the time of filing, this information has not been provided to the Defence.

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<sup>14</sup> PRH707 Decision, par 79.

<sup>15</sup> Ibid, par 80.

<sup>16</sup> Transcript, 21 April 2016, 20160421\_STL-11-01\_T\_T258\_PROV\_CONF\_EN 66/99, Line 7.

<sup>17</sup> Ibid., Lines 14-18.

23. If this information is provided together with the refiled Request setting out the annex requested above, the Defence will be able to respond to the Request and will better be able to assist the Chamber to understand which areas of evidence it contests and why.

#### IV. Relief

1. For the foregoing reasons, the Sabra Defence requests the Trial Chamber to:

- **DENY** the admission of the Statements of PRH705 in their entirety; and,
- **DISMISS** the Prosecution Request to admit certain paragraphs of the Statements pursuant to Rules 155(c) of 156 together with the attached Annexes due to the Prosecution's failure to demonstrate the probative value and reliability of this evidence; or,
- **ORDER** the Prosecution to re-file its Request with an annex describing the relevant and probative value of each paragraph of the Statements and the Annexes.

Respectfully submitted on 28 April 2016,



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