SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

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: **6 May 2015**

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THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

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 UNIIIC AND STL'S PROSECUTION

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BACKGROUND

1. The Prosecution's case against the five Accused relies heavily upon telecommunications data and records, including call data records. According to the Prosecution, these are collections of relevant portions of call data business records generated and maintained by three Lebanese communication service providers, Ogero, MTC and Alfa.[1] The records relate to numbers in five groups of telephones that the Prosecution describes in the consolidated indictment; the 'red',[2] 'green',[3] 'purple'[4] and 'blue'[5] networks and the 'yellow' telephones.[6]

2. Call data records contain information routinely collected by these providers in connection with telephones using their services, for customer billing and systems management. Many are on the Prosecution's exhibit list filed under Rule 91 of the Special Tribunal's Rules of Procedure and Evidence.[7] As call data records are 'without further analysis largely unintelligible',[8] the Prosecution extracted information from the call data records and entered it into what it terms 'call sequence tables' to make them accessible and capable of presentation and analysis without altering the data.[9] Produced by a Prosecution analyst in a 'standardized' and 'mechanical' manner by 'copying and pasting the relevant data from the underlying material,'[10] call sequence tables present chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time, comprising relevant call data records and cell site information.[11] For each call, they detail:[12]

- the other telephone number in contact with the target number;
- the time and the date of the call;
- the type of call (voice or Short Message Service (SMS));
- the duration;

[1] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1831, Prosecution Motion For the Admission of Red Network-Related Call Sequence Tables and Related Statement, 28 January 2015, para. 2 and footnote 2.
[2] F1831, Prosecution Motion For the Admission of Red Network-Related Call Sequence Tables and Related Statement, 28 January 2015.
[3] F1832, Prosecution Motion for the Admission of Green Network Related Call Sequence Tables and Related Statement, 29 January 2015.
[4] F1836, Prosecution Motion for the Admission of Purple Phone Related Call Sequence Tables, 30 January 2015.
[5] F1837, Prosecution Motion for the Admission of Blue Network-Related Call Sequence Tables and Related Statements, 2 February 2015.
[6] F1840, Prosecution Motion for the Admission of Yellow Phone Related Call Sequence Tables and Related Statement, 3 February 2015.
[7] Red network motion, paras 2-3.
[8] Red network motion, para. 13.
[9] Red network motion, paras 4-13.
[10] Red network motion, para. 9.
[11] Red network motion, para. 5. Cell site data is information about what cell tower a mobile telephone was connected to. Red network motion, paras 5, 31. *See also* red network motion, Annex B.
[12] Red network motion, para. 11.

- the IMEI[13] of the handset used by the target number;
- the cell identity and name of the cell sector used by the target number at the start of the call;[14] and
- the cell identity and cell sector at the end of the call, when necessary.

3. The Prosecution has filed five motions seeking the admission into evidence, under Rules 154 and 155,[15] of 'call sequence tables' derived from these telephone call data records, and related witness statements. The statements describe the production of these tables for numbers relating to the five groups of telephones.

4. Counsel for the five Accused, Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra filed consolidated responses to the five Prosecution motions.[16] They oppose admitting the call sequence tables into evidence. The Prosecution thereafter filed a consolidated reply,[17] and, to correct two errors in a call sequence table, filed supplementary submissions to admit a corrected call sequence table and another witness statement.[18] Counsel for Mr Ayyash and counsel for Mr Badreddine responded.[19]

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[13] Every mobile telephone handset has a unique International Mobile Equipment Identity (IMEI) number. *See* F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 9 and footnote 28.

[14] Cell identity and cell sector names correspond to longitudinal and latitudinal coordinates of cell tower locations. Cell sector names are short-form alphanumeric identifiers used by communication service providers for a particular cell identity. Red network motion, para. 12 and footnote 6.

[15] Rule 154: '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).' Rule 155 (A): '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.'

[16] F1854, Consolidated Response by the Ayyash Defence to Five Prosecution Motions pursuant to Rules 154 and 155 for the Admission of Evidence Related to Call Sequence Tables, 16 February 2015; F1856, Badreddine Defence Consolidated Response to Five Prosecution Motions for Admission of Call Sequence Tables and Related Statements, 16 February 2015; F1855, Consolidated Response from the Merhi Defence to the Motions for the Admission of Call Sequence Tables and Statements Relating to the Disputed Networks, 16 February 2015; F1857, Oneissi Consolidated Response to the Prosecution Motions for the Admission of Call Sequence Tables, 16 February 2015; F1853, Sabra Consolidated Response to Prosecution Motions for Admission of Call Sequence Tables, 16 February 2015.

[17] F1865, Prosecution Consolidated Reply to the Defence Responses to the Prosecution Motions for the Admission of Call Sequence Tables, 26 February 2015. The Prosecution requested leave to reply, a short extension of time and an increased word count. F1859, Prosecution Request for an Extension of Time to File a Consolidated Reply to the Defence Reponses to the Prosecution Motions for the Admission of Call Sequence Tables, 18 February 2015. This was granted. Email from Trial Chamber Senior Legal Officer to counsel, 19 February 2015.

[18] F1911, Supplementary Submission to "Prosecution Motion for the Admission of Green Network Related Call Sequence Tables and Related Statement" of 29 January 2015, 16 April 2015. The time for responding to this filing was shortened to 23 April 2015. Email from Trial Chamber Legal Officer to counsel, 21 April 2015.

[19] F1918, Response by the Ayyash Defence to the "Supplementary Submission to 'Prosecution Motion for the Admission of Green Network Related Call Sequence Tables and Related Statement' of 29 January 2015", 21 April 2015; F1926, Badreddine Defence Response to "Supplementary Submission to 'Prosecution Motion for the Admission of Green Network Related Call Sequence Tables and Related Statement' of 29 January 2015", 23 April 2015.

PROSECUTION SUBMISSIONS—THE FIVE MOTIONS

A. First Prosecution motion: the 'red network'

5. The Prosecution requests the admission into evidence under Rule 154 of eight call sequence tables and, under Rule 155, Witness PRH371's related statement, which explains how she produced the 'red network' call sequence tables.[20] The Prosecution further seeks leave to add that statement to its exhibit list.

(i) Admission of 'red network' call sequence tables

6. The 'red network' call sequence tables, sequentially titled CST-306 to CST-313, are annexed to the motion.[21] They are derived from the call data records provided by 'Alpha CS' in relation to a group of eight telephones the Prosecution refers to as the 'red network.'[22] These call sequence tables provide evidence that these telephones operated as 'mission telephones'—telephones that were operated as a closed group, for a limited time and purpose[23]—in a closed network and were used in the surveillance of former Lebanese Prime Minister Rafik Hariri between 4 January 2005 and his assassination in Beirut on 14 February 2005.[24]

7. According to the Prosecution, the 'red network' call sequence tables are admissible under Rule 154 as they have probative value, bear sufficient indicia of reliability and their admission does not prejudice the fair trial rights of the five Accused.

8. With regard to their probative value, the Prosecution submits that, read in conjunction with other evidence, the 'red network' call sequence tables help prove that the 'red network' telephones operated as 'mission telephones' in the month preceding the attack on Mr Hariri. Prosecution analysts, Witnesses PRH147 and PRH435, analysed the call sequence tables.[25] In particular, the analysis of CST-306 of the telephone 'Red 741' by Witnesses PRH230, PRH435 and PRH356, according to the Prosecution, supports the conclusion that this telephone is attributable to Mr Ayyash.[26]

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[20] Red network motion. paras 1-10.
[21] Red network motion, Annex A. *See* F1791, Prosecution Request to Amend its Exhibit List, 15 December 2014.
[22] F1444, Redacted Version of the Consolidated Indictment (consolidated indictment), 7 March 2014, para. 15 (a).
[23] Red network motion, para. 20.
[24] Red network motion. paras 7 and 17-20.
[25] Red network motion, paras 18-20.
[26] Red network motion, paras 21-25.

9. The Prosecution submits that both the 'red network' call sequence tables and the call data records are reliable. Prosecution analysts used Microsoft Excel software to produce the call sequence tables by copying, storing and formatting the relevant data from the call data records. Prosecution analysts performed this standardised and mechanical process and verified call sequence tables against previous versions for consistency and accuracy.[27] Similarly, in respect of multiple call data records covering the same calls, the Prosecution created separate call sequence tables from each source for cross-checking, for consistency.[28]

10. The call data records in Annex B to the 'red network' motion are the business records of the Lebanese telecommunications companies.[29] They provided them to the Lebanese Prosecutor-General and the Lebanese Ministry of Telecommunications in electronic format (on DVDs and hard drives) pursuant to requests for assistance sent by the Special Tribunal's Prosecutor or the Commissioner of the United Nations International Independent Investigation Commission (UNIIIC). The UNIIIC also obtained some data directly from Lebanese communication service providers. The Prosecution intends to lead evidence on the creation, storage, and retrieval of the underlying material, including the call data records, at a later time.[30]

11. Finally, the probative value of the 'red network' call sequence tables is not substantially outweighed by the need to ensure a fair trial under Rule 149 (D).[31] Indeed, 'red network' call sequence tables present relevant portions of call data records in an intelligible format and exclude irrelevant data, in compliance with the requirement of relevance imposed by Rule 149 (C).[32] Moreover, the practice of tendering an extract of a large record has been accepted by the International Criminal Tribunal for the former Yugoslavia (ICTY)[33] and by some common law jurisdictions.[34]

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[27] Red network motion, paras 30-33.
[28] Red network motion, paras 26-33.
[29] Red network motion, para. 33.
[30] Red network motion, para. 27.
[31] Rule 149 (D): 'A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules.'
[32] Rule 149 (C): 'A Chamber may admit any relevant evidence which it deems to have probative value.'
[33] Red network motion, para. 36. An ICTY Prosecution investigator reviewed extensive data of genetic profiles of bodies exhumed from mass graves and produced a summary report and spreadsheet; these were admitted by the Trial Chamber and relied upon in the trial judgement. ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, T. 1726-1728, 13 May 2010 and T. 1789, 14 May 2010; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Trial Judgement, 12 December 2012, para. 50.
[34] Red network motion, paras 34-37, citing, *e.g.*, Canada Evidence Act, RSC 1985, c C-5, s. 30 (5) Business Records; Canada, Alberta Court of Appeal, *R v. Monkhouse* [1987] A.J. No. 1031, (C.A.); and United States, Federal Rules of Evidence, Rule 1006.

(ii) Admission of Witness 371's statement

12. The Prosecution submits that Witness 371's proposed statement will provide evidence on how the 'red network' call sequence tables and 19 other call sequence tables—the subject of future Prosecution applications—were produced. More precisely, it documents source material and the witness's methodology in producing the 'red network' call sequence tables and any notable features of the call data observed when checking the call sequence tables against previous versions.[35] Further, the witness's statement is limited to establishing the reliability of the call sequence tables and does not concern the acts and conduct of the Accused. It also complies with the relevant Practice Direction.[36]

13. The evidence describes a standardised and mechanical procedure, and the Prosecution intends to lead evidence about the integrity of the underlying material—the call data records. The admission of Witness 371's statement would therefore contribute to an expeditious trial, without impacting on the rights of the Accused to a fair trial. Witness 371's statement is also cumulative to the evidence of other witnesses who will testify about similar facts. If the Trial Chamber considers it necessary to hear evidence about the production of the call sequence tables orally, the Prosecution will call the analyst who supervised their production, Witness PRH308.[37]

(iii) Amendment of the Rule 91 exhibit list

14. The Prosecution also seeks to amend its exhibit list by adding Witness 371's statement, arguing that it is *prima facie* relevant and has probative value. It has been disclosed to the Defence, and it merely consolidates and replaces two witness statements on the exhibit list.[38]

B. Second Prosecution motion: the 'green network'

15. The Prosecution seeks the admission into evidence under Rule 154 of sixteen call sequence tables related to the 'green network' and, under Rule 155, of Witness 230's related statement. This statement explains and documents the process whereby the witness produced four of the 'green network' telephone call sequence tables and four other call sequence tables. This statement consolidates and updates four existing witness statements on the exhibit list.[39] In its supplementary

[35] Red network motion, paras 40-41.
[36] Red network motion, paras 42-43. *See also* 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.
[37] Red network motion, paras 44-46.
[38] Red network motion, para. 47.
[39] Green network motion, paras 1-5.

submission, the Prosecution explains that one of the call sequence tables from the 'green network' motion contained two errors, which a new call sequence table corrects and a new statement by Witness 371 explains its production.[40]

(i) Admission of 'green network' call sequence tables

16. The 'green network' call sequence tables annexed to the motion present the call data records of a group of eighteen post-paid mobile telephones the Prosecution refers to as the 'green telephones'.[41] They provide evidence that the 'green telephones' were managed as a group. In particular, the call sequence tables of the telephones of 'Green 023', 'Green 300' and 'Green 071'—referred to as the 'green network'—demonstrate that these three telephones operated in a closed network between 13 October 2004 and 14 February 2005. Further, these three call sequence tables provide evidence that telephones used by Mr Badreddine, Mr Ayyash and Mr Merhi, respectively, were involved in the planning and preparation of the attack against Mr Hariri and in the disappearance of Mr Ahmad Abu Adass.[42]

17. The Prosecution submits that the 'green network' call sequence tables are admissible under Rule 154 as they have probative value, bear sufficient indicia of reliability and their admission does not prejudice the rights of the Accused to a fair trial.[43]

18. The Prosecution submits that, when read in conjunction with other evidence, the 'green network' call sequence tables demonstrate that the 'green telephones' operated as a group. Prosecution analyst, Witness 147, analysed the call sequence tables and is expected to testify that: nine fake identification documents were used to purchase the 18 post-paid SIM cards; all 18 telephones were paid as a group at the end of each month; and all 18 telephones were deactivated on 23 August 2005.[44] Moreover, Prosecution analysts, Witnesses 230, 435 and 356, analysed the call sequence tables relating to 'Green 023', 'Green 300' and 'Green 071' and state that:[45]

- these three telephones formed a closed 'green network' between 13 October 2004 and 14 February 2005;
- 'Green 023' was predominantly in contact with Mr Ayyash and Mr Merhi;

[40] Green network motion supplementary submission, para. 2.
[41] Consolidated indictment, para. 15 (b).
[42] Green network motion, paras 1-3.
[43] Green network motion, paras 10-11.
[44] Green network motion, para. 13.
[45] Green network motion, paras 15-22.

- the geographic use of 'Green 023' was consistent with the geographical profile of other telephones that have been attributed to Mr Badreddine;
- the geographical use of 'Green 300' was consistent with the geographical profile of other telephones that have been attributed to Mr Ayyash; and
- the geographical use of 'Green 071'—which was predominantly in contact with Mr Badreddine—was consistent with the geographical profile of 'Purple 231', which is attributed to Mr Merhi.

19. With regard to the indicia of reliability and potential prejudice to the fair trial rights of the Accused, the Prosecution makes the same arguments summarised in paragraphs 9 to 11 above in relation to the 'red network' motion. It states that the underlying material is annexed to the motion and has been disclosed to the Defence.[46]

(ii) Admission of Witness 230 and Witness 371's statements

20. The Prosecution submits that Witness 230's proposed statement contains evidence which explains how four of the 'green telephones' call sequence tables and 40 other call sequence tables were produced. The statement of Witness 371 documents the production of the corrected call sequence table, including describing the two errors in the previous call sequence table.[47] Consistent with the Prosecution's arguments on the admission of witness' statements relating to other networks or groups of telephones, the Prosecution further submits that the evidence contained in Witness 230 and 371's statements—which are standardised and mechanical in nature—does not concern the acts and conduct of the Accused and complies with the relevant Practice Direction. These statements are also cumulative and their admission would not prejudice the rights of the Accused to a fair trial. If the Trial Chamber decides to hear oral testimony about the production of the call sequence tables, the Prosecution proposes to call Witness 230.[48]

(iii) Amendment of Rule 91 exhibit list

21. The Prosecution also seeks to amend its exhibit list by adding Witness 230's statement, Witness 371's statement, and the updated call sequence table. According to the Prosecution, these materials

[46] Green network motion, paras 23-33.
[47] Green network motion supplementary submission, para. 8.
[48] Green network motion, paras 36-41. Green network motion supplementary submission, para. 9-10.

are *prima facie* relevant and probative. Witness 230's statement consolidates and replaces four witness statements on the exhibit list. All of these documents have been disclosed to the Defence.[49]

C. Third Prosecution motion: the 'purple telephones'

22. The Prosecution also seeks the admission into evidence under Rule 154 of three call sequence tables and two SMS call sequence tables, and, under Rule 155, of Witnesses 308 and PRH377's related statements. These statements explain how the SMS call sequence tables were produced.[50]

(i) Admission of 'purple telephone' call sequence tables

23. The 'purple telephones' call sequence tables and SMS call sequence tables represent the call data records and SMS content of a group of three telephones the Prosecution refers to as the 'purple telephones'.[51] These call sequence tables help prove that the 'purple telephones' functioned as a group involved in the planning and carrying out of the false claim of responsibility for the attack of 14 February 2005.[52] Further, these call sequence tables and other evidence establish that Mr Merhi, Mr Oneissi and Mr Sabra were, respectively, the users of 'Purple 231', 'Purple 095' and 'Purple 018'.[53]

24. According to the Prosecution, the 'purple telephones' call sequence tables and SMS call sequence tables are admissible under Rule 154 as they are probative, bear sufficient indicia of reliability and their admission does not prejudice the rights of the Accused to a fair trial.

25. With regard to their probative value, the Prosecution argues that, with other evidence, the 'purple telephones' call sequence tables prove that the 'purple telephones' were linked together as a group. Witness 147 analyzed these call sequence tables and determined that they establish patterns of contacts among the 'purple telephones' between October 2004 and February 2005 in the context of:[54]

- the alleged disappearance of Mr Ahmad Abu Adass at the Arab University Mosque on 16 January 2005;
- calls to family members at Mr Adass's home on 17 January 2005; and
- four calls made to Reuters and Al-Jazeera on 14 February 2005 regarding the false claim of responsibility.

[49] Green network motion, para. 42.
[50] Purple network motion, paras 1-6.
[51] Consolidated indictment, para. 15 (e).
[52] Consolidated indictment, paras 5, 15 (e), 23-29, 44.
[53] Purple network motion, paras 3-4.
[54] Purple network motion, paras 16-20.

26. Moreover, according to the Prosecution, Witness 230's analysis of the call sequence tables and SMS call sequence tables proves that: [55]

- 'Purple 231' is attributed to Mr Merhi from 19 December 2002 until 15 February 2005;
- 'Purple 095' is attributed to Mr Oneissi from at least 9 January 2003 to 16 February 2005; and
- 'Purple 018' is attributed to Mr. Sabra from at least 9 January 2003 to 16 February 2005.

27. The Prosecution reiterates its arguments with regard to the indicia of reliability and potential prejudice to the fair trial rights of the Accused as summarised above for the 'red network' motion. Again, it states that the underlying material is annexed to the motion and has been disclosed to the Defence.[56]

(ii) Admission of Witnesses 308 and 377's statements

28. The Prosecution submits that Witnesses 308 and 377's statements provide evidence on how the 'purple telephones' SMS call sequence tables and other SMS call sequence tables—the subject of future Prosecution applications—were produced. It documents source material and the methodology these witnesses used to produce the SMS call sequence tables and any notable features of the SMS records. Consistent with the Prosecution's arguments on the admission of witness statements relating to other networks or groups of telephones, the Prosecution submits that this evidence does not concern the acts and conduct of the Accused and complies with the relevant Practice Direction. These statements are also cumulative and their admission would not prejudice the rights of the Accused to a fair trial. The Prosecution again proposes, if necessary, to call Witness 308 to testify about the creation of the call sequence tables. [57]

(iii) Amendment of Rule 91 exhibit list

29. The Prosecution also seeks to amend its exhibit list by adding these statements, arguing that they are *prima facie* relevant and probative. Each statement consolidates and replaces two witness statements already on the exhibit list.[58]

[55] Purple network motion, paras 21-25.
[56] Green network motion, para. 23-33.
[57] Purple network motion, paras 40-46.
[58] Purple network motion, para. 47.

D. Fourth Prosecution motion: the 'blue' network

30. The Prosecution also seeks to have admitted into evidence, under Rule 154, eighteen call sequence tables and, under Rule 155, Witnesses 308 and PRH458's related statements. The Prosecution seeks leave to add these statements to its exhibit list. The statements explain how the Prosecution analysts produced the 'blue network' call sequence tables.[59]

(i) Admission of 'blue network' call sequence tables

31. The 'blue network' call sequence tables are annexed to the motion. They represent the call data records in relation to a group of telephones the Prosecution refers to as 'blue network.'[60]

32. According to the Prosecution, the 'blue network' call sequence tables are admissible under Rule 154 as they are probative, bear sufficient indicia of reliability and their admission does not prejudice the rights of the Accused to a fair trial.

33. With regard to their probative value, the Prosecution submit that, read in conjunction with other evidence, the 'blue network' call sequence tables help prove that the 'blue network' telephones operated as 'mission telephones' in the month preceding the attack on Mr Hariri and that a group of six telephones were used between 21 December 2004 and 14 February 2005 in planning the attack. Witnesses 147 and 435 analysed the call sequence tables. Moreover, the analysis by Witnesses 230, 435 and 356 of CST-0182 attributes a telephone referred to as 'Blue 233' to Mr Ayyash. Witness 435 also relied upon the call sequence table for a telephone referred to as 'Blue 322' to conclude that this telephone could be found at the same location as other telephones attributed to Mr Ayyash from 10 January 2005 to 21 September 2005.[61]

34. As with the other motions, the Prosecution repeats its arguments about reliability and prejudice to the Accused. Also, the underlying material is detailed in Annexes A and B to the motion and has been disclosed to the Defence.[62]

(ii) Admission of Witnesses 308 and 458's statements

35. Witnesses 308 and 458's statements explain the production of the 'blue network' call sequence tables and 21 and 41 other call sequence tables that will be the subject of future Prosecution applications. The evidence in Witnesses 308 and 458's statements is limited to establishing the

[59] Blue network motion, paras 1-5.
[60] Blue network motion, paras 2-4; consolidated indictment, para. 15 (c).
[61] Blue network motion, paras 13-22.
[62] Blue network motion, paras 23-36.

reliability of the call sequence tables and does not concern the acts and conduct of the Accused, and further, complies with the relevant Practice Direction. More precisely, it documents the source material and the methodology used in producing the 'blue network' call sequence tables and any notable features of the call data.

36. The Prosecution submits that the process employed by Witnesses 308 and 458 in creating the call sequence tables is standardised and mechanical. The Prosecution again states their intention to lead evidence about the integrity of the underlying materials. The admission of these statements, with other statements related to the production of call sequence tables, would contribute to an expeditious trial without impacting on the rights of the Accused to a fair trial. The Prosecution proposes to call Witness 308, as the analyst supervising the production of SMS call sequence tables, to testify. Thereafter, Witness 458's statement would be cumulative of similar evidence.[63]

(iii) Amendment of Rule 91 exhibit list

37. The Prosecution also seeks to amend its exhibit list by adding Witnesses 308 and 458's statements, arguing that they are *prima facie* relevant, are probative, have been disclosed to the Defence, and consolidate and replace four witness statements already on the exhibit list.[64]

E. Fifth Prosecution motion: the 'yellow telephones'

38. The Prosecution seeks the admission into evidence, under Rule 154, of fourteen call sequence tables and, under Rule 155, of Witness PRH313's related statement. The Prosecution also seeks leave to add that statement to its exhibit list. This statement explains how the Prosecution analysts produced the 'yellow telephones' call sequence tables.[65]

(i) Admission of 'yellow telephones' call sequence tables

39. The 'yellow telephones' call sequence tables represent the call data records in relation to 14 prepaid mobile telephones for various date ranges between February 2004 and January 2005, with the exception of 'Yellow 669', which begins in August 2002, and 'Yellow 294', which begins in January 2003.[66]

[63] Blue network motion, paras 39-45.
[64] Blue network motion, para. 46.
[65] Yellow telephones motion, paras 1-7.
[66] Yellow telephones motion, para. 14.

40. The Prosecution submits that the 'yellow telephones' call sequence tables are admissible because they are probative and reliable. Also, their admission does not prejudice the fair trial rights of the Accused.

41. With regard to their probative value, the Prosecution argues that, together with other evidence, the 'yellow telephones' call sequence tables help prove that the 'yellow telephones' operated as a group.[67] Witness 147 analysed the call sequence tables and is anticipated to testify that:[68]

- 14 of the telephones began contacting each other from at least February 2004;
- the telephones ceased operating as a group, in a staggered manner, over the thirteen-day period between 30 December 2004 and 12 January 2005;
- based on a comparison of the location of the 'yellow telephones' locations and the whereabouts and movement of Mr Hariri, a subset of the 'yellow telephones' began operating around Mr Hariri's residence in Beirut and his residence in Faraya from 21 to 31 December 2004 and were in contact with the Accused, Mr Ayyash, during this period; and
- two of the 'yellow telephones' were used in Tripoli on 4 January 2005.

42. Witnesses 230, 435 and 356 analysed the call sequence tables of 'Yellow 669' and 'Yellow 294' and attributed both telephones to the Accused, Mr Ayyash, during relevant periods. Witnesses 147 analysed the call sequence tables of 'Yellow 457', 'Yellow 933' and 'Yellow 024'. Witness 147 is anticipated to testify that the call sequence tables of three telephone combinations could be consistent with use by a single user. The analysis of these call sequence tables also helps prove that several co-conspirators, until early January 2005, simultaneously held 'blue telephones' and 'yellow telephones', and, from 14 January to 14 February 2005, 'blue telephones' and 'red telephones'.[69]

43. The Prosecution makes the same submissions as to the reliability of the 'yellow telephones' call sequence tables and to the fair trial rights of the Accused as summarised for the 'red network' motion. Namely, the underlying material is in Annexes A and B to the 'yellow telephones' motion and has been disclosed to the Defence.[70]

[67] Consolidated indictment, para. 15 (d).
[68] Yellow telephones motion, paras 15-16.
[69] Yellow telephones motion, paras 17-23.
[70] Yellow telephones motion, paras 24-36.

(ii) Admission of Witness 313's statement

44. According to the Prosecution, Witness 313's statement explains how the 'yellow telephones' call sequence tables and two other call sequence tables were produced. Witness 313's statement does not concern the acts and conduct of the Accused, is cumulative and complies with the relevant Practice Direction. Its admission would contribute to an expeditious trial without impacting on the rights of the Accused to a fair trial.[71]

(iii) Amendment of Rule 91 exhibit list

45. The Prosecution also seek to amend its exhibit list by adding Witness 313's statement, submitting that it is *prima facie* relevant, probative, and consolidates and replaces another witness statement already on the exhibit list.[72]

DEFENCE SUBMISSIONS

A. Summary of relief sought by counsel for the Accused

46. Defence counsel for all five Accused oppose the admission into evidence of the call sequence tables.

47. Counsel for Mr Ayyash request the Trial Chamber to defer ruling on the admission of the call sequence tables and witness statements—including those in the supplementary submissions—until the Trial Chamber has sufficient evidence to assess the relevance, probative value, and reliability of the call sequence tables and the statements.[73] They also want to cross-examine Witnesses 230, 308, and 371.[74] Counsel for Mr Badreddine ask the Trial Chamber to defer its decision on the motions and supplementary submissions until the Prosecution has led evidence on the reliability of the call data records and called at least one witness who produced the call sequence tables.[75] Counsel for Mr Merhi ask the Trial Chamber to dismiss the motions as premature.[76]

48. Counsel for Mr Oneissi request the Trial Chamber to dismiss the motions, to decide on the legality of the call data records before admitting any call sequence tables, and to allow further oral

[71] Yellow telephones motion, paras 38-44.
[72] Yellow telephones motion, para. 45.
[73] Ayyash response, para. 44; Ayyash response to supplementary submissions, paras 7-8.
[74] Ayyash response, para. 45; Ayyash response to supplementary submissions, para. 6.
[75] Badreddine response, para. 27; Badreddine response to supplementary submissions, para. 11.
[76] Merhi response, para. 7.

submissions. They also want the Trial Chamber to exclude the call sequence tables, especially those for telephone number 3598095. Alternatively, they request an order to the Prosecution to tender the 'communication evidence' through witnesses who can testify to 'all of the reliability issues'.[77]

49. Counsel for Mr Sabra ask the Trial Chamber to deny the motions or defer a decision on the admissibility of the call sequence tables until it has received the call data records into evidence and heard live testimony as to their collection, retrieval, and storage.[78]

B. The motions are premature

(i) Defence submissions

50. Counsel for Mr Badreddine, Mr Ayyash, Mr Sabra and Mr Merhi argue that the Prosecution should tender into evidence the call data records—from which the call sequence tables were allegedly extracted and produced—before seeking the admission of the call sequence tables. Admitting the call sequence tables now would violate the rights of the Accused to effectively confront the evidence against them.[79] The motions are premature because the Prosecution has not tendered into evidence the call data records and, consequently, has failed to demonstrate the admissibility of the call data records from which the call sequence tables derive.[80] The Prosecution has also failed to provide sufficient information about the provenance, relevance, reliability, accuracy, integrity and authenticity of the call data records and the call sequence tables.[81] Counsel for Mr Badreddine state that it is inappropriate to provisionally allow the Prosecution to use the call sequence tables now to present its evidence, but to address the admissibility of the call data records later.[82]

51. Counsel for Mr Ayyash and Mr Sabra argue that, to allow for their 'contextualization', the Prosecution should lead the evidence on the creation, storage, and retrieval of the call data records, as it states that it will do, before tendering the call sequence tables.[83] Further, counsel for Mr Ayyash submit that the call sequence tables include information not found in the call data records derived from other sources, such as the name of the cell towers. Consequently, the reliability of the call

[77] Oneissi response, para. 53.
[78] Sabra response, para. 24.
[79] Badreddine response, paras 8-10; Ayyash response, paras 30-32, 35; Sabra response, paras 1, 6, and 20-23; Merhi response, para. 4.
[80] Badreddine response, paras 8-10, 12-14, 20; Ayyash response, para. 21; Sabra response, paras 1 and 5-6; Merhi response, paras 3-4.
[81] Ayyash response, para. 32; Badreddine response, paras 10-11, 12-14; Sabra response, paras 5-11.
[82] Badreddine response, para. 11.
[83] Ayyash response, paras 25-29; Sabra response, paras 16-19.

sequence tables can be established only after evidence is led on the reliability of the underlying material.[84]

52. Counsel for Mr Merhi submit that they are not yet prepared to assess the reliability and probative value of the call data because their own expert report on telecommunications is still being prepared and will not be ready for several months.[85]

(ii) Prosecution reply

53. The Prosecution argues that counsel for Mr Ayyash have cited no legal authority for their contention that the supporting material annexed to the motions is not properly before the Trial Chamber.[86] The call sequence tables are not substantively different from the underlying call data records, but merely re-formatted for ease of presentation.[87]

C. The data and call sequence tables may be unreliable

54. Counsel for Mr Sabra submit that the Trial Chamber must satisfy itself that the process of transforming call data records into call sequence tables is reliable. The Trial Chamber must properly hear and assess the evidence of the Prosecution analysts who carried out this process.[88] Counsel for Mr Oneissi also submit that it is not possible to ascertain the reliability of the communications evidence before hearing the testimony of the relevant witnesses.[89] In particular, counsel want to challenge the conditions in which the telephone data upon which the Prosecution relies were stored by the communication service providers before being sent to the UNIIIC or the Special Tribunal's Prosecutor.[90]

55. In their response to the Prosecution's supplementary submissions, counsel for Mr Badreddine use the errors identified by the Prosecution as proof that the call sequence tables are unreliable and that their creators need to be cross-examined.[91]

[84] Ayyash response, paras 30-32.
[85] Merhi response, paras 3-6.
[86] Prosecution reply, para. 38.
[87] Prosecution reply, para. 39.
[88] Sabra response, paras 12-14.
[89] Oneissi response, paras 2 and 42-44.
[90] Oneissi response, para. 47.
[91] Badreddine response to supplementary submissions, paras 5-10.

D. The call sequence tables must be tendered through Prosecution witnesses

56. The Defence of Mr Ayyash, Mr Badreddine, Mr Merhi and Mr Sabra object to the tender of call sequence tables from the bar table, submitting that that they should be tendered through the witnesses who produced them. They have no probative value without the explanations provided by their author.[92] According to counsel for Mr Sabra, admitting the call sequence tables without cross-examining the Prosecution analysts would not allow for an adversarial challenge to their evidence.[93] Counsel for Mr Badreddine also object to the admission under Rule 155 of the proposed witness statements because the call sequence tables concern the acts and conduct of the Accused.[94] Counsel for Mr Ayyash object to admission under Rule 155 because the reliability of the underlying materials has not been established.[95]

E. These Prosecution witnesses must be cross-examined

(i) Defence submissions

57. Counsel for Mr Oneissi argue that, as the integrity of the telephone data used to produce the call sequence tables cannot be guaranteed, they wish to cross-examine, among others, the employees of the Lebanese communication service providers involved in the production, collection, storage, and transfer of the call and SMS data to the Prosecution. They also wish to cross-examine the UNIIIC investigators and the Prosecution experts and investigators involved in the collection of the call data records and in the maintenance of the structured query language (SQL)—a special programming language for databases—and the production of the call sequence tables.[96] Discrepancies in one specific call sequence table confirm the importance of cross-examination.[97] These discrepancies raise serious doubts about the reliability of the call sequence tables and their underlying call data records.[98]

(ii) Prosecution reply

58. The Prosecution argued in reply that any concerns of counsel for Mr Oneissi about a discrepancy concerning the data for 'Purple 095' relate to the differences in the business records of two different

[92] Ayyash response, paras 12-14; Badreddine response, para. 22; Badreddine response to supplementary submissions, para. 8; Merhi response, para. 2; Sabra response, paras 13-14.
[93] Sabra response, paras 13-14, 21.
[94] Badreddine response, para. 23.
[95] Ayyash response, paras 39-41.
[96] Oneissi response, paras 45-50.
[97] Counsel for Mr Oneissi's response refers at para. 51 to CST-0388, which corresponds to the telephone Purple 095. *See* Purple network motion, Annex A.
[98] Oneissi response, paras 51-52.

companies. Any discrepancy goes to the weight the Trial Chamber may give the evidence rather than to the integrity of the data itself.[99]

F. Further oral submissions are required

59. Counsel for Mr Oneissi seek to make additional oral submissions. They refer to the importance of the telecommunications evidence and their submission that it was collected in breach of international standards on human rights and applicable Lebanese law.[100]

G. The Prosecution submissions are 'confusing'

60. Counsel for Mr Badreddine find 'confusing' the Prosecution's submission that the admission of the call sequence tables will eliminate the need to call witnesses solely to admit the call sequence tables. The Prosecution must clarify who would not be called if its motions were granted. Without this, it is impossible for the Defence to make informed objections to protect the rights of the Accused to a fair trial.[101]

H. Collecting the call data records breached Lebanese and international human rights law

(i) Defence submissions

61. Referring to international[102] and domestic legal authorities,[103] counsel for Mr Oneissi argue that the data used to produce the call sequence tables was gathered in breach of the international

[99] Prosecution reply, paras 40-46.
[100] Oneissi response, paras 2 (b), 41, 53 (c).
[101] Badreddine response, paras 14-15.
[102] This includes a treaty provisions on the right to privacy, including: Article 12 of the Universal Declaration of Human Rights; Article 17 of the International Covenant on Civil and Political Rights; Article 8 of the European Convention on Human Rights; and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. They also cite cases from the European Court of Human rights and European Union Court of Justice on the right to privacy: ECHR, *Malone v. the United Kingdom*, 2 August 1984; ECHR, *Rotaru v. Romania*, 4 May 2000; ECHR, *Amann v. Switzerland*, 16 February 2000; ECHR, *Niemietz v. Germany*, 16 December 1992; ECHR, *Wieser and Bicos Beteiligungen GmbH v. Austria*, 16 October 2007; ECHR, *Iliya Stefanov v. Bulgaria,* 22 May 2008; ECHR, *Robathin v. Austria*, 3 July 2012; ECHR, *S. and Marper v. the United Kingdom*, 4 December 2008; ECHR, *Bykov v. Russia*, 10 March 2009; ECHR, *Peck v. the United Kingdom*, 28 January 2003; ECHR, *Uzun v. Germany*, 2 September 2010; ECHR, *Brunet v. France*, 18 September 2014; ECHR, *Al-Nashif v. Bulgaria*, 20 June 2002; ECHR, *Lupsa v. Romania*, 8 June 2006; ECHR, *Kruslin v. France*, 24 April 1990; ECHR, *Klass and Others v. Germany*, 6 September 1978; ECHR, *Moulin v. France*, 23 November 2010; CJEU, Judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger v. Minister for Communications, Marine and Natural Resources*, 8 April 2014. Counsel also cite an opinion of the United Nations High Commissioner for Human Rights: Report of the Office of the United Nations High Commissioner for Human Rights, The right to privacy in the digital age, 30 June 2014, A/HRC/27/37.
[103] This includes constitutional provisions, laws, and court cases: United States, Amend. IV, *Constitution*; United States, *United States v. Jones*, 132 S.Ct. 945 (2012); United States, *Riley v. California*, 134 S.Ct. 2473 (2014); United States, *United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014) (This decision was vacated and the appeal was reheard en banc, *United States v. Davis*, 573 F. App'x 925 (2014)); United States, 18 U.S.C. §§ 2703 (c) (1), (d); Canada, Canadian Charter of Rights and Freedoms, section 8; Canada, *R. v. Plant* (1993) 3 S.C.R. 281; Canada, *R. v. Telus Communications Co* (2013) 2 S.C.R. 3; Canada, s. 487.1, Criminal Code of Canada; Canada, *R. v. Vu* (2013) 3 S.C.R.

standards on human rights and the applicable Lebanese law governing the collection of such evidence.[104] The Trial Chamber must therefore exclude this evidence under Rule 162 (B).[105] Additionally, their admission would consequently be antithetical to, and would seriously damage, the integrity of the proceedings, and the Trial Chamber must therefore exclude this evidence under Rule 162 (A).[106]

62. Counsel for Mr Badreddine argue that the Prosecution should be required to demonstrate that the call data records have been collected in compliance with the applicable Lebanese law and the relevant international human rights standards.[107]

(ii) Prosecution reply: no laws or standards were breached

63. The Prosecution argues that the evidence was collected in accordance with the applicable procedures of the Special Tribunal and, when applicable, the UNIIIC.[108] The Defence did not submit that the call data records were collected in violation of these legal regimes.[109] The Defence bears the evidential burden of proving that the call data records were collected in violation of international standards on human rights.[110] However, the Defence has not proven any violation of international standards binding on Lebanon—namely, conventions ratified by Lebanon or customary international law. The only relevant treaties ratified by Lebanon are the International Covenant on Civil and Political Rights (ICCPR) and the League of Arab States' Arab Charter on Human Rights. Neither specifically address whether the collection of business records includes the right to privacy, and neither is sufficiently specific and concrete on the right to privacy to acquire immediate force of

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657; Canada, *The Canadian Broadcasting Corporation v. The Attorney General for New Brunswick* (1991) 3 R.S.C. 469; United Kingdom, Investigatory Powers Tribunal, IPT/13/77/H, IPT/13/92/CH, IPT/12/168-173-H, IPT/13/194/CH, IPT/13/204/CH, *Liberty and others v. Secretary of States for Foreign and commonwealth Affairs and others*, 6 February 2015.

[104] The cited Lebanese authorities include: Articles 8 and 13, *Constitution of Lebanon*; Lebanese Constitutional Council, decision no. 2/2001, 10 May 2001; Lebanese Law 140/99, On safeguarding the right to the privacy of communications transmitted by any means of communication; Exhibit 4D105, the non-binding conclusions of the Lebanese Independent Commission of three judges tasked with ensuring the legality of the administrative interception of telephone calls, 21 November 2012.

[105] Rule 162 (B) reads: 'In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture.'

[106] Oneissi response, paras 2 and 34-41. Rule 162 (A) reads: 'No evidence shall be admissible if obtained by methods which cast doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceeings.'

[107] Badreddine response, paras 16-17, citing ECHR, *Malone v. United Kingdom*, 2 August 1984 (incorrectly cited as *Malone v. Italy*).

[108] Prosecution reply, paras 6-10.

[109] Prosecution reply, para. 10.

[110] Prosecution reply, paras 11-14.

law.[111] The UN Human Rights Committee, which monitors implementation of the ICCPR through non-binding rulings, has not addressed the right to privacy with regard to call data records.[112]

64. Moreover, considering the legislative practice of the Arab Charter's member States, the right to privacy specified in the Charter has not been interpreted to cover call data records.[113] The Defence did not identify any Lebanese laws directly covering call data records. The law cited—Lebanese Law 140/99, titled 'On safeguarding the right to the privacy of communications transmitted by any means of communication'—is limited to the interception of the content of the communications, and does not extend to call data records. A mere non-binding judicial opinion holding that the law covered call data records does not constitute a definitive legislative determination that the Arab Charter's right to privacy covers call data records.[114]

(iii) Prosecution reply: the Defence has not demonstrated a customary norm

65. The Defence has not demonstrated the existence of customary international law on the right to privacy in respect of call data records. In determining whether the collection of this data violated customary international law, the Trial Chamber must consider whether States recognise, with near unanimity, that the right to privacy is violated by access to call data records, rather than whether there is a general right to privacy.[115] The judicial decisions of national and regional courts cited in support of the Defence submissions are insufficient to demonstrate the existence of a customary norm of international law. They either did not involve access to call data records or do not clearly demonstrate State practice necessary to establish a customary norm.[116]

DISCUSSION

A. General principles of international criminal law to admit and exclude evidence

66. The general principles and rules in international criminal law relating to the admission and exclusion of evidence have been summarised as: a Chamber may admit any relevant evidence, taking into account, among other things, the probative value of the evidence; a Chamber is not bound any by national rules of evidence; and, a Chamber may exclude evidence obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage,

[111] Prosecution reply, paras 17-19.
[112] Prosecution reply, para. 19.
[113] Prosecution reply, para. 19.
[114] Prosecution reply, para. 21, referring to Exhibit 4D105. *See* footnote 104, above.
[115] Prosecution reply, para. 26.
[116] Prosecution reply, paras 29-37.

the integrity of the proceedings.[117] These principles are in the Special Tribunal's Statute and its Rules of Procedure and Evidence.[118]

B. Exclusion of the call sequence tables under Rule 149 (D)

67. Counsel for Mr Merhi seek the exclusion of the call sequence tables under Rule 149 (D), arguing that the Prosecution's motion for admission is premature. Under Rule 149 (D):

> A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules.

68. Defence counsel do not challenge the relevance or probative value of the data, but maintain that the records should be excluded because their probative value is substantially outweighed by the need to ensure a fair trial. Their principal arguments are, first, that they require more time to prepare and, second, that the Prosecution is posing its admission in reverse order, namely the call sequence tables—which derive from the call data records—before seeking to admit call data records into evidence.[119] On this second point, the Trial Chamber agrees. Before it can admit into evidence the secondary material, the call sequence tables, the Trial Chamber has to be satisfied of the reliability of the underlying data.

69. On the first point—and for the reasons set out in paragraphs 111 to 115 below—the Trial Chamber is not prepared to dismiss the Prosecution motions and, before admitting the call sequence tables into evidence, will satisfy itself of the reliability of the call data records. For this reason, the Trial Chamber is satisfied that, by the time the evidence is led in court, counsel for Mr Merhi will have had at least 18 months to prepare for this aspect of the Prosecution's case.

70. The Trial Chamber will therefore not summarily exclude the evidence under Rule 149 (D).

C. Oneissi Defence submissions—exclusion of call sequence tables

71. Counsel for Mr Oneissi request the Trial Chamber to (a) dismiss the motion, (b) order that the legality of the call data records be adjudicated upon prior to any decision on the admissibility of the

[117] *See, e.g.*, Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappalá (eds), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, p. 1043.
[118] Article 21 (2) of the Statute, Rules 3, 149, 162.
[119] Merhi response, paras 3-7.

call sequence tables, and (c) order that in light of the importance of the issue, the Defence be granted the opportunity to make oral submissions.[120]

(i) No need for a public oral hearing

72. Counsel ask the Trial Chamber 'to refrain on ruling on the admissibility of any other communications evidence until the legality of the call data records has been the subject of a public hearing'.[121] However, the Trial Chamber, with the full benefit of Defence counsel's written submissions and the Prosecution's reply, does not need further submissions—either in a public hearing or otherwise. It will not order an oral hearing.

(ii) Excluding the call data records under Rules 149 and 162

73. This decision will deal with the substantive issue of the possible exclusion of the call sequence tables based on the alleged illegal collection of the call data records. Order (b) sought by counsel for Mr Oneissi asks the Trial Chamber to adjudicate the legality of the call data records. That requires a positive finding as to the legality or otherwise of the call data records, and, in particular, their transmission to the UNIIIC and the Special Tribunal's Office of the Prosecutor. Counsel want the call sequence tables excluded and declared inadmissible, on the basis that they were generated from illegally collected call data records. Alternatively, they seek an order for the Prosecution to tender communication evidence through witnesses who can comprehensively address all of the reliability issues.[122] Before determining whether the call sequence tables and the witness statements are admissible under Rules 154 and 155, the Trial Chamber will address the possible exclusion of the call sequence tables.

(iii) Rule 149 (C)—no exclusion for unreliability

74. Although Defence counsel argued that the evidence is unreliable under Rule 149 (C),[123] they did not submit that *the collection* of the call data records cast any doubt on their reliability. Because the Trial Chamber—for the reasons in paragraphs 111 to 115 below—will rule on the reliability of the call sequence tables only after hearing some evidence, this decision is confined to possible exclusion under Rule 162. That is, whether the call data records were 'obtained in violation of international standards on human rights', as the Defence claims. If so, the Trial Chamber cannot admit them—or material deriving from them—into evidence.

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[120] Oneissi response, para. 53.
[121] Oneissi response, paras 2, 41, and 53 (c).
[122] Oneissi response, para. 53 (e).
[123] Rule 149 (C): 'A Chamber may admit any relevant evidence which it deems to have probative value.'

D. Possible Rule 162 exclusion for breaching international human rights law right to privacy

75. Rule 162 'Exclusion of certain evidence', provides:

> (A) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and seriously damage, the integrity of the proceedings.
>
> (B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture.

76. According to Defence counsel, the Lebanese telephone data should be excluded under Rule 162 (B) because the UNIIIC and the Prosecution obtained it—without effective and independent judicial oversight—in violation of 'international standards on human rights'. The call data records were therefore collected, used and retained illegally. Admitting into evidence the call sequence tables derived from the illegally obtained call data records would therefore be 'antithetical to, and would seriously damage, the integrity of the proceedings', requiring their exclusion under Rule 162 (A).[124]

(i) The Lebanese companies legally collected and retained the call data records

77. Although the heading in the Oneissi Defence response reads, '[T]he CDRs were collected, are used and retained illegally', the submissions under the heading are silent on the alleged illegal collection of the data. The data is the business records of Lebanese telecommunications companies generated and retained automatically, and legally, in the normal course of their business. As no question can arise about their collection and retention by these companies, the Trial Chamber will ignore this heading and confine its analysis to the legality of their transfer to the UNIIIC and the Prosecution.

(ii) International human rights law includes a right to privacy

78. The threshold question is whether the right to privacy forms part of the 'international standards on human rights' referred to in Rule 162 (B). The answer to this is 'yes'. Under international law, the right to privacy, generally, provides that people are free from unreasonable governmental intrusions into their lives and property. For example, Article 17 of the ICCPR, ratified by Lebanon in 1972, provides:

[124] Oneissi response, paras 33-41.

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

79. The UN Human Rights Committee has defined 'privacy'—although in the context of changing a family name—as referring to the 'sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone'.[125] The Arab Charter,[126] also ratified by Lebanon, and the Universal Declaration of Human Rights[127] also recognise this right. Other regional conventions on human rights, for example, Article 8 of the European Convention on Human Rights, Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and Article 11 of the American Convention on Human Rights contain a similar provision.

80. Some States provide a constitutional or legal right to privacy.[128] The Lebanese Constitution, while guaranteeing individual liberty and freedom of expression and assembly does not specify a separate right to privacy.[129] Internationally, in decisions on the admissibility of illegally or unlawfully obtained evidence, the International Criminal Court[130] and the ICTY[131] have recognised that the right to privacy is protected by internationally recognised norms on human rights. Thus, contrary to the Prosecution's submissions,[132] the conventions and treaties referred to above, even if not ratified by Lebanon, are relevant under both Rule 3 and Rule 162 (B) as they contribute to the body of principles comprising 'international standards'.

81. The right to privacy undoubtedly forms part of 'international standards on human rights' referred to in Rule 162 (B). However, the definition and content of a right to privacy under

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[125] *See, e.g.*, Human Rights Committee, *AR Coeriel and MAR Aurik v. Netherlands*, CCPR/C/52/D/453/1991, 9 December 1994, section 10.2.
[126] Article 17 provides, 'Private life is sacred, and violation of that sanctity is a crime. Private life includes family privacy, the sanctity of the home, and the secrecy of correspondence and other forms of private communication.' The Arab Charter entered into force in March 2008.
[127] Article 12 states, 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.
[128] *See* United States, Amend. IV, *Constitution*; Canada, Canadian Charter of Rights and Freedoms, section 8; Belgium, Article 22, *Constitution*; France, Civil Code, Article 9.
[129] Articles 8 and 13, *Constitution of Lebanon*.
[130] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2007, para. 84. (*Lubanga* decision).
[131] *See, e.g.*, ICTY, IT-99-36-T, *Prosecutor v. Radoslav Brđanin*, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003, para. 29. (*Brđanin* decision). Brđanin appealed the Trial Chamber's use of illegally obtained telephone intercepts, but the Appeals Chamber dismissed his appeal on this issue summarily as merely restating his arguments from the original motion. ICTY, IT-99-36-A, Judgement, 3 April 2007, paras 34-35.
[132] Prosecution reply, paras 15-16.

international human rights law is far from settled. It is self-evident from the words 'arbitrary or unlawful' in Article 17 of the ICCPR that a case specific assessment is required.

(iii) The 'international standards on human rights' referred to in Rule 162 (B) need not be customary norms

82. The Prosecution argued that the Defence has not met its burden to demonstrate that, under customary international law, the right to privacy is violated by access to call data records.[133] The Trial Chamber, it is submitted, must inquire into whether States recognise with near unanimity that the right to privacy is violated by access to the call data records. In other words—and although not expressly stated—in interpreting the words 'international standards on human rights' in Rule 3 (A),[134] and the 'violation of international standards on human rights' in Rule 162 (B), the Trial Chamber must be satisfied that these form part of customary international law. But, apart from referencing some definitions of customary international law, the Prosecution offered no legal source for asserting that an international standard on human rights had to be considered to have gained customary law status.

83. Unquestionably, some international human rights law standards are part of customary international law, for example, the prohibition on genocide, torture and slavery and the principle of non-discrimination.[135] However, disagreement exists as to identity and content of the fundamental principles and regional human rights instruments vary in the human rights protected.[136] And, neither the Special Tribunal's Statute nor its Rules specify that the 'violation of international standards on human rights' under Rule 162 (B) refers only to a protected human right that has attained customary status. To read this requirement into the Rule would unduly restrict its application. The Trial Chamber therefore finds that it does not have to satisfy itself that an alleged 'violation of international standards on human rights' forms part of customary international law. For this reason it

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[133] Prosecution reply, heading 3 (c) and paras 24-37.

[134] Which provides, relevantly, that the 'Rules shall be interpreted in a manner consonant with the spirit of the Statute, and in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights…'

[135] *See, e.g.*, ICJ, *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)*, ICJ Reports, 5 February 1970, p. 32; American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States*, 14 May 1986, § 702; Malcolm N. Shaw, *International Law* 7th edition, Cambridge University Press, 2014, p. 201; James Crawford, *Brownlie's Principles of Public International Law*, 8th edition, Oxford University Press, 2012, p. 642.

[136] *See Brownlie,* p. 642, and a chart at p. 644 comparing the 'key human rights protected' under the ICCPR, ECHR, the Arab Charter, the African Charter on Human and People's Rights, and the International Covenant on Economic, Social and Cultural Rights and illustrating the differences in regional human rights protections.

is unnecessary to examine whether there are any customary norms on privacy that may bind Lebanon.[137]

(iv) The right to privacy is not absolute

84. The right to privacy under international law, however, is not absolute.[138] Interferences are permissible when they are not 'unlawful and arbitrary'.[139] International criminal tribunals and human rights courts have interpreted this to mean that any restriction imposed on the right of privacy must respect certain guarantees.[140] For example, the restriction must be provided for by law, be necessary in the circumstances, and proportionate to the pursuance of a legitimate aim.[141]

(v) Call data records and similar metadata may fall within privacy protections

85. The principal Defence argument for exclusion under Rule 162 is that the Prosecution's possession of the call data records breaches the right to privacy recognised in international standards on human rights. Call data records and accompanying personal data contain information that may affect the rights to privacy of those whose data has been captured. In June 2014, the United Nations High Commissioner for Human Rights reported to the UN General Assembly that;[142]

> [t]he aggregation of information commonly referred to as 'metadata' may give an insight into an individual's behaviour, social relationships, private preferences and identity that go beyond even that conveyed by accessing the content of a private communication. As the European Union Court of Justice recently observed, communications metadata 'taken as a whole may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained'.[143]

86. The UN Human Rights Council, in 2015, recognised that the collection of data about communications—as opposed to the content of these communications—constitutes interference with privacy. The Human Rights Council consequently appointed a special rapporteur on the right to

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[137] *See, e.g.*, F0936, STL-1-01/I/AC/R176*bis*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 114-122.
[138] *Brđanin* decision, para. 30.
[139] *See* ICCPR, Article 17. 1.
[140] *See* ECHR, *Malone v. United Kingdom*, 2 August 1984, para. 62; *Brđanin* decision, para. 30.
[141] ECHR, *Uzun v. Germany*, 2 September 2010, paras 77-81. *See* UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on State Party to the Covenant, CCPR/C/21/Rev.1/Add. 13, 24 May 2004, para. 6.
[142] Report of the Office of the United Nations High Commissioner for Human Rights, The right to privacy in the digital age, 30 June 2014, A/HRC/27/37, para. 19. *See also* Resolution of the Human Rights Council, 24 March 2015, A/HRC/28/L.27, p. 3.
[143] Referring to Court of Justice of the European Union, Judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger v. Minister for Communications, Marine and Natural Resources*, 8 April 2014, paras. 26-27. *See also* United States, President's Council of Advisors on Science and Technology, "Big Data and Privacy: A Technological Perspective", May 2014, p. 19.

privacy.[144] From this, it is evident that international human rights standards are evolving to include legal protection of metadata such as call data records from unwarranted disclosure to governments and law enforcement agencies.

(vi) Judicial control over transferring call data records to international investigatory agencies

87. Both the UNIIIC and the Special Tribunal's Office of the Prosecutor are investigatory agencies established pursuant to UN Security Council Resolutions. They obtained the call from Lebanese telecommunications companies. But did this transfer require judicial control? And, if yes, did its absence violate any international human rights standard on the right to privacy justifying the exclusion of the data under Rule 162?[145] The answer to both questions is 'no'.

88. Counsel for Mr Oneissi argue that some form of 'judicial control', by an independent Lebanese *juge d'instruction* according to Lebanese law, was required to regulate the transfer of call data records.[146] They have, however, failed to point to any Lebanese law requiring judicial control over providing telecommunications metadata for investigative purposes. As the Prosecution has submitted, the Lebanese law cited by counsel, Law 140/99, titled 'On safeguarding the right to the privacy of communications transmitted by any means of communication', is relevant only to surveillance and interception, and not to the transfer of legally collected and retained telecommunications data.

89. The ICTY—which, like the Special Tribunal was created by a Security Council Resolution under Chapter VII of the Charter of the United Nations—has examined the nature of the relationship between such international institutions and corresponding national authorities. It has described it as 'vertical', 'at least as far as the judicial and injunctory powers of the International Tribunal are concerned (whereas in the area of enforcement the International Tribunal is still dependent upon States and the Security Council).'[147]

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[144] Resolution of the UN Human Rights Council, 24 March 2015, A/HRC/28/L.27, p. 3.
[145] In other international criminal courts and tribunals, no rules provide for the automatic exclusion of illegally or unlawfully obtained evidence. *See, e.g. Brđanin* decision, paras 28-56; *Lubanga* decision, para. 84.
[146] Oneissi response, para. 35.
[147] ICTY, *Prosecutor v. Tihomir Blaškić*, IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 47. *See also* ICTY, *Prosecutor v. Dragan Nikolić*, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 100; ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, 5 April 2007, para. 108.

90. The Trial Chamber agrees with this description in relation to cases in which the Special Tribunal has exercised its primacy under Article 4 (1) of the Special Tribunal's Statute and Rules 17 (A) and (B). A distinction must be drawn between national and international authorities when international institutions derive their authority from Security Council Resolutions. The policy rationale is to maintain the institution's true international independence by preventing national authorities from imposing conditions on or frustrating or influencing investigations. Allowing domestic oversight could prevent international institutions from exercising their investigative powers[148] and fulfilling mandates such as those specified in Security Council Resolutions 1595 and 1757.

91. Thus, if judicial oversight were required, it should, as a matter of principle, come from either the UNIIIC or the Special Tribunal under their own rules and internal mechanisms, as opposed to that of national judges. The UNIIIC, however, as a purely investigating agency, had no judicial competence; no international judicial oversight was therefore possible until the Special Tribunal's establishment on 1 March 2009.

92. Defence counsel justify the need for judicial overview over the UNIIIC and the Prosecution's actions by arguing that 'a Prosecutor whose position depends on the Minister of Justice, who receives his instructions when prosecuting and investigating from that same Minister and reports to him or her on their execution, is not structurally independent from the executive'.[149] This argument, however, illustrates precisely why any judicial oversight over an investigation should be international rather than national. The UNIIIC Commissioner and the Special Tribunal's Prosecutor, by contrast, are independent.

93. Both are expressly prohibited from receiving instructions from any political bodies—international or national. Security Council Resolution 1595 highlights the UNIIIC's independence by naming it the 'International *Independent* Investigation Commission' and providing it with all necessary powers to function independently. These are:[150]

- full access to all documentary, testimonial and physical information and evidence in the possession of Lebanese authorities;
- authority to collect—by itself—any additional information;
- freedom of movement within Lebanese territory; and
- facilities necessary to perform its functions.

[148] *See* Security Council Resolution 1595 (2005), para. 3; Article 11 (5) of the Statute.
[149] Oneissi response, para. 24.
[150] Security Council Resolution 1595 (2005), paras 1 and 3.

The UNIIIC had the required legal authority to collect investigatory information, which must, by necessity, include call data records. Further, the Agreement annexed to Resolution 1757 and the Statute itself highlight that the Prosecutor is independent in the performance of his or her functions and shall not accept or seek instructions from any Government or any other source.[151]

94. Allowing national control—even judicial—over investigations would also contravene Article 4 (1) of the Special Tribunal's Statute, specifying that within its jurisdiction, 'the Tribunal shall have primacy over the national courts of Lebanon.' Once the Special Tribunal exercises its primacy over a case under this Article and Rules 17 (A) and (B), the Lebanese courts must defer their competence to it. It then has full jurisdiction over all aspects of the investigation and trial of the case. This includes obtaining evidence. The case of the attack against Mr Hariri and others was transferred to the Special Tribunal on 27 March 2009.[152]

95. National authorities, under their domestic law, however, may of course assist in implementing or enforcing the UNIIIC's or the Special Tribunal's requests for assistance, or orders such as to arrest suspects.[153] By virtue of the Security Council Resolution 1757, Lebanon is required to cooperate with the Special Tribunal.

(vii) The Special Tribunal does not judicially control Prosecution or Defence investigations

96. Do the Special Tribunal's Chambers control or oversee the Prosecution or Defence investigations? No. The Special Tribunal has no investigating magistrate (*juge d'instruction*) and its Prosecutor has no judicial powers. Under the Statute and the Rules the Prosecution and Defence conduct their own investigations.

97. The Prosecution needs no authorization from the Pre-Trial Judge, or the Trial Chamber, before collecting evidence. Nor do Defence counsel. Nor does the Head of the Defence Office in sending a request for assistance to the Lebanese authorities.[154]

98. Under Article 18 (2) of the Statute, the Pre-Trial Judge may issue orders required for the conduct of the investigation, but only upon the Prosecutor's request. He does not investigate or compile a

[151] Article 3, para. 4 of the Agreement annexed to Security Council Resolution 1757 (2007), 10 June 2007, and Article 11, para. 2 of the Statute.
[152] CH/PTJ/2009/01, Order directing the Lebanese Judicial Authority Seized with the Case of the Attack Against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, 27 March 2009, Disposition.
[153] *See* Security Council Resolution 1595 (2005), para. 6; Rule 16 (B).
[154] Memorandum of Understanding between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.

dossier of evidence for any party. The Prosecutor, apparently, did not seek a judicial order from the Pre-Trial Judge to obtain the call data records from Lebanon. But he did not have to. Security Council Resolution 1595, establishing the UNIIIC, also contained no requirement for international judicial control over the international investigation.

(viii) The transfer of the call data records did not involve surveillance or interception

99. Neither the UNIIIC nor the Prosecution conducted surveillance or interception of communications to obtain the data in question.[155] Any interference with a right to privacy must be assessed in this light. Their involvement was confined to requesting, either directly or indirectly *via* the Lebanese Prosecutor-General, the transfer of existing data that was *legally* compiled and held by Lebanese telephone companies in the ordinary course of their business for billing purposes.

(ix) The transfer of the data was legal

100. The transfer of the call data records occurred under the legal framework of cooperation between the UNIIIC or the Special Tribunal and the Lebanese authorities, as regulated by Security Council Resolution 1595, Article 15 (1) of the Agreement annexed to Security Council Resolution 1757, Rules 14 and 61, the Memoranda of Understanding concluded between the UNIIIC or the Special Tribunal and Lebanese authorities[156] and Lebanese law on intercepting telecommunications.[157] None of these legal instruments require judicial control over the transfer of investigative material to the UNIIIC or the Special Tribunal's Prosecution or Defence.

101. The Trial Chamber, moreover, emphasises that the Security Council adopted Resolutions 1595 and 1757 under Chapter VII of the Charter of the United Nations, and Article 48 (1)[158] of the Charter obligates members of the United Nations—including Lebanon—to implement its decisions.

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[155] This includes the SMS content used to make SMS call sequence tables for two telephones in the 'purple network' with numbers 3419018 and 3598095 between 1 February 2004 and 16 February 2005. *See* purple network motion, para. 4 and Annex A.

[156] Memorandum of Understanding between the Government of the Republic of Lebanon and the Office of the Prosecutor of the Special Tribunal for Lebanon regarding the Modalities of Cooperation Between Them, 5 June 2009; Letter dated 16 June 2005 from the Secretary General addressed to the President of the Security Council, S/2005/393, 20 June 2005, attaching Memorandum of Understanding Between the Government of the Republic of Lebanon and the United Nations regarding the Modalities of Cooperation for the International Independent Investigation Commission.

[157] Exhibit 4D99, Article 9, Lebanese Law 140/99, On safeguarding the right to the privacy of communications transmitted by any means of communication, 27 October 1999.

[158] Chapter VII, Article 48 (1) reads: 'The action required to carry out the decisions of Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.'

(x) The call data transfer had a narrow and legitimate forensic purpose

102. The call data transfer had a narrow and legitimate forensic purpose, namely, according to the UNIIIC's and Special Tribunal's respective mandates, conducting a criminal investigation against those allegedly responsible for the attack against Mr Hariri and others.

103. The proportionality of the collection of a large amount of telephone data—necessary to establish the call sequence tables relevant for the case—must be evaluated in light of the gravity of the attack under investigation and of the overall unstable security situation then prevailing in Lebanon and that the investigation was pursuant to a UN Security Council Chapter VII Resolution. The Trial Chamber is satisfied that, in the circumstances, the transfer was for a narrow and legitimate forensic purpose.

(xi) Access to the call records data is strictly limited

104. The data is retained within the Special Tribunal's Office of the Prosecutor and access to it is strictly limited. The intrusion to any right to privacy is minimised because the data is available only to an extremely limited number of people involved in the trial—namely, staff of the Office of the Prosecutor, Defence counsel, the Legal Representative of the Victims, the Judges and their staff—all of whom have professional and ethical obligations of confidentiality.

105. The Trial Chamber also emphasises that Defence counsel do not have access to all the telephone data held by the Prosecution, but only to that between 1 January 2003 and 31 December 2005 (and additionally to two specified telephone numbers)—declared by the Trial Chamber to be material to the Defence preparation for trial—and any other agreed between the Parties to be material under Rule 110 (B).[159] The restrictions imposed by such measures on any right to privacy are proportional to this legitimate investigatory aim referred to above.

(xii) Judicial oversight is required over the admission of evidence, not its collection

106. The Trial Chamber has not found any specific international standard on the transfer to an investigating agency of metadata, such as call data records—either with or without judicial

[159] STL-11-01/PT/TC, F1252, Decision on Call Data Records and Disclosure to defence (on Remand from Appeals Chamber), 4 December 2013, para 31, 33 and Disposition. In this decision, counsel for Mr Oneissi—as opposed to their current request for exclusion for having been illegally obtained—sought access to all of the call data records in the Prosecution's custody from 2003 onward in SQL format. The Trial Chamber, at para. 27, held that they had demonstrated relevance, and therefore materiality to their preparations, of the call data records after the time period specified in the amended indictment for only two specified telephone numbers.

oversight.[160] However, the conduct of the UNIIIC and the Prosecution in their investigations are not free from judicial scrutiny.

107. The Trial Chamber assesses the legality, necessity and proportionality of the measures taken by these investigative bodies to collect evidence during admission into evidence under Rule 149 (C) and (D) and, in particular, when determining their reliability. And similarly in determining the possible exclusion of evidence under Rule 162. It is at this point—according to the Statute and Rules—and not during the investigation, that judicial oversight over the collection of material is required.

(xiii) Conclusion: the transfer of the call data records was legal

108. Although the collection of telephone data *may* constitute a restriction of the right to privacy, the Trial Chamber concludes that, since the transfer of the legally-collected call data records was neither unlawful nor arbitrary, no violation of international standards on human rights has occurred. The Trial Chamber is satisfied that what has been described as a 'restriction' on the right to privacy was provided for by law, was necessary in the circumstances, and was proportionate to the pursuance of a legitimate aim.[161]

109. The two Security Council Resolutions—supplemented by the Agreement annexed to Security Council Resolution 1757, the Special Tribunal's Statute and Rules, and the Memoranda of Understanding concluded between the UNIIIC or the Special Tribunal and Lebanese authorities—provide the necessary legal authorisation for the transfer of the call data records. The transfer of the records was necessary in the circumstances; without these records the Prosecutor could not have constructed his case and filed an indictment against the first four, and then the fifth Accused. The legitimate aim—in accordance with the UNIIIC's and Special Tribunal's mandates—was investigating the attack of 14 February 2005. Transferring call data records, and strictly limiting access to them, was proportionate to this legitimate aim.

110. Accordingly, no violation justifying the exclusion pursuant to Rule 162 of the call data records or call sequence tables derived from the data, has occurred. The Defence submissions made in this regard are therefore rejected.[162] The call data records—and their derivative call sequence tables as

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[160] The Trial Chamber recognises that, in some national systems, investigators require a warrant or other judicial supervision to obtain SMS content. However, for the reasons above at paras 87-98, this does not apply to the transfer of SMS content data to the UNIIIC and the Special Tribunal's Office of the Prosecutor.

[161] ECHR, *Uzun v. Germany*, 2 September 2010, paras 77-81. *See* UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on State Party to the Covenant, CCPR/C/21/Rev.1/Add. 13, 24 May 2004 para. 6.

[162] The Trial Chamber has carefully examined each cases cited above in footnotes 102, 103, and 104. However, most of the cases are distinguishable. The two most relevant are *Malone v. United Kingdom* and *Uzun v. Germany*. However,

demonstrative evidence—are thus admissible as evidence in the case if the Trial Chamber is satisfied that they are relevant and probative.

E. Admitting the call sequence tables into evidence

111. The Trial Chamber has specified the procedural safeguards for admitting material tendered from the 'bar table' under Rule 154. It must meet the basic requirements for admission of evidence in Rule 149 (C) and (D): it must be relevant and probative, and its probative value must not be outweighed by its prejudicial effect.[163] Only *prima facie*—rather than definite—reliability and probative value is required at this stage.[164] Probative value, in this sense, is distinct from the weight that the Trial Chamber may ultimately give to a document or record. The tendering party must also demonstrate, with clarity and specificity, where and how each document or record fits into its case.[165]

112. The Defence argues that determining the admissibility of the call sequence tables would be premature, as the Prosecution did not tender into evidence the call data records from which the call sequence tables were produced.[166] The Prosecution failed to provide sufficient information about the provenance, reliability, accuracy, integrity and authenticity of both the call data records and the call sequence tables.[167] Counsel for Mr Ayyash and Mr Sabra state that, before the tendering of the call sequence tables and to allow for their contextualization, the Prosecution should lead the evidence on the creation, storage, and retrieval of the call data records, as it declares it will do in each of the motions.[168]

113. The Trial Chamber believes that no practical utility could exist in admitting into evidence *all* the call data records from which the call sequence tables are derived. The call data records of themselves are voluminous, and, without extraction of the relevant data into a readable format, meaningless. However, to allow the Trial Chamber to evaluate the admissibility of the call sequence tables and the

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Malone dates from 1984 and concerns the legality of the interception of telephone call data using 1970s technology, and *Uzun* relates to the police planting a GPS device on a suspect's vehicle, without a court warrant, and raises different considerations about State action.

[163] F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 33; F1781, Decision on Prosecution Motion to Admit into Evidence Geographic Documents, 8 December 2014, para. 4.

[164] Decision of 6 March 2015, para. 33; F1350, Decision on Prosecution's Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, para. 7; STL-11-01/PT/TC, F1308, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, para. 8.

[165] Decision of 6 March 2015, para. 33; Decision of 28 January 2014, para. 7; Decision of 13 January 2014, paras 4-6.

[166] Badreddine response, paras 8-10, 12-14; Ayyash response, paras 21, 31; Sabra response, paras 1 and 9; Merhi response, paras 3-4.

[167] Badreddine response, paras 8-10 12-14; Sabra response, paras 5-13; Oneissi response, paras 45-46; Ayyash response, paras 30-32.

[168] Ayyash response, paras 25-29; Sabra response, para. 21.

reliability of their underlying data, the Prosecution must provide contextual evidence on its provenance.

114. As to the admissibility of the call sequence tables themselves, the Trial Chamber considers that the Prosecution has *prima facie* demonstrated that they show the existence of groups of mobile telephone operating as networks referred to as 'red', 'green', 'purple' and 'blue' networks and 'yellow' group allegedly involved in the planning and carrying out of the attack against Mr Rafik Hariri and making a false claim of responsibility for the attack.

115. These tables are therefore *prima facie* relevant to the allegations pleaded in the consolidated indictment and, in particular in paragraphs 14 to 19. However, the Trial Chamber has insufficient information to effectively assess the reliability and probative value of these call sequence tables, which amalgamate and organise underlying data from different sources of raw data. To properly evaluate the integrity, value and authenticity of these call sequence tables, the Prosecution must provide contextual evidence on these tables and, in particular, on how they were produced. The Trial Chamber will thus defer its decision on the admissibility of the call sequence tables until the Prosecution has called at least one witness who can provide information on: (i) the provenance of the underlying call data records (including the gathering, retrieval and storage of this data), and (ii) the production of the call sequence tables.

F. Admitting the witness statements into evidence

116. The principles governing the admission into evidence of statements under Rule 155 are also set out in previous decisions.[169] In particular, these statements can be admitted in lieu of live in-court testimony if they meet the basic requirements for admission under Rule 149. If going to proof of acts or conduct of the Accused, they may not be admitted without cross-examination. These principles are applicable to this decision.

117. The Prosecution submits that the eight witness statements are relevant, probative and contain the necessary indicia of reliability. According to the Prosecution, none go to the acts and conduct of the Accused and the admission of each into evidence would be in the interest of justice. The evidence of

[169] F1820, Decision on the Prosecution Motion for Admission Under Rule 155 of Written Statements in Lieu of Oral Testimony Relating to the 'Red Network' Mobile Telephone Subscriptions, 19 January 2005, para. 3; F1785, Decision on the Prosecution Motion for Admission Under Rule 155 of Written Statements in Lieu of Oral Testimony Relating to Rafik Hariri's Movements and Political Events, 11 December 2014, para. 3; STL-11-01/PT/TC, F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, paras 7-14; F937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements Under Rule 155, 30 May 2013, para. 13.

the six witnesses explains how the call sequence tables, relating to each network or group of telephones, were produced by the Prosecution from the call data records, namely:

- Witness 371—a Prosecution analyst since March 2009—produced 27 call sequence tables[170] referred to in the 'red network' motion and the one call sequence table[171] in the supplementary submission to the 'green network' motion;
- Witness 230—a Prosecution analyst since March 2009—produced 44 call sequence tables[172] referred to the 'green network' motion;
- Witness 308—a Prosecution analyst since November 2009—produced several call sequence tables from SMS messages referred to the 'purple network' motion[173] and the 'blue network' motion;[174]
- Witness 377—a Prosecution analyst since October 2009—produced 12 call sequence tables[175] referred to in the 'purple network' motion;
- Witness 458—a Prosecution analyst since June 2010—produced call sequence tables listed in the investigator's note[176] referred to in the 'blue network' motion; and
- Witness 313—a Prosecution analyst since April 2009—described producing call sequence tables[177] referred to in the 'yellow telephones' motion.

118. These analysts' statements all concern producing the call sequence tables relating to the networks and groups of telephones, allegedly involved in the attack against Mr Hariri. These are *prima facie* relevant to the allegations pleaded in the consolidated indictment. However, as the Trial Chamber requires further contextual evidence from the Prosecution to properly evaluate their probative value and the reliability of their subject matter—namely, producing the call sequence tables, and the underlying data used—their admission is premature. The Trial Chamber will therefore defer its decision until hearing this evidence. If the Trial Chamber finds the call data records reliable and declares the call sequence tables admissible, it follows that these statements will be declared admissible as integral associated exhibits.

[170] Witness 371's statement of 18 December 2014.
[171] Witness 371's statement of 13 April 2015.
[172] Witness 230's statement of 19 January 2015.
[173] Witness 308's statement of 23 January 2015.
[174] Witness 308's statement of 14 January 2015.
[175] Witness 377's statement of 23 January 2015.
[176] Witness 458's statement of 14 January 2015.
[177] Witness 313's statement of 23 January 2015.

119.Collectively, Defence counsel want to cross-examine all witnesses involved in the collection of call data records and production of call sequence tables. As these statements relate to vital parts of the Prosecution's case, the Trial Chamber considers that their authors should be made available for cross-examination under Rule 156.

G. Amending the Prosecution's exhibit list

120.The Prosecution requests amendments to its exhibit list to add the statements of Witnesses 313, 230, 308, 371, 377 and 458 and the corrected call sequence table.[178] The Defence takes no position on the Prosecution's requested amendments to the exhibit list. The Trial Chamber has previously held that it may, in the interests of justice, allow a party to amend its exhibit list. In doing so, it must balance the Prosecution's interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for trial.[179] These documents have already been disclosed to the Defence and largely consolidate and replace other witness statements. Adding them to the exhibit list will neither delay the proceedings nor prejudice Defence preparations for trial. The Trial Chamber is therefore satisfied that adding the eight statements and corrected call sequence table to the exhibit list is in the interest of justice.

H. Confidentiality

121.Because they contain confidential witness information, the Prosecution seeks to keep confidential the annexes to its motions.[180] The Trial Chamber reiterates the public nature of the proceedings and orders the Prosecution to either file a public redacted version of the annexes or have them reclassified as public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS leave to the Prosecution to amend its exhibit list filed under Rule 91;

[178] Red network motion, para. 47; Green network motion, para. 42; Purple network motion, para. 47; Blue Network motion, para. 46; Yellow telephones motion, para. 45; Green network motion supplementary submission, paras 3 and 11-13.
[179] Decision of 6 March 2015, para. 31; F1781, Decision on Prosecution Motion to Admit into Evidence Geographic Documents, 8 December 2014, para. 4; F1780, Decision Authorizing the Prosecution to Amend its Witness and Exhibit Lists, 8 December 2014, para. 15.
[180] Red network motion, para. 48; Green network motion, para. 43; Purple network motion, para. 48; Blue network motion, para. 47; Yellow telephones motion, para. 46.

FINDS that the call data records were not illegally transferred to the United Nations International Independent Investigation Commission, or to the Special Tribunal's Office of the Prosecutor, in breach of either Rule 162 (A) or (B);

ORDERS the Prosecution to call at least one witness who can testify to the creation of the call sequence tables and to the collection, storage and reliability of their underlying materials;

DECIDES that it will defer a decision on the admissibility of the call sequence tables and related witness statements until at least one witness has testified about:

(i) the provenance of the underlying call data records (including the gathering, retrieval and storage of this data); and

(ii) the production of the call sequence tables; and

DECIDES that, if it is satisfied of (i) and (ii), it will:

- **DECLARE** the statements of Witnesses PRH230, PRH308, PRH313, PRH371, PRH377, and PRH458 admissible under Rule 155 (C) or Rule 156; and
- **ORDER** the Prosecution to make Witnesses PRH230, PRH308, PRH313, PRH371, PRH377, and PRH458 available for cross-examination.

Leidschendam,
The Netherlands
6 May 2015

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy