

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: 21 October 2015

Original language: English

Classification: Public

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

**DECISION ON PROSECUTION MOTION TO ADMIT THE STATEMENTS
OF WITNESSES PRH575 AND PRH703**

Office of the Prosecutor:Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Hugh Milne**Counsel for Mr Salim Jamil Ayyash:**Mr Eugene O'Sullivan, Mr Emile Aoun &
Mr Thomas Hannis**Victims' Legal Representatives:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Mustafa Amine Badreddine:**Mr Antoine Korkmaz, Mr Iain Edwards &
Ms Mylène Dimitri**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothee Le Fraper
du Hellen & Mr Jad Khalil**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yassine
Hassan & Mr Philippe Larochelle**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts

INTRODUCTION

1. The Prosecution seeks to admit into evidence, under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence, two witness statements, one each by Witnesses PRH575 and PRH703. It also seeks leave to add Witness 703 to its witness list, filed under Rule 91.¹ Counsel for the Accused, Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, responded to the motion, and the Prosecution filed a reply to the responses of counsel for Mr Ayyash and Mr Merhi.² Counsel for Mr Merhi filed a clarification, at the request of the Trial Chamber.³

SUBMISSIONS

Prosecution submissions

2. Witness 575 is an Associate Evidence Custodian with the Special Tribunal's Office of the Prosecutor. His statement describes some technical aspects of uploading evidence into the electronic presentation of evidence (or EPE, as the Prosecution describes it), a computer program that allows different pieces of evidence to be shown together to more effectively and efficiently illustrate its analysis of telephone activity relevant to the Prosecution's case.⁴ Witness 575 also describes the management of evidence when uploading evidence into the electronic presentation of evidence. He describes how the electronic presentation of evidence identifies when two call data records form two sides of a single call—that is, the dialling and receiving telephones—so that the program only displays one call. The Prosecution submits that Witness 575's statement assists the Trial Chamber in determining that the electronic presentation of evidence is reliable.⁵

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2229, Prosecution Motion to Admit the Statements of PRH575 and PRH703, 30 September 2015, paras 1-4.

² F2265, Ayyash Defence Response to Prosecution Motion to Admit the Statements of PRH575 and PRH703, 14 October 2015; F2268, Badreddine Defence Response to "Prosecution Motion to Admit the Statements of PRH575 and PRH703", 14 October 2015; F2266, Merhi Defence Response to the "Prosecution Motion to Admit the Statements of PRH575 and PRH703", 14 October 2015; F2267, Response to "Prosecution Motion to Admit the Statements of PRH575 and PRH703", 14 October 2015; F2264, Sabra Defence Response to "Prosecution Motion to Admit the Statements of PRH575 and PRH703", 14 October 2015; F2274, Prosecution Reply to Ayyash and Merhi Defence Responses to "Prosecution Motion to Admit the Statements of PRH575 and PRH703", 19 October 2015.

³ F2280, Clarification de la Défense de Merhi relative à la "Prosecution Motion to Admit the Statements of PRH575 and PRH703", 21 October 2015. On 21 October 2015, the Trial Chamber requested a clarification from counsel for Mr Merhi about what they meant in their submissions by 'an independent server' on which to use the electronic presentation of evidence. Email from Trial Chamber Senior Legal Officer to counsel, 21 October 2015.

⁴ Prosecution motion, paras 2, 7.

⁵ Prosecution motion, paras 2, 6-7.

3. Witness 703 is an Information Management Analyst with the Special Tribunal's Office of the Prosecutor. His statement describes his statistical analysis of the call data records in the Prosecution's possession provided by the two Lebanese mobile telecommunications companies, Alfa and MTC Touch. His analysis establishes the extent of the synchronisation between the clocks recording the times of calls when creating call data records. When the mobile telephones making and receiving a call are routed through different Mobile Switching Centres,⁶ the internal clocks of the Mobile Switching Centres of the two sides of the call may not be synchronised, so the call data records may show different call times. Witness 703 examined over 120,000 telephone calls between 1 September 2004 and 30 September 2005 to establish by how much the clocks of the Alfa and MTC Touch Mobile Switching Centres differed. He then performed a statistical analysis to determine what percentage of calls within his dataset fell within a given time variance—for example, for 99.9% of calls involving any two MTC Touch Mobile Switching Centres with the exception of one named Mobile Switching Centre, the call data records showed a timing difference between zero and two seconds. The Prosecution submits that this analysis is relevant to understanding the extent of differences in the times of calls recorded in the call data records and is relevant to any analysis of the Lebanese call data records.⁷

4. The Prosecution submits that the statements contain the necessary indicia of reliability for admission into evidence under Rule 155 and that there are no overriding interests favouring hearing this evidence in court. It argues that this evidence goes to peripheral, background issues and not to any live issues between the Parties.⁸

5. Lastly, the Prosecution requests leave to amend its witness list by adding Witness 703. It submits that his evidence is relevant to and probative of the analysis of call data records. It submits that it has good cause in seeking this amendment now, because Witness 703's evidence is a new version of an earlier, similar analysis done by another witness, Mr Andrew Donaldson, PRH230. Mr Donaldson's report is already on the Prosecution's exhibit list. Witness 703's analysis was done to provide more specific results, but the methodology and

⁶ Mobile Switching Centres route calls for telecommunication service providers from the cell site of the outgoing call to wherever the call is going. They also create call data records of the calls they route. Transcript of 18 August 2015, pp 77-83, 113-115.

⁷ Prosecution motion, paras 3, 8-11.

⁸ Prosecution motion, paras 12-15.

results are consistent between the analyses. The Defence, therefore, are not prejudiced by this addition.⁹

Defence submissions

6. Counsel for Mr Merhi oppose the addition of Witness 703 to the Prosecution's witness list. They submit that his statistical analysis is markedly different from the one performed by Mr Donaldson on the Prosecution's exhibit list. Mr Donaldson only analysed around 33,000 calls between Alfa and MTC Touch mobile telephones, whereas Witness 703's analysis concerns timing variances within the respective networks. Counsel argue that, given the advanced stage of the proceedings, this much larger analysis is an unacceptable burden on their Defence preparations and on their telecommunications expert.¹⁰ No other Defence counsel objected to his addition.¹¹

7. Counsel for Mr Ayyash and Mr Badreddine oppose admitting both statements into evidence because they do not appear on the Prosecution's exhibit list, nor has the Prosecution sought leave to add them.¹² Counsel for Mr Ayyash submit that, for Witness 575, though he appears on the Prosecution's witness list, his expected testimony relates only to the transfer of evidence from the United Nations International Independent Investigation Commission to the Special Tribunal. They, therefore, had no notice that he might testify about the electronic presentation of evidence. For Witness 703, they submit that the Prosecution has not demonstrated good cause to add Witness 703's statement to its exhibit list.¹³ Counsel for Mr Badreddine disagree that merely being on the Prosecution's witness list is sufficient notice to admit the witness's statement into evidence, particularly when Witness 703 does not yet appear on the Prosecution's witness list.¹⁴

8. Counsel for Mr Badreddine and Mr Sabra submit that it is premature to admit Witness 703's statement, with counsel for Mr Badreddine arguing that it is also premature to admit Witness 575's statement.¹⁵ In its decision of 6 May 2015 on the admission into evidence of call sequence tables, the Trial Chamber deferred their admission until the Prosecution had produced at least one witness to provide information on the provenance of the underlying call

⁹ Prosecution motion, paras 16-17.

¹⁰ Merhi Defence response, paras 7-9.

¹¹ Ayyash Defence response, para. 3; Badreddine Defence response, para. 2; Sabra Defence response, para. 2.

¹² Ayyash Defence response, paras 4-10; Badreddine Defence response, paras 3-5.

¹³ Ayyash Defence response, paras 4-10.

¹⁴ Badreddine Defence response, para. 4.

¹⁵ Badreddine Defence response, paras 9-10; Sabra Defence response, paras 6-14.

data records.¹⁶ Witnesses 575 and 703 rely on the same underlying call data records, but no witnesses have testified to its provenance. Therefore, the Trial Chamber should similarly defer a decision on admitting Witness 575's and Witness 703's statements.¹⁷

9. Counsel for Mr Badreddine, Mr Merhi and Mr Sabra submit that the Trial Chamber would be better assisted by hearing Witness 575's and Witness 703's testimony orally. Counsel for Mr Badreddine and Mr Sabra argue that, in his statement, Witness 703 describes his methodology for his statistical analysis, but he cautions that it is intended only for someone who understands working with datasets. His oral testimony would therefore better assist the Trial Chamber, as it could ask pertinent questions so as to understand his methodology.¹⁸ Counsel for Mr Badreddine and Mr Merhi submit that the technical nature of the evidence requires contextualisation that makes admission of this evidence through written statements inappropriate.¹⁹ Counsel for Mr Merhi also argue that they have only had access to the electronic presentation of evidence system 'with an independent server' since 28 September 2015, meaning a separate version of the system from the one made available by the Prosecution, shared by all the Defence teams. Counsel for Mr Merhi wished to upload their own confidential evidence into the system to test its functionality.²⁰

10. Counsel for Mr Ayyash submit that Witness 575's statement is inconsistent with the testimony of Mr Andrew Fahey, PRH263, who testified that only admitted evidence will be displayed using the electronic presentation of evidence. Witness 575 states that the electronic presentation of evidence can display tendered evidence and evidence that the Prosecution is in the process of tendering. Counsel also argue that Witness 703's analysis is intended to replace an expert report authored by Mr Andrew Donaldson, but the Prosecution has not demonstrated that Witness 703 is an expert. His analysis is predicated on a number of assumptions, and there is no evidence that he has any specialised knowledge of Lebanese mobile telecommunications systems. Without such information, the Trial Chamber cannot assess the reliability of his statement.²¹

¹⁶ F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHCR and STL's Prosecution, 6 May 2015, para. 115.

¹⁷ Badreddine Defence response, paras 9-10; Sabra Defence response, paras 6-14.

¹⁸ Badreddine Defence response, para. 7; Sabra Defence response, paras 15-18.

¹⁹ Badreddine Defence response, para. 7; Merhi Defence response, paras 3-5.

²⁰ Merhi Defence response, paras 3-5; Merhi Defence clarification, paras 3-5, resulting from an email from Trial Chamber Senior Legal Officer to counsel, 21 October 2015.

²¹ Ayyash Defence response, paras 11-12.

11. Counsel for Mr Merhi and Mr Oneissi request that, if the Trial Chamber declares the statements admissible, the Prosecution makes both witnesses available for cross-examination.²²

Prosecution reply

12. Replying to counsel for Mr Ayyash's submission that Witness 703 is not an expert in Lebanese telecommunications systems, the Prosecution argues that Mr Donaldson's earlier report was classified as an expert report 'out of an abundance of caution'. Mr Donaldson is an expert witness who will be testifying about telecommunications analysis and attribution of telephones to the Accused. The Prosecution submits that Witness 703's analysis, though requiring familiarity with Microsoft's Excel program, does not require independent knowledge of telecommunications systems.²³

13. The Prosecution also addresses counsel for Mr Merhi's complaint that they only received access to electronic presentation of evidence in September 2015 by clarifying that all Defence counsel have had access to the system through the Special Tribunal's Information Technology Services Section since September 2014.²⁴

DISCUSSION

Amending the Prosecution's witness list

14. The Trial Chamber may, in the interests of justice, allow a party to amend its witness list, but 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.²⁵ The evidence must be *prima facie* relevant and probative, and the Trial Chamber may consider general factors that include: (i) whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage; (ii) the stage of the proceedings; (iii) whether granting the amendment would result in undue delay.²⁶

15. The Trial Chamber, having read and considered Witness 703's statement, is satisfied that his evidence is relevant and probative. It can help the Trial Chamber understand the

²² Merhi Defence response, para. 6; Oneissi Defence response, paras 7-8.

²³ Prosecution reply, paras 2-3.

²⁴ Prosecution reply, para. 4.

²⁵ F2263, Corrected Version of 'Decision on Prosecution Request to Amend Its Witness and Exhibit Lists' Dated 13 October 2015, 19 October 2015, para. 28; F2149, Decision on Prosecution Motion to Admit 62 Photographs, 28 August 2015, para. 3.

²⁶ Decision of 28 August 2015, para. 3.

evidence the Prosecution will present from the call data records and will assist in determining their reliability. As this evidence largely duplicates and corroborates a similar report already on the Prosecution's exhibit list—performed by Mr Donaldson—the Trial Chamber does not believe this addition to the Prosecution witness list will unduly burden the Defence preparations for trial. The Trial Chamber is therefore satisfied that it is in the interests of justice to allow this addition to the Prosecution's witness list.

Admitting the statements into evidence

16. In earlier decisions, the Trial Chamber determined the procedural safeguards for admitting statements into evidence under Rule 155. These allow it to receive written testimony in lieu of live oral testimony in the courtroom. In particular, a statement must meet the basic requirements for admission into evidence under Rule 149 and, if going to proof of the acts or conduct of the Accused, may not be admitted without cross-examination.²⁷ These principles are applicable here.

17. Furthermore, the Trial Chamber previously held that a witness statement does not necessarily need to be on a Party's exhibit list for admission into evidence, as long as the witness appears on the Party's witness list.²⁸ The substantial point is to ensure that the opposing Party has notice of the intended evidence. If the other Parties have notice of the scope of the witness's evidence, the Trial Chamber does not consider that every statement needs to appear on the calling Party's exhibit list.

18. The Trial Chamber considers that, in this instance, the Defence have had adequate notice of Witness 575's and Witness 703's evidence. For Witness 703, though the Prosecution is only now seeking to add him to its witness list, the test applied above would be identical if the Prosecution had sought to add the statement to its exhibit list. His evidence is relevant and probative, and the Defence had notice that the Prosecution could tender a statistical analysis of the timing differences in call data records. Separate addition to the exhibit list for Witness 703's statement is therefore unnecessary.

²⁷ STL-11-01/PT/TC, F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, para. 13; F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, paras 7-14; STL-11-01/T/TC, 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.

²⁸ F2224, Corrected Version of 'Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087' of 29 September 2015, 5 October 2015, para. 18.

19. The Trial Chamber understands the Defence submission that the Prosecution's summary of Witness 575's evidence indicates that he would testify about the transfer of evidence to the Special Tribunal. However, while the Trial Chamber does not encourage this practice, the Prosecution, on 16 September 2015, highlighted that it would be tendering a statement by Witness 575 on the technical aspects of the electronic presentation of evidence. The Trial Chamber, therefore, considers that Witness 575's statement can be admitted without having to appear on the Prosecution's exhibit list.

20. The Trial Chamber finds the two witness statements relevant and probative. Witness 575's evidence can assist the Trial Chamber in determining the reliability of the electronic presentation of evidence system. Witness 703's evidence assists the Trial Chamber in assessing the reliability of the call data records of the Lebanese mobile telecommunication service providers, from which the Prosecution derived the call sequence tables it intends to use as evidence. The statements are therefore admissible into evidence. However, as counsel for Mr Merhi and Mr Oneissi requested to cross-examine the witnesses, the Trial Chamber requires the Prosecution to call Witnesses 575 and 703 and, under Rule 155 (C) or Rule 156, make them available for questioning by the Judges and cross-examination by the Defence.

21. Contrary to the arguments of counsel for Mr Badreddine and Mr Sabra, the Trial Chamber does not consider this evidence to be premature without having heard evidence on the provenance of the call data records. Although the statements concern the call data records, further information on the provenance of the call data records is not necessary to understand the statements. Nor does the analysis performed by Witness 703 require expert knowledge, skills or training. He clearly states his understandings of the call data records and how the Lebanese telecommunications systems operate. Any evidence contrary to his assumptions will, of course, be factored into the Trial Chamber's eventual determination of evidentiary weight.

22. The Trial Chamber does not believe that these witnesses must be heard orally. Particularly since it has ordered the Prosecution to make them available for questioning by the Judges and cross-examination, any questions the Judges have, for instance about Witness 703's methodology, may be clarified with the Witness at that time. Similarly, during cross-examination, counsel for Mr Ayyash may question Witness 575 on the parts of his statement they submitted were inconsistent with Mr Fahey's testimony, if they wish.

23. Regarding counsel for Mr Merhi's complaint that they 'only actually had access to the EPE system with an independent server since 28 September 2015',²⁹ the Prosecution's reply that all Defence teams received access in September 2014³⁰ and counsel's further clarification,³¹ the Trial Chamber understands counsel's concern, but ultimately does not consider it relevant to determining the issue at hand—whether the statements are admissible into evidence. Counsel may, though, file other submissions requesting relief, as necessary and appropriate.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS the Prosecution leave to amend its witness list by adding Witness PRH703;

DECLARES admissible under Rule 155 (C) the statements of Witnesses PRH575 and PRH703 as listed in Annex A to the motion and requires the Prosecution to make them available for cross-examination under Rule 156; and

DECIDES that it will, at a suitable stage in the proceedings, formally admit the statements into evidence.

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

Leidschendam,
The Netherlands

21 October 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



²⁹ Merhi Defence response, para. 4.

³⁰ Prosecution reply, para. 4.

³¹ Merhi Defence clarification, paras 3-5.