



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,

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THE PROSECUTOR

v.

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

**DECISION ON PROSECUTION RULE 154 MOTION
FOR THE ADMISSION OF DOCUMENTS RELATING TO TELEPHONE
SUBSCRIBER RECORDS FROM THE ALFA COMPANY**

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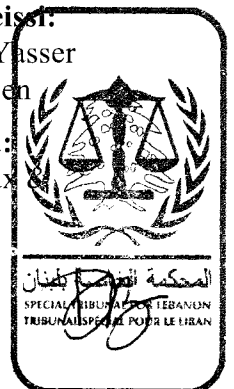
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Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks the admission into evidence, under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence, of eighty-eight documents relating to telephone records received from the Lebanese mobile telecommunication service provider 'Alfa'.¹ In the consolidated indictment, the Prosecution alleges that five interconnected groups of mobile telephones were involved in the assassination of the former Lebanese Prime Minister Mr Rafik Hariri, in Beirut, on 14 February 2005.² According to the Prosecution, the documents proposed for admission will assist in the attribution of certain telephone numbers to the five Accused.³ The Prosecution also seeks the Trial Chamber's leave to add to its exhibit list eight of the eighty-eight documents proposed for admission.⁴ Counsel for the Accused, Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi, and Mr Assad Hassan Sabra responded to the motion.⁵ While counsel for Mr Sabra do not oppose the motion,⁶ counsel for the other Accused oppose it either in part, with regard to some of the documents, or in its entirety, requesting that the decision on their admission into evidence be deferred. The Prosecution replied to the Ayyash Defence response.⁷

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2481, Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the Alfa Company (public with confidential annexes A-H), 4 March 2016, paras 1 and 41. The documents proposed for admission are listed in confidential annexes A- E to the Prosecution motion.

² Consolidated indictment, para. 14.

³ Prosecution motion, paras 1, 7, 19, 31. The Prosecution underlines that the attribution of a telephone number is based on an analysis of the totality of the evidence, and that each individual subscriber record fits into the Prosecution's case as one piece of evidence to be considered in the analysis of the telephone attribution.

⁴ Prosecution motion, paras 5, 36-39, 41, and annex G.

⁵ F2491, Public Redacted version of Sabra Defence Response to "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the Alfa Company" (a confidential version was also filed on 15 March 2016), 15 March 2016; F2498, Ayyash Defence Response to Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Records from the Alfa Company, 17 March 2016; F2511, Badreddine Defence Response to "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the Alfa Company", 21 March 2016; F2509, Réponse de la défense de Merhi à la "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the Alfa Company", 21 March 2016.

⁶ Sabra response, para. 2.

⁷ F2513, Prosecution Reply to Ayyash Defence Response to the 'Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Records from the Alfa Company', 22 March 2016.

A. AMENDMENT OF THE PROSECUTION'S EXHIBIT LIST UNDER RULE 91**Submissions**

2. As a prerequisite to the admission into evidence of eight of the documents tendered, the Prosecution seeks the Trial Chamber's leave to add them to its exhibit list. Seven of these documents are subscriber notes.⁸ The eighth document is a list of IMEIs⁹ for a number sought to be attributed to the Accused, Mr Ayyash.¹⁰

3. In support of its request, the Prosecution argues that the eight documents are relevant and have probative value.¹¹ The Prosecution also submits that it has good cause for adding them at this stage,¹² stating that: (i) five of the seven subscriber notes sought to be added contain information which is already on the exhibit list, in another form; and (ii) the remaining two subscriber notes have been created to assist in the analysis of third party contacts;¹³ and (iii) the list of IMEIs sought to be added assists in the analysis of the relevant phone number.¹⁴ The Prosecution adds that the amendments will not cause undue delay given that all eight exhibits have been previously disclosed to the Defence and they will provide 'the best available evidence for the benefit of the Trial Chamber'.¹⁵

4. Counsel for Mr Badreddine, Mr Merhi and Mr Sabra do not oppose the addition of the documents.¹⁶ Counsel for Mr Ayyash object only to the addition of the list of IMEI numbers. They claim that the Prosecution has failed to establish the authenticity and reliability of the relevant data.¹⁷ The Prosecution submits that counsel for Mr Ayyash mistakenly states that the reliability and relevance of the IMEI data have not been proved.¹⁸

⁸ Prosecution motion, para. 37.

⁹ Every mobile telephone handset has a unique International Mobile Equipment Identity (IMEI) number. *See* Prosecution motion, para. 1, fn. 3.

¹⁰ Prosecution motion, para. 38.

¹¹ Prosecution motion, para. 36.

¹² Prosecution motion, para. 37.

¹³ Prosecution motion, paras 37, 39.

¹⁴ Prosecution motion, para. 38.

¹⁵ Prosecution motion, para. 39.

¹⁶ Badreddine response, para. 2; Merhi response; Sabra response, para. 2.

¹⁷ Ayyash response, paras 5-6.

¹⁸ Prosecution reply, paras 2, 6.

Discussion

5. The Trial Chamber may, in the interests of justice, allow a party to amend its witness and exhibit lists. 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. The evidence must be *prima facie* relevant and probative, and the Trial Chamber may consider, among other factors; i) whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage; ii) the stage of the proceedings; and iii) whether granting the amendment would result in undue delay.¹⁹

6. The Trial Chamber finds that the documents are *prima facie* relevant and probative, as explained below. Adding these documents to the exhibit list will not unduly impact Defence preparations for trial nor cause significant delay. They have already been disclosed to the Defence and the contents of five of the eight documents are already on the exhibit list in another form.²⁰ The Trial Chamber is satisfied that the interests of justice allow the Prosecution to amend its exhibit list.

B. ADMISSION OF DOCUMENTS INTO EVIDENCE UNDER RULE 154

7. Eighty-five of the documents are subscriber records for Alfa mobile telephones. They consist of eighty-one so-called 'subscriber notes', three subscriber contracts,²¹ and one document containing subscriber information for three Alfa telephone numbers.²² The Prosecution explains that the subscriber notes are extracted from the Alfa subscriber databases containing the information provided by individual subscribers when applying for a telephone number.²³ The remaining three

¹⁹ F2544, Decision on Prosecution Motion to Add Inventory and Supporting Documents relating to the Searches of the Residence of Ahmed Abu Adass, 11 April 2016, para. 4; F2270, Decision Authorising the Prosecution to Amend Its Exhibit List, 15 October 2015, para. 4; 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; F1901, Decision on Prosecution Motion to Amend its Exhibit List and Oneissi Defence Request to Stay the Proceedings, 13 April 2015, para. 34.

²⁰ The information provided in the five documents (ERNs: D0470568-D0470568, D0470569-D0470569, D0470570-D0470570, D0470571-D0470571, D0470572-D0470572) is contained in a larger document that is already on the exhibit list: ERN D0135398-D0135398.

²¹ The three subscriber contracts consist of the hard copy of the contract that an individual signed when applying for an Alfa telephone number. Prosecution motion, para. 10.

²² Prosecution motion, para. 2. This document, according to the Prosecution, demonstrates that two Alfa numbers which were in contact with two numbers attributed to the Accused, Mr Badreddine, were subscribed to by the Ministry of Post and Telecommunications. Prosecution motion, para. 11; annex A, row 21.

²³ Prosecution motion, para. 20. The subscriber databases were provided by Alfa in electronic format. Prosecution motion, para. 10. The Prosecution submits—relying on the statements of Witnesses PRH692 and PRH431—that the subscriber notes were produced by analysts in the Office of the Prosecutor according to the following process: (i) the extraction of the subscriber information, for each relevant phone number, and its insertion in a Microsoft Word

documents proposed for admission are lists of IMEIs used with three Alfa mobile telephone numbers which the Prosecution seeks to attribute to the Accused, Mr Badreddine and Mr Ayyash.²⁴

8. The Prosecution submits that the probative value of the exhibits is not outweighed by any prejudice to the Accused's right to a fair trial. The documents have been disclosed and the Defence may cross-examine their analyst Mr Andrew Donaldson (Witness PRH230)—who relies upon most of them in his telephone attribution reports—on how he used them and the attribution process in general.²⁵

I. Whether the documents are relevant

Submissions

(i) The eighty-five telephone subscriber records

9. The telephone subscriber records are the records of the name and details (such as activation and cancellation dates of subscription, and in some cases an address) of the subscribers of: (i) Alfa telephone numbers the Prosecution seeks to attribute to the five Accused; and (ii) Alfa telephone numbers which were in contact with those that the Prosecution seeks to attribute to the Accused (the users of the latter telephone numbers are referred to as 'third party contacts').²⁶ The Prosecution submits that these documents are relevant and have probative value.²⁷ It relies on them to identify the subscribers or users of these telephone numbers, including third party contacts, and ultimately, to attribute telephone numbers to the Accused.²⁸

10. The Prosecution lists in an annex the call sequence tables for each number sought to be attributed to the Accused and referred to when explaining the 'probative value and relevance' of documents proposed for admission.²⁹ Call sequence tables will allegedly show contacts between

document; (ii) subsequent verification, by another analyst, of the correspondence between the extracted information and the original source content. *See* Prosecution motion, para. 21.

²⁴ Prosecution motion, para. 3.

²⁵ Prosecution motion, para. 35. A telephone attribution report collates and examines evidence regarding the attribution of one or more telephone numbers to each of the Accused. *See* F1852, Decision on Prosecution Motion to Add Four Items to the Exhibit List, 13 February 2015, para. 11, fn. 22.

²⁶ Prosecution motion, paras 1-2, 8.

²⁷ Prosecution motion, paras 13-19.

²⁸ Prosecution motion, paras 1, 7, 13, 19, 36.

²⁹ Prosecution motion, para. 4. *See* annex H to the Prosecution motion. 'Probative value and relevance' is one of the columns in the annexes A-E listing the documents proposed for admission.

some of the subscribers or users identified through the documents and telephone numbers attributed to the Accused.

11. Counsel for Mr Ayyash and Mr Sabra do not object to the relevance of the documents proposed for admission.³⁰ Counsel for Mr Badreddine submit that the Prosecution has not established the relevance of thirty subscriber notes and of the document providing subscriber information for three Alfa telephone numbers, as they concern third party contact numbers. They argue that ‘the relevance of the Third Party Contact numbers’ is contingent upon call sequence tables which have not yet been admitted into evidence.³¹

(ii) The three lists of IMEIs

12. The Prosecution submits that these documents are relevant because they list IMEIs used on specific dates by three Alfa telephone numbers—one of which the Prosecution seeks to attribute to the Accused, Mr Badreddine, and two to the Accused Mr Ayyash. The Prosecution argues that they are relevant to the analysis of those numbers’ attribution.³²

Discussion

13. The documents proposed for admission are all relevant. The attribution of telephones is a key part of the Prosecution’s case, as alleged in the consolidated indictment.³³

14. The telephone subscriber records and lists of IMEIs contain information on the registered subscribers,³⁴ or movements of SIM cards from one handset to another for certain telephone numbers. These telephone numbers are relevant because they are either numbers that the Prosecution seeks to attribute to an Accused or numbers that the Prosecution alleges were in contact with numbers the Prosecution seeks to attribute to an Accused.

³⁰ Ayyash response, paras 2, 7; Sabra response, para. 2.

³¹ Badreddine response, para. 9. Counsel for Mr Badreddine claim that the Prosecution, in doing so, places ‘the cart before the horse’. Badreddine response, para. 10.

³² Prosecution motion, paras. 1, 31; annex A to Prosecution motion, row 34; annex B, rows 24-25.

³³ Consolidated indictment, paras 14-19. *See also* consolidated indictment, paras 20-47.

³⁴ Only three subscriber records demonstrate instead the registration of three telephone numbers to ‘unnamed Alfa accounts’.

15. The documents related to third party contacts are relevant because they provide the identity of subscribers of certain numbers.³⁵ However, other evidence—the call sequence tables—will tend to prove, according to the Prosecution, the contacts between these subscribers and the Accused.

16. The Trial Chamber has not yet made a decision on admitting the call sequence tables into evidence. But this does not prevent the Trial Chamber from admitting into evidence other relevant evidence that may be contingent upon the admission into evidence of the call sequence tables—such as the third party contract documents. No statutory provision specifies the order of receiving onto the trial record pieces of evidence that may be contingent upon each other. It is self-evident that these documents will lose their probative value if the call sequence tables are not admitted into evidence.

17. Further, the Trial Chamber has already admitted some evidence related to the attribution of telephones to the Accused.³⁶ The Defence did not specifically object to the Prosecution's reliance on call sequence tables to explain the 'specific probative value' of the documents submitted for admission, on the grounds that they had not yet been admitted into evidence.³⁷

II. Whether the documents had to be tendered through a witness

Submissions

18. The Prosecution submits, with regard to the provenance of the telephone subscriber records (databases, contracts, and information), that the records are generally described in the statement, dated 11 November 2015, of Witness PRH707—the authorised representative for Alfa.³⁸ It also refers to passages of Witness 707's testimony.³⁹

³⁵ Two of the three subscriber notes demonstrating the registration of telephone numbers to 'unnamed Alfa accounts' assist, according to the Prosecution, in the analysis of third party contacts to numbers attributed to the Accused, Mr Merhi and Mr Oneissi. The third subscriber note demonstrating the registration to an unnamed Alfa account concerns a telephone number that is alleged to be a purple telephone used by Mr Sabra. *See* respectively, annex C, row 5, annex E, row 5, and annex D, row 1. The five interconnected groups of mobile telephones allegedly involved in the attack on 14 February 2005 have been colour-coded for ease of reference. *See* consolidated indictment, para. 15.

³⁶ F2297, Decision on Prosecution Motion for the Admission of Witness Statements Pursuant to Rule 155 and Documents Pursuant to Rule 154, 2 November 2015, paras. 24, 51, disposition.

³⁷ Decision of 2 November 2015.

³⁸ Prosecution motion, para. 12.

³⁹ Prosecution motion, fn. 7.

19. Counsel for Mr Badreddine opposed the admission into evidence of the documents concerning the attribution of telephones to Mr Badreddine, except for two subscriber contracts.⁴⁰ They argued that the documents should have been tendered through the testimony of Witness 707 and requested the Trial Chamber to order the Prosecution to do so during the witness's examination-in-chief, pursuant to Rule 130.⁴¹

20. Counsel for Mr Merhi, however, requested the Trial Chamber to defer any decision on the admission into evidence of the eighty-eight documents until after the conclusion of Witness 707's testimony.⁴² They submitted that Witness 707 must explain the process of collection, preservation and transfer of these documents and also provide information on their reliability and probative value before any decision by the Trial Chamber.⁴³ They argue that there are discrepancies between the subscriber databases provided by Alfa and the subscriber notes extracted from them.⁴⁴

21. At the hearing of 18 April 2016, the Prosecution—on the request of the Trial Chamber—stated that it had already 'elicited from [the witness] evidence on the compilation of the Alfa subscriber database which was retrieved upon request from the Prosecution'.⁴⁵ Further, the witness was not involved in the preparation of these extracts, and had already provided information on the meaning of the individual fields appearing in some of them.⁴⁶ The Prosecution was satisfied that it had elicited the evidence required from the witness for that purpose.⁴⁷

Discussion

22. Admitting evidence 'from the bar table', under Rule 154, without requiring a witness to produce or to identify it, is well-established in international courts and tribunals and this Trial

⁴⁰ Badreddine response, paras 2, 15. The documents concerning the attribution of telephone numbers to the Accused, Mr Badreddine are listed in annex A attached to the Prosecution motion.

⁴¹ Badreddine response, paras 4-8, relying on ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Bar Table Motion for the Admission of Documents Related to the Sarajevo Component, 11 May 2012. Counsel for Mr Badreddine submit that this would be the most efficient use of the Special Tribunal's and the Parties' resources and underlines that the Prosecution tendered similar types of documents through this witness. Counsel notes that the Trial Chamber has previously stated that it would not have followed the general guidelines of the ICTY *Karadžić* Trial Chamber in relation to bar table motions (referring to F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015). However, they argue that the present circumstances are entirely distinguishable, as Witness 707 is in mid-testimony.

⁴² Merhi response, relief requested.

⁴³ Merhi response, para. 2.

⁴⁴ Merhi response, relief requested.

⁴⁵ Transcript of 18 April 2016, p. 59.

⁴⁶ Transcript of 18 April 2016, p. 59.

⁴⁷ Transcript of 18 April 2016, p. 59.

Chamber. Material tendered in this manner—like any other evidentiary material—must meet the basic requirements for the 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. Only *prima facie* rather than definite reliability and probative value is required at this stage. Probative value 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.⁴⁸

23. In support of their request to tender the documents during Witness 707's examination-in-chief, counsel for Mr Badreddine pointed to a decision of the International Criminal Tribunal for the former Yugoslavia, in *Karadžić*, holding that 'the most appropriate method for the admission of a document is through a witness who can speak to it and answer questions thereto'.⁴⁹ The Trial Chamber has previously dealt with this point holding that it was not prepared to adopt those general guidelines in relation to bar table motions. In particular, the Trial Chamber did not agree with the *Karadžić* Trial Chamber's holding that these motions are supplementary measures to fill in gaps in a case, nor that they should be, generally, filed at later stages in a case. The Trial Chamber noted that in international criminal law proceedings there is neither a fixed methodology nor a firm principle that mandates how and when Chambers should receive documents into evidence from the bar table.⁵⁰

24. The Trial Chamber reiterates that the essential issue is whether the proposed documents would be admissible as documents that can be tendered without a witness.⁵¹ Rule 154 allows a Chamber to accept from the bar table contemporaneous documentary evidence if all the requirements for admission are satisfied.⁵² The Trial Chamber does not require the testimony of a witness to receive evidence if the criteria in Rule 149 (C) and (D) and in Rule 154 are met.

⁴⁸ Decision of 11 April 2016, para. 6; F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 66.

⁴⁹ Badreddine response, para. 7, referring to the *Karadžić* Decision of 11 May 2012, para. 4.

⁵⁰ Decision of 6 March 2015, paras 34-36.

⁵¹ Decision of 6 March 2015, para. 37.

⁵² Decision of 6 March 2015, para. 38.

25. The Trial Chamber has also previously found that for business records that appear to have been generated in the ordinary course of business, the requirements for admission into evidence may *prima facie* be satisfied.⁵³

26. Even if the Trial Chamber, in this case, might have ultimately found that it did not need a witness to receive the evidence, Witness 707 has now provided the necessary evidence as to the *prima facie* reliability and probative value of the documents, as explained below.⁵⁴ Witness 707 is in mid-testimony.

III. Prima facie reliability and probative value

Submissions

27. The Prosecution lists the supporting documents concerning reliability and the chain of custody in an annex.⁵⁵ It does not seek their admission into evidence now, unless the Trial Chamber deems it necessary.⁵⁶ In support of their reliability, it submits that the Alfa subscriber databases, contracts, document containing subscriber information and the lists of IMEI: (i) were provided to the United Nations International Independent Investigation Commission or to the Prosecutor in response to requests for assistance sent to the Lebanese authorities;⁵⁷ and (ii) contain subscriber information or information recorded and retained by Alfa during the normal course of its business.⁵⁸

⁵³ Decision of 6 March 2015, para. 38. The Trial Chamber has however underlined that such a conclusion does not mean of itself that it *must* admit the documents into evidence without a witness. The Trial Chamber has required, even when holding that documents are admissible from the bar table, that an available witness testify as to their content, or that a relevant witness statement also be tendered into evidence. Decision of 6 March 2015, paras 38, 40, 48, 52, 54.

⁵⁴ The Trial Chamber has also declared admissible specific paragraphs of his statements—although deferring their admission into evidence, pending further submissions and possibly evidence, until the conclusion of the witness's evidence. F2552, Decision on Prosecution Motion for the Admission of Statements by Witness PRH707 and on Ayyash Defence Motion to Strike the Prosecution Reply, 15 April 2016, paras 74-75, disposition.

⁵⁵ It is annex F to the Prosecution motion.

⁵⁶ Prosecution motion, para. 4. The Trial Chamber, however, notes that the Prosecution has sought the admission into evidence of the two statements of Witness 707 relied upon in annex F to the Prosecution motion. *See* F2450, Prosecution Motion for the Admission of Witness Statement signed by Witness PRH707, 12 February 2016 (public with confidential annex A).

⁵⁷ Prosecution motion, paras 20, 22-24, 26-29, 32-34. According to the Prosecution's submissions, the documents were provided either through the Ministry of Telecommunications or directly by Alfa representatives. *See* Prosecution motion, paras 25, 27-29.

⁵⁸ Prosecution motion, paras 9, 10, 20, 26-29, 31.

28. Counsel for Mr Ayyash complain that, despite the testimony of Witness 707, the Prosecution still relies on documents not yet properly before the Trial Chamber to provide information on the creation, storage, retrieval and production of telecommunications data and business records.⁵⁹

29. They also oppose the admission into evidence of the IMEI lists as lacking the required indicia of authenticity or reliability.⁶⁰ They argue that the responses to the requests for assistance, on which the Prosecution relies,⁶¹ only prove the chain of custody of the documents but not their reliability.⁶² Further, the Trial Chamber cannot be assured of the authenticity or reliability of the IMEI lists given that Witness 707: (i) was unclear in his testimony as to how or when IMEI data were placed into the data warehouse or when the data warehouse became functional; (ii) does not know how call data records were archived before 1 August 2004; and (iii) does not explain how or when archived records from 2002 or 2003, stored on magnetic tapes, were transferred to the data warehouse.⁶³

30. The Prosecution replied that the required indicia of reliability of the IMEI data are contained in Witness 707's evidence.⁶⁴ It submits that Witness 707 explained in detail the points raised by counsel for Mr Ayyash. Further, their submissions are incorrect.⁶⁵

31. Counsel for Mr Ayyash also contest 'the inferences that the Prosecution wishes to draw from third party contacts', namely, that a SIM card subscriber is the user of the SIM card.⁶⁶ In addition, counsel for Mr Badreddine submit that the Prosecution has failed to establish the probative value of the document providing subscriber information for three telephone numbers. They submit that: (i) the information that these mobile telephone numbers were subscribed to a government Ministry is insufficiently specific for assisting in determining the identity of the user(s) of the sequential mobile phones that the Prosecution attributes to Mr Badreddine;⁶⁷ and (ii) no valid inference can be drawn

⁵⁹ Ayyash response, para. 3.

⁶⁰ Ayyash response, para. 5.

⁶¹ Counsel for Mr Ayyash inadvertently refers to 'requests for assistance' as being relied upon by the Prosecution. However, the Trial Chamber understands that counsel intended to refer to 'responses to requests for assistance', as the Prosecution lists in annex F on 'Documents supporting reliability', and not the underlying requests.

⁶² Ayyash response, para. 5.

⁶³ Ayyash response, para. 5.

⁶⁴ Prosecution reply, para. 3.

⁶⁵ Prosecution reply, para. 4. Specifically, the Prosecution asserts that counsel for Mr Ayyash are incorrect in implying that magnetic tapes containing call data records are stored in the data warehouse, as they are only stored in the archives.

⁶⁶ Ayyash response, para. 4. To challenge this inference, counsel for Mr Ayyash rely on the testimony of Witness 707.

⁶⁷ Badreddine response, para. 14. The Prosecution alleges that Mr Badreddine, besides personal mobile telephones, used 'sequential mobile telephones'. These telephones, according to the Prosecution were used in sequential order, meaning that each telephone was used for a period of weeks or months and then replaced by another. See Consolidated indictment, para. 16.

with regard to one of the three telephone numbers, as according to the relevant information it was in contact with one alleged sequential mobile phone attributed to Mr Badreddine on only two occasions.⁶⁸

32. Counsel for Mr Badreddine also submit that any subscriber notes containing significant errors are unreliable and cannot be admitted.⁶⁹ In particular, they point to two discrepancies, in two subscriber notes, as found by Prosecution analyst Witness PRH693—who verified the correspondence between the content of the extracted subscriber notes and of the subscriber databases received from Alfa.⁷⁰

33. Finally, counsel for Mr Sabra, Mr Ayyash, Mr Badreddine and Mr Oneissi reserve their right—if the documents are admitted—to challenge the attribution of the telephone numbers referred to.⁷¹ In particular, counsel for Mr Sabra affirm that they intend to ‘verify the credibility and reliability of the exhibits’ by cross-examining several witnesses who are scheduled to testify on the attribution of those numbers. They argue that the withdrawal by the Prosecution of any of these witnesses will constitute a ground for the reconsideration of any Trial Chamber decision on the Prosecution motion and a valid ground for other relief.⁷²

Discussion

a. *The eighty-one subscriber notes extracted from the subscriber databases received from Alfa and the document providing information for three telephone numbers*

34. Witness 707 explained that the Alfa subscriber database for the billing system was used to generate the subscriber databases provided to the Special Tribunal’s Office of the Prosecutor in response to three requests for assistance.⁷³ He testified that the Alfa subscriber database for the billing system is a database containing subscriber details: ‘the name, address and other information

⁶⁸ Badreddine response, para. 14.

⁶⁹ Badreddine response, para. 12.

⁷⁰ Badreddine response, para. 11. Counsel for Mr Badreddine submit that the Prosecution has chosen not to rectify these errors, and re-create corrected extracts, despite being aware of the significant and misleading errors. Badreddine response, para. 12.

⁷¹ Ayyash response, paras 4, 7; Sabra response, para. 4; Badreddine response, para. 3.

⁷² Sabra response, paras 5-7.

⁷³ Transcript of 17 February 2016, p. 38. The Witness explained that, also in 2004 and 2005, Alfa had two databases, one for the billing system and another containing the subscriber technical profile. Transcript of 19 April 2016, pp 24-25. A screenshot of the subscriber database received by the Prosecution on 24 April 2010 from Alfa was admitted into evidence as P783. See transcript of 17 February 2016, p. 57.

related to the subscriber as a person', as well as the activation date of the subscription, the type of subscription and other information.⁷⁴ Alfa uses it to link a telephone number to a name and an address for issuing an invoice.⁷⁵ This information derives from his personal knowledge and that the source of the subscriber database, depending on the information, is the Alfa customer relations department or the Alfa billing system itself.⁷⁶ These records are retained in the ordinary course of business at Alfa.⁷⁷

35. The Trial Chamber is satisfied from this evidence that the Prosecution has proved the provenance of the subscriber databases and thus, their *prima facie* reliability. Further, the Trial Chamber has previously declared admissible, under Rule 154, subscriber notes extracted from subscriber databases.⁷⁸ It found that the fact that they were extracted from databases that the Lebanese communication services providers, and the Ministry of Telecommunications, provided to the Prosecution, conferred upon them sufficient indicia of reliability.⁷⁹

36. The two discrepancies pointed out by the Badreddine Defence and noted by Witness 693 concern; (i) for one document a switch-off date field with the date of 2 June 2005, but that is blank in the subscriber database received from Alfa; and (ii) for the other, an activation date field with the date of 8 May 2005, while the activation date in the subscriber database received from Alfa is 18 May 2005.⁸⁰

37. Witness 707's testimony cannot assist on the reason for any discrepancy between the content of the subscriber databases provided by Alfa and the subscriber notes. The discrepancies are minor

⁷⁴ Transcript of 17 February 2016, pp 37-39; transcript of 19 April 2016, pp 33, 37. Witness 707 testified that other information available in the billing system database is: 'the IMSI, date of entry into service, out of service'. Transcript of 19 April 2016, p. 37 (the IMSI is the 'international mobile subscriber identity', *see* transcript of 9 February 2016, pp. 27-28). The witness also explained that, along with the subscribers database, the billing system also takes into account another database, which is the database for calls or call data records, that come from the Mobile Switching Centre and does not encompass names or addresses. *See* transcript of 17 February 2016, pp 20, 40.

⁷⁵ Transcript of 17 February 2016, p. 20.

⁷⁶ Transcript of 17 February 2016, pp 37, 41-42. The witness testified that the field concerning the account ID was generated automatically by the billing system, while the information provided by the customers on the contract or identification form was entered manually into the billing system by Alfa's customer relations department staff. The witness consulted two departments when reviewing an extract of the database provided by Alfa: the team working on the billing system, and the customer relations department.

⁷⁷ Transcript of 9 February 2016, pp 28-29.

⁷⁸ Decision of 2 November 2015, para. 51, disposition. The Trial Chamber has also found that '[t]he mere fact that a party created a document or record does not make it inadmissible or inherently unreliable'. F1308, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, para. 10.

⁷⁹ Decision of 2 November 2015, para. 51.

⁸⁰ *See* annex A to the Prosecution motion, row 17 (ERN D0074778-D0074778), and row 28 (ERN D0132845-D0132845), and Witness Statement of Witness PRH693 (ERN 60314634-60314677), pp 12, 21.

and may be explicable; however, for the moment the Trial Chamber agrees with counsel for Mr Badreddine that these two subscriber notes cannot be admitted into evidence at this point. The Trial Chamber therefore seeks further clarification from the Prosecution.

38. The Prosecution also relies on several documents in support of the reliability and chain of custody of the documents proposed for admission, including responses from Alfa to requests for assistance and witness statements relating to the creation or verification of the subscriber notes. It does not seek their admission into evidence at this stage.⁸¹ With regard to responses to requests for assistance, the fact that the relevant documents were provided by Alfa is not disputed. Witness 707, in his testimony, referred to several of them.⁸² The Trial Chamber considers that their admission into evidence is not needed. It also considers that the Prosecution has satisfactorily explained the process of the creation of the subscriber notes and therefore has proved their provenance and *prima facie* reliability.

39. As to the document containing subscriber information for three Alfa telephone numbers, which was received from Alfa in response to a request for assistance, Witness 707 testified—with regard to other documents submitted to him and produced by Alfa in response to requests for assistance—that when a document contains names and addresses with regard to a telephone number, it means it is extracted from the subscriber database used in the billing department or billing system database.⁸³ It is therefore the same database used to generate the subscriber databases provided to the Prosecution by Alfa and from which subscriber notes were extracted. This document, instead of a specific name, shows as the subscriber the Ministry of Post and Telecommunications.⁸⁴

40. In conclusion, with the exception of two subscriber notes, the Trial Chamber is satisfied of the *prima facie* reliability and probative value of the subscriber notes proposed for admission and of the document providing subscriber information for three Alfa telephone numbers, as identifying the subscribers of relevant telephone numbers.

b. The three subscriber contracts and the three lists of IMEIs received from Alfa

⁸¹ Ayyash response, para. 3.

⁸² See e.g. transcript of 17 February 2016, pp 35-36.

⁸³ Transcript of 19 April 2016, pp 30-42. The Witness testified that Alfa needs to keep contract information—from where the details of the subscriber are inputted in the subscriber database—for ten years.

⁸⁴ There are a few columns or fields less (account ID, and network name, or IMSI). The other fields are the same as in the other documents the witness testified were extracted from the billing system database, or in the subscriber notes (such as: product name, active date, switch-off date). See transcript of 19 April 2016, pp 30-42.

41. At the Trial Chamber's request,⁸⁵ Witness 707 testified on the provenance of thirty-one contracts in the Alfa archives, after having made inquiries with the relevant Alfa departments.⁸⁶ The witness explained, more generally, the difference between 'contracts' signed by the customer and Alfa for the purchase of post-paid subscriptions, and 'identification forms', which were filled out for purchasing pre-paid lines.⁸⁷ The witness commented on representative examples of the documents, including identification forms for pre-paid lines, and one contract or subscriber form for a post-paid line.⁸⁸ The originals of the contracts are stored in the company archives.⁸⁹

42. The Trial Chamber is satisfied by the witness's testimony on the provenance, in general, of the Alfa contracts, and therefore of the *prima facie* reliability of the three Alfa contracts proposed for admission.⁹⁰

43. Concerning the 'lists of IMEI', the Prosecution tendered, through Witness 707, thirty-two documents from the Alfa records containing IMEI numbers.⁹¹ Those are list of IMEIs similar to those submitted here for admission.⁹²

44. Witness 707 explained that the four sets of numbers appearing on a representative document concern: (i) the subscriber's number or SIM number; (ii) the date and time of the call; (iii) the IMEI of the first handset used with the number; and (iv) the IMEI of the second handset used with the

⁸⁵ In the decision of 6 March 2015, the Trial Chamber requested the Prosecution to call a witness—or seek the admission into evidence of a witness statement—on the provenance of the contracts declared admissible in that decision. *See* Decision of 6 March 2015, para. 52. These documents were read into evidence on 13 March 2015 and 22 May 2015 and were admitted as exhibits P404, P405, P466 and P467. *See* Transcript of 17 February 2016, p. 21.

⁸⁶ Transcript of 17 February 2016, pp 21-22. Witness 707 testified that he had consulted with the information request team and the customer service department. Transcript of 19 February 2016, p. 22

⁸⁷ Transcript of 17 February 2016, pp 16-17.

⁸⁸ Transcript of 17 February 2016, pp 22-35. *See also* transcript of 29 January 2016, p. 53 (where the Prosecution anticipated that it intended 'to take the witness through *representative examples* of the documents').

⁸⁹ Transcript of 17 February 2016, pp 18-19.

⁹⁰ The Trial Chamber notes that the contract proposed for admission into evidence are all 'contracts' for post-paid lines.

⁹¹ Transcript of 18 February 2016, pp 7, 15. The Defence did not object to their admission. The Trial Chamber assigned them an exhibit number: P790. *See* Transcript of 18 February 2016, pp 19-20. These documents had been previously submitted for admission pursuant to a Rule 154 motion. *See* F2023, Prosecution Rule 154 Motion for the Admission of Business Records and Documents from Communication Service Providers (public with confidential annexes A and B), 23 June 2015, paras 24-25.

⁹² The Trial Chamber notes that one of the IMEI lists proposed for admission (ERN D0470399) concerns the same number as another IMEI list (D0162909) which was tendered and admitted on 18 February 2016 (as part of exhibit P790). Three sets of information provided by these two documents concern the same dates and therefore the pairs of old IMEIs and new IMEIs provided coincide. However, the IMEI list now proposed for admission provides additional information on a further movement of the relevant SIM card from one handset to another on an earlier date.

same number on that date.⁹³ The movement of the SIM card from one handset to another is information transferred between the handset and the network.⁹⁴ Although the information as such is not important for the company, it can be retrieved from its records to respond to requests from judicial and security authorities, like in this case.⁹⁵

45. The IMEI lists proposed here for admission concern IMEIs used before August 2004—the date from which, according to the Prosecution’s motion, Alfa began recording them in its calls data records.⁹⁶ According to the witness’s testimony, a different method and source was used for retrieving call data records predating August 2004.⁹⁷

46. Witness 707 testified that IMEI numbers do not exist in the billing system, but that ‘IMEI is one of the fields that exists in the data warehouse nowadays’, and are retrieved from there.⁹⁸ He stated that the archiving of call data records in the data warehouse started in August 2004.⁹⁹ Call data records predating August 2004 were retrieved by ‘translat[ing] or treat[ing] the archives, the raw CDRs’. Raw call data records in archives are stored on magnetic tapes.¹⁰⁰ In 2004 and 2005, magnetic tapes were the only way used to safeguard information, they were kept in safe boxes, to which few people had access.¹⁰¹

47. The Trial Chamber is therefore satisfied of the provenance and therefore the *prima facie* reliability of the IMEI lists.

48. As to counsel for Mr Badreddine’s submission on the lack of probative value of the subscriber information contained in the ‘document containing subscriber information for three telephone

⁹³ Transcript of 18 February 2016, pp 15- 17. Witness 707 testified that the document provides information on ‘the date of the call for a certain number using a first handset (old IMEI), then moving the SIM card from the first handset to a second handset (new IMEI)’.

⁹⁴ Transcript of 18 February 2016, p. 17.

⁹⁵ Transcript of 18 February 2016, pp 17-18. The witness confirmed that the same answers provided with regard to the example, applied to the similar IMEI-related documents tendered.

⁹⁶ Prosecution motion, para. 31. The Trial Chamber notes that also some IMEI lists tendered through Witness 707 (*see* para. 43 above), include information on IMEIs used before August 2004 (*see*, in Exhibit P790, the following ERNs: D0162905, D0162909, D0162881, D0162874, D0162905, D0162895, D0162902, D0162833-D0162836, D0162899, D0162891, D0162898, D0162908).

⁹⁷ Transcript of 10 February 2016, pp 40-41.

⁹⁸ Transcript of 10 February 2016, pp 52-53.

⁹⁹ Transcript of 10 February 2016, pp 40-41.

¹⁰⁰ Transcript of 10 February 2016, pp 43-44. Witness 707 uses the word ‘treatment’ as meaning ‘translating’ or ‘arranging’ the data: to ‘process the information to arrange it in a clear way for the person who wants to read certain information’. *See* Transcript, 10 February 2016, p. 34. The witness testified that the main source of call data records is the Mobile Switching Centre, and that, according to the requests received by Alfa, what was needed was looked into.

¹⁰¹ Transcript of 10 February 2016, pp 75-78.

numbers’ for one of those telephone numbers (3262150),¹⁰² the Prosecution is clear in its submissions that it intends to rely on that document to ‘demonstrate that [the] two [other] specific numbers [numbers 3250892 and 3261341] were subscribed to by the Ministry of Post and Telecommunications’.¹⁰³ Therefore, while counsel for Mr Baddreddine argue that no valid inference can be drawn with regard to number 3262150, the Prosecution does not submit that any inference should be drawn with regard to that number. As the document is a single document containing subscriber information for three telephone numbers—as provided by Alfa—and the Prosecution’s submissions are clear that it does not intend to rely on information concerning number 3262150, counsel for Mr Badreddine’s submissions are moot, and the admission of the document is not prejudicial.

49. With regard to their argument that the information that mobile telephone numbers were subscribed to a government ministry ‘is insufficiently specific’ for assisting in determining the identity of the user(s) of the sequential mobile phones (SMP),¹⁰⁴ the Trial Chamber notes the Prosecution’s submissions that ‘while the relationship between the accused Mr Badreddine and persons within the Ministry for Post and Telecommunications is unclear, the document assists in the analysis of two third party contacts to three SMP attributed to the Accused’. The Trial Chamber finds that the Baddreddine Defence arguments—like those of counsel for Mr Ayyash on the inferences not to be drawn from third party contacts documents—go to the ultimate weight to be given to the documents rather than to their *prima facie* probative value.

Conclusion

50. The Prosecution has demonstrated the *prima facie* reliability and probative value of the telephone subscriber records, and of the IMEI lists, and how it intends to rely upon them to attribute certain telephone numbers to the Accused.

51. The documents are therefore admissible under Rule 154. While the *prima facie* reliability and probative value of the documents is established, this does not prevent counsel for the Accused, if they so wish, from cross-examining Witness 707 further on any of these documents—given that the

¹⁰² Badreddine response, paras 13-14.

¹⁰³ Prosecution motion para. 11; annex A to the Prosecution motion, row 21.

¹⁰⁴ Badreddine response, para. 14.

witness in examination-in-chief provided general information on those type of documents or information contained in them—or from challenging their ‘definite’ reliability.

52. This decision concerns only the admissibility into evidence of the proposed documents. Counsel for the Accused may of course challenge the attribution of any number to the Accused.

CONFIDENTIALITY

53. Because they contain confidential information regarding the identity of numerous third party individuals, the Prosecution seeks to maintain the confidential status of the annexes to its motion.¹⁰⁵ The Trial Chamber reiterates the public nature of these proceedings and orders the Prosecution either to file a public redacted version of the annexes or have them reclassified as public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS the Prosecution leave to amend its exhibit list by adding the exhibits listed in Confidential Annex G;

DECLARES admissible the documents listed in Annexes A to E to the Prosecution motion, with the exception of two subscriber notes, as described in the decision; and

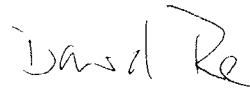
DECIDES that it will, at a suitable stage in the proceedings, formally admit the documents into evidence.

¹⁰⁵ Prosecution motion, para. 40.

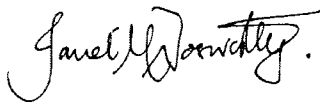
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,
The Netherlands

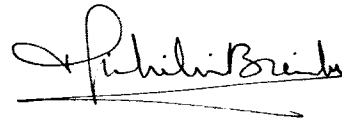
3 May 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

