

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 7 November 2016

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
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 OGERO COMPANY**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Milne

Counsel for Mr Salim Jamil Ayyash:

Mr Emile Aoun, Mr Thomas Hannis & Mr Chad Mair

**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Khalil**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Hassan
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Guénaél Mettrich
Mr Geoffrey Roberts

INTRODUCTION AND BACKGROUND

1. The Prosecution seeks the admission into evidence, under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence, of sixty telephone subscriber records from the Lebanese fixed telecommunications provider 'OGERO'.¹ The Prosecution's case, evidence, and procedural history concerning evidence from Lebanese telecommunications providers have been detailed elsewhere.²
2. According to the Prosecution, the documents proposed for admission will assist in the attribution of certain telephone numbers to the Accused. The Prosecution also seeks the Trial Chamber's leave to add to its exhibit list eight documents proposed for admission.³ Counsel for the Accused, Mr Assad Hassan Sabra, Mr Hassan Habib Merhi and the former Accused Mr Mustafa Amine Badreddine⁴ responded to the motion, while the Prosecution replied to the Sabra Defence response.⁵

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2487, Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the OGERO Company, 10 March 2016 ('Prosecution motion'), paras 1, 32 (public with confidential annexes A-H). The documents proposed for admission are listed in confidential annexes A-E to the Prosecution motion.

² See F2750, Reasons for Admitting Witness 705's Statements and Annexes into Evidence, 30 September 2016, paras 1-11; F2767, Written Reasons for Admitting Witness 707's Statements and Annexes into Evidence, 10 October 2016, paras 1-11; F2793, Reasons for Decision Admitting Prosecution's Cell Site Evidence, 26 October 2016, paras 1-10; Decision on the Admission of Call Sequence Tables Related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements, 31 October 2016, paras 1-9; F2799, Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks, 31 October 2016, paras 1-6.

³ Prosecution motion, para. 4, annex G. 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 The Appeals Chamber has found that sufficient evidence has been presented by the Prosecution to convince it that the death of Mr Badreddine has been proven to the requisite standard. Accordingly, the Trial Chamber terminated, without prejudice, the proceedings against Mr Badreddine. See STL-11-01/T/AC/AR126.11, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0019-AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016; F2633, Order Terminating Proceedings Against Mustafa Amine Badreddine Without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016.

⁵ F2503, Sabra Defence Response to "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the OGERO Company", 17 March 2016 ('Sabra response') (confidential; a public redacted version was filed on the same day); F2510, Prosecution Reply to the Sabra Defence Response to the Prosecution Rule 154 Motion for the Admission of Documents relating to the Telephone Subscriber Records from the Ogero Company, 21 March 2016 ('Prosecution reply') (public); F2515, Réponse de la défense de Merhi à la "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the OGERO Company", 23 March 2016 ('Merhi response') (public); F2525, Badreddine Defence Response to "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the OGERO Company", 29 March 2016 ('Badreddine response') (public).

AMENDING THE PROSECUTION'S EXHIBIT LIST

Prosecution

3. As a prerequisite to the admission into evidence of the eight documents tendered which are not on its exhibit list, the Prosecution requests the Trial Chamber's leave to add them. Seven documents are four landline subscription records and three billing records, while the eighth is a subscriber note. The Prosecution argues that they are relevant and have probative value. It has good cause for adding them at this stage as (i) the four landline subscription records and three billing records are fresh extracts from larger ranges of documents already on its exhibit list; (ii) the remaining subscriber note was created to assist in the analysis of third party contact to a telephone number attributed to the Accused, Mr Sabra; and (iii) all eight documents have been disclosed. The amendment will not cause undue delay, the documents are not voluminous, and they 'facilitate the efficient presentation of evidence at trial by only presenting the most relevant evidence'.⁶

Defence

4. Counsel for Mr Sabra does not oppose amending the Prosecution's exhibit list, if and when the authenticity, reliability and credibility of the documents have been ascertained through relevant witnesses.⁷ Counsel for Mr Merhi and counsel for Mr Badreddine do not directly address the request.

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, whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage, the stage of the proceedings and whether granting the amendment would result in undue delay.⁸

⁶ Prosecution motion, paras 27-30.

⁷ Sabra response, para. 4.

⁸ 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

6. As explained below, the Trial Chamber finds that the documents are relevant and have probative value. Adding these documents to the exhibit list will not unduly impact Defence trial preparations nor cause significant delay. They have already been disclosed and the contents of seven of the eight documents are already on the exhibit list within larger ranges of other documents.⁹ The Trial Chamber is satisfied that the interests of justice allow the Prosecution to amend its exhibit list. The issue of a witness attesting to the reliability and authenticity of the documents is discussed below.

ADMITTING THE DOCUMENTS INTO EVIDENCE UNDER RULE 154

Prosecution

7. The Prosecution submits that the sixty OGERO landline subscriber records are relevant because they show the identities of third parties who subscribed to OGERO numbers in contact with telephone numbers that the Prosecution seeks to attribute to each of the four Accused and Mr Badreddine and they show that two OGERO numbers were registered to Mr Ayyash.¹⁰ In turn, this is relevant, together with other evidence, to the attribution to the Accused of a number of network and group mobiles that the Prosecution alleges were used in the perpetration of the attack that killed Mr Rafik Hariri and others on 14 February 2005.¹¹

8. As to reliability and probative value, the Prosecution explains that fifty-three subscriber records are ‘subscriber notes’ which contain information provided by individual subscribers when applying for an OGERO telephone number.¹² The Prosecution explains—relying on two statements from Witness PRH431 that are not tendered into evidence—that they were produced by an analyst in the Office of the Prosecutor by extracting the subscriber information for each relevant number from the OGERO subscriber database. This was provided by the company in electronic format in response

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.

⁹ See ERNs 60143645-60143711, 60279292-60279372, 60195524-60195717.

¹⁰ Prosecution motion, paras 11-17. Confidential annex A outlines OGERO subscriber notes relating to former Accused Mr Badreddine; confidential annex B outlines OGERO subscriber notes relating to Mr Ayyash; confidential annex C outlines OGERO subscriber notes relating to Mr Merhi; confidential annex D outlines OGERO subscriber notes relating to Mr Sabra; confidential annex E outlines OGERO subscriber notes relating to Mr Oneissi. The specific probative value and relevance of each exhibit is outlined in further detail in a column entitled ‘Probative Value and Relevance’ in each confidential annex.

¹¹ Prosecution motion, paras 1, 6, 17. See Amended consolidated indictment, paras 14-19.

¹² Prosecution motion, paras 19, 22-24.

to a Prosecution request for assistance, and copied into a Word document. The extracted information was verified by comparing it to the original content.¹³

9. The remaining seven documents are four landline subscription records and three billing records (relating to three of the four land subscription records), obtained pursuant to three separate requests for assistance from the Prosecution to the Government of the Lebanese Republic. They contain personal information provided by subscribers in applying for an OGERO number, and related invoices. These were generated by OGERO in the ordinary course of its business.¹⁴

10. With respect to the subscriber records generally, the Prosecution relies on a number of responses to its requests for assistance to demonstrate the chain of custody of the subscriber records. In addition, the Prosecution also relies on a witness statement from a senior OGERO representative confirming the chain of custody and the provenance of the OGERO subscriber database and contracts, which it anticipates will be tendered into evidence in the near future.¹⁵ These are outlined in annex F to the Prosecution motion and are not sought to be admitted into evidence ‘unless the Trial Chamber deems it necessary.’¹⁶

11. The Prosecution submits that the probative value of the subscriber records is not outweighed by any prejudicial effects and that their admission does not prejudice the Accused’s right to a fair trial. The documents have been disclosed, their relevance is known to the Defence as Prosecution analyst Andrew Donaldson (Witness PRH230) relies on most of these for his telephone attribution reports¹⁷ and the Defence may cross-examine him. The admission of the subscriber records is efficient and serves the interests of justice and a fair and expeditious trial.¹⁸

¹³ Prosecution motion, para. 20.

¹⁴ Prosecution motion, paras 2, 9, 22-24.

¹⁵ Prosecution motion, para. 10. Since the filing of the Prosecution motion, the Prosecution has sought to admit this statement into evidence: F2805, Prosecution Motion for the Admission of the Consolidated OGERO statement pursuant to Rule 155, 2 November 2016. The Trial Chamber notes, in this respect, the position of the Prosecution on that motion’s impact on the present decision as expressed in court, namely, that it has none. The Defence made no submissions on this matter in court. *See* provisional transcript of 3 November 2016, pp. 22-23.

¹⁶ Prosecution motion, para. 3.

¹⁷ 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; F2584, Decision on Prosecution Rule 154 Motion for the Admission of Documents Relating to Telephone Subscriber Records from the Alfa Company, 3 May 2016, para. 8, fn. 25.

¹⁸ Prosecution motion, para. 26.

Defence

12. Defence counsel, to varying degrees, share one common underlying submission: that the Prosecution should first call a witness or witnesses to testify on the reliability, authenticity and provenance of the OGERO subscriber records before they can be admitted into evidence.¹⁹

13. Counsel for Mr Sabra submits that the documents themselves do not offer such evidence on their own and that the Prosecution acknowledges the evidential inadequacy of the records since it seeks to tender the statement of a senior OGERO representative, on the issue of their provenance, in the future.²⁰ The motion is therefore premature. Nevertheless, and subject to its usual caveats, counsel for Mr Sabra do not oppose the admission of the subscriber records into evidence if and when the authenticity, reliability and credibility of the documents have been ascertained through relevant witnesses.²¹ In light of the six witnesses on the Prosecution's witness list that are scheduled to testify on the attribution of two numbers, the Sabra Defence will seek to verify the credibility and reliability of the exhibits through these witnesses.

14. Counsel acting for Mr Badreddine argued that the use of Rule 154 is inappropriate as the attribution of telephones to the Accused is a central component of the Prosecution's case and that the Prosecution appears to concede that it can offer no indicia of reliability at this stage, since it will tender evidence on this issue in the future.²² A witness should therefore be called first and a decision on the OGERO subscriber records should be deferred. They also oppose the admission of nine specific subscriber records on the basis that the Prosecution has not provided information on the alleged relationship between those third party subscribers and Mr Badreddine nor evidence on how they are relevant to the Prosecution's case against him. They therefore lack relevance and probative value.²³

15. Counsel for Mr Merhi submit that a witness must explain the collection, preservation and transfer of the documents to the Prosecution and the Defence be permitted to test this evidence. They

¹⁹ Sabra response, paras 2-4; Badreddine response, paras 4, 6; Merhi response, para. 2.

²⁰ The Prosecution has since tendered the witness statement contained in Prosecution motion, annex F concerning this matter into evidence. *See* fn. 15 above.

²¹ Sabra response, paras 3-10.

²² The Prosecution has since tendered the witness statement contained in Prosecution motion, annex F concerning this matter into evidence. *See* fn. 15 above.

²³ Badreddine response, paras 4, 6, 9.

also deny the inferences sought by the Prosecution concerning the attribution of the telephones to Mr Merhi.²⁴

Prosecution reply

16. The Prosecution's reply addresses the submissions of counsel for Mr Sabra. The witnesses cited by the Sabra Defence, through whom they intend to test the credibility and reliability of the exhibits, are not witnesses from the OGERO company and there is no basis for assuming that they could give any meaningful evidence on such matters. The Prosecution argues that subscriber records do not purport to be the definitive or sole evidence on the attribution of telephone numbers; that the Rules do not provide for 'contingent admissibility' and that the documents' admissibility stand to be judged on the indicia of their reliability alone; that counsel for Mr Sabra conflate admissibility with the weight accorded to the evidence; and that the Sabra Defence attempts to dictate which witnesses should be called by the Prosecution.²⁵

Discussion

17. The Trial Chamber has identified the principles on the admission of documents under Rule 154 and procedural safeguards for the admission of material tendered 'from the bar table'. The material must be relevant and probative, and its probative value must not be outweighed by the need to ensure a fair trial.²⁶ Definite reliability is unnecessary; *prima facie* reliability is sufficient.²⁷ In addition, how and where each document or record fits into the tendering party's case must be clearly explained.²⁸ The weight that the Trial Chamber may ultimately give to the material is separate and distinct from its probative value.

18. The documents proposed for admission are all relevant, since the attribution of mobile telephones to the Accused is a key part of the Prosecution's case as alleged in the amended

²⁴ Merhi response, paras 2-3.

²⁵ Prosecution reply, paras 7-10.

²⁶ See 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 UNIIC and STL's Prosecution, 6 May 2015 ('CST decision'), paras 66, 111; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015 ('Mobile documents decision'), para. 33; F1781, Corrected Version of "Decision on Prosecution Motion to Admit into Evidence Geographic Documents" of 8 December 2014, 10 December 2014, para. 4.

²⁷ F1308, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014 ('Visuals decision'), para. 8; F1350, Decision on Prosecution's Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014 ('Victims decision'), para. 7; Mobile documents decision, para. 33; CST decision, para. 111.

²⁸ CST decision, para. 111; Mobile documents decision, para. 33; Victims decision, para. 7; Visuals decision, para. 6.

consolidated indictment.²⁹ The OGERO subscriber records provide evidence that assists the Prosecution. The submissions of the Badreddine Defence contesting this issue are therefore rejected.

19. The Trial Chamber has previously admitted into evidence, under Rule 154, OGERO subscriber notes that were extracted from the OGERO database in the Prosecution's possession.³⁰ It found the requisite *prima facie* indicia of reliability from their sourcing from the business records of a Lebanese telecommunications service provider and their transfer to the Prosecution through the Lebanese Ministry of Telecommunications.³¹ In that decision, the Merhi Defence, which was affected by the OGERO evidence, did not insist that the Prosecution call a witness.³² The Trial Chamber held that no witness was required to testify as to the reliability and provenance of the subscriber records.

20. The present motion is no different. The Defence has not drawn to the attention of the Trial Chamber any issue which could reasonably call into question the accuracy of the subscriber records. The Trial Chamber therefore holds that an OGERO witness is not required to testify on such matters and accordingly dismisses the Defence arguments concerning the prematurity of the Prosecution's motion without the testimony of such a witness.

CONFIDENTIALITY

21. The Trial Chamber reiterates the public and transparent nature of these proceedings. Filings are to be public whenever possible; confidentiality is the exception, not the rule. Here, the Prosecution requests that the annexes to its motion remain confidential as they contain information regarding the identity of numerous third party individuals. The Defence has not objected. For the reasons submitted by the Prosecution, the Trial Chamber grants its confidentiality request.

²⁹ See Amended consolidated indictment, paras 14-47.

³⁰ See F2297, Decision on Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155 and Documents pursuant to Rule 154, 2 November 2015 ('Decision of 2 November 2015'). They are now exhibits P670, P674, P675, P677 and P680.

³¹ Decision of 2 November 2015, para. 51.

³² See F2216, Merhi Defence Response to the "Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155 and Documents pursuant to Rule 154", 24 September 2015.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

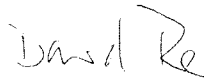
GRANTS the Prosecution leave to amend its exhibit list by adding the exhibits listed in annex G to the Prosecution motion;

ADMITS into evidence the documents listed in annexes A-E to the Prosecution motion; and

ORDERS that the annexes to the Prosecution motion remain confidential until the Trial Chamber decides otherwise.

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

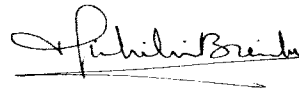
Leidschendam,
The Netherlands
7 November 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

