

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
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ON PROSECUTION MOTION TO ADMIT DOCUMENTS RELATING
TO TELEPHONE SUBSCRIBER RECORDS FROM THE TOUCH COMPANY**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Milne

Legal Representatives of Victims:Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**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 Yasser
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Guénaël Mettraux &
Mr Geoffrey Roberts

INTRODUCTION AND BACKGROUND

1. The full background concerning the Prosecution's case and procedural history related to this decision has been explained by the Trial Chamber in prior decisions.¹ Similarly, the Trial Chamber has issued various decisions setting out the relevant admissibility principles.² They also apply here.
2. The Prosecution seeks the admission into evidence, under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence, of 103 documents either received from the Lebanese mobile telecommunication service provider Touch, or that the Prosecution created by extracting information from larger documents received from Touch.³ According to the Prosecution, the documents proposed for admission will assist in the attribution of mobile numbers to the four Accused and to Mr Mustafa Amine Badreddine.⁴
3. The Prosecution also seeks the Trial Chamber's leave to add to its exhibit list twelve documents proposed for admission.⁵ Counsel for the Accused, Mr Salim Jamil Ayyash, Mr Hassan Habib Merhi, and Mr Assad Hassan Sabra, and counsel then acting for the former Accused, Mr Badreddine, responded to the motion, requesting either that the admission of the documents, or any decision in this regard, be deferred after the Trial Chamber had received evidence on the authenticity and reliability of Touch telecommunications data and business records, or that their admission be sought through the testimony of the witness who could provide such evidence.⁶

¹ STL-11-01/T/TC, *The Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2815, Decision on the Admission of Documents related to Telephone Subscriber and User Information, 4 November 2016, paras 3-4, 27 ('Telephone Subscriber Information Decision of 4 November 2016'); 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 ('Colour-coded Call Sequence Tables Decision'), paras 2, 4.

² Telephone Subscriber Information Decision of 4 November 2016, para. 6; F2584, Decision on Prosecution Rule 154 Motion for the Admission of Documents relating to the Telephone Subscriber Records from the Alfa Company, 3 May 2016 ('Decision of 3 May 2016'), para. 22.

³ STL-11-01/T/TC, *The Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2533, Corrected Version of Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the Touch Company (public with confidential annexes A-H), 19 April 2016 ('Prosecution motion'), paras 1 and 41. The documents proposed for admission are listed in confidential annexes A- E to the Prosecution motion.

⁴ Prosecution motion, para. 1.

⁵ Prosecution motion, paras 5, 41, and confidential annex G 'Exhibit Additions'.

⁶ F2547, Public Redacted Version of Sabra Defence Response to "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the Touch Company", 12 April 2016 (a confidential version was filed on the same date) ('Sabra response'); F2555, Merhi Defence Response to the "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the Touch Company", 18 April 2016 ('Merhi response'); F2556, Ayyash Defence Response to "Prosecution Rule 154 Motion for the Admission of Documents related to Telephone Subscriber Records from the Touch Company, 18 April 2016 ('Ayyash response'); F2554, Badreddine Defence Response to "Prosecution Rule 154 Motion for the Admission of Documents relating to Telephone Subscriber Records from the Touch Company", 18 April 2016 ('Badreddine response').

4. Since Witness PRH705—the authorised representative for Touch—has now testified, the original requests from the Defence are moot.

AMENDING THE PROSECUTION'S EXHIBIT LIST

5. As a prerequisite to the admission into evidence of twelve of the documents, the Prosecution seeks the Trial Chamber's leave to add them to its exhibit list. Ten are subscriber notes. The eleventh contains lists of IMEIs⁷ for four numbers: one attributed to Mr Ayyash, and three to Mr Badreddine.⁸ The twelfth is a list containing the dates of activation and deactivation for multiple numbers attributed to Mr Ayyash, Mr Merhi, Mr Sabra, and Mr Badreddine.⁹ Counsel for Mr Ayyash, Mr Merhi, Mr Sabra and Mr Badreddine take no position on adding the documents to the exhibit list.¹⁰

6. The Prosecution submits that the documents are relevant and have probative value, and it has good cause for adding them at this stage, as: (i) the ten subscriber notes are 'extracts of exhibits from the larger subscriber databases provided by Touch' and 'these Subscriber Notes allow only the relevant portions of the exhibits to be tendered thereby streamlining trial proceedings'; and (ii) the IMEIs lists and the activation/deactivation dates list assist in the analysis of the relevant numbers. The amendments will not cause undue delay given that all documents were disclosed to the Defence (as part of 'larger databases'), and they are not voluminous.¹¹

7. The Trial Chamber may, in the interests of justice, allow a party to amend its exhibit list. In doing so, it must balance the Prosecution's interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for trial. The evidence must be *prima facie* relevant and probative, and the Trial Chamber may consider, among other factors,

⁷ Every mobile telephone handset has a unique International Mobile Equipment Identity (IMEI) number. *See* F2767, Written Reasons for Admitting Witness PRH707's Statements and Annexes into Evidence, 10 October 2016 ('Decision of 10 October 2016'), para. 71; F2797, Decision on Four Prosecution Motions on Call Sequence Tables related to Salim Jamil Ayyash, Hassan Habib Merhi, Assad Hassan Sabra, Mustafa Amine Badreddine, and Five Witness Statements, 31 October 2016 ('Call Sequence Tables Decision of 31 October 2016'), para. 4.

⁸ Prosecution motion, paras 3, 31, 37 and confidential annex B, row 22. The Trial Chamber notes that, in paragraph 37 of its motion, the Prosecution incorrectly states that the document is a list of IMEIs for 'a number' sought to be attributed to Mr Ayyash and Mr Badreddine. This is an inadvertent mistake. It is clearly stated in paragraphs 3 and 31 of the Prosecution motion and in confidential annex B, row 22, that the IMEI lists contain IMEI numbers used with 'four numbers' sought to be attributed to Mr Ayyash and Mr Badreddine.

⁹ Prosecution motion, para. 38 and confidential annex B, row 23.

¹⁰ Sabra response, paras 7, 11, 15; Ayyash response, paras 2, 6; Badreddine response, para. 2.

¹¹ Prosecution motion, paras 5, 35-39.

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.¹²

8. 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 were disclosed to the Defence in May 2013, October 2015, January and March 2016.¹³ The Trial Chamber is satisfied that the interests of justice allow the Prosecution to amend its exhibit list.

THE EVIDENCE

9. One hundred and one documents are ‘subscriber records’ for Touch mobile numbers. They consist of 95 ‘subscriber notes’—extracted from subscriber databases provided by Touch¹⁴—three subscriber contracts,¹⁵ two invoices,¹⁶ and ‘one document containing subscriber information for two Touch telephone numbers’.¹⁷ The remaining two documents contain lists of IMEIs and a list of activation and deactivation dates for Touch numbers.¹⁸

10. 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 the Prosecution’s analyst Mr Andrew Donaldson (Witness PRH230)—who relies

¹² 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 (‘Decision of 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.

¹³ Confidential annex G.

¹⁴ Prosecution motion, paras 2, 8. The subscriber databases were provided by Touch in electronic format. Prosecution motion, para. 9. The Prosecution submits 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 number, and its insertion in a Microsoft Word document; (ii) subsequent verification, by another analyst, of the correspondence between the extracted information and the original source content. The subscriber notes proposed for admission were verified by Prosecution analysts Mr Amrajdeep Virk (PRH693) and Mr Lachlan Christie (PRH313). *See* Prosecution motion, para. 23, footnote 23, and confidential annex F, rows 12-15.

¹⁵ The three subscriber contracts consist of the hard copy of the contract that an individual signed when applying for a Touch number. Prosecution motion, para. 10.

¹⁶ They consist of the hard copy of the invoices; Prosecution motion, para. 11.

¹⁷ Prosecution motion, para. 12.

¹⁸ Prosecution motion, paras 2-3.

upon most of them in his telephone attribution reports—on how he used them and the attribution process in general.¹⁹

Relevance – submissions

11. The Prosecution explains that the subscriber records provide, with varying degrees of detail, the name of the person registered as the subscriber of a specific Touch number, the activation date of the subscription, and in some cases the subscriber's address.²⁰ These are relevant because they identify the registered subscriber of a number which the Prosecution either seeks to attribute to an Accused (or Mr Badreddine), or was in contact with a number the Prosecution seeks to attribute to an Accused (or Mr Badreddine).²¹ Identifying third party contacts assists in attributing numbers to the Accused.²²

12. The Prosecution submits that the IMEI lists are relevant, and probative, because they show the IMEIs used with four numbers attributed to Mr Baddredine and Mr Ayyash on specific dates before January 2004, which was when Touch began recording the IMEIs in its call data records.²³ Finally, the list of activation and deactivation dates proposed is relevant, and probative, because it shows the deactivation dates, as recorded by Touch,²⁴ for numbers attributed to Mr Badreddine, Mr Ayyash, Mr Merhi and Mr Sabra. The document also includes the activation and deactivation dates for ten numbers in the 'blue network' and for two in the 'yellow network'.²⁵

13. Counsel for Mr Ayyash, Mr Sabra and Mr Merhi do not object to the relevance of the documents.²⁶ Counsel for Mr Badreddine submitted that the Prosecution has not established the relevance, and the probative value, of eight subscriber records, and how they fit into the Prosecution

¹⁹ Prosecution motion, para. 34. A telephone attribution report collates and examines evidence regarding the attribution of one or more telephone numbers to each of the Accused and to Mr Badreddine. *See* F1852, Decision on Prosecution Motion to Add Four Items to the Exhibit List, 13 February 2015, para. 11, fn. 22.

²⁰ Prosecution motion, para. 8.

²¹ Prosecution motion, para. 14. A 'third party contact' is the alleged user of a number who was in contact with one or more numbers attributed to the Accused or Mr Badreddine. *See* Prosecution motion, para. 1, footnote 2. The Prosecution submits that the call sequence tables—which it lists in confidential annex H—show that the third party contact telephone numbers were in contact with telephone numbers attributed to the Accused or to Mr Badreddine.

²² Prosecution motion, para. 20.

²³ Prosecution motion, paras 3, 31. The Prosecution explains that the IMEI for each number can be seen on call data records and call sequence tables after 1 January 2004.

²⁴ Prosecution motion, para. 32. The Prosecution explains that the deactivation date was sought from Touch by way of a request for assistance, as the subscriber databases received from Touch contained the activation dates but not the deactivations dates.

²⁵ Confidential annex B, row 23. 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* amended consolidated indictment, para. 15; Colour-coded Call Sequence Tables Decision'. The Prosecution submits that Mr Gary Platt (Witness PRH147) would rely upon this document to demonstrate that the 'blue network' numbers were deactivated by the end of October 2005.

²⁶ Ayyash response, paras 3-4; Sabra response, paras 6, 15; Merhi response, para. 1.

case. In particular: (i) three subscriber notes do not contain subscriber names and the Prosecution does not establish the identity of the users of the numbers or articulate what inferences can be drawn from their contacts with numbers attributed to Mr Badreddine; (ii) two subscriber notes relate to numbers for which subscriber information changed over time, and the Prosecution does not articulate what inference can be drawn; and (iii) three documents are linked to names of individuals about whom the Prosecution has no information, especially in respect of their possible relationship to Mr Badreddine. No valid inference can be drawn from these documents.²⁷

Discussion

14. The attribution of mobiles to the Accused and Mr Badreddine is a key part of the Prosecution's case, as alleged in the amended consolidated indictment.²⁸ The documents proposed for admission therefore are all relevant.

15. The Trial Chamber has held that similar documents from Lebanese communication service providers (subscriber records and IMEIs lists) are relevant to the Prosecution's case.²⁹ The telephone subscriber records, lists of IMEIs and the list of activation and deactivation dates proposed for admission contain information on the registered subscribers, IMEIs used, and activation and deactivation dates for certain telephone numbers. These numbers are relevant because they are either numbers that the Prosecution seeks to attribute to an Accused or to Mr Badreddine, or numbers that the Prosecution alleges were in contact with numbers the Prosecution seeks to attribute to an Accused or Mr Badreddine.

16. In certain instances, as noted by counsel for Mr Badreddine, the Prosecution submits that the relationship between the users of the relevant numbers and Mr Badreddine, is 'unknown' or 'unclear'.³⁰ These are where subscriber notes show that the relevant Touch numbers were registered either to named subscribers or to unnamed accounts. The Prosecution makes the same submissions

²⁷ Badreddine response, paras 9-10.

²⁸ Amended consolidated indictment, paras 14-47; Decision of 3 May 2016, para. 13.

²⁹ Decision of 3 May 2016, paras. 13-15; 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'), para. 51.

³⁰ Confidential annex A to the Prosecution motion, rows 41, 48-52. In one case (*see* row 41) the Prosecution explains that the number was one of a group of three numbers all registered on the same date to unnamed accounts of the same type, and were the three highest contacts to three sequential mobiles attributed to Mr Badreddine.

with regard to certain subscriber notes related to Mr Ayyash and Mr Sabra.³¹ Other subscriber notes show that the registered subscriber of a number allegedly changed over time.³²

17. The Trial Chamber will assess the weight of these documents at a later stage. These also concern numbers which—according to the Prosecution—were in contact with Mr Badreddine or the relevant Accused.³³ The Trial Chamber also notes the Prosecution’s submissions that while the relationship between a certain number user and the relevant Accused or Mr Badreddine is unknown or unclear, the documents assist in the analysis of third party contacts to one or more numbers attributed to either the relevant Accused or Mr Badreddine.³⁴ The analysis of these numbers is in Mr Donaldson’s reports—referred to in the annexes.³⁵ He will testify about the attribution process.

Prima facie reliability and probative value – submissions

18. The Prosecution submits that the subscriber databases, contracts, invoices, document containing subscriber information, lists of IMEI and list of activation and deactivation dates: (i) were provided to the United Nations International Independent Investigation Commission (UNIIC) or to the Prosecution in response to requests for assistance sent to the Lebanese authorities;³⁶ and (ii) contain subscriber information or information recorded and retained by Touch during the ordinary course of its business.³⁷ The Prosecution also submits that the provenance of the documents is described in Witness 705’s statement of 16 November 2015.³⁸

19. The documents have probative value.³⁹ The Prosecution refers, for each document, to the ‘probative value and relevance’ entries in confidential annexes A-E. The subscriber records for each number (personal mobiles or network mobiles of the Accused or Mr Badreddine, or third parties in

³¹ Confidential annex B to the Prosecution motion, rows 15, 17-21; confidential annex D, rows 5-6.

³² Confidential annex A to the Prosecution motion, rows 25-26 and 45-46. Recorded changes of subscribers, either related to numbers allegedly attributed to the Accused or to third party contacts, are contained in the annexes related to the Accused, Mr Sabra and Mr Oneissi. *See* for instance confidential annexes D, rows 2-3; E, rows 7-8.

³³ Also in respect of subscriber records for third party contact numbers showing that subscriber information changed, as pointed to by counsel for Mr Badreddine, contacts with one or more numbers attributed to Mr Badreddine occurred, according to the Prosecution, both before and after the recorded change.

³⁴ Confidential annex A to the Prosecution motion, rows 41, 48-52.

³⁵ Annexes A to E.

³⁶ According to the Prosecution’s submissions, the documents were provided either through the Ministry of Telecommunications or directly by Touch representatives. Prosecution motion, paras 22, 25, 27-29, 33.

³⁷ Prosecution motion, paras 9-12, 22, 27-29, 31-32.

³⁸ Prosecution motion, para. 17, page 4 (the Prosecution motion inadvertently contains two paragraphs 17), fn. 9 (where it points to specific paragraphs of the statement). The Prosecution, among the supporting documents concerning reliability listed in annex F, includes other three statements of Witness 705 (dated, respectively, 16 December 2015, 3 February and 26 February 2016), and refers to specific paragraphs of Witness 705’s statements. *See* confidential annex F to the Prosecution motion, rows 8-11.

³⁹ Prosecution motion, paras 14, 20-21.

contact with them) either provide the name of the registered subscribers,⁴⁰ or demonstrate that the number was registered to an unnamed account. The Prosecution refers to contextualizing evidence to propose inferences with regard to the identity of third party contacts. In some instances, it submits that the relationship between a third party contact and an Accused, or Mr Badreddine, is unclear or unknown, and that, notwithstanding, the subscriber record assists in the analysis of a third party contact to one (or more) numbers attributed to the Accused or to Mr Badreddine.

20. Counsel for Mr Ayyash responds that the Prosecution relies on documents not yet properly before the Trial Chamber.⁴¹ Counsel for Mr Merhi and counsel for Mr Badreddine submit that Rule 154 is not the appropriate legal basis to admit the documents into evidence, as they should be tendered through a witness who can testify about their reliability,⁴² as the alleged attribution of mobiles to the Accused goes to the heart of the Prosecution case.⁴³ Counsel for Mr Badreddine specifically opposed the admission into evidence of three documents based on their ‘manifest unreliability’.⁴⁴

21. Counsel for Mr Sabra requested that the Trial Chamber, after hearing the evidence on the reliability of the Touch telecommunications records, allow the Parties to file additional submissions on the admissibility of the documents.⁴⁵ However, supplemental submissions filed following Witness 705’s evidence concern his evidence and also some of the documents proposed here for admission.⁴⁶

22. No Defence counsel specifically objected to the documents’ probative value—except for counsel for Mr Badreddine in relation to eight subscriber notes, and on the same grounds as their

⁴⁰ The number in annex A, row 33, is not attributed to an Accused or Mr Badreddine, or a third party contact. The Prosecution submits that this subscriber record identifies the subscriber of a number that was used in a document (a university application) together with a third party contact number.

⁴¹ Ayyash response, para. 4.

⁴² Badreddine response, paras 4-5, 7, 14; Merhi response, paras 1-2, 4.

⁴³ Merhi response, paras 1-2, 4. Counsel for Mr Merhi point to paragraph 17 in the Prosecution motion (on page 5 of the motion), reading: ‘Annex C contains the Subscriber Records for the Touch telephone *numbers* attributed to the Accused, Merhi, and for the relevant Third Party contact numbers to any of the three telephone numbers attributed to the Accused, Merhi by the Prosecution’ (footnotes omitted and emphasis added). They submit that the Prosecution incorrectly refers to ‘multiple’ Touch numbers attributed to the Accused, while only a ‘single’ Touch number is allegedly attributed, and not to Mr Merhi, but to the Merhi family more broadly (Merhi response, para. 5). It is clear from confidential annex C, row 1, to the Prosecution motion that the relevant records concern only one Touch number which is allegedly attributed—as noted in the same annex and pleaded in the pre-trial brief—to Mr Merhi and members of his family. *See also* Prosecution’s updated pre-trial brief, dated 23 August 2013, para. 59; Prosecution’s Pre-Trial Brief, 8 January 2014, para. 34.

⁴⁴ Badreddine response, paras 2, 11-14.

⁴⁵ Sabra response, para. 6.

⁴⁶ F2678, Public Redacted Version of Ayyash Defence Submissions on the Evidence of Prosecution Witness PRH705 of 29 July 2016, 3 August 2016 (the confidential version was filed on 29 July 2016) (‘Ayyash submissions of 29 July 2016’), paras 2, 53-61; F2680, Sabra Joinder to “Ayyash Defence Submissions on the Evidence of Prosecution Witness PRH707” and “Ayyash Defence Submissions on the Evidence of Prosecution Witness PRH705”, 1 August 2016. *See below*, paras 31-37.

challenges to relevance.⁴⁷ Defence counsel do not concede the attribution of the numbers referred to in the documents and submit that if the documents are admitted into evidence they will challenge it.⁴⁸ Counsel for Mr Sabra add that they intend to ‘verify the credibility and reliability of the exhibits’ by cross-examining several witnesses scheduled to testify on the attribution of those numbers.

Discussion

23. The Trial Chamber reiterates that it 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.⁴⁹ Rule 154 does not distinguish according to the alleged significance of the evidence.

24. Further, Witness 705 has testified about the provenance, creation, storage and retrieval of documents, like the databases—from which the subscriber notes have been extracted—and of specific documents proposed for admission—such as the lists of IMEIs, list of activation and deactivation dates, two invoices and three contracts. The Trial Chamber has also held that business records are considered to have the necessary indicia of reliability if produced in the normal course of business of the relevant organisation or workplace.⁵⁰ The documents here fall into this category.⁵¹

25. With regard to the Ayyash Defence’s argument that the Prosecution relies on documents not properly before the Trial Chamber, the Trial Chamber has since formally admitted into evidence selected paragraphs of Witness 705’s statements, and related annexes, listed in annex F to the Prosecution motion.⁵² Witness 705 in his testimony also referred to the content of several paragraphs from his statement dated 16 November 2015 not admitted into evidence under Rule 155 as exhibit P826, but thereby incorporating them.

⁴⁷ See above, para. 13.

⁴⁸ Sabra response, para. 9; Ayyash response, para. 5; Merhi response, para. 6; Badreddine response, para. 3.

⁴⁹ Decision of 3 May 2016, para. 24; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 37.

⁵⁰ F2750, Reasons for Admitting Witness PRH705’s Statements and Annexes into Evidence, 30 September 2016 (‘Decision of 30 September 2016’), para. 23 (noting that, however, this indicia may be challenged or undermined); F2597, Written Reasons for the Trial Chamber’s Decision on Prosecution Motion for the Admission of Statements by Witness PRH705, 13 May 2016 (‘Decision of 13 May 2016’), paras 23-24. See also Decision of 6 March 2015, para. 38, 40, 48, 52, 54 (where the Trial Chamber has underlined that such a conclusion ‘does not mean of itself that [it] must admit the documents into evidence without a witness. The Trial Chamber could decide that the documents are admissible from the bar table, but also additionally decide, according to the circumstances, that an available witness should testify as to their content’ or that a relevant witness statement also be tendered into evidence).

⁵¹ Decision of 30 September 2016, paras 25, 27.

⁵² Exhibit P826 (selected paragraphs of Witness 705’s Statement of 16 November 2015) and exhibit 826.11 (annex 18 to this statement); exhibit P1093 (selected paragraphs of Witness 705’s Statement of 16 December 2015); exhibit P1094 (selected paragraphs of Witness 705’s Statement of 3 February 2016); exhibit P1095 (selected paragraphs of Witness 705’s Statement of 26 February 2016 and annex 1 to this statement).

a) *95 subscriber notes and one document providing information for two telephone numbers*

Witness 705's testimony on Touch subscriber databases

26. Witness 705 testified that in 2007 and 2010—in response to two requests for assistance—Touch provided to the UNIIC and the Special Tribunal's Prosecutor a complete list or an updated list of subscriber information (subscriber databases). He also explained that the complete list of subscriber information originates from the TABS Customer Relationship Management (CRM) database⁵³—the TABS CRM is the database where pre-paid and post-paid subscriber information is stored and logged⁵⁴—through a so-called 'database dump', which is an operation that retrieves all the information on a database.⁵⁵ The source of this information is the Touch's information technology department.⁵⁶ Touch has used TABS since 1998, and used it in 2004 and 2005.⁵⁷ The database is retained for the commercial purpose to bill the post-paid customers.⁵⁸ The information in TABS CRM is retained indefinitely.⁵⁹

27. Witness 705 testified that the database is populated with subscriber information,⁶⁰ and explained the process for pre-paid and post-paid subscriptions. Touch's commercial department was responsible, in 2004 and 2005, for entering the information into the TABS database (in particular, the so called 'customer profiling team' for pre-paid subscriptions).⁶¹ The source of this information was the commercial department.⁶²

28. The Trial Chamber admitted into evidence several paragraphs of Witness 705's statements, and annexes, providing information on the subscriber databases, and specifically the retrieval of

⁵³ Transcript of 11 May 2016, pp 58-59, 66. TABS stands for Telecom Advanced Business Solutions. 'It is the name of the billing system'. In 2004 and 2005, the billing system in Touch was provided by a company called International Turnkey Systems (ITS), and the software is named TABS. The witness referred to paragraphs 87-89 of his Statement dated 16 November 2015. *See* transcript of 10 May 2016, pp 53-54.

⁵⁴ Transcript of 10 May 2016, p. 54.

⁵⁵ Witness 705 stated that a 'database dump is a good method to use in order not to miss any information when we're asking for a complete database versus asking for information about a specific subscriber'. *See* transcript of 11 May 2016, p. 59.

⁵⁶ Witness 705 referred to paragraph 198 of his Statement of 16 November 2015. Transcript of 11 May 2016, p. 59.

⁵⁷ Transcript of 10 May 2016, pp 53-54.

⁵⁸ Transcript of 11 May 2016, pp 27-28, 46. The witness explained that he has a general knowledge about this information, namely the purpose of keeping subscriber information. He testified that the information, as contained and more detailed in paragraph 203 of his statement dated 16 November 2015, was provided by Touch on the basis that it is part of the company practices.

⁵⁹ Transcript of 11 May 2016, p. 61. The witness testified that the source of this information was the IT department. He referred to paragraph 195 of his statement dated 16 November 2015.

⁶⁰ Referring to paragraph 184 of his statement of 16 November 2015. *See* transcript of 11 May 2016, pp 31-32.

⁶¹ Transcript of 11 May 2016, pp 31-32. Witness 705 also testified that he was informed that there was no way of verifying the authenticity of the information provided in terms of address.

⁶² Transcript of 11 May 2016, pp 32, 40, 42.

subscriber information for the Special Tribunal.⁶³ Paragraph 196 of exhibit P826 explains that between 2004 and 2005, there were no measures in place to ensure the accuracy of subscriber details.⁶⁴

29. Having considered Witness 705's evidence, the Trial Chamber is satisfied that the Prosecution has proved the *prima facie* reliability of the Touch subscriber databases, from which subscriber notes have been extracted.

30. The Prosecution has satisfactorily explained how the Prosecution analysts produced the subscriber notes, through a process of extraction of the subscriber information for the relevant telephone numbers and verification of the correspondence between the extracted information and the original source content. This verification was conducted by Prosecution analysts, Mr Virk and Mr Christie.⁶⁵ The Prosecution has therefore proved the provenance and *prima facie* reliability of the subscriber notes. Further, the Trial Chamber has admitted into evidence under Rule 154 subscriber notes extracted from subscriber databases. It also 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.⁶⁶ The Trial Chamber is generally satisfied of the *prima facie* reliability of the subscriber notes proposed for admission.

b) Exhibits P828 MFI and P829 MFI - further submissions from the Parties

31. Counsel for Mr Ayyash and for Mr Sabra, in submissions following the testimony of Witness 705, objected to the admission into evidence of three subscriber notes marked for identification during his testimony as exhibits P828 MFI and P829 MFI.⁶⁷ P828 MFI is a subscriber note for a number ending 128, which the Prosecution alleges was a sequential mobile phone used by Mr Badreddine.⁶⁸ Exhibit P829 MFI corresponds to two subscriber notes—one extracted from the

⁶³ Such as paragraphs 196-197, 200 and 202 of Witness 705's Statement of 16 November 2015 (exhibit P826) and annex 1 to Witness 705's Statement of 26 February 2016 (exhibit P1095). See Decision of 30 September 2016, paras 58-59, 124.

⁶⁴ See Decision of 30 September 2016, para. 58.

⁶⁵ As recounted in a statement of Witness 693 and three statements of Witness 313, listed in confidential annex F. The Prosecution does not seek their admission into evidence, unless the Trial Chamber deems it necessary. See Prosecution motion, para. 4. The Trial Chamber considers that their admission into evidence is not needed.

⁶⁶ Decision of 2 November 2015, para. 51, as referred to in the Decision of 3 May 2016, paras 35, 40. They are now exhibits P670, P674, P675, P677 and P680. 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.

⁶⁷ Transcript of 11 May 2016, pp 63, 66.

⁶⁸ Confidential annex A, row 9.

database provided in 2007 and the other from the one provided in 2010—relating both to a number ending 091, which the Prosecution alleges was used by Mr Ayyash as a personal mobile.⁶⁹

32. Witness 705, with regard to clarification requested from the Prosecution in relation to these documents, testified that Touch's IT department could provide the information requested.⁷⁰ Later, he adopted, in his capacity as the representative witness for Touch, the clarification provided on exhibit P828 MFI by the identified department in Touch.⁷¹

33. Counsel for Mr Ayyash and Mr Sabra—while taking no position on the admission of the Touch's supplemental response⁷²—opposed the admission into evidence of both exhibits because Witness 705 was unable to assist in assessing the reliability of the documents and directed any queries to the IT department.⁷³ The Prosecution responds to these further Defence submissions stating that the documents should be admitted.⁷⁴ Witness 705 confirmed the provenance of the subscriber databases on behalf of Touch and testified on the collection of the subscriber data and generation of the database in the normal course of business.⁷⁵

34. The Trial Chamber has found that the Prosecution has proved the *prima facie* reliability of the Touch subscriber databases and of the subscriber notes, in general, and that the subscriber databases are business records produced in the normal course of business.⁷⁶

35. The Trial Chamber has previously held that business records, by their very nature, are produced by different company officials, in differing capacities and differing sub-departments and that, in these circumstances, a court can but receive the best available evidence, and, at a later point, attribute to it the appropriate weight. Further, the Statute of the Special Tribunal and the Rules of Procedure and Evidence contain no prohibition against the admission of hearsay evidence, which is allowed by the general principles of international criminal procedural law.⁷⁷

36. Consistent with this, the fact that Witness 705 requested clarification on the subscriber databases from the company department responsible to have the relevant information cannot detract

⁶⁹ Confidential annex B, rows 2-3.

⁷⁰ Transcript of 11 May 2016, pp 62, 66.

⁷¹ See P953 MFI; transcript of 19 July 2016, pp 98, 101.

⁷² Ayyash submissions of 29 July 2016, para. 19; Sabra Joinder of 1 August 2016.

⁷³ Ayyash submissions of 29 July 2016, paras 54-55.

⁷⁴ F2690, Prosecution Response to "Ayyash Defence Submissions on the Evidence of Prosecution Witness PRH705" ('Prosecution Response to Ayyash Submissions of 29 July 2016'), 15 August 2016, para. 6.

⁷⁵ Prosecution Response to Ayyash Submissions of 29 July 2016, paras 21-23.

⁷⁶ Decision of 13 May 2016, para. 23.

⁷⁷ Decision of 13 May 2016, para. 24; Decision of 10 October 2016, para. 44; Call Sequence Tables Decision of 31 October 2016, para. 77.

from the documents' *prima facie* reliability being established through his testimony. The Trial Chamber has analogously found, in the written reasons for its decision admitting Witness 705's statements and annexes, that 'his lack of knowledge of the evidence does not of itself render the documents *prima facie* unreliable'.⁷⁸

37. The Trial Chamber is therefore satisfied of the *prima facie* reliability of exhibits P828 MFI and P829 MFI. They may be admitted into evidence.

c) Subscriber information for two telephone numbers

38. Witness 705 testified that when there is a request for a specific set of subscriber details, like those related to a specific telephone number, Touch's IT department writes a sequence of queries to extract the information from the TABS CRM databases. The witness explained that the source of this information was the IT department.⁷⁹ The Trial Chamber is therefore satisfied that the 'document containing subscriber information for two Touch telephone numbers' is also *prima facie* reliable.

d) The list of activation and deactivation dates, lists of IMEIs, two invoices, and three subscriber contracts

39. These documents were marked for identification as exhibits P1101 (list of activation and deactivation dates for multiple telephones), P1102 (lists of IMEIs for numbers ending 165, 354, 663 and 128), P1103 and P1104 (two invoices, respectively, for numbers 3966663 and 3833354), P1100, P1105, and P1106 (three contracts, for numbers 3833354, 3966663 and number ending 777).⁸⁰

40. Witness 705 adopted, as Touch's representative, the information Touch provided on the generation and storage of these documents.⁸¹ Touch confirmed that the three contracts were original Libancell forms,⁸² and that the two invoices were Touch records, generated based on billing

⁷⁸ See Decision of 30 September 2016, para. 24.

⁷⁹ Transcript of 11 May 2016, pp 60-61.

⁸⁰ Transcript of 21 July 2016, pp 68-69, 71-73.

⁸¹ The information was provided in response to questions asked of Witness 705 before the commencement of his testimony. Touch's response, dated 21 July 2016, was admitted into evidence as exhibit P1099, with no objection from the Defence. Witness 705 acknowledged that the headings in Touch's response—paras 4 a) and b)—consisting in the ERN numbers of the list of activation and deactivation dates and the lists of IMEIs—were inadvertently reversed. See transcript of 21 July 2016, pp 65-68.

⁸² The information originates from Touch's corporate management. Libancell was the name of the company before its rebranding in 2004 as MTC. See transcript of 11 May 2016, pp 75-76. Standard forms were admitted into evidence with regard to the purchase of post-paid subscriptions for the period from 2004 to 2009 (GSM service contract of MTC Touch), the MTC Touch post-paid and pre-paid customer information forms, and the Libancell customer information pre-paid line form (for the period 1997-2004, before the rebranding to MTC). The witness, by adopting and confirming paragraphs 117-125 of his statement of 16 November 2015, testified, among other things, that the GSM service contract sets out the agreement between the post-paid customer and Touch in relation to the monthly subscription and that one

information stored in the database, and which can be reprinted upon request.⁸³ Touch also provided information about the source of retrieval for the information in the list of activation and deactivation dates;⁸⁴ and explained that IMEI⁸⁵ information is used to answer police requests regarding handset robbery, and that a process called IMEI tracking was developed by a Libancell engineer to track the IMEI utilization within the network.⁸⁶

41. The Trial Chamber is satisfied, also based on Witness 705's testimony, of the *prima facie* reliability of the three Touch contracts, two invoices, IMEIs lists, and activation/deactivation dates list proposed for admission.

Conclusion

42. In conclusion, the Prosecution has demonstrated the *prima facie* reliability of all the documents proposed for admission. They also have probative value, as they provide information on numbers allegedly attributed to the Accused, to Mr Badreddine, or to an alleged third party contact—such as names of registered subscribers (or, in some cases, the information that a number was registered to an unnamed account), IMEIs used, activation and deactivation dates. Furthermore, the Prosecution has satisfactorily demonstrated how the evidence fits into its case, as these are individual pieces of evidence to be considered in the analysis of the totality of evidence on telephone attribution. In

section provides for the individual customer's information, and that once received by Touch, the originals of the customer information forms are stored in the archive department and the 'application forms' are retained for an unlimited period. Transcript of 11 May 2016, pp 68-76. Exhibits P830, P831, P832, P833 (respectively annexes 5, 7, 10 and 14 to the Witness Statement of 16 November 2015). The Trial Chamber has also admitted into evidence paragraph 116 of Witness 705's Statement of 16 November 2015 (as part of exhibit P826) outlining the different types of customer forms, like a GSM service contract, and annexes 6 and 8 (as exhibits P826.3 and P826.4). See Decision of 30 September 2016, paras 50-51, 53.

⁸³ The information originates from the IT department. Witness 705 testified that the invoice is generated at each billing cycle and includes rated services and calls. To this purpose, he testified that such information, as contained in paragraph 201 of his statement dated 16 November 2016, was provided by the IT department on the basis that it reflects the company practices. See transcript of 11 May 2016, pp 45-47.

⁸⁴ Touch identifies it in the action history database for both the 'activation data/installation order' and 'deactivation' fields, and, for the former, alternatively, in the CRM database if the first source is not available due to migration issue of the old data. The information originates from the IT department.

⁸⁵ Witness 705 had already testified that the IMEI is 'a unique serial number of the phone', that the Mobile Switching Centre (MSC) records, among other data, the IMEI information, which is recorded to track handsets. See transcript of 10 May 2016, p. 24.

⁸⁶ This information originates from the IT department. The Trial Chamber has admitted into evidence paragraph 114 of Witness 705's statement of 16 November 2015 as part of exhibit P826, which also explains how the change of IMEI is detected. See Decision of 30 September 2016, para. 50.

addition, with regard to the list of activation and deactivation dates, this is also relied upon in order to demonstrate that 'blue network' mobiles were deactivated by the end of October 2005.⁸⁷

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

CONFIDENTIALITY

44. 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.⁸⁸ While the Trial Chamber reiterates the public nature of these proceedings, it is satisfied that the annexes should be remaining confidential.

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 to the motion;

DECLARES admissible the documents listed in annexes A to E to the motion;

DECIDES that it will, at a suitable stage in the proceedings, formally admit the documents into evidence, and assign them exhibit numbers; and

ORDERS that exhibits P828 MFI, P829 MFI, P1100 MFI, P1101 MFI, P1102 MFI, P1103 MFI, P1104 MFI, P1105 MFI and P1106 MFI are admitted into evidence.

⁸⁷ See also transcript of 26 July 2016, pp 68-71 (in particular p. 69 where Mr Platt, testifying about the organized cessation of the networks, stated that 'the Blues [...] ended in October 2005 in an organized fashion'), and Colour-coded Call Sequence Tables Decision, para. 34.

⁸⁸ Prosecution motion, para. 40.

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

Leidschendam,
The Netherlands
7 November 2016

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

