

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: 31 March 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

DECISION ADMITTING 10 CALL SEQUENCE TABLES RELATED TO MR SALIM JAMIL AYYASH AND MR HASSAN HABIB MERHI UNDER RULE 154 AND TWO RELATED WITNESS STATEMENTS UNDER RULE 155

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Milne

Legal Representatives of**Participating 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 Dorothee 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 Geoffrey Rober



EVIDENCE AND SUBMISSIONS

Prosecution motion

1. The Prosecution seeks the admission into evidence, under Rule 154, of call sequence tables for: (i) two landline telephone numbers which it contends were used by the Accused, Mr Salim Jamil Ayyash, during specified periods of time; (ii) two landline numbers subscribed to the Reuters and Al-Jazeera news agencies in Beirut; and (iii) four mobile telephone numbers attributable to the relatives and associates of the Accused, Mr Hassan Habib Merhi. It also requests the admission into evidence, under Rule 154, of two short message service (SMS) call sequence tables, for two mobiles attributable to Mr Merhi's relatives and associates. As a prerequisite, the Prosecution requests the addition of the ten call sequence tables to its Rule 91 exhibit list. Finally, the Prosecution seeks to have admitted into evidence, under Rule 155, the witness statement of Prosecution analyst Ms Kei Kamei, who produced the ten call sequence tables.¹

2. The Prosecution argues that it is in the interests of justice to add these call sequence tables to the exhibit list because they are relevant and probative, and adding them at this time will not prejudice the Defence. The call sequence tables for four landlines are revised versions of tables already on the exhibit list. The ten call sequence tables were disclosed to the Defence, which had notice of the Prosecution's intention to seek their admission into evidence.²

3. The Trial Chamber has previously described call sequence tables as lists of calls derived from call data records supplied to the Prosecution by the three Lebanese telecommunication service providers MTC, Alfa and OGERO.³ The Prosecution is using the cell towers, identified in the call data records by their 'cell ID', to which mobiles connected to prove the

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi, and Sabra*, F2996, Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi pursuant to Rule 154 and one related witness statement pursuant to Rule 155, 16 February 2017 (confidential with confidential Annexes A-D) (a public redacted version of the motion was filed on 7 March 2017) ('Prosecution motion'), paras 1-3, 7.

² Prosecution motion, paras 8-10.

³ 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 ('Decision of 31 October 2016'), paras 3-5; see also 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 UNIIIC and STL's Prosecution, 6 May 2015; F2750, Reasons for Admitting Witness PRH705's Statements and Annexes into Evidence, 30 September 2016; F2767, Written Reasons for Admitting Witness PRH707's Statements and Annexes into Evidence, 10 October 2016.

location of the caller or the person receiving the call, and, in conjunction with other evidence, to prove that the mobiles were engaging in the surveillance of Mr Hariri's movements and planning the attack and assassination of the former Prime Minister of Lebanon, Mr Rafik Hariri in Beirut on 14 February 2005.⁴

Probative value of the call sequence tables

4. The Prosecution submits that the two call sequence tables concerning Mr Ayyash, which were subscribed in his name and registered to two different addresses, are relevant to the attribution of telephone numbers to him. They are newly produced call sequence tables comprising Alfa and Touch call data records and selected OGERO records. They show that the landlines had many contacts in common with four personal mobile telephones that the Prosecution attributes to Mr Ayyash. Therefore, together with other evidence, these call sequence tables demonstrate that the landlines were also in contact with Mr Ayyash's extended family and associates. The tables also show calls with Mr Ayyash's personal mobile telephones and one of the call sequence tables shows contact with Iranian telephone numbers coinciding with his family members travelling there.⁵

5. The amended consolidated indictment pleads that Mr Merhi coordinated the activities of the Accused, Mr Assad Hassan Sabra and Mr Hussein Hassan Oneissi who, using the same prepaid Telecard, disseminated statements falsely attributing responsibility for Mr Hariri's assassination, ensuring the delivery to Al-Jazeera of the video (with a letter attached, containing a false claim of responsibility for the attack) and ensuring that the video would be broadcast.⁶ It also pleads that Mr Merhi used telephone number 'Purple 231' and Mr Ayyash used multiple personal mobiles in planning and carrying out the attack against Mr Hariri.⁷

⁴ Amended consolidated indictment, para. 14.

⁵ Prosecution motion, paras 12-13.

⁶ Amended Consolidated Indictment, paras 3 (b)-(c), 5, 44. The Prosecution pleads in the amended consolidated indictment that the Accused, Mr Merhi, Mr Sabra and Mr Oneissi, used three private mobiles, color-coded 'purple phones' in relation to the perpetration of the attack. More specifically, 'purple phones' (from at least 1 January 2003 until 16 February 2005) were used to communicate amongst each other and to communicate with others outside the group. 'Purple phones' were used to coordinate the false claim of responsibility. 'Purple 231', in particular, is attributable to Mr Merhi as he had allegedly used this and other mobiles to frequently contact and send text messages to his family members and associates (see *e.g.*, paras 15-16 of the amended consolidated indictment).

⁷ Amended Consolidated Indictment, paras 17-19, 23 and 44.

6. The two call sequence tables concerning Reuters and Al-Jazeera are original versions of call sequence tables which have been redacted to display only OGERO Telecarte records.⁸ They show that, in the afternoon of 14 February 2005, Reuters received one call and Al-Jazeera received three calls, all made using the same Telecarte. The calls to Al-Jazeera concerned a claim of responsibility for the attack, providing information about a videotape and its location, and queries as to why Al-Jazeera had not yet broadcast the video and threatening the Bureau Chief. The Al-Jazeera call sequence table shows that the first of the three calls was received a few minutes after Mr Hariri's death was confirmed. The two call sequence tables, together with other evidence, permit a finding that Mr Sabra and Mr Oneissi were involved in the delivery of the false claim videotape and accompanying letter.⁹

7. The two call sequence tables concerning Mr Merhi, for telephone numbers ending in 072 and 472, support the attribution of these numbers to a member of Mr Merhi's family, through an addendum to the report of Prosecution analyst, Mr Andrew Donaldson (Witness PRH230).¹⁰ They also show patterns consistent with this member of Mr Merhi's family being the single user of the two telephone numbers and that he moved from one telephone to another. Both numbers are among the top thirty contacts with 'Purple 231', which the Prosecution attributes to Mr Merhi, which supports the attribution of this number to Mr Merhi.¹¹

8. The SMS call sequence table for the number ending in 072 shows the receipt of a message whose contents are consistent with this number's user being addressed by the same given name as one of Mr Merhi's family members. According to the Prosecution, although the number from which the message was sent is unattributed, a member of Mr Merhi's family may have been the sender, as references to names in this message are similar to those she used in messages recorded in the SMS call sequence table for the telephone number ending in 685, which is attributable to her. Both SMS call sequence tables show messages in which she refers to herself by the relevant first name and refers to individuals with the same or similar first names as Mr Merhi's two other relatives, mentioned above. Both SMS call sequence tables also support the attribution of the telephone number ending in 072 to one of Mr Merhi's

⁸ Call sequence tables ECT/CST/0100 and ECT/CST/0101. The Prosecution previously sought the admission into evidence of older versions of these call sequence tables, but later withdrew its request; *see* Prosecution motion, para. 4.

⁹ Prosecution motion, paras 14-16.

¹⁰ *See* Prosecution motion, para. 18, footnote 40.

¹¹ Prosecution motion, paras 17-18.

relatives. Further, the Prosecution's evidence will show the names and relationships among these members of Mr Merhi's family.¹²

9. The call sequence tables for the mobile telephone numbers ending in 072, 479 and 405 also support a finding that a telephone number attributed to Mr Merhi was generally used for reasons other than family contact, by showing that the only time this number was used to call certain family members was within a two week period starting on 21 September 2003 in southern Lebanon, which coincided with a Merhi family event. The call sequence table for the number ending in 072, which the Prosecution attributes to Mr Merhi's relative, activated two cell towers seven times during the week of 21 September 2003. The call sequence table for the mobile number ending in 479, which the Prosecution attributes to another of Mr Merhi's relatives, shows that this number: (i) received a call from a telephone number which the Prosecution attributes to Mr Merhi—the only call between these two numbers; and (ii) activated a cell site adjacent to one of the two cell towers activated by that member of Mr Merhi's family, during the week of 21 September 2003, on 29 out of 31 activations. The call sequence table for the telephone number ending in 405, which the Prosecution attributes to another of Mr Merhi's family members, shows that over a two-year period the telephone number activated a cell sector adjacent to one of the two cell towers activated by Mr Merhi's relative, with ten out of thirteen times of those occurring on 23 September 2003.¹³

Reliability of the call sequence tables

10. The Prosecution submits that the ten call sequence tables bear sufficient indicia of reliability as they were produced from call data records, SMS content records and cell site information from the business records of Alfa and Touch and the Kalam Card and Telecarte records of OGERO.¹⁴ The Prosecution has led evidence demonstrating the reliability of the OGERO records.¹⁵ Prosecution analyst, Ms Kamei, produced the ten call sequence tables in line with the protocol she explained in court in July 2015 and in her statements.¹⁶ The landline

¹² Prosecution motion, paras 19-21.

¹³ Prosecution motion, paras 22-25.

¹⁴ The Prosecution submits that the four landline call sequence tables no longer include landline-to-landline records from OGERO call data records, although these were included in the call sequence records which were the subject of a Prosecution request for admission into evidence, which has since been withdrawn; *see* Prosecution motion, para. 26.

¹⁵ Prosecution motion, paras 26-28.

¹⁶ Ms Kamei testified in chief on 20 and 21 July 2015 and was cross-examined on 21 July and 16-19 November 2015. Ms Kei made written statements on 16 December 2016 and 21 March 2017, the admission of which the Prosecution requested in this motion.

call sequence tables for the news networks were redacted, leaving only the rows with a Telecarte serial number. The reliability of the call sequence tables can be tested by comparing them to the underlying material, which has been disclosed to the Defence and is detailed in the annexes to the Prosecution's motion.¹⁷

Prejudice to the Accused's fair trial rights resulting from the call sequence tables' admission

11. The Prosecution submits that the call sequence tables' probative value is not outweighed by any prejudicial effect, as the Defence has access to the relevant call data records and underlying materials, and had the opportunity to cross-examine the analysts who produced the call sequences tables, the representatives of Alfa, Touch and OGERO, and various witnesses on the Prosecution's handling of the underlying material. The Appeals Chamber confirmed the Trial Chamber's finding that the collection of the call data records was provided for by law, was necessary in the circumstances, and was proportionate to the pursuance of a legitimate aim.¹⁸ Consequently, the ten call sequence tables are admissible.¹⁹

The admissibility of Ms Kamei's statement

12. The Prosecution asks the Trial Chamber to admit into evidence, under Rule 155 (C), Ms Kamei's statement without cross-examination. Her statement is relevant to and probative of the reliability of the ten call sequence tables, as it details the source material and methodology used to produce them. Ms Kamei has already testified and been cross-examined on this. The statement does not concern the Accused's acts and conduct as charged in the amended consolidated indictment, it complies with the requirements of the relevant Practice Direction, and displays the necessary indicia of reliability. It is also not necessary to add the statement to the Prosecution's Rule 91 exhibit list.²⁰

13. The Prosecution requests that the confidential status of the annexes to its motion be maintained until the Trial Chamber decides otherwise, after hearing from the Prosecution.²¹

¹⁷ Prosecution motion, paras 29-31, 42 ('42' was the number given, apparently in error, to the paragraph found between paras 29-30).

¹⁸ Prosecution motion, paras 33-35, referring to STL-11-01/T/AC/AR126.9, Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call data Records, 28 July 2015, paras 49, 51, 56-58.

¹⁹ Prosecution motion, para. 36.

²⁰ Prosecution motion, paras 37-40.

²¹ Prosecution motion, para. 41.

Defence responses

14. In its response, the Oneissi Defence argues that the Prosecution did not justify the redactions applied to call sequence tables ECT/CST/0100 and ECT/CST/0101 and, on this basis, asks the Trial Chamber not to admit them into evidence.²² Counsel for Mr Sabra submit that: (i) the Prosecution failed to explain why heavy redactions were necessary or why it departed from current practice; and (ii) these heavily redacted call sequence tables are misleading and impede the Trial Chamber's determination of the truth. The Trial Chamber should deny leave to add them to the exhibit list, deny the admission into evidence of the Al Jazeera and Reuters call sequence tables and order the Prosecution to tender complete and unredacted call sequence tables for all phone calls to Al Jazeera and Reuters on 14 February 2005.²³ The Prosecution replied to the Sabra Defence's response.²⁴

15. The Merhi Defence submits that: (i) the admission of these two call sequence tables would be prejudicial to the Defence because the Prosecution did not provide reasons for redacting them and because they are incomplete, as confirmed by Witness PRH709—one of the OGERO representatives who testified in January 2017;²⁵ (ii) the admission of call sequence tables CST-0428 and CST-0424 would breach Mr Merhi's fair trial rights due to the 'late attribution' by the Prosecution of the phone numbers ending in 072 and 472 to a family member of Mr Merhi and the number ending in 685 to another person;²⁶ (iii) call sequence tables CST-SMS-0152 and CST-SMS-0154 are based on an very narrow choice of SMSs and therefore lack relevance and probative value; and (iv) call sequence tables CST-0426 and CST-0427 are based on a 'purely speculative theory of a Merhi family event'.²⁷ The admission of the eight call sequence tables would also require the Defence's

²² F3023, Response to the "Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi pursuant to Rule 154 and one related witness statement pursuant to Rule 155", 6 March 2017, paras 9 and 11.

²³ F3021, Response to "Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi pursuant to Rule 154 and one related witness statement pursuant to Rule 155", 6 March 2017, paras 4-13 and 15.

²⁴ F3028, Prosecution Reply to Sabra Defence "Response to Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi Pursuant to Rule 154 and One Related Witness Statement Pursuant to Rule 155", 9 March 2017.

²⁵ F3022, Merhi Defence Response to the "Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi Pursuant to Rule 154 and one Related Witness Statement Pursuant to Rule 155", 6 March 2017 ('Merhi Defence response'), paras 3-9. The Merhi Defence also submits that the unredacted version of call sequence table CST-0101 has already been admitted into evidence as exhibit 3D305.

²⁶ Merhi Defence response, paras 10-23.

²⁷ Merhi Defence response, paras 24-25.

telecommunication expert to redo his already completed analysis and would therefore result in prejudice to the Defence and delay the proceedings.²⁸ The Prosecution's request to add the eight call sequence tables to its Rule 91 exhibit list 'is not justified by valid reasons'.²⁹ Ms Kamei's witness statement of 16 December 2016 should not be admitted due to its late disclosure to the Defence and because the relevance of the statement is contingent upon the admission of the eight call sequence tables.³⁰ The Prosecution replied to the Merhi Defence's response.³¹

16. The Ayyash Defence submits that it identified in CST-0429, in addition to the duplicates already identified by the Prosecution, further duplicate entries.³² The Defence requests the Trial Chamber to defer a decision on the admissibility of CST-0429 and CST-0430 until the Prosecution addresses the concerns it raised or, in the alternative, that Ms Kamei appear for cross-examination.³³ The Prosecution should tender and the Trial Chamber should receive into evidence all call data records of landlines attributed to Mr Ayyash, including call sequence tables CST-0185 and CST-0186 which the Prosecution relied upon up until it withdrew its motion to admit them on 28 July 2016.³⁴

17. After reviewing these submissions, the Trial Chamber instructed the Ayyash Defence to communicate with the Prosecution and report back to it the steps taken to resolve two matters: (i) the Defence's unsuccessful attempts to reproduce specific call sequence tables; and (ii) the removal of some duplicate entries from certain call sequence tables.³⁵ The Prosecution then withdrew call sequence tables CST-429 and CST-430 and substituted them with CST-429A and CST-430A; it also requested the addition of these two new call sequence tables to its exhibit list. The Prosecution also sought the admission into evidence of a statement dated 21 March 2017 from Ms Kamei, describing the methodology used to produce the two additional

²⁸ Merhi Defence response, paras 26-27.

²⁹ Merhi Defence response, paras 28-31.

³⁰ Merhi Defence response, paras 32-33.

³¹ F3038, Prosecution Consolidated Reply to "Réponse de la Défense de Merhi à la "Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi Pursuant to Rule 154 and One Related Witness Statement Pursuant to Rule 155" and Ayyash Defence Response to Prosecution Motion for the Admission of Ten Call Sequence Tables and One Witness Statement, 15 March 2017.

³² F3031, Ayyash Defence Response to Prosecution Motion for the Admission of Ten Call Sequence Tables and One Witness Statement, 10 March 2017.

³³ Ayyash Defence response, paras 13-15 and 22.

³⁴ Ayyash Defence response, paras 16-21. *See* Prosecution consolidated reply.

³⁵ F3040, Order to Ayyash Defence and Prosecution in Relation to Prosecution Motion For The Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi Pursuant to Rule 154 and One Related Witness Statement Pursuant to Rule 155, 16 March 2017.

call sequence tables.³⁶ Counsel for Mr Merhi, Mr Oneissi and Mr Sabra did not object to admitting these into evidence, or to admitting into evidence Ms Kamei's additional statement.³⁷ The Ayyash Defence did not object to admitting into evidence Ms Kamei's additional statement, but request the Trial Chamber to defer its decision on the admissibility of CST-0429A and CST-0430A until the Prosecution has submitted new call sequence tables which capture all available landline records.³⁸

DISCUSSION

Admission of evidence under Rule 154

18. The Trial Chamber has previously acknowledged the general principles and rules of international criminal procedural law relating to the admission and exclusion of evidence, and the procedural safeguards for the admission of material tendered 'from the bar table', under Rule 154.³⁹ These are applicable here.

Preliminary matters

19. Counsel for Mr Ayyash, Mr Merhi, Mr Oneissi and Mr Sabra submit that the Prosecution did not justify the substantial redactions applied to call sequence tables ECT/CST/0100 and ECT/CST/0101. The Prosecution withdrew, on 28 July 2016, its motion to admit seven landline call sequence tables, including the two tables, and put the Defence on notice that it will tender 'slimmed down' versions of these call sequence tables.⁴⁰ The Trial Chamber is satisfied with the detailed explanations provided by the Prosecution that the redaction of specific line entries in these call sequence tables constitutes the equivalent of withdrawing evidence, specifically the data in relation to OGERO landline-to-landline calls for 2004 and

³⁶ F3044, Supplementary Submission to Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi Pursuant to Rule 154 and One Related Witness Statement Pursuant to Rule 155, 21 March 2017 ('Prosecution supplementary submissions'), paras 3-5.

³⁷ Transcript of 22 March 2017, pp 29-30, 49, 51 and 92.

³⁸ F3048, Ayyash Defence Response to Prosecution Supplementary Submission to Motion for the Admission of Ten Call Sequence Tables and One Witness Statement, 23 March 2017, paras 2-5.

³⁹ Rule 154: 'Subject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149 (C) and (D). 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 UNHCR and STL's Prosecution, 6 May 2015, paras 66 and 111; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 33; F1350, Decision on Prosecution's Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, para 5-7; Decision of 31 October 2016, paras 70-72.

⁴⁰ F2672, Prosecution Notice of Withdrawal of Requests to Admit Landline Call Sequence Tables, 28 July 2016, para. 4.

2005.⁴¹ It is also satisfied with the Prosecution's clarification that the call sequence tables were redacted to show only Telecarte call data records and that a visual comparison between the old and new redacted versions of the call sequence tables shows that only those rows with a Telecarte serial number have been left unredacted.⁴²

20. The Trial Chamber considers unsubstantiated the submissions of the Merhi Defence that it will be prejudiced if the eight call sequence tables are admitted. As stated above, the full versions of the call sequence tables have been disclosed and the Defence had the opportunity to cross-examine both Ms Kamei, who produced the call sequence tables, and Witness 709. In addition, the Merhi Defence can request the admission of the full versions of the call sequence tables into evidence at the appropriate time.

21. The Merhi Defence argues that the admission of call sequence tables CST-0428 and CST-0424 would violate Mr Merhi's fair trial rights because the Prosecution 'ambushed' the Defence by the 'late attribution' of the numbers ending in 072 and 472 to a family member of Mr Merhi and a number ending in 685 to another person.⁴³ The two call sequence tables do not as such attribute these two numbers to any specific person, but they form part of the totality of the evidence, which also includes other call sequence tables already admitted into evidence. On 4 November 2016, the Prosecution disclosed to the Defence a statement by Mr Donaldson dated 13 October 2016. In an addendum accompanying this statement, the Prosecution attributed the numbers ending in 072 and 472 to a family member of Mr Merhi and a number ending in 685 to another person. Mr Donaldson will rely on them to attribute the numbers ending in 072 and 472 to a specific person. The Defence can challenge Mr Donaldson's evidence when he testifies. The Trial Chamber agrees with the Prosecution's submission that the attribution of these numbers does not create any new allegations against Mr Merhi and therefore does not change the nature of the Prosecution case. The Trial Chamber is also satisfied that the Prosecution put the Defence on notice in a timely manner about the addendum to Mr Donaldson's statement of 13 October 2016.

22. The Merhi Defence's submission that the admission of the call sequence tables related to Mr Merhi would require its telecommunication expert to redo his completed analysis would result in prejudice to the Defence and delay the proceedings lacks merit. Further, the Defence

⁴¹ F2845, Consolidated Prosecution Reply to Defence Responses to "Prosecution Motion for the Admission of the Consolidated OGERO Statement Pursuant to Rule 155", 21 November 2016, para. 4.

⁴² Prosecution motion, para. 30.

⁴³ Merhi Defence response, paras 10-19.

failed to explain with clarity what analysis its expert has to redo and clearly describe the ensuing prejudice.

23. As for the Merhi Defence's complaint that admitting the SMS call sequence tables CST-SMS-0152 and CST-SMS-0154 would be prejudicial because the Prosecution produced them on the basis of a narrow choice of SMSs, the Defence may request, under Rule 110 (B),⁴⁴ the disclosure of other messages sent from or received by the phone numbers ending in 072 and 685.

24. The Merhi Defence argues that the admission of call sequence tables ECT/CST/0100 and ECT/CST/0101 would prejudice Mr Merhi's fair trial rights because they are incomplete, as Witness 709 confirmed in his testimony.⁴⁵ The Defence also submits that call sequence tables CST-0426 and CST-0427 are based on a 'speculative theory'.⁴⁶ As stated above, the Trial Chamber, in its previous decisions, has dealt with the general Defence challenges to the reliability of the Prosecution's cell site evidence, call data records and call sequence tables generally.⁴⁷ The Trial Chamber must only be satisfied that these particular tables are *prima facie* reliable.

25. The Ayyash Defence submits that the Trial Chamber should receive into evidence all call data records of landlines attributed to Mr Ayyash, including call sequence tables CST-0185 and CST-0186, which the Prosecution withdrew on 28 July 2016.⁴⁸ The Trial Chamber is satisfied with the detailed explanations provided by the Prosecution for the withdrawal call sequence tables CST-0185 and CST-0186.⁴⁹ In addition, the Prosecution is entitled to present its case as it sees fit, while the Merhi Defence can request the admission of the full versions of these call sequence tables into evidence at the appropriate time.

⁴⁴ Rule 110 (B) provides that the Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

⁴⁵ Merhi Defence response, paras 3-9.

⁴⁶ Merhi Defence response, paras 24-25.

⁴⁷ F2750, Reasons for Admitting Witness PRH705's Statements and Annexes into Evidence, 30 September 2016, paras 18-28; F2767, Written Reasons for Admitting Witness PRH 707's Statements and Annexes into Evidence, 10 October 2016, paras 39-57, 62-74; Decision of 26 October 2016, paras 62-96; Decision of 31 October 2016, paras 74-95; F2894, Decision on the Admission of the Consolidated OGERO Statement, 7 December 2016 ('Decision of 7 December 2016'); F2818, Decision on Prosecution Rule 154 Motion for the Admission of Documents Relating to Telephone Subscriber Records from the OGERO Company, 7 November 2016 ('Decision of 7 November 2016').

⁴⁸ Ayyash Defence response, paras 16-21. *See* Consolidated Prosecution reply, paras 9-11.

⁴⁹ Consolidated Prosecution reply, para. 4.

26. The Trial Chamber is satisfied that the Ayyash Defence and the Prosecution resolved the issue of duplicates identified in certain call sequence tables. The Prosecution subsequently withdrew call sequence tables CST-429 and CST-430 and instead tendered CST-429A and CST-430A and requested to admit into evidence a statement dated 21 March 2017 from Ms Kamei describing how the call sequence tables were produced.⁵⁰ As no Defence counsel objected to admitting into evidence CST-429A and CST-430A, or to admitting Ms Kamei's additional statement into evidence, the Ayyash Defence's request that she appears for cross-examination is redundant.

General reliability of the call sequence tables

27. From 10 to 12 January 2017, the Trial Chamber heard extensive testimony from Witnesses PRH711, 709 and PRH713 (Mr Toufic Chebaro)—all representatives of relevant departments of OGERO—on the underlying call data records, and particularly regarding the generation, retrieval and storage of this data, from which the landline call sequence tables were created. The Trial Chamber also admitted into evidence sixty OGERO subscriber records and a consolidated statement, accompanied by eleven annexes, in support of the reliability of OGERO call data records and subscriber records.⁵¹ This evidence allows the Trial Chamber to evaluate the admissibility of the tendered landline call sequence tables, including the reliability of the underlying data. Further, Ms Kamei testified on the production of the tendered call sequence tables on 20 and 21 July 2015 and was cross-examined on 21 July and 16 to 19 November 2015. The Trial Chamber is accordingly satisfied of the *prima facie* reliability of the evidence, and hence its probative value.

Reliability of the specific call sequence tables

28. The Trial Chamber has held that the telecommunication evidence received from OGERO, including call data records, is generally *prima facie* reliable.⁵² Cell site evidence provided by Alfa and Touch, the admission into evidence of which is a precursor to admitting call sequence tables, has also been admitted into evidence.⁵³ In admitting this evidence, the Trial Chamber also considered the Prosecution's evidence on the production of call sequence tables

⁵⁰ Prosecution supplementary submission.

⁵¹ Decision of 7 December 2016; Decision of 7 November 2016. The consolidated statement is now exhibit P01777.

⁵² Decision of 7 December 2016; Decision of 7 November 2016.

⁵³ F2793, Reasons for Decision Admitting Prosecution's Cell Site Evidence, 26 October 2016 ('Decision of 23 October 2016').

and the design, implementation, maintenance and repair of the SQL database that enables call record analysis.⁵⁴ This is detailed in the Trial Chamber's decision on the admission of call sequence tables related to the Accused and Mr Badreddine.⁵⁵

29. The Trial Chamber has carefully reviewed the statements of Ms Kamei listed in annex D to the Prosecution motion, including her statement of 16 December 2016, to establish if the standard methodology was followed in the production of the edited call sequence tables and SMS call sequence tables. The Trial Chamber finds that these call sequence tables result from the same standardized procedure followed by Prosecution analysts, as explained in their live evidence, including Ms Kamei's previous cross-examination.⁵⁶ This gives the tendered call sequence tables and SMS call sequence tables the necessary indicia of reliability for their admission into evidence. For the same reason, Ms Kamei's cross-examination is unnecessary.

30. The Trial Chamber has also carefully reviewed each document referred to in annexes B and C to the Prosecution motion, submitted in support of the reliability and authenticity of the tendered call sequence tables.

31. Based on the totality of the evidence and supporting material—including that referred to in the other relevant decisions—the Trial Chamber is satisfied that the call sequence tables tendered in this motion are *prima facie* reliable and hence may have probative value for admission into evidence.

Relevance of the call sequence tables

32. The relevance of the evidence is uncontested and the Trial Chamber is satisfied that these call sequence tables are all relevant to the pleaded allegations, particularly in paragraphs 3 (b)-(c), 5, 17-19, 23 and 44 of the amended consolidated indictment, which relate to the delivery and receipt of the false claim of responsibility for the attack of 14 February 2005. The call sequence tables are also relevant to the attribution of landline telephones and

⁵⁴ Prosecution analyst Ms Kamei (Witness PRH308) testified in chief on 20 and 21 July 2015 and was cross-examined on 21 July and 16-19 November 2015. In addition, Prosecution analysts Mr Andrew Donaldson (Witness PRH230), Ms Helena Habraken (PRH371), Mr Lachlan Christie (Witness PRH313) and Mr Christian Carnus (Witness PRH377) testified in court on 21-22 July and 16-19 November 2015, respectively. They described the process of creating call sequence tables from the call data records, the method used, the peer review and the correction of errors in the produced call sequence tables. The Prosecution's database administrator, Mr Spartak Mkrtychyan (Witness PRH111) testified on 14 and 15 September 2015 regarding the Structured Query Language.

⁵⁵ Decision of 31 October 2016, paras 88-93, 95.

⁵⁶ See the testimonies Ms Kamei, Mr Donaldson, Ms Habraken, Mr Christie and Mr Carnus of 20-22 July and 16-19 November 2015.

personal mobiles to: (i) Al-Jazeera and Reuters; (ii) each of the Accused; and (iii) relatives and associates of Mr Ayyash and Mr Merhi.

33. The Trial Chamber has previously set out the considerations relevant to allowing amendments to the Prosecution's exhibit list, which are also applicable here.⁵⁷ For the reasons set out above, the Trial Chamber is satisfied that the call sequence tables are *prima facie* relevant and probative. It is also satisfied that their addition to the Prosecution's exhibit list will not cause undue delay or prejudice to the Defence. Four of the ten call sequence tables were already on the exhibit list in an extended form and were disclosed to the Defence in their new form, together with the remaining six call sequence tables, in advance of the Prosecution's motion.⁵⁸ It is therefore in the interests of justice⁵⁸ to allow the Prosecution to add the ten call sequence tables to its exhibit list.

Admission into evidence of Ms Kamei's witness statement

34. The Prosecution asks the Trial Chamber to admit into evidence, under Rule 155 (C), Ms Kamei's statement of 16 December 2016 without cross-examination. The Merhi Defence argues that Ms Kamei's witness statement should not be admitted due to its late disclosure to the Defence and because the relevance of the statement is contingent upon the admission of the eight call sequence tables to which counsel referred in their response.⁵⁹

35. The Trial Chamber has in previous decisions outlined the procedural safeguards for admitting written statements into evidence under Rule 155 in lieu of live testimony.⁶⁰

⁵⁷ See e.g., F2798, 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, para 68.

⁵⁸ As noted above, there were no Defence objections regarding the replacement of two of the ten call sequence tables originally tendered by the Prosecution with corrected versions of the same.

⁵⁹ Merhi Defence response, paras 32-33.

⁶⁰ Rule 155 (A): 'Subject to Rule 158, the Trial Chamber may admit in lieu of oral testimony the evidence of a witness in the form of a written statement, or a transcript of evidence which was given by a witness in proceedings before the Tribunal, which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.' See also, STL-11-01/PT/TC, F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, para. 13; F1280, First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013, paras 7-14; STL-11-01/T/TC, F1785, Corrected Version of Decision on the Prosecution Motion for Admission under Rule 155 of Written Statements in Lieu of Oral Testimony Relating to Rafik Hariri's Movements and Political Events of 11 December 2014, 13 January 2015, para. 3; F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 5; F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 Pursuant to Rule 155, 12 July 2016, para. 25.

36. Having reviewed the content of the statement, the Trial Chamber finds it relevant to and probative of the reliability of the respective call sequence tables produced by the witness. The proposed statements also have sufficient indicia of reliability under both Rule 155 and the relevant Practice Direction.⁶¹ The witness statement contains evidence which does not concern the acts and conduct of the Accused.

37. As the statement was disclosed to the Defence shortly after its production, the Trial Chamber is satisfied that the Defence has had sufficient notice for its admission into evidence. Further, as Ms Kamei's evidence is repetitive of her previous evidence, the rights of the Defence are not prejudiced by the admission of her statements without cross-examination. Ms Kamei's witness statement is thus admissible under Rule 149 (C), and can be admitted into evidence under Rule 155.

CONFIDENTIALITY

38. The Prosecution requested the Trial Chamber to maintain the confidentiality of the annexes accompanying its motion as they contain numbers used by third parties, until the Trial Chamber decides otherwise, either upon the motion of the Prosecution or after having given the Prosecution the opportunity to be heard on this issue. The Prosecution and the Merhi Defence ask the Trial Chamber to maintain the confidentiality of the annexes accompanying their submissions as they contain *inter partes* correspondence and numbers used by third parties.⁶² The Trial Chamber will maintain the confidentiality of the annexes to the Prosecution motion, its consolidated reply and supplementary submissions, and the annexes to the Merhi Defence response until it decides otherwise.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS the Prosecution's request to amend its Rule 91 exhibit list to add call sequence tables CST-0429A, CST-0430A, ECT/SCT/0100, ECT/SCT/0101, CST-0428, CST-0424, CST-0426, CST-0427 and SMS call sequence tables CST-SMS-0152 and CST-SMS-0154, listed in annex A of the Prosecution motion and annex B to its supplementary submissions;

⁶¹ STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010.

⁶² Merhi Defence response (F3022), with confidential annexes A and B; Prosecution consolidated reply (F3038), with confidential annex A; and Prosecution supplementary submissions (F3044), with confidential annexes A and B.

DECLARES admissible, under Rule 154, call sequence tables CST-0429A, CST-0430A, ECT/SCT/0100, ECT/SCT/0101, CST-0428, CST-0424, CST-0426, CST-0427 and SMS call sequence tables CST-SMS-0152 and CST-SMS-0154, listed in annex A of the Prosecution motion and annex B to its supplementary submissions;

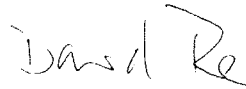
DECLARES admissible, under Rule 155, the statements of Ms Kei Kamei (Witness PRH308) of 16 December 2016 and 21 March 2017;

DECIDES that it will, at the suitable stage in the proceedings, admit these documents into evidence and allocate exhibit numbers to them; and

MAINTAINS the confidentiality of the annexes of the Prosecution submissions and the response filed by counsel for Mr Hassan Habib Merhi until it decides otherwise.

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

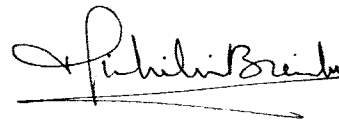
Leidschendam,
The Netherlands
31 March 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

