

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: 29 June 2017

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Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON THE ADMISSION OF 27 DOCUMENTS AND ONE WITNESS
STATEMENT RELATING TO THE ATTRIBUTION OF MOBILE NUMBERS TO
HASSAN HABIB MERHI**

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Milne

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**Legal Representatives of
Participating Victims:**
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Counsel for Mr Hussein Hassan Oneissi:
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Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Geoffrey Roberts
Ms Sarah Bafadhel



INTRODUCTION

1. The Prosecution's case is that five interconnected groups of mobile telephones—referred to as the Red, Green, Blue and Yellow networks and the Purple 'group'—carried out the attack of 14 February 2005 in Beirut which killed Mr Rafik Hariri, and others.¹ To assist in the identification and attribution of relevant mobile numbers to the Accused, Mr Hassan Habib Merhi, and his family (in particular the mobile numbers referred to as PMP (or 'personal mobile phone') 091 and Purple 231), and of third party contacts² whose identification aids in such attribution, the Prosecution seeks the admission into evidence of 27 documents under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence. They are nine financial records, four land registry records, three subscriber records, three vehicle registration records, three movement/exit-entry records to and from Lebanon, two Hajj application records, an official personal family status extract, an electricity supply record and a medical record. The Prosecution also seeks the admission, under Rule 155, of one witness statement and requests the addition of seven exhibits to its Rule 91 exhibit list.³ Counsel for Mr Merhi oppose the Prosecution's motion in part.⁴

2. The amended consolidated indictment uses 'PMP 091' to refer to a personal mobile number that is attributed to the Accused, Mr Salim Jamil Ayyash.⁵ The personal mobile number the Prosecution has labelled as 'PMP 091' in its motion in connection with Mr Merhi—a label the Merhi Defence has also used in its response—is different (but also ends in '091') to that referred to in the amended consolidated indictment in connection with Mr Ayyash.

SUBMISSIONS – DOCUMENTS

Prosecution

3. The Prosecution argues that the 27 documents are admissible under Rule 154 since each individual document is relevant and probative, displays the requisite indicia of reliability

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi, and Sabra*, F2720, Amended consolidated indictment, 12 July 2016, para. 14.

² A 'third party contact', according to the Prosecution, is an alleged user of a number that was in contact with one or more numbers which the Prosecution attributes to an Accused.

³ F3084, Prosecution Motion to Admit 27 Documentary Exhibits and 1 Witness Statement Relating to the Attribution of Telephone Numbers to Hassan Habib Merhi, 18 April 2016 ('Prosecution motion').

⁴ F3113, Réponse de la Défense de Merhi à la « Prosecution Motion to Admit 27 Documentary Exhibits and 1 Witness Statement Relating to the Attribution of Telephone Numbers to Hassan Habib Merhi », 2 May 2017 ('Merhi response').

⁵ See F2720, Amended consolidated indictment, 12 July 2016, paras 17, 18, 19 (c), 31, 37, 38 (a).

and their admission into evidence does not prejudice the Defence's right to a fair trial. The exhibits have been disclosed to the Defence and their relevance is known as Prosecution analyst Mr Andrew Donaldson (Witness PRH230) relies upon their content in his various attribution reports.⁶ The Defence will have the opportunity to cross-examine Mr Donaldson and thus admitting these documents would serve the interests of justice, and a fair and expeditious trial. The Prosecution emphasizes that the attribution of a mobile number is based on the totality of the evidence, with each individual document constituting one piece of this totality.⁷

Nine financial records

4. These records include bank account documents of Mr Merhi's family members obtained from the Lebanese Special Investigation Commission; Mr Merhi's tax records obtained from the Ministry of Finance; and a claim made by Mr Merhi pursuant to the 'Rebuild Lebanon' recovery project following the conflict with Israel in 2006, obtained from the General Secretariat of the Council of Ministers. These documents were received pursuant to various requests for assistance from the Special Tribunal's Office of the Prosecutor to the Government of the Republic of Lebanon which render them reliable, and provide biographical information, addresses and numbers for Mr Mehri and close relatives. These exhibits are relevant as they assist in the attribution of numbers to Mr Merhi; to the numbers of third parties who contacted numbers attributed to Mr Merhi and his family members; and to the analysis of the geographical profiles of mobile numbers attributed to Mr Merhi.⁸

Four land registry records

5. These documents, from the Land Registry of Lebanon, include land title records and certificates for two properties in the Baabda and Nabatiyeh Districts, as well as their respective contracts of sale, showing Mr Merhi as their registered owner. Also included is a real estate ownership card for Mr Merhi's father showing that he is the registered owner of three properties in the Nabatiyeh District. The documents, received in response to various requests for assistance which render them reliable, assist in determining a geographical profile

⁶ Mr Donaldson has prepared five 'attribution reports', one for each Accused and the former Accused, Mr Mustafa Amine Badreddine, which analyse numerous individual Prosecution exhibits and provide opinion evidence on the attribution of relevant mobiles to the Accused and Mr Badreddine. *See generally* F3172, Decision Allowing Prosecution Analyst Andrew Donaldson to Provide Opinion Evidence, 2 June 2017, paras 7-13, 42-57, fn. 10.

⁷ Prosecution motion, paras 6-7, 26.

⁸ Prosecution motion, paras 8-9; annex A, items 1-9; annex C, items 1-3.

for Mr Merhi and his family which is relevant to the attribution of numbers to Mr Merhi.⁹ One of these land registry records is already in evidence.¹⁰

Three subscriber records

6. These include two mobile subscriber notes¹¹ from MTC Touch and one from Alfa—both Lebanese mobile telephone communication service providers. They were extracted from three databases either provided by them directly to the Prosecution or pursuant to a request for assistance and each had its provenance and accuracy verified by an analyst. They are reliable on this basis. The subscriber notes are relevant to analysing the users of numbers subscribed to or used by third party contacts to either Mr Merhi or his brother and ultimately relevant to the attribution of numbers to Mr Merhi.¹²

Three vehicle registration records

7. These documents are from the Traffic, Trucks and Vehicles Management Authority of Lebanon and were received by the Prosecution in response to various requests for assistance. They are reliable. The records provide addresses and numbers that assist in the analysis of the use of two telephone numbers by, and the geographical profile of, Mr Merhi's brother to contact numbers the Prosecution attributes to Mr Merhi (Purple 231) and his family (PMP 091). They are ultimately relevant to the attribution of numbers to Mr Merhi.¹³

Three exit-entry records

8. These documents detail the exit and entry into and out of Lebanon to Iran in September and October 2004 of Mr Merhi's wife and son, and of a third party contact on the same flights. They are relevant to the attribution of PMP 091 to Mr Merhi and his family, because a number attributed to the third party contacted PMP 091 on the date when that individual returned to Lebanon from Iran with Mr Merhi's wife and son. The documents are extracts from a database provided to the Prosecution by the Lebanese Directorate General of

⁹ Prosecution motion, paras 10-11; annex A, items 10-13; annex C, items 4-6.

¹⁰ See below para. 29.

¹¹ Subscriber notes are records maintained by telecommunications companies which contain 'the information provided by individual subscribers when applying for a telephone number': 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. 7. See also F2815, Decision on the Admission of Documents Related to Telephone Subscriber and User Information, 4 November 2016, para. 7.

¹² Prosecution motion, paras 12-13; annex A, items 14-16; annex C, items 7-9, 18. Item 18 is a statement of Prosecution analyst Mr Lachlan Christie (Witness PRH313), whose admission is not sought in the Prosecution's motion.

¹³ Prosecution motion, paras 14-15; annex A, items 17-19; annex C, items 10-12.

General Security in response to a request for assistance. They were verified as accurate by a Prosecution analyst. They are reliable.¹⁴

Two Hajj application records

9. These two documents are extracts from a Hajj application database (for Hajj Year 1427),¹⁵ received by the Prosecution from the Hajj Committee of Lebanon, which (erroneously) according to the Prosecution has previously been received into evidence. The extracts are therefore reliable. Each provides details of a member of Mr Mehri's brother's extended family including the name of the applicant and a telephone number which is common to both applications. They are relevant because this common number was in contact with two numbers attributed to Mr Mehri's brother. In turn, Mr Merhi's brother, using these two numbers, contacted numbers the Prosecution attributes to Mr Merhi (Purple 231) and his family (PMP 091). Each extract had its provenance and accuracy verified by a Prosecution analyst.¹⁶

Personal family status extract

10. This document is an official personal family status extract provided to the Prosecution by the Lebanese Directorate General of Personal Status in response to a request for assistance. It is reliable on this basis. The document is relevant as it assists in the identification of members of Mr Merhi's extended family which also assists in the attribution of two numbers to Mr Merhi's brother and ultimately to Mr Merhi.¹⁷

Electricity supply record

11. This document is from Électricité du Liban and relates to Mr Merhi's brother's electricity account. It is relevant to the address of, and therefore the geographic profile of mobile numbers belonging to, Mr Merhi's brother. These numbers contacted mobile numbers the Prosecution attributes to Mr Merhi (Purple 231) and his family (PMP 091). The document was forwarded by Électricité du Liban pursuant to a request for assistance and is reliable.¹⁸

¹⁴ Prosecution motion, paras 16-17; annex A, items 20-22; annex C, items 13, 18. Item 18 is a statement of a Prosecution analyst Mr Christie, whose admission is not sought in the Prosecution's motion.

¹⁵ Hajj Year 1427 corresponds with the year 2006.

¹⁶ Prosecution motion, paras 14, 18-19; annex A, items 23-24; annex C, items 14, 18. Item 18 is a statement of a Prosecution analyst Mr Christie, whose admission is not sought in the Prosecution's motion.

¹⁷ Prosecution motion, paras 20-21; annex A, item 25; annex C, item 15.

¹⁸ Prosecution motion, paras 14, 22-23; annex A, item 27; annex C, item 16.

Medical record

12. This record comprises, relevantly, patient registration forms and injection records for three of Mr Merhi's children. It was provided by the Lebanese Order of Physicians in response to a request for assistance and is reliable. The record is relevant as it provides PMP 091 as the contact number for the three Merhi children which, in turn, is relevant to the attribution of this mobile number to Mr Merhi and his family.¹⁹

Amendment of Rule 91 exhibit list

13. The Prosecution also requests that seven of the tendered documents, listed in annex D of its motion, be added to its exhibit list. The Prosecution argues that it has good cause to add them at this stage. Six of the documents (namely, a subscriber record, the three vehicle registration records, the official personal family status extract and the electricity supply record) are relevant to the attribution of two numbers to Mr Merhi's brother and, ultimately, to Mr Merhi himself. They are referred to in a proposed addendum to Mr Donaldson's attribution report for Mr Merhi contained in a separate filing.²⁰ The seventh document (the medical record), was referred to in a witness statement of a Prosecution investigator which was previously listed on the Prosecution's exhibit list and was cited in the footnotes of Mr Donaldson's attribution report for Mr Merhi.²¹ However, the medical record is from the best available source. These exhibits are not voluminous, their addition would not cause undue delay but would facilitate the efficient presentation of evidence, and their addition does not give rise to any potential Defence prejudice.²²

Defence

14. The Merhi Defence objects to the admission of some of the documents and to the addition of the seven documents to the Prosecution's exhibits list on the basis that it would seriously affect the trial's fairness and the Defence's right to be informed in detail of the charges and to prepare an effective defence.²³

¹⁹ Prosecution motion, paras 24-25; annex A, item 26; annex C, item 17.

²⁰ See F3059, Prosecution Request to Amend its Exhibit List, 31 March 2017 (since then, the addendum has been added to the Prosecution's exhibit list: F3106, Decision Allowing the Prosecution to Add to its Exhibit List a Statement by Mr Andrew Donaldson (Witness PRH230), 28 April 2017).

²¹ See Prosecution motion, fn. 37.

²² Prosecution motion, paras 31-34; annex D, items 1-7 (the documents are those found in Prosecution motion, annex A, items 14, 17-19, 25-27).

²³ Merhi response, paras 2, 21, 27-28, fn. 20.

Amendment of the exhibit list

15. The Merhi Defence objects to the Prosecution's request to add seven documents to its exhibit list on the basis that it has been requested too late in the proceedings. It rejects the Prosecution's reasons for not requesting permission to add six of the documents²⁴ at an earlier stage in the proceedings, namely, that they were referenced in the addendum to Mr Donaldson's attribution report for Mr Merhi, or that they were used to attribute numbers to a close relative of Mr Mehri. With regards to the seventh document (the medical record),²⁵ the Merhi Defence submits that its alleged relevance should have been clear since the preparation of the last attribution report for Mr Merhi (November 2015). The Prosecution's sudden realisation that the original document was a better source was not a valid reason.²⁶

16. The Merhi Defence contends that the Prosecution's motion was one of a series of unacceptably late additions to its exhibit list. Further, the Prosecution did not provide any valid reason to justify why it took so long to request the addition of these documents at such an advanced stage of the proceedings, considering that the Prosecution's last witness was due to begin his testimony within a few days. The Merhi Defence argues that to add the documents at this stage would be tantamount to rendering Rule 91's time frames meaningless²⁷ and would unjustifiably broaden the criteria for late additions to the exhibit list. The cumulative effect of all the Prosecution's late requests not only illustrated the Prosecution's negligence, but also prejudiced the Defence, as it had to constantly adapt its case to new and unexpected evidence.²⁸

17. The Merhi Defence also questions the relevance of two vehicle registration records and the official personal family status extract,²⁹ arguing that they only showed, respectively, that a number used by Mr Merhi's close relative was also used by his wife; that another

²⁴ Prosecution motion, annex A, items 14, 17-19, 25, 27.

²⁵ Prosecution motion, annex A, item 26.

²⁶ Merhi response, paras 3-5.

²⁷ Rule 91 ('Preparation and Implementation of Working Plan') is a procedure implemented by the Pre-Trial Judge, which, among other things, states in Rule 91 (G) (iii) that the Prosecution is required to file, no less than six weeks before the pre-trial conference referred to in Rule 127, a list of exhibits that it intends to present during its case. The Prosecution filed its original exhibit list in November 2012 in accordance with Rule 91 (G) (iii) before the Pre-Trial Judge and has since revised, amended, updated and consolidated it on a number of occasions.

²⁸ Merhi response, paras 3, 6-8, 10.

²⁹ Prosecution motion, annex A, items 17, 19, 25.

number was attributed to Mr Merhi's close relative; and the identification of family members of Mr Merhi's sister-in-law. They do not assist in the attribution of numbers to Mr Merhi.³⁰

Admission of documents

18. The Merhi Defence contends that seven of the financial records³¹ are not included in the last version of the Prosecution's exhibit list and were, in fact, withdrawn from the exhibit list at the Prosecution's request. It was thus reasonable for the Merhi Defence to expect that they would not be used in the proceedings. As a result, the Defence did not take them into consideration in its preparation. Their admission would therefore be a surprise and would be unfounded as the Prosecution failed to request their addition to the exhibit list.³²

19. Further, the Merhi Defence contends that four of the documents—two subscriber records³³ and the two Hajj application records³⁴—do not have the relevance required for admission. The relevance of one subscriber record³⁵ depends on the prior admission of the other,³⁶ which should not be added to the Prosecution's exhibit list due to a lack of justification for its late addition. The Merhi Defence also submits that the number identified by the Prosecution in all four documents was never in contact with those attributed to Mr Merhi, but rather to numbers the Prosecution attributes to a close relative of Mr Merhi. As a result, this number is not a third party contact and, by describing it as such, the Prosecution is stretching its own definition of what constitutes a 'third party contact'. Such an interpretation is tantamount to treating Mr Merhi's close relative as an accused and attributing their actions to Mr Merhi. The Prosecution was thus using one intermediary too many to attempt to prove the relevance of the documents and link them to Mr Merhi.³⁷

20. Concerning the medical record,³⁸ the Merhi Defence argues that it was obtained in breach of medical confidentiality, a privileged relationship that must be respected and protected. There was nothing to show that Mr Merhi's children, or their parents on their behalf, relinquished the medical confidentiality to which they are entitled with regards to their

³⁰ Merhi response, para. 9.

³¹ Prosecution motion, annex A, items 3-9.

³² Merhi response, paras 11-13 (citing to F1344, Decision Authorizing the Prosecution to Amend its Witness and Exhibit Lists, 24 January 2014).

³³ Prosecution motion, annex A, items 14-15.

³⁴ Prosecution motion, annex A, items 23-24.

³⁵ Prosecution motion, annex A, item 15.

³⁶ Prosecution motion, annex A, item 14.

³⁷ Merhi response, paras 14-18.

³⁸ Prosecution motion, annex A, item 26.

medical certificates contained in the medical record. It cannot be admitted into evidence pursuant to Rule 149 (D), which allows the Trial Chamber to exclude evidence obtained in violation of the rights of the accused as set out in the Statute and the Rules.³⁹

21. The Merhi Defence takes no position, at this stage, on the admission of the remaining documents.⁴⁰

DISCUSSION

Principles

22. 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, 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.⁴¹

23. The Trial Chamber has also identified the procedural safeguards and principles applicable to the admission of documents under Rule 154 or '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.⁴² *Prima facie* reliability is sufficient.⁴³ In addition, how and where each

³⁹ Merhi response, paras 19-20.

⁴⁰ Merhi response, paras 21-22 (namely, the documents at Prosecution motion, annex A, items 1-2, 10-13, 16, 20-22).

⁴¹ F2544, Decision on Prosecution Motion to Add Inventory and Supporting Documents relating to the Searches of the Residence of Ahmed Abu Adass, 11 April 2016, para. 4; F2270, Decision Authorising the Prosecution to Amend its Exhibit List, 15 October 2015, para. 4; F2263, Corrected Version of 'Decision on Prosecution Request to Amend its Witness and Exhibit Lists' dated 13 October 2015, 19 October 2015, para. 28; F2149, Decision on Prosecution Motion to Admit 62 Photographs, 28 August 2015, para. 3; F1901, Decision on Prosecution Motion to Amend its Exhibit List and Oneissi Defence Request to Stay the Proceedings, 13 April 2015, para. 34.

⁴² 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 UNIIIC 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.

⁴³ 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.

document or record fits into the tendering party's case must be clearly explained.⁴⁴ The ultimate weight given to the material by the Trial Chamber is separate and distinct from its probative value.

Amendments to Prosecution's exhibit list

24. The Trial Chamber has reviewed the seven documents the Prosecution seeks to add to its exhibit list and, as explained below, is satisfied that they are relevant and have probative value. Concerning the main Defence objection—namely, the lateness of the motion—the Trial Chamber has already considered similar submissions when it approved the addition of a statement by Mr Donaldson (an addendum to his attribution report for Mr Merhi of 13 October 2016) to the Prosecution's exhibit list. This statement/addendum explicitly referenced six of the documents (one subscriber record, three vehicle registration records, one official personal family status extract and one electricity supply record) at issue here.⁴⁵ In its decision, the Trial Chamber held that:

Allowing these additions will not adversely affect the Defence's ability to prepare for trial or cause undue delay given that the statement was disclosed to the Defence in November 2016. Therefore, the Merhi Defence already had five months to prepare on the issues analysed in the statement.⁴⁶

25. In the same month, November 2016, together with Mr Donaldson's statement/addendum, five of the documents were disclosed to the Defence.⁴⁷ The sixth document was disclosed even earlier, in March 2016.⁴⁸ Therefore, consistent with its previous decision on the addition of Mr Donaldson's statement/addendum to the Prosecution's exhibit list, the Trial Chamber considers that the Merhi Defence has had, at least, seven months to consider the documents cited in that statement and to prepare accordingly. In this respect, the Trial Chamber has already found that 'the Prosecution put the Defence on notice in a timely manner about the addendum to Mr Donaldson's statement of 13 October 2016.'⁴⁹ Adding

⁴⁴ CST decision, para. 111; Mobile documents decision, para. 33; Victims decision, para. 7; Visuals decision, para. 6.

⁴⁵ Namely, the documents at Prosecution motion, annex A, items 14, 17-19, 25, 27.

⁴⁶ F3106, Decision Allowing the Prosecution to Add to its Exhibit List a Statement by Mr Andrew Donaldson (Witness PRH230), 28 April 2017, para. 22.

⁴⁷ Prosecution motion, annex D, items 1-3, 5-6.

⁴⁸ Prosecution motion, annex D, item 4.

⁴⁹ F3061, 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, 31 March 2017, para. 21. *See also* F3106, Decision Allowing the Prosecution to Add to its Exhibit List a Statement by Mr Andrew Donaldson (Witness PRH230), 28 April 2017, para. 22. Furthermore, the Prosecution put the Defence on notice that the

these documents to the exhibit list, therefore, will not unduly impact Defence trial preparations, nor cause any undue delay. Although the Prosecution has only noted that these documents were cited in Mr Donaldson's statement/addendum (which has now been added to the exhibit list) as a good cause for the late addition, having balanced the Prosecution's right to present evidence in support of its case and the Defence's right to adequately prepare for trial, the Trial Chamber finds that it is in the interests of justice to allow the addition of the six documents.

26. Concerning the seventh document (the medical record), the Trial Chamber also finds that its addition would not impact Defence preparations or delay the trial. The information it contains is the same as that in a statement of Prosecution investigator Mr Toby Smith (Witness PRH550) which was referenced in Mr Donaldson's attribution report for Mr Merhi. The medical record is the original source from which Mr Smith recorded the information in his statement, since the Prosecution did not, at that time, have the original medical records. Further, the document was disclosed in December 2016⁵⁰—the Defence has thus had over six months to consider it—and the Defence has been on notice as to the relevant underlying content relied upon by the Prosecution when Mr Donaldson's attribution report for Mr Merhi was first disclosed in April 2014. The Trial Chamber therefore finds that, on balance, the interests of justice weigh in favour of allowing the addition of the seventh document.

27. For these reasons, the Trial Chamber will permit the addition of all seven documents to, and thereby amends, the Prosecution's exhibit list.

Admission of documents

28. As a preliminary matter, the Trial Chamber agrees with the Defence that, with one exception,⁵¹ a number of documents were previously on the Prosecution's exhibit list, but were withdrawn upon its request.⁵² While, on its face, this could have created an expectation that the Prosecution did not intend to rely upon them, this was open to question. Indeed, the documents continued to be referenced in the various updated versions of Mr Donaldson's

underlying evidence contained in Mr Donaldson's statement/addendum was 'in the process of being added to the Prosecution's Exhibit List': F3059, Prosecution Request to Amend its Exhibit List, 31 March 2017, para. 17.

⁵⁰ Prosecution motion, annex D, item 7.

⁵¹ Prosecution motion, annex A, item 9.

⁵² This includes the documents at Prosecution motion, annex A, items 3-8 (*see* F1344, Decision Authorizing the Prosecution to Amend its Witness and Exhibit Lists, 24 January 2014, disposition; F1273, Prosecution Submission Pursuant to Rules 91(G)(ii) and (iii), 18 December 2013, annex B, item 224). However, the document at Prosecution motion, annex A, item 9, was not, contrary to the submission of the Merhi Defence, included in the Prosecution's exhibit withdrawal request.

attribution report for Mr Merhi, the first of which was disclosed in April 2014. Although the Prosecution should have, in principle, sought the addition of the documents to the exhibit list, the Trial Chamber has seen nothing that reveals that the Defence objected to this until May 2017 (the date of the Merhi Defence response) or that it inquired with the Prosecution to obtain clarification. However, in the circumstances, and considering the advanced stage of the trial, it is in the interests of justice to add the documents to the Prosecution's exhibit list. The Defence has not contested the relevance and probative value of the documents, which, for the reasons explained below have been satisfied.

29. Additionally, one of the land registry records the Prosecution seeks to admit in its motion⁵³ has already been admitted into evidence as exhibit P646.⁵⁴ Its admission in this decision is therefore moot.

30. The Trial Chamber has carefully reviewed the documents proposed in the Prosecution's motion—minus exhibit P646, the related annexes to the motion, as well as the submissions of the Parties. It is satisfied that the 26 proposed documents are relevant to the allegations pleaded in the amended consolidated indictment. The attribution of specified mobile numbers to Mr Merhi is a key part of the Prosecution's case⁵⁵ and the proposed documents assist in this respect by either attributing numbers (to Mr Merhi, to third party contacts who contacted Mr Merhi or members of his family, or to members of Mr Merhi's immediate or extended family) or by identifying members of Mr Merhi's extended family and by providing addresses for Mr Merhi, or members of his family. This assists in the geographic profile of relevant mobile numbers which also assists in the attribution of numbers to Mr Merhi.⁵⁶

31. The Trial Chamber therefore rejects the Merhi Defence submission that the Prosecution has not adequately justified the relevance of two subscriber records, two vehicle registration records, the two Hajj applications records and the official personal family status extract.⁵⁷ Similarly, the Trial Chamber has now granted the Prosecution's request to add documents to its exhibit list—which addresses the Merhi Defence's argument concerning the

⁵³ Prosecution motion, annex A, item 10.

⁵⁴ See transcript of 15 October 2015, pp. 86-87.

⁵⁵ See F2720, Amended consolidated indictment, 12 July 2016, paras 3 (b)-(e), 16-17, 19 (a), (c)-(d), 21, 23, 27-30, 37, 44-46.

⁵⁶ See Prosecution motion, paras 8, 10, 12, 14, 16, 18, 20, 22, 24.

⁵⁷ Merhi response, paras 9, 18 (challenging the relevance of the documents at Prosecution motion, annex A, items 14-15, 17, 19, 23-25).

admission of a subscriber record⁵⁸—and rejects the Defence contention concerning the Prosecution’s use of the term ‘third party contact’. While the Defence is correct in pointing out that the Prosecution’s identification of a number as having contacted two ‘third party contact’ numbers (numbers attributed to Mr Merhi’s close relatives who are not accused persons)⁵⁹ goes beyond what the Prosecution has defined as a ‘third party contact’,⁶⁰ the Trial Chamber finds that this argument is one of semantics rather than substance. There is no basis to submit, and it would be wrong to accept, that, in making this submission, the Prosecution is treating Mr Merhi’s close relatives as accused persons or attributing their actions to Mr Merhi. The Prosecution should nonetheless, in the future, be more cautious to describe individuals in accordance with the terminology it has already defined and the Trial Chamber has accepted.

32. Concerning the medical record and the purported breach of medical confidentiality,⁶¹ the Special Tribunal’s Rules, unlike those of the International Criminal Court (ICC),⁶² do not explicitly recognize medical doctor-patient privilege.⁶³ Neither does the Special Tribunal’s Statute. Nonetheless, there may be scope for the Special Tribunal to recognize a non-enumerated privilege such as, for example, war correspondent’s privilege.⁶⁴ Here, the Merhi Defence has asserted medical doctor-patient privilege, although it has not used that term, without citing to any statutory or case law—either domestic or international.

33. Notwithstanding this, the Trial Chamber finds that, on the facts of this case, it need not consider the matter further. Even if doctor-patient privilege had in fact been breached, it would not lead to the exclusion of the document. Rule 149 (D), the sole provision upon which the Defence relies, provides the Trial Chamber with the discretion to exclude ‘evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules’. Here, doctor-patient privilege is not set out in the Special Tribunal’s Statute or its

⁵⁸ Merhi response, para. 15.

⁵⁹ See Prosecution motion, paras 12, 18.

⁶⁰ Merhi response, paras 16-17. The Prosecution defined a ‘third party contact’ as ‘an alleged user of a phone number that was in contact with one or more phone numbers which the Prosecution attributes to an accused’: Prosecution motion, fn. 1.

⁶¹ Merhi response, paras 19-20.

⁶² ICC Rule 72 (2) states that ‘communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged’. Rule 73 (3) goes on to provide that that ICC ‘shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor’.

⁶³ The Special Tribunal’s Rules only explicitly recognise legal professional privilege (Rule 163) and the privilege of the International Red Cross and Red Crescent movement (Rule 164).

⁶⁴ See F2040, Decision on Prosecution Application for a Summons to Appear for Witness 012 and Order Issuing a Summons for a Witness, 1 July 2015, paras 21-26. See also STL-11-01/T/AC, F2102, Reasons for Decision on Applications Filed by Counsel for Witness PRH012 and Order on Confidentiality – Dissenting Opinion of Judge Baragwanath, 28 July 2015, paras 8-12, 36.

Rules. In the alternative, Rule 162, a provision which the Merhi Defence has not relied upon, provides that evidence will be excluded when it has been obtained in a manner that ‘is antithetical to, and would seriously damage, the integrity of the proceedings’ and, in particular, evidence obtained ‘in violation of international standards on human rights, including the prohibition of torture’. Aside from the lack of submissions from the Defence on whether a violation of doctor-patient privilege is also a violation of ‘international standards on human rights’, Rule 162 indicates that the violation in question must be sufficiently serious or attain a certain level of gravity in order for the evidence to be excluded. Here, the documents were obtained by the Prosecution pursuant to a request for assistance from the Lebanese Order of Physicians. The request indicated, in bold lettering, that ‘[n]o patient medical treatment records are required’.⁶⁵ Any violation of doctor-patient privilege, on these facts, does not rise to the level that would justify the medical record’s exclusion under Rule 162; neither does it affect its reliability.⁶⁶

34. The Trial Chamber also finds that the documents tendered for admission by the Prosecution are, on the whole, *prima facie* reliable. The three land registry records, three vehicle registration records, three exit-entry records and the official personal family status extract are official Lebanese Government records which have been transmitted to the Prosecution by various Lebanese Government agencies.⁶⁷ Their status as official documents—in the absence of any reason to doubt the authenticity and the reliability of the information in the documents—is sufficient to meet the *prima facie* reliability threshold.⁶⁸ The three subscriber records and the two Hajj application records constitute extracts that originate from the same databases from which other documents have already been extracted and admitted into evidence. Further, their accuracy has been individually verified. This renders these documents *prima facie* reliable.⁶⁹ The nine financial records and the electricity supply record constitute business records produced in the ordinary course of business and

⁶⁵ See Prosecution motion, annex A, item 26 (at ERN 60315543-60315545).

⁶⁶ See e.g. ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 29 January 2007, paras 84-90 and case law cited therein (finding that although the accused’s right to privacy had been breached, the breach had not been so serious as to warrant the evidence’s exclusion under Article 69 (7) of the ICC Statute (the equivalent of the Special Tribunal’s Rule 162)).

⁶⁷ See Prosecution motion, paras 11, 15, 17, 21; annex A, items 11-13, 17-22, 25; annex C, items 4, 6, 10-13, 15.

⁶⁸ See e.g. F2899, Decision on the Prosecution Motion for the Admission of Records Received from the Traffic, Truck, and Vehicle Management Authority, 9 December 2016, paras 22-23.

⁶⁹ With respect to the three subscriber records, see F2819, Decision on Prosecution Motion to Admit Documents Relating to Telephone Subscriber Records from the Touch Company, 7 November 2016; F2584, Decision on Prosecution Rule 154 Motion for the Admission of Documents Relating to Telephone Subscriber Records from the Alfa Company, 3 May 2016. Concerning the two Hajj application records, see F2871, Decision on the Prosecution Motion for the Admission of Hajj Applications, 5 December 2016 (contrary to Prosecution motion, para. 19, the Hajj database itself has not been received into evidence, only extracts from the database).

possess all the indicia of being company documents. They are *prima facie* reliable on this basis.⁷⁰ Finally, the medical record was obtained from the Lebanese Order of Physicians, the professional medical association of physicians in Lebanon, and contains nothing that would call into question its *prima facie* reliability. The Merhi Defence did not challenge any of the documents on the basis of their reliability.

35. For these reasons, the Trial Chamber finds that the 26 documents are relevant, *prima facie* reliable and thus possess some probative value. They are therefore admissible pursuant to Rule 154.

SUBMISSIONS – STATEMENT

Prosecution

36. The witness statement of Ms Helen Green (Witness PRH370) outlines her review of relevant Short Message Service (SMS) call sequence tables⁷¹ for numbers Purple 231 and PMP 091. It confirms that the SMS content for PMP 091 revealed a variety of names which were the same as those of the Accused's children. The Prosecution argues that the statement is admissible under Rule 155. It has already been disclosed to the Defence, is relevant and has probative value under Rule 149 (C) without requiring Ms Green to attend court for cross-examination, and does not go to the acts and conduct of the accused as charged in the amended consolidated indictment. The statement is therefore relevant to the identification of the user of PMP 091, namely, Mr Merhi's family. The statement includes the necessary indicia of reliability, fulfils the requirements of Rule 155 (B) (which requires statements to be signed, dated and the location, time and persons present to be stated), and is compliant with the applicable Practice Direction.⁷² Moreover, there is no overriding public interest in the evidence being presented orally. The interests of justice and a fair, expeditious trial warrant

⁷⁰ See also F2258, Decision on Prosecution Motion for the Admission of Evidence Related to the Locations of Residences Associated with the Accused, 9 October 2015 (finding that other documents from Électricité du Liban were *prima facie* reliable).

⁷¹ SMS call sequences tables 'provide the time of the SMS, the recipient's number, the sender and the recipient, and content of the SMS. For each call [or SMS], these tables detail: the other number in contact with the target number; the time and the date of the call; the type of call (voice or SMS); the duration [when a voice call]; the International Mobile Equipment Identity (IMEI) of the handset used by the target number; the cell identity and name of the cell sector used by the target number at the start of the call; and the cell identity and cell sector at the end of the call, when necessary': 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, para. 4.

⁷² See 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.

the statement's admission without cross-examination pursuant to Rule 155 (C).⁷³ The Defence may cross-examine Mr Andrew Donaldson on his attribution of PMP 091 to Mr Merhi's family.

Defence

37. The Merhi Defence notes that Ms Green's statement is not included in the Prosecution's exhibit list, even though there was ample time to request that it be added. Citing a Trial Chamber decision,⁷⁴ the Defence submits that, since the statement adds new substantive evidence, a request to add the statement to the Prosecution's exhibit list should have been submitted before requesting its admission into evidence. Additionally, the Merhi Defence argues that in a case where the acts alleged are essentially linked to the use of mobiles, the sending and content of SMS messages is an act or conduct of the accused and that the factors that could justify the statement's admission without cross-examination pursuant to Rule 155 (A) (i) did not exist here. Finally, the Merhi Defence contends that Ms Green's conclusions regarding the identity of PMP 091's users are complex, speculative and often lacking in clarity. The statement should not be admitted without prior cross-examination.⁷⁵

DISCUSSION

38. Under Rule 155, the Trial Chamber may receive written testimony in lieu of live oral testimony. The procedural safeguards and principles for admitting statements under Rule 155 into evidence have been previously identified. In particular, the statement must meet the basic requirements for admission into evidence under Rule 149 and, if going to proof of the acts or conduct of the Accused, may not be admitted without cross-examination.⁷⁶ These apply here.

⁷³ Prosecution motion, paras 27-30.

⁷⁴ Specifically, F2224, Corrected Version of 'Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087' of 29 September 2015, 5 October 2015, para. 18.

⁷⁵ Merhi response, paras 23-26.

⁷⁶ See 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 13-14; 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, 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; F2311, Decision on Prosecution Motion for the Admission under Rule 155 of the Statements of Witnesses PRH371 (Helena Habraken) and PRH698 (Nicole Blanch), 9 November 2015, para. 13; F2635, Decision on Prosecution Motion for the Admission Under Rule 155 of the Statement of Witness PRH696, 12 July 2016, para. 6; F2644, Decision on Prosecution Motion to Admit the Statements of Witness PRH024, PRH069, PRH106 and PRH051 Pursuant to Rule 155, 12 July 2016, para. 25.

39. The statement is relevant to matters in contention in this trial, as the Prosecution seeks to attribute numbers to Mr Merhi by linking him to other numbers, in this case PMP 091.⁷⁷ Relevance is undisputed by the Defence. However, contrary to the Defence's submission, the Trial Chamber has not held that a statement that adds new substantive evidence must, by that fact alone, be added to the Prosecution's Rule 91 exhibit list before it is admitted into evidence. In the cited decision, the Trial Chamber merely noted this factor after first espousing the general principle that 'witness statements do not have to be on a Party's exhibit list in order to be admitted into evidence'.⁷⁸ Whether intervening factors displace this general principle is to be decided on a case-by-case basis. Here, although the statement does indeed contain the results of new analysis, the underlying evidence is not, as such, 'new'. Rather, the SMS call sequence tables, from which Ms Green conducted her analysis, were disclosed to the Defence in September 2013. On these facts, the Prosecution need not have requested the addition of the statement to its exhibit list before seeking its admission.

40. Concerning the question of whether the sending and receiving of SMS messages constitute 'acts and conduct of the accused' for the purposes of Rule 155, the Trial Chamber has previously considered this issue. It held that statements which seek to establish that a person used a particular mobile 'does not, of itself, go to the acts and conduct of an Accused person'.⁷⁹ The Defence has not presented any arguments addressing this finding. Accordingly, the Trial Chamber sees no reason to depart from its previous decisions.

41. Lastly, the Merhi Defence has not adequately explained why, in its view, Ms Green should appear for cross-examination or what it would cross-examine her about should she be required to appear. Rather, the Defence has simply asserted Ms Green's conclusions are 'complex, speculative and often lacking in clarity',⁸⁰ without actually identifying what lacks clarity, what is speculative and what is complex, or providing any examples from the statement that would support such assertions.

⁷⁷ The Trial Chamber has previously admitted evidence relating to the SMS content of a number used by Mr Merhi and his family and, in doing so, recognized its relevance: 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, paras 43-45, 73, disposition.

⁷⁸ F2224, Corrected Version of 'Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087' of 29 September 2015, 5 October 2015, para. 18.

⁷⁹ F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 39. See also F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 Pursuant to Rule 155, 12 July 2016, para. 34; F3139, Decision on Prosecution Motion to Admit Two Witness Statements and Three Documents Related to General Telephone Evidence, 12 May 2017, para. 31 (confidential).

⁸⁰ Merhi response, para. 24.

42. Having considered the content of the statement as a whole, the Trial Chamber is satisfied as to its relevance, reliability and hence its probative value. For the above reasons, the Trial Chamber finds that the statement of Ms Green is admissible pursuant to Rule 155 without the need for cross-examination.

CONFIDENTIALITY

43. The Prosecution requests the Trial Chamber to maintain the confidential status of the annexes to its motion until it decides otherwise either upon a Prosecution motion or after giving the Prosecution the opportunity to be heard. The annexes contain confidential information regarding the identity and personal details of numerous third party individuals. A public redacted version of the Prosecution's motion will be filed in due course.⁸¹ The Defence submitted its response confidentially on account of the confidentiality of the Prosecution's motion, but states that its response could be reclassified upon the Trial Chamber's request.⁸²

44. The Trial Chamber agrees with the Prosecution concerning the content of the annexes to its motion. They should remain confidential for the moment. The Prosecution is ordered to file a public redacted version of its motion, and the Merhi Defence's response is to be reclassified from confidential to public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS the Prosecution's request to amend its Rule 91 exhibit list by adding the seven documents listed in annex D of the Prosecution's motion;

ORDERS the Prosecution to add to its Rule 91 exhibit list the documents listed in annex A, items 3-8 of its motion;

DECLARES 26 of the documents listed in annex A of the Prosecution's motion (minus item 10) admissible under Rule 154;

DECLARES Ms Helen Green's statement listed in annex B of the Prosecution's motion admissible under Rule 155;

⁸¹ Prosecution motion, para. 35.

⁸² Merhi Response, para. 28.

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

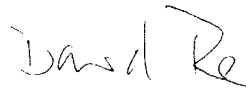
ORDERS that the annexes to the Prosecution's motion remain confidential until the Trial Chamber decides otherwise;

ORDERS the Prosecution to file a public redacted version of its motion; and

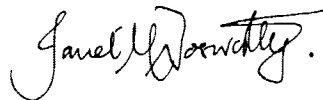
ORDERS the Registry to reclassify the Merhi Defence's response from confidential to public.

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

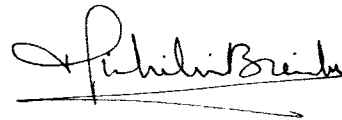
Leidschendam,
The Netherlands
29 June 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

