

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: 30 August 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

DECISION ADMITTING SEVEN DOCUMENTS RELATING TO MR SALIM JAMIL AYYASH AND MR HASSAN HABIB MERHI

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Hugh Milne

Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun, Mr Thomas Hannis & Mr Chad Mair

Legal Representatives of Participating Victims:
Mr Peter Haynes, Mr Mohammad F. Mattar & Ms Nada Abdelsater-Abusamra

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothee Le Fraper du Hellen & Mr Jad Yousef 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 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 22 persons, including the former Lebanese Prime Minister Mr Rafik Hariri, and injured many others.¹ To assist in the identification and attribution of relevant mobile numbers allegedly involved in the attack to the Accused, Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi, the Prosecution seeks the admission into evidence of seven documents under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence.² They consist of three bank records, one Lebanese entry/exit record, one mobile telephone subscriber record, one call sequence table³ explanatory document and a Lebanese vehicle registration document. Counsel for Mr Ayyash, Mr Assad Hassan Sabra and Mr Merhi responded to the motion.⁴

THE EVIDENCE AND SUBMISSIONS

Prosecution

2. Two of the three bank records are from a Lebanese bank—Bank Audi—and record the same address for Mr Ayyash in a 2003 automatic payment application form and in a 2005 cancellation form. The third bank record shows two automatic teller machine withdrawals in Saudi Arabia from Mr Ayyash's Bank Audi account in January 2004. The documents were provided by Bank Audi to the Special Investigation Commission of Lebanon pursuant to a request for assistance from the Special Tribunal's Office of the Prosecutor and they were

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended consolidated indictment, 12 July 2016 ('Amended consolidated indictment'), paras 14-15.

² F3263, Prosecution Motion to Admit Seven Documentary Exhibits pursuant to Rule 154 relating to the Attribution of Telephone Numbers to the Accused Salim Jamil Ayyash, and Hassan Habib Merhi, 4 August 2017 (public with confidential annexes A and B) ('Prosecution motion').

³ 'Call sequence tables present chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time, comprising relevant call data records and cell site information': 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. See also F2793, Reasons for Decision Admitting Prosecution's Cell Site Evidence, 26 October 2016 ('Cell site decision'), para. 3.

⁴ F3267, Ayyash Defence Response to Prosecution Motion to Admit Seven Documentary Exhibits pursuant to Rule 154 relating to the Attribution of Telephone Numbers, 11 August 2017 ('Ayyash Response'); F3273, Sabra Defence Response to "Prosecution Motion to Admit Seven Documentary Exhibits pursuant to Rule 154 relating to the Attribution of Telephone Numbers to the Accused Salim Jamil Ayyash, and Hassan Habib Merhi", 14 August 2017 (confidential) ('Sabra response'); F3285, Réponse de la Défense the Merhi à la « Prosecution Motion to Admit Seven Documentary Exhibits pursuant to Rule 154 relating to the Attribution of Telephone Numbers to the Accused Salim Jamil Ayyash, and Hassan Habib Merhi », 22 August 2017 ('Merhi response').

forwarded to the Prosecution. These documents are relevant to prove Mr Ayyash's address between 2003 and 2005 and his travel to Saudi Arabia in January 2004.⁵

3. The official Lebanese entry/exit record relates to a relative of Mr Ayyash who contacted two numbers the Prosecution attributes to Mr Ayyash. The record shows that, during January 2005, the relative exited Lebanon for Saudi Arabia and returned. The document was obtained by the United Nations International Independent Investigation Commission (UNIIC) from the Lebanese Ministry of the Interior. The document is relevant to the travel and mobile use of Mr Ayyash's relative and, together with other exhibits, assists in analysing Mr Ayyash's mobile use in January 2005.⁶

4. The mobile subscriber record is from ALFA, a Lebanese mobile telecommunication service provider, and shows a number registered to a person identified as a relative of Mr Ayyash. This number was in contact with a number that the Prosecution attributes to Mr Ayyash. The document is relevant to the identification of a third party contact of the number attributed to Mr Ayyash and to that number's attribution to Mr Ayyash. The document was received by the Special Tribunal's Office of the Prosecutor directly from ALFA pursuant to a request for assistance to the Government of Lebanon.⁷

5. The call-sequence table explanatory document is from the MTC Touch, another Lebanese mobile telecommunication service provider, and clarifies that the use of an underscore ('_') in MTC Touch call data records⁸ or call sequence tables shows that the call usually originated from an international destination. In response to a request for assistance from the Special Tribunal's Office of the Prosecutor, the document was provided by MTC Touch to the Lebanese Public Prosecutor by the Directorate General for Public Security and then transmitted to the Prosecution. The exhibit is relevant to the analysis of the content of call sequence tables.⁹

⁵ Prosecution motion, para. 5; annex A, lines 1-3.

⁶ Prosecution motion, para. 5; annex A, line 4.

⁷ Prosecution motion, para. 5; annex A, line 5.

⁸ 'Call Data Records are digital records of phone activity. The records contain details of the originating (outgoing) number and recipient (incoming) numbers, call duration as well as the international mobile equipment identity, international mobile subscriber identity and Cell ID data for mobile phones. These records therefore contain information such as time, date and duration of each phone call and the cell mast activated by the call, which provides an indication of the mobile phone user's location': Amended consolidated indictment, para. 14. *See also* Cell site evidence decision, para. 3.

⁹ Prosecution motion, para. 5; annex A, line 6.

6. The vehicle registration document is a bill of sale for a vehicle bought by the brother of Mr Merhi's sister-in-law in 2005 in which he provided his mobile number. This number contacted two numbers that the Prosecution attributes to Mr Merhi's brother. In turn, these two numbers contacted a mobile the Prosecution describes as Purple 231 which it attributes to Mr Merhi.¹⁰ The document therefore assists in the attribution of two numbers to Mr Merhi's brother and Purple 231 to Mr Merhi. The document was provided by the Lebanese Traffic Central and Motor Vehicle Authority to the Special Tribunal's Office of the Prosecutor in response to a request for assistance.¹¹

7. The Prosecution submits that the admission of the documents is in the interests of justice, that they are relevant and probative, and their probative value is not outweighed by any prejudicial effect. They have been disclosed and their relevance is known since a Prosecution analyst, Mr Andrew Donaldson (Witness PRH230), relies upon them in his analytical attribution reports relating to Mr Ayyash and Mr Merhi.¹² Footnote references to Mr Donaldson's reports where he refers to the documents are provided in annex A. Reliability and chain of custody documents are contained in annex B; their admission into evidence is not sought at this stage.¹³

Defence

8. Counsel for Mr Ayyash take no position on the *prima facie* relevance and probative value of the documents. However, they reserve their right to challenge the weight the Trial Chamber can give them and dispute the attribution of mobiles to Mr Ayyash and any inferences the Trial Chamber may draw in relation to Mr Ayyash.¹⁴

¹⁰ The Prosecution alleges that Purple 231 was used to coordinate the false claim of responsibility for the attack of 14 February 2005: Amended consolidated indictment, paras 15 (e), 17, 23 (a), 23 (d)-(e), 27, 29, 31, 45.

¹¹ Prosecution motion, para. 5; annex A, line 7.

¹² Mr Donaldson has prepared five reports—one for each Accused and for the former Accused, Mr Badreddine—which 'analyse numerous Prosecution exhibits, including witness statements and testimony, extended family trees, extracts from official Lebanese records, and documents such as electricity bills, university records, medical records and telecommunications records. These include telephone subscriber notes and SMS text content. Many documents link names [...] to numbers': F3172, Decision Allowing Prosecution Analyst Andrew Donaldson to Provide Opinion Evidence, 2 June 2017, para. 9. These reports assist the Prosecution in identifying and attributing mobile numbers allegedly involved in the attack of 14 February 2005 to particular Accused.

¹³ Prosecution motion, paras 2-4, 6.

¹⁴ Ayyash response, para. 2.

9. Counsel for Mr Sabra do not oppose the admission of the seven documents, but reserve their right to challenge the attribution of, according to the Prosecution, the brother of Mr Merhi's sister-in-law's mobile.¹⁵

10. Counsel for Mr Merhi take no position on the admission of the bill of sale, but qualify this by stating that their position should not be interpreted as recognising the document's probative value or its use in attributing numbers to Mr Merhi.¹⁶

11. However, they object to the admission of the call-sequence table explanatory document. They submit that the footnote reference to Mr Donaldson's Merhi attribution report refers not to the document, but to an expert report of a witness 'who will probably not testify' during the Prosecution's case. If the Prosecution intends to substitute the expert report with the tendered document, then it should say so and, if so, clarify whether the tendered document will also 'substitute' in other instances where the expert report appears in Mr Donaldson's report. Further, the document lacks context since it does not show the question contained in the request for assistance to which it was responding.¹⁷

12. In any event, the Merhi Defence contests the Prosecution's claim that the document shows that the '_' symbol in MTC Touch call sequence tables shows that a call originated internationally. It points to the document's reference to 'Voice Over IP' that, in its view, 'merely indicates that the call originated with an Internet telephone service [...] and that the call was transmitted via an international connection.' The Prosecution has therefore misinterpreted the document and it does not support Mr Donaldson's report as identified in annex A of the Prosecution's motion. The admission of the document prejudices the Defence as the meaning of the '_' symbol excludes the reasonable possibility that some calls could have come from Lebanon, which would be inconsistent with the Prosecution's assertion that Purple 231 received calls from overseas during a period when Mr Merhi's wife and son were in Iran. Therefore, the tendered document does not meet the conditions for admission under Rule 149.¹⁸

¹⁵ Sabra response, para. 2.

¹⁶ Merhi response, paras 2, 10-11

¹⁷ Merhi response, paras 2-5, 9, 12.

¹⁸ Merhi response, paras 2-3, 6-9, 12.

DISCUSSION

13. The Trial Chamber has previously identified the applicable principles and procedural safeguards concerning 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.¹⁹ Definite reliability is unnecessary; *prima facie* reliability is sufficient.²⁰ In addition, how and where each document or record fits into the tendering party’s case must be clearly explained.²¹ The weight that the Trial Chamber may ultimately give to the material is separate and distinct from its probative value. These also apply here.

14. The Trial Chamber has carefully reviewed the documents proposed for admission by the Prosecution. The seven proposed documents are relevant to the allegations pleaded in the amended consolidated indictment. The attribution of specified mobile numbers to Mr Merhi and Mr Ayyash are key components of the Prosecution’s case and the proposed documents assist in this respect by attributing numbers to third parties who contacted Mr Ayyash or Mr Merhi’s relatives who contacted Mr Merhi’s brother and who, in turn, contacted Mr Merhi. They may also identify Mr Ayyash’s address, as well as Mr Ayyash’s travel and that of Mr Ayyash’s relative, at times relevant to the Prosecution’s case. This assists in the geographic profile of relevant mobile numbers which also assists in the attribution of numbers to Mr Ayyash.

15. The call sequence table explanatory document assists in the Trial Chamber’s understanding of symbols used in the call data records and call sequence tables of MTC Touch, as they relate to international calls. The arguments submitted by the Merhi Defence in relation to this document, particularly as to the correct interpretation of the ‘_’ symbol, concern the weight that the Trial Chamber should attribute to it, not its admissibility. It is therefore premature to consider them. Indeed, the Merhi Defence assumes, incorrectly, that the Trial Chamber has determined that it agrees with the Prosecution’s interpretation of the

¹⁹ See F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL’s Prosecution, 6 May 2015 (‘CST decision’), paras 66, 111; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015 (‘Mobile documents decision’), para. 33; F1781, Corrected Version of “Decision on Prosecution Motion to Admit into Evidence Geographic Documents” of 8 December 2014, 10 December 2014, para. 4.

²⁰ 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.

²¹ CST decision, para. 111; Mobile documents decision, para. 33; Victims decision, para. 7; Visuals decision, para. 6.

document's content. Further, the Merhi Defence's submissions misapprehend the relevance standard for admission. Relevance for the purposes of admission into evidence is not, in this case, measured against the Prosecution's reliance on the document in Mr Donaldson's expert report; rather, it is measured by the allegations contained in the amended consolidated indictment. Therefore, the fact that the Prosecution has referred to a footnote in Mr Donaldson's report where the document is not expressly relied upon does not, in itself, make the document irrelevant. The Prosecution should decide how it will use this document, subject to the Trial Chamber's oversight.

16. The Trial Chamber also finds that the documents are *prima facie* reliable. The exit-entry record and the vehicle registration document are official Lebanese Government records which have been transmitted to the Prosecution or the UNIIC by Lebanese Government agencies. Their status as official documents—in the absence of any reason to doubt the authenticity and reliability of the information in the documents—is sufficient to meet the *prima facie* reliability threshold.²² The three bank records and the ALFA subscriber record are business records produced in the ordinary course of business and possess all the indicia of normal company documents. They are *prima facie* reliable on this basis.²³ The call sequence table explanatory document was received by the Prosecution from MTC Touch through Lebanese Government agencies in response to a request for assistance. Nothing calls into question its *prima facie* reliability. Furthermore, no counsel for the Defence challenged any of the documents on the basis of their reliability.

17. For these reasons, the Trial Chamber finds the seven documents admissible under Rule 154.

CONFIDENTIALITY

18. The Prosecution filed the annexes to its motion confidentially. It submits that they contain information regarding the identity and personal details of third parties and should

²² See 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; F2963, Decision on the Prosecution Motion to Admit Ten Witness Statements Relating to Salim Jamil Ayyash and Hassan Habib Merhi and to Admit One Exhibit, 31 January 2017, para. 32; F3202, Decision on the Admission of 27 Documents and One Witness Statement Relating to the Attribution of Mobile Numbers to Hassan Habib Merhi, 29 June 2017, para. 34.

²³ See F2258, Decision on Prosecution Motion for the Admission of Evidence Related to the Locations of Residences Associated with the Accused, 9 October 2015, para. 34; F2750, Reasons for Admitting Witness PRH705's Statements and Annexes into Evidence, 30 September 2016, paras 23, 25; F2767, Written Reasons for Admitting Witness PRH707's Statements and Annexes into Evidence, 10 October 2016, paras 46, 49.

therefore remain confidential until the Trial Chamber decides otherwise, or after giving the Prosecution the opportunity to be heard on the matter.²⁴ The Sabra Defence motion was filed confidentially in light of the identifying details of a third party and a public redacted version will be filed in due course.²⁵

19. In light of their content, the Trial Chamber agrees with Prosecution’s position on the confidentiality of its annexes. They shall remain confidential until further order. The Sabra Defence is ordered to file a public redacted version of its response.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES the documents listed in annex A to the Prosecution’s motion admissible under Rule 154;

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

MAINTAINS the confidentiality of the Prosecution’s annexes, until otherwise ordered; and

ORDERS counsel for Mr Assad Hassan Sabra to file a public redacted version of their response.

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

Leidschendam,
The Netherlands
30 August 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



²⁴ Prosecution motion, para. 7.

²⁵ Sabra response, para. 3.