

BEFORE 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: 10 March 2017

Filing Party: Defence Counsel – Ayyash

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THE PROSECUTOR
v.
SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

AYYASH DEFENCE RESPONSE TO PROSECUTION
MOTION FOR THE ADMISSION OF TEN CALL
SEQUENCE TABLES AND ONE WITNESS STATEMENT

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I. Introduction

1. The Prosecution filed a motion tendering into evidence ten call sequence tables and one witness statement. The Ayyash Defence objects to the admission of two of the call sequence tables, CST-0429 and CST-0430, which the Prosecution alleges to be the landline telephones of Mr. Ayyash or his family. The Ayyash Defence takes no position on the remaining eight call sequence tables. The Ayyash Defence takes no position on the admissibility of the witness statement of PRH308, but may wish to cross-examine PRH308, as detailed further below.

II. Procedural History

2. On 16 February 2017, the Prosecution filed a motion tendering into evidence from the bar table ten call sequence tables and, pursuant to Rule 155, one witness statement (“Motion”).¹
3. On 2 March 2017, the Ayyash Defence requested an extension of time to file its response in order to correspond with the Prosecution regarding the production of the tendered call sequence tables.² The Prosecution did not oppose this request, and the Trial Chamber granted the extension.³
4. On 7 March 2017, the Prosecution provided the Ayyash Defence with additional information regarding the production of CST-0429 and CST-0430.
5. The Ayyash Defence provides its response to the Motion below.

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, 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, hereinafter (“Motion”).

² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Motion for Extension of Time to File Response to Prosecution Motion for the Admission of Ten Call Sequence Tables and One Witness Statement, 2 March 2017.

³ Oral Order, 20170306_STL-11-01_T_T342_OFF_PRV_EN_1-112, p. 111.

III. Submissions

A. Preliminary matters regarding reliability

6. The Ayyash Defence first notes that the Prosecution submits that the Trial Chamber has found the material underlying the call sequence tables, comprising call data records and cell site evidence, to be reliable.⁴ The Prosecution has overstated the findings of the Trial Chamber listed in footnote six of the Motion, which are to date limited to *prima facie* reliability. No findings have been made on the ultimate reliability of the call data records and cell site evidence, and the Ayyash Defence reserves its right to make additional submissions on the reliability of the material underlying the call sequence tables at the appropriate time.

B. CST-0429 and CST-0430

7. The Prosecution submits that the reliability of the call sequence tables as representations of the underlying material can be tested by comparing the call sequence tables to the underlying material.⁵ The Ayyash Defence agrees, in that the Trial Chamber must be in a position where it is satisfied that the call sequence tables are an accurate reflection of the underlying call data records. This is particularly important because of the Prosecution's reliance on landline call sequence tables in the attribution report of Andrew DONALDSON (PRH230).⁶
8. The Ayyash Defence has attempted to recreate CST-0429 and CST-0430 based on the call records in the possession of the Defence, the information provided by the Prosecution in the tendered witness statement of Kei KAMEI (PRH308),⁷ and the additional information provided by the Prosecution to the Ayyash Defence on 7 March 2017. To date, those attempts have been unsuccessful.

⁴ Motion, paras. 6, 27.

⁵ Motion, para. 31.

⁶ R91-801194, D0506541-D0507009, pp. 17-40 specifically, but also the report more generally.

⁷ Motion, Annex D, ERN 60321199-60321207.

9. CST-0429 and CST-0430 have a number of problems that affect their *prima facie* reliability and the Trial Chamber should not admit them in their current form.
10. The witness statement of PRH308 (but not the Motion) notes as a result of the combination of call data records from different sources used to create the call sequence tables, some calls are duplicated in the call sequence table.⁸ PRH308 removed some duplicates from CST-0429 and CST-0430, but not all of them.⁹ The Ayyash Defence similarly identified a number of duplicate calls remaining in the call sequence tables and sought clarification from the Prosecution regarding how many and which ones PRH308 had identified. In response, the Prosecution provided the Defence with a schedule, identifying 21 duplicated pairs of calls remaining in CST-0429 and two duplicated pairs of calls remaining in CST-0430. Using the explanation provided by Ms. KAMEI in her witness statement for identifying a duplicated call, the Ayyash Defence identified another eight duplicated pairs¹⁰ remaining in CST-0429 and not identified by the Prosecution or PRH308.
11. A number of issues arise out of this matter. First, the Prosecution has not explained why it has erroneously left the duplicates in the call sequence table, even where it has identified the duplicates and is aware of their existence. In this regard, the Ayyash Defence highlights the Trial Chamber's decision admitting call sequence tables related to telephones attributed by the Prosecution to the accused, which emphasizes the testimony of PRH308 that all call sequence tables are "peer reviewed" by other Prosecution analysts as a form of quality assurance.¹¹ The number of errors present in CST-0429 and CST-0430 (both identified and unidentified) demonstrate that either the work of PRH308 was not

⁸ ERN 60321199-60321207, para. 13

⁹ ERN 60321199-60321207, para. 13.

¹⁰ This includes one duplicate that appears twice from the same source and does not appear to be a KALAM/mobile phone duplicate. *See* call numbers 0426 and 0427. The Ayyash Defence has no explanation for how this duplicate appeared in CST-0429.

¹¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, 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. 92; citing 20160720_STL-11-01_T_T279_OFF_PUB_EN_1-96, pp. 58-61; 20160721_STL-11-01_T_T280_OFF_PUB_EN_1-86, pp. 6-7.

- “peer reviewed” by other analysts as is supposed to be the practice of the Prosecution, or that the level of quality assurance within the Office of the Prosecutor cannot be trusted to produce reliable call sequence tables.
12. Second, the Ayyash Defence is concerned that when applying the same methodology as the Prosecution for determining duplicates, it came to a significantly different number of duplicated pairs in CST-0429.
 13. Finally, and most importantly, CST-0429 and CST-0430 do not include any information identifying which calls are duplicates and are not being relied upon by the Prosecution. Thus, the Trial Chamber is unable to determine which calls the Prosecution are relying upon, and which calls are included in the call sequence tables unnecessarily and erroneously.
 14. It cannot be said that the call sequence tables are reliable representations of the underlying call data records. The call sequence tables are not admissible from the bar table in such a form, and this is not a matter that should simply go to weight at the end of the trial. At a minimum, the Prosecution needs to correctly identify and remove duplicate calls from CST-0429 and CST-0430, and re-tender reliable call sequence tables that do not contain extraneous information.
 15. The Ayyash Defence requests the Trial Chamber to defer a decision on the admissibility of CST-0429 and CST-0430 until the Prosecution addresses the concerns raised above that significantly affect the reliability of the call sequence tables. The Ayyash Defence reserves the right to make further submissions on the reliability of the call sequence tables at that point.

C. OGERO records as a whole

16. CST-0429 and CST-0430 replace landlines call sequence tables previously tendered and then withdrawn by the Prosecution,¹² CST-0185/CST-0265 and CST-0186 respectively. These previous landline call sequence tables included landline-to-landline calls, as well as KALAM and Telecarte calls.
17. CST-0185/CST-0265 and CST-0186 were withdrawn by the Prosecution in July 2016. Several reasons were given for this withdrawal: the records form an incomplete dataset of all landline-to-landline calls on the OGERO system prior to 1 January 2006; the Prosecution's failure to keep the original hard drive containing the OGERO records; the Prosecution's failure to make a forensic copy of this original data before converting it to a different format; and OGERO's confirmation, in July 2016, that it no longer had a copy of the raw data containing landline-to-landline records.¹³
18. Until July 2016, and in full knowledge of the first three issues listed above, the Prosecution relied upon CST-0185/CST-0265 and CST-0186. PRH230's attribution reports have included extensive analysis of landline-to-landline calls until the analysis was removed in the most recent version of the report.¹⁴ The Prosecution was aware of the limitations of the landline call sequence tables since at least January 2014, when OGERO responses to requests for assistance were added to the Rule 91 Exhibit List, and nonetheless continued to rely on them.¹⁵ Likewise, the Prosecution's failure to keep the hard drive does not provide

¹² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Prosecution Motion for the Admission of Call Sequence Tables Related to the Accused Ayyash, 18 August 2015; *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Prosecution Notice of Withdrawal of Requests to Admit Landline Call Sequence Tables, 28 July 2016.

¹³ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, 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.

¹⁴ *Cf.* R91-801194, D0483333- D0483835, paras. 36, 37, 40, 58, 59, 61, with R91-801194, D0506541-D0507009, paras. 36, 37, 40, 58, 59, 61.

¹⁵ R91-805071, "Explanation from OGERO in re to what date landline to landline calls started to be recorded as Call Data Records (CDR) in Lebanon"; added to Rule 91 list in STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Decision Authorising the Prosecution to Amend its Witness and Exhibit Lists, 24 January 2014.

- sufficient ground to exclude all of the landline-to-landline records; the Prosecution has been aware of this since it received the records from OGERO.¹⁶
19. The reasons provided by the Prosecution for the withdrawal of the previously-tendered call sequence tables are not sufficient to lead to the exclusion of the entirety of the landline-to-landline call records. These are issues which the Trial Chamber generally deems as going to weight rather than admissibility.
20. Representatives of OGERO testified in January 2017 and explained how call records were generated and stored. PRH711 and PRH709 confirmed that while not all landline-to-landline calls were recorded prior to 1 January 2006, any calls which were recorded would be present in the call data records and those calls present in the call data records were actual calls between operational landline telephones.¹⁷ Thus, while all calls may not be present in the CDRs, there is no reason to doubt the reliability of those calls that *do* appear in the call data records provided by OGERO to the Prosecution. The Trial Chamber has previously found that call data records are business records produced in the ordinary course of business.¹⁸ The call data records containing landline-to-landline records of OGERO are no different and thus contain the necessary indicia for *prima facie* reliability. They are admissible within the business records definition promulgated by this Trial Chamber.¹⁹ The fact that the records were produced as a result of

¹⁶ R91-800194. The failure to make a forensic copy of the call data records only came to light to the Defence in November 2016, after Prosecution witnesses PRH111 and PRH542 testified to the process by which call data records were received, stored, and processed. The Defence could not cross-examine on Prosecution failures it did not know about at the time the witnesses testified.

¹⁷ 20170110_STL-11-01_T_T319_OFF_PRV_EN_1-92, p. 56; 20170111_STL-11-01_T_T320_OFF_PRV_EN_1-120, pp. 63-64.

¹⁸ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Reasons for Admitting Witness PRH705's Statements and Annexes into Evidence, 30 September 2016, para. 25; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Written Reasons for Admitting Witness PRH707's Statements and Annexes Into Evidence, 10 October 2016, para. 49.

¹⁹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Decision on Prosecution Motion for the Admission of Statements by Witness PRH707 and on Ayyash Defence Motion to Strike the Prosecution Reply, 15 April 2016, para. 55; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Reasons for Admitting Witness PRH705's Statements and Annexes into Evidence, 30 September 2016, para. 23; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Written Reasons for Admitting Witness PRH707's Statements and Annexes Into Evidence, 10 October 2016, para. 46.

testing to the OGERO system does not negate their reliability, or their status as a business record with the requisite indicia of reliability.

21. If the Trial Chamber is minded to receive records of landline records, and where the Prosecution seeks to have the Trial Chamber draw inferences based on call data records of landline telephones attributed to Mr. Ayyash or his family, then the Trial Chamber should receive all available landline records, including the recorded landline-to-landline calls. For CST-0185, this amounts to 958 calls.²⁰ For CST-0186, this amounts to 1832 calls. As the Prosecution should re-do CST-0429 and CST-0430 to correct the errors contained within, the Ayyash Defence requests that the Prosecution also include the landline-to-landline calls contained within CST-0185 and CST-0186, which the Prosecution relied upon until July 2016 and for which there has been evidence that the records contain the necessary indicia of reliability.

D. Cross-examination of Kei KAMEI (Witness PRH308)

22. The Ayyash Defence takes no position as to the admissibility of PRH308's statement detailing the production of, *inter alia*, CST-0429 and CST-0430. If the Prosecution replaces CST-0429 and CST-0430 with call sequence tables that do not contain errors and unnecessary duplications, the Ayyash Defence does not require PRH308 for cross-examination. If the Trial Chamber finds admissible CST-0429 and CST-0430 as they are currently tendered, the Ayyash Defence requires PRH308 to appear for cross-examination.

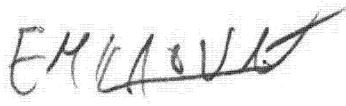
²⁰ CST-0265 contains four calls taken from KALAM call data records and are already included in CST-0429.

IV. Relief requested

23. For the foregoing reasons, the Ayyash Defence request the Trial Chamber to:

- (i) defer its decision as to the admissibility of CST-0429 and CST-0430 until the Prosecution has submitted new call sequence tables which capture all available landline records and remove erroneously included duplicate telephone calls, or
- (ii) in the alternative, should the Trial Chamber find CST-0429 and CST-0430 admissible, the Ayyash Defence requests to cross-examine PRH308.

Respectfully submitted 10 March 2017,



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