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: 5 May 2017

Original language: English

Classification: Public

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

INTERIM DECISION ON JOINT DEFENCE MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF ANALYST MR ANDREW DONALDSON

Office of the Prosecutor:
Mr Norman Farrell, Mr Graeme Cameron & 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 Dorothée Le Fraper du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yasser Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:
Mr David Young & Mr Geoffrey Roberts

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

INTRODUCTION

1. Prosecution analyst, Mr Andrew Donaldson (Witness PRH230), provides evidence for the Prosecution attributing—to the four Accused and to the former Accused, Mr Mustafa Amine Badreddine—mobile telephones allegedly used in the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005. Mr Donaldson has prepared five 'attribution' reports analysing many different pieces of Prosecution evidence, and linking these to the Accused and Mr Badreddine to prove that they were using specified mobiles. Additionally, in a witness statement, dated 13 October 2016, recently added to the Prosecution's exhibit list, Mr Donaldson complemented the attribution report related to the Accused, Mr Hassan Habib Merhi.

2. For some months, depending upon the completion of other witness testimony, he has been scheduled to testify in the first or second week of May 2017.

3. On Monday 24 April 2017, the week before the scheduled commencement of Mr Donaldson's evidence, the Trial Chamber received a motion filed by counsel for the Accused, Mr Salim Jamil Ayyash and Mr Merhi, asking the Trial Chamber to preclude the Prosecution from leading evidence from Mr Donaldson on mobile telephone 'co-location'.[1] The Defence motion seeks the exclusion of paragraphs related to mobile telephone 'co-location' from the attribution reports regarding Mr Ayyash, Mr Merhi and Mr Badreddine, and from Mr Donaldson's witness statement of 13 October 2016.

4. Co-location is a forensic technique—based upon analysing telecommunications call data records and geography—used to prove that a single person was simultaneously using different mobiles handsets.[2] The Trial Chamber has heard and received extensive evidence from an expert witness, Mr John Edward Philips, specifically on co-location.[3] The Prosecution opposed the motion[4] and, on the Trial Chamber's order—in view of the limited

[1] STL, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, Joint Defence Motion *in limine* regarding Expert Evidence from Prosecution Witness PRH230, 21 April 2017 ('Defence motion'), public with confidential annexes A, B, C, D.
[2] *See* definition in exhibit P1111, Demonstration of single person use of multiple mobile phones using Cell Site Analysis Suspect 1, J. E. Philips, dated 19 December 2014, paras 3.1.1.3-3.1.1.4.
[3] For example exhibit P1936. Mr Philips (Witness PRH495) testified on 18-21, 24-26 August 2015, 30-31 August, 1-2, 5-6 September 2016, 19-21, 24-26 April; 2-4 May 2017.
[4] Transcript of 24 April 2017, pp 40-41, 45-47; Transcript of 26 April 2017, pp 3-8.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

time available to consider the issue[5]—filed a response essentially confined to answering the Defence motion's legal arguments.[6] The Defence filed a reply.[7]

5. The Prosecution does not seek to lead expert opinion evidence from Mr Donaldson and is not asking the Trial Chamber to declare him as qualified to provide such evidence under Rule 161 of the Special Tribunal's Rules of Procedure and Evidence.

SUBMISSIONS

Joint Defence submissions

6. The Defence motion argues that the paragraphs listed for exclusion contain 'inadmissible expert opinion'. Mr Philips, who had also written five reports, was qualified to provide an opinion on co-location, but according to the motion, Mr Donaldson is not. Mr Donaldson is not qualified to offer a similar opinion and, as the offending paragraphs contain such opinions, they should thus be excluded from the reports.

7. Legally, an expert witness is 'a person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute'.[8] Mr Donaldson, the Defence motion argues, is unqualified to provide an opinion on co-location, as this requires 'an in-depth knowledge of how telephones and telephone networks operate; how to interpret call data records; and how to interpret and utilize cell site evidence'.[9] Further, Mr Donaldson's reports contain no methodology for co-location analysis, no parameters for comparison and no commentary on the limitations and problems with cell site evidence. Mr Donaldson's reports attempt to provide co-location evidence in a similar manner to those of Mr Philips. This evidence should therefore be excluded.

8. Relying upon a decision of a Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) in *Karemera*, and one of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Perišić*, the Defence argues that the opinions in Mr Donaldson's

[5] Order Setting a Deadline for Filing of a Response to Joined Defence Counsel's Motion of 21 April 2017 (F3098), transcript of 26 April 2017, pp 8-9.
[6] F3115, Response to Joint Defence Motion regarding Co-Location Evidence from Witness PRH230, 3 May 2017 ('Prosecution response').
[7] F3118, Joint Defence Reply to Reply to Motion *In Limine* Regarding Expert Evidence from Prosecution Witness PRH230, 4 May 2017 ('Defence reply').
[8] F1610, Decision on Expert Witness PRH120, Professor Fouad Hussein Ayoub, and Expert Witness PRH508, Dr. Issam Mansour, 7 July 2014 ('Decision of 7 July 2014'), para. 6.
[9] Defence motion, para. 11.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

reports are only admissible if 'they emanate from personal experience' of factual witnesses.[10] His do not, rather they come from his experience as an analyst in the Special Tribunal's Prosecution. These portions of the reports should therefore be excluded under Rule 149 (D) as the prejudice to the Accused outweighs the probative value of the evidence.

Prosecution response

9. The Prosecution responded arguing that the Defence submissions for excluding the evidence had no legal basis. The Statute of the Special Tribunal and its Rules do not divide evidence into categories, such as 'fact' or 'opinion' evidence; these categorisations derive from common law jurisdictions and have no direct application to the Special Tribunal.

10. The Trial Chamber, under Rule 149 (C), may admit relevant evidence which has probative value. The Trial Chamber has previously admitted such opinion evidence from non-expert witnesses where it emanates from the professional experiences of the witness, regardless of whether it comes from an expert.[11] The Trial Chamber has also held that the principal difference in accepting the opinion of a non-expert as against that of an expert is of 'weight in assessing the evidence'[12] and that statements 'falling outside the expert's area of expertise should be treated as personal opinions and weighted accordingly'.[13]

11. The Prosecution pointed out that the ICTR and ICTY Trial Chambers also acknowledged that non-expert opinions are admissible if based upon personal experience.[14] The *Perišić* Trial Chamber permitted a witness who had headed a relevant Federal Yugoslav legal department to provide opinion evidence on pertinent Yugoslav laws. *Karemera* is inconsistent with the Trial Chamber's practice insofar as that case attempts to draw a distinction between personal and professional experiences.[15] At the International Criminal Court (ICC) the Trial Chamber and Appeals Chamber in *Lubanga* permitted and relied upon

---

[10] ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on "Requete de la Defense de M. Ngirumpatse en Retrait de la Deposition du Temoin GFJ et des Pieces Afferentes", 6 August 2008 ('*Karemera* Decision'), para.4; ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Defence motion *in limine* for Prosecution witness Miodrag Starčević, 21 April 2009 ('*Perišić* Decision'), para. 11.
[11] Prosecution response, para. 4; referring to the Trial Chamber's 'Decision on Dr Ghazi Ali Youssef's (PRH265) Opinion Evidence', transcript of 13 March 2015, pp 3-9. The Prosecution also refers to the opinion evidence from Witness PRH707 regarding predictive coverage of cell sites, transcript of 17 February 2016, p. 12.
[12] Prosecution response, para. 5; referring to the Trial Chamber's 'Decision Clarifying Mr Gary Platt's Area of Expertise', transcript of 25 January 2017, pp 36-41.
[13] Prosecution response, para. 5; referring to the Decision of 7 July 2014, para. 5.
[14] Prosecution response, para. 8; referring to *Karemera* Decision, para. 4; *Perišić* Decision, para. 11.
[15] Prosecution response, paras 8-9; referring to *Perišić* Decision, para. 13; and *Karemera* Decision, paras 3-4.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

the opinion evidence of non-expert witnesses regarding the age of child soldiers. This was based upon personal knowledge of child recruitment and the demobilisation process in the Democratic Republic of the Congo.[16]

12. Substantively, Mr Donaldson takes a step by step approach to show his conclusions on co-location, but these analytical conclusions do not require the expertise of an expert such as Mr Philips. Mr Donaldson's *curriculum vitae* demonstrates his specialised knowledge. He has sufficiently explained the basis of his conclusions. Moreover, some of the work he performed is mechanical in nature.

13. Further, the Defence has not provided a basis to exclude the co-location conclusions. Defence counsel may cross-examine Mr Donaldson on his qualifications, analysis and conclusions. Finally, the Prosecution's preliminary analysis of the paragraphs sought for exclusion shows that the Defence seeks the exclusion of a number that contain only factual information derived from already admitted evidence such as call sequence tables, while other paragraphs contain a mixture of facts and analysis, conclusions or opinions based on those facts.

Joint Defence reply

14. Defence counsel replied stating that the Prosecution response was internally contradictory by stating that Mr Donaldson was providing opinion evidence, while recognising that Mr Philips had testified that the mapping and labelling of calls, although mechanical in nature, required an in-depth knowledge of cell site data and mapping. The Prosecution was attempting to provide expert opinion evidence disguised as the analytical work of an employee.[17]

ANALYSIS AND DISCUSSION

15. Rule 161 'Testimony of Expert Witnesses' does not define the term 'expert', and does no more than prescribe a procedural regime for disclosing and responding to the statements of experts. Neither the Statute nor the Rules delineate between expert testimony and any other

[16] Prosecution response, para. 7; referring to ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgement pursuant to Article 74 of the Statute, 14 March 2012, para. 645; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 A 5, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014, paras. 231-262.
[17] Defence reply, para. 2.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

'category' of testimony, nor divide testimony into categories such as 'fact', 'lay', 'opinion' or 'expert'.

16. The Trial Chamber has previously decided the principles applicable to expert evidence, namely, that an expert is someone 'who by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute'. Further, a report 'will only be treated as expert evidence insofar as it is based on the expert's specialised knowledge, skills or training. Statements falling outside the expert's area of expertise should be treated as personal opinions and weighted accordingly'.[18]

17. The Trial Chamber has also permitted witnesses who have not been declared as experts under the Rule 161 procedural regime, to provide opinion evidence, that is, to draw conclusions from things they have witnessed or from facts with which they are familiar.[19] So long as the evidence is relevant, its assessment, assuming that it is *prima facie* reliable, is a matter of weight.

18. International criminal law procedural law does not definitively state whether there is strict delineation between 'expert' evidence and 'opinion' evidence. As noted above, the ICC in *Lubanga* has relied upon non-expert opinion evidence to establish a crucial fact, namely, the age of child soldiers in a case tried on that very issue. The Appeals Chamber approved the approach of the Trial Chamber, given that it had applied a margin of error in the difficulties of age assessment based upon physical appearance, holding:

> In assessing the ability of various witnesses to determine the ages of the children, the Trial Chamber took into account factors such as their experience in dealing with demobilised children, their knowledge of the conditions in the area and the level of contact that they had with the children, and explanations that the witnesses gave as to the behaviour of the children, which would indicate that they were under the age of fifteen years.[20]

19. The ICTY in *Perišić*—referring to *Karemera*—allowed a 'lay' witness, albeit with legal qualifications, to provide his opinion about relevant Yugoslav military laws 'based on his own experience'.[21] This was in circumstances where none of the Trial Chamber judges

[18] Decision of 7 July 2014, paras 5-6.
[19] Oral Order on PRH265's opinion evidence, 13 March 2015; Transcript of hearing of 17 February 2016, pp 4, 12.
[20] *Lubanga* Appeal Judgement, paras 235 and 236.
[21] *Perišić*, para. 13.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

would appear to have had such expertise. In *Popović*, the ICTY Appeals Chamber refused an appeal ground seeking to exclude the report from a Prosecution investigator (who had not been declared as an expert) in updating an expert report which contained a summary of forensic evidence related to the missing and dead following the fall of Srebrenica in Bosnia and Herzegovina in July 1995.[22]

20. On the other hand, an ICTR Trial Chamber in *Karemera* held that:

> Actual witnesses can also express opinions, so long as they emanate from personal experience. Where a party chooses to call a highly qualified or skilled individual as a factual rather than an expert witness, it implicitly makes a choice to limit the witness's testimony to matters which he personally saw, heard, or experienced.[23]

21. The decision, however, does not define what is meant by 'personal experience'. If it is confined to something that a witness has seen, or experienced (such as witnessing a relevant crime) this, in the Trial Chamber's view, would be unduly restrictive. Conversely, 'personal experience', if interpreted more liberally, could also include that of say, an analyst working for the Prosecution or the Defence. For these reasons, the Trial Chamber believes that *Karemera* is ambiguous and thus distinguishable.

22. The Trial Chamber is of the view that the ICC's unambiguous approach is more consistent with the principles of international criminal law procedural law and the intent of Rule 149 (C), which permits a Chamber to receive relevant evidence which has some probative value. Whether the opinions or conclusions of witness are probative—assuming that they are relevant to the case—will depend upon differing factors. These include the witness's personal and professional experience and, in the context of the case, what they have themselves witnessed. Opinion evidence cannot be confined to those who have been declared as experts under Rule 161. Doing that would artificially constrict the evidence that a Chamber could hear and hence prejudice the ability of a Party to present its case. These matters, consistent with the ICC decisions, should be examined on a case by case basis.

23. For these reasons, the Trial Chamber rejects the Defence arguments that only someone qualified as an expert under Rule 161 can provide opinion evidence.

---

[22] *Prosecutor v. Popović and others*, IT-05-88-A, Judgement, 30 January 2015, para. 280.
[23] *Karemera*, para. 4, relying upon *The Prosecutor v. Ndindiliyimana and others*, ICTR-00-56-T, Decision on the Prosecutor's Motion Opposing the Testimony of Witness DE-430 as a Factual Witness, 16 May 2007, para. 8.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

24. Mr Donaldson testified in July 2015 about preparing call sequence tables, which are tables that list the calls made and received by a telephone and the cell (tower) to which a mobile is connected during the calls.[24] He has a law degree and worked in law enforcement in the United Kingdom between 2000 and 2007. He has been an analyst with the United Nations International Independent Investigation Commission, and then the Special Tribunal's Office of the Prosecutor, since 2008. His *curriculum vitae* specifies that he received training in 2010 from the 'FTS' in 'Advanced cell site analysis'.[25] It appears that he has had experience in 'communications data analysis', since at least October 2007.[26]

25. The Prosecution proposes to tender into evidence five attribution reports authored by Mr Donaldson; one for each Accused and one for Mr Badreddine. To facilitate the Trial Chamber's understanding of his methodology and conclusions, the Prosecution intends to use PowerPoint slide presentations, for example, in the case of Mr Ayyash, 275 slides in relation to his 275 page report (plus annexes).

26. To attribute mobile usage to an Accused and Mr Badreddine, Mr Donaldson has analysed many pieces of Prosecution evidence. These include witness statements and testimony, family trees, extracts from official Lebanese records such as Land Registry and income tax documents, service accounts such as for electricity, university records, medical records and telecommunications records, including subscriber forms and the content of SMS texts. He has also performed geographical profiling based upon the cell sector usage of the mobiles attributed to each Accused and Mr Badreddine. Additionally, he has prepared contact profiles based upon the mobiles in contact with those attributed to the Accused, such as friends and family members. From analysing this data he has concluded that certain mobiles were used by each Accused and Mr Badreddine as alleged in the amended consolidated indictment. In many paragraphs of the three reports the subject of this motion, and also those relating to the Accused, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, Mr Donaldson has referred to co-location.

27. As an example, at paragraph 265 of his attribution report related to Mr Ayyash, Mr Donaldson states of network 'Yellow' mobile 294, 'Obtaining cell data prior to August 2004 allowed the co-location for the period from 29-05-04 and 01-08-04 to be tested against'

[24] Transcript of hearing of 21 July 2015, pp 78-100.
[25] No further information is provided.
[26] *Curriculum vitae* of Mr Andrew Donaldson, ERN 60279516.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

personal mobile phone (or PMP) 395.[27] There are many similar examples in the five reports. The joint Defence motion seeks the exclusion of virtually any paragraph in the reports relating to Mr Ayyash, Mr Merhi and Mr Badreddine, and in Mr Donaldson's statement of 13 October 2016, which mention the concept of co-location.

28. The reports, in their introductions in respect of each individual Accused, state that they should be considered in conjunction with other relevant reports of Mr Philips, who provided an overview of cell cite analysis and other communications based evidence.[28] It is evident from this that Mr Donaldson's conclusions must be read together with Mr Philips' reports (and indeed his lengthy testimony in respect of these reports).[29]

29. Mr Donaldson may be qualified to provide an opinion on co-location based upon his experience working since at least 2008 in the field of communication data analysis. His opinion, if probative, would be subject to a careful balancing of its weight at the appropriate time.

30. However, Mr Donaldson's reports and his *curriculum vitae* do not make clear his experience in this area, nor the methodology he employed to draw his conclusions based upon the concept of co-location. It is unclear whether he has relied entirely upon Mr Philips' evidence, or is using his own experience, or whether the answer lies somewhere in between. How he has concluded that there was co-location, whether it is his own conclusion or that of Mr Philips (or someone else) is thus uncertain.

31. To determine this motion to finality, the Trial Chamber would therefore be assisted by hearing evidence on a *voir dire* as to Mr Donaldson's experience to provide this opinion evidence. It will do this before proceeding to hear Mr Donaldson's evidence-in-chief.

DISPOSITION

FOR THESE REASONS, the Trial Chamber defers a decision on whether Mr Andrew Donaldson (Witness PRH230) can provide opinion evidence on co-location until it has heard evidence on a *voir dire* on this issue.

[27] Attribution Report related to Mr Salim Jamil Ayyash, Version 4, 1 December 2016, p. 115, ERN D0506655.
[28] Mr Philips' reports were admitted as exhibits P549, P1111, P1112, P1113, P1114, P1115, P1116, P1117, P1936, P1937, P1938.
[29] Mr Philips testified on 19-21; 24-26 April; and 2-4 May 2016 (with respect to the final aspect of his testimony, namely, co-location analysis).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

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

Leidschendam,
The Netherlands
5 May 2017

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm