



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:** 12 December 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

**DECISION ADMITTING INTO EVIDENCE  
A CALL SEQUENCE TABLE RELATING TO THE GREY MOBILE  
AND THE CORRESPONDING WITNESS STATEMENT**

**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 Dorothée Le Fraper  
du Hellen & Mr Jad Youssef 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

## **BACKGROUND**

1. The Prosecution seeks to prove that the Accused, Mr Hassan Habib Merhi, coordinated the preparation of the false claim of responsibility following the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005. According to the Prosecution, Mr Merhi used a mobile referred to as ‘Purple 231’, which co-located with a separate mobile referred to as ‘Green 071’. Green 071 was part of a three-mobile closed network used to monitor both the physical perpetration of the attack and to prepare the subsequent false claim of responsibility. On the basis of Purple 231 co-locating with Green 071, the Prosecution identifies Mr Merhi as the user of Green 071.<sup>1</sup>

2. In an attempt to suggest that Mr Merhi was not the user of Green 071, co-counsel for Mr Merhi cross-examined Prosecution analyst Mr Andrew Donaldson (Witness PRH230)<sup>2</sup> regarding the co-location of Green 071 with a number other than Purple 231. This number was first introduced to the proceedings by the Merhi Defence and is referred to as the ‘Grey phone’ or mobile. Counsel for Mr Merhi apparently did not analyse whether the Grey mobile also co-located with Purple 231.<sup>3</sup>

3. The Prosecution had not previously been aware of the existence of the Grey mobile.<sup>4</sup> Following counsel for Mr Merhi bringing the number to their attention, the Prosecution promptly prepared a ‘combined’ call sequence table presenting the call data records<sup>5</sup> for Green 071, Purple 231 and the Grey mobile between 24 September 2004 and 15 February

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720/A01, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 3, 15; F1077/A01, Prosecution’s Updated Pre-Trial Brief, dated 23 August 2013, 23 August 2013 (confidential), paras 56-58.

<sup>2</sup> Mr Donaldson has provided evidence on the attribution of mobile telephones to the four Accused and a former Accused and named co-conspirator, Mr Mustafa Amine Badreddine. *See* F3172, Decision Allowing Prosecution Analyst Andrew Donaldson to Provide Opinion Evidence, 2 June 2017, para. 7. The Trial Chamber has admitted or marked for identification his attribution reports, including PP1962 MFI which attributes Green 071 and Purple 231 to Mr Merhi. Co-counsel for Mr Merhi cross-examined Mr Donaldson on 29 September and 2 October 2017.

<sup>3</sup> Transcript of 2 October 2017, pp 77-89.

<sup>4</sup> Transcript of 8 November 2017, pp 7-8. 12-14.

<sup>5</sup> Call data records ‘are so-called metadata [and] provide information about communications, such as the source and destination phone number, the type of communication (phone call or text message), the date and time of phone calls and text messages, the duration of phone calls, the IMEI number of the hand set relevant to the communications, and the cell sectors engaged at the beginning and end of a call’; *see* STL-11-01/T/AC/AR126.9, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0007, Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber’s Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, para. 3 (references omitted). Call sequence tables render the information contained in call data records legible by presenting ‘chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time’; *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, para. 2. *See also* F2799, Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks, 31 October 2016, para. 3.

2005. The Prosecution then re-engaged expert Mr John Edward Philips (Witness PRH435) to examine the results and tendered Mr Philips's resulting report, which concludes that the data 'very strongly support' the proposition that the three numbers could have been used by a single person between those dates.<sup>6</sup> The Trial Chamber has admitted Mr Philips's report into evidence as exhibit P2120.<sup>7</sup> The Prosecution now contends that Mr Merhi used all three numbers during this time period.<sup>8</sup>

4. The Prosecution seeks the admission into evidence of this call sequence table and a witness statement of the table's creator. It also requests leave to add the call sequence table to its exhibit list as a precursor to its admission into evidence.<sup>9</sup> The Merhi Defence opposes the application.<sup>10</sup>

### **LEGAL PRINCIPLES**

5. The Trial Chamber has previously acknowledged the general principles and rules of international criminal law relating to the admission and exclusion of evidence, and the procedural safeguards for admitting material tendered 'from the bar table' under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence and for admitting written statements in lieu of live testimony under Rule 155.<sup>11</sup> It reiterates them here.

6. The Trial Chamber may, in the interest 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 the Accused 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, (i) whether the Prosecution has shown good cause for not

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<sup>6</sup> Exhibit P2120, p. 4.

<sup>7</sup> F3477, Decision Admitting into Evidence an Expert Report of J.E. Philips Demonstrating Single Person Use of Green 071, Purple 231 and the 'Grey Phone' Through Cell Site Analysis ('Decision Admitting Philips Report'), 12 December 2017.

<sup>8</sup> F3412, Prosecution Motion for the Admission of a Call Sequence Table Related to the Accused Merhi pursuant to Rule 154 and a related witness statement pursuant to Rule 155, 14 November 2017 (confidential) ('Prosecution motion'), para. 2.

<sup>9</sup> Prosecution motion, paras 1, 5, 7, 27.

<sup>10</sup> F3435, Réponse de la Défense de M. Merhi à "Prosecution Motion for the Admission of a Call Sequence Table Related to the Accused Merhi Pursuant to Rule 154 and a Related Witness Statement Pursuant to Rule 155", 29 November 2017 (confidential) ('Merhi Defence response'), paras 2, 16. The Prosecution and Merhi Defence submissions address Mr Philips's report as well. The Trial Chamber took these submissions into account when adding the report to the Prosecution exhibit list and admitting it into evidence; *see* Decision Admitting Philips Report, paras 18, 21.

<sup>11</sup> *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, paras 66, 111, 116.

seeking the amendments at an earlier stage; (ii) the stage of the proceedings; and (iii) whether granting the amendment would result in undue delay.<sup>12</sup>

### **CALL SEQUENCE TABLE**

#### *Prosecution submissions*

7. The Prosecution seeks the admission into evidence of the call sequence table under Rule 154. The table is relevant and probative. It demonstrates the geographic profiles of Green 071, Purple 231 and the Grey mobile between 24 September 2004 and 15 February 2005,<sup>13</sup> information on which Mr Philips relied in analysing whether these numbers show patterns consistent with a single user.<sup>14</sup>

8. The table bears sufficient indicia of reliability, as it is based on underlying call data records and cell site information from the business records of the Lebanese telecommunications company Alfa. The Trial Chamber has found evidence from Alfa reliable and has admitted into evidence call sequence tables based on Alfa's records. The tendered call sequence table is a reliable extract of the call data records, as Prosecution analyst Ms Kei Kamei (Witness PRH308) produced it in line with the methodology she has already described in court. The reliability of the table can be tested, as the underlying material has been disclosed to the Defence.<sup>15</sup>

9. The admission of the table would not prejudice the fair trial rights of the Accused. The Defence has access to the underlying materials for the table and has had the opportunity to cross-examine both the analysts who produced such tables and representatives of Alfa. The Trial Chamber has held that there would be no practical utility in admitting into evidence all of the relevant call data records, and the Appeals Chamber has confirmed the Trial Chamber's finding that the collection of call data records by the Prosecution and the United Nations International Independent Investigation Committee was appropriate.<sup>16</sup>

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<sup>12</sup> F2798, Decision on the Admission of Call Sequence Tables related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements, 31 October 2016, para. 68.

<sup>13</sup> The Trial Chamber understands the Prosecution's references to 15 February 2004 (Prosecution motion, paras 2, 10) to be to 15 February 2005.

<sup>14</sup> Prosecution motion, paras 1, 8-10, 20.

<sup>15</sup> Prosecution motion, paras 4, 8, 11-15, 20.

<sup>16</sup> Prosecution motion, paras 8, 16-20.

10. As a precursor to its admission, the Prosecution seeks the addition of the table to its exhibit list. This addition is in the interest of justice as the table is relevant and probative and its addition at this time will not prejudice the Defence.<sup>17</sup>

#### *Merhi Defence submissions*

11. The Merhi Defence opposes the admission into evidence of the call sequence table. The Prosecution is attempting to invert the burden of proof by seeking admission of the table without explaining its relevance to the indictment confirmed against Mr Merhi. The Prosecution has instead made circular arguments that the table has probative value because Mr Philips's report analyses it and because Mr Philips has testified on the basis of his report. The Prosecution is unfairly seeking to resume its investigations and to have new evidence admitted following the confirmation of the indictment without clearly stating that it wishes to attribute a new telephone number to Mr Merhi. The Prosecution seeks to introduce new material facts at an advanced stage of the proceedings, and the prejudice this would cause the Defence outweighs the table's probative value.<sup>18</sup>

12. The Merhi Defence also opposes the addition of the call sequence table to the Prosecution exhibit list. The Prosecution did not disclose the table until 3 November 2017, near the close of its case, and it is unacceptable for the Prosecution to be introducing new evidence at such an advanced stage of the proceedings. The Prosecution should have acted more diligently and submitted this evidence earlier, and it has not justified this very belated addition. Allowing it to make this addition to its exhibit list now would prejudice the Defence, unjustifiably broaden the criteria for late additions to the Prosecution exhibit list, and run counter to the purpose and spirit of the Special Tribunal's Statute and Rules, which seek to ensure the fairness of the proceedings.<sup>19</sup>

#### *Discussion and decision*

13. The tendered call sequence table is a 64-page document detailing the call data records for Green 071, Purple 231 and the Grey mobile from 24 September 2004 to 15 February 2005.<sup>20</sup> Ms Kamei produced it based on an existing call sequence table detailing the call data

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<sup>17</sup> Prosecution motion, paras 1, 6.

<sup>18</sup> Merhi Defence response, paras 2-3, 9-12, 14, 16.

<sup>19</sup> Merhi Defence response, paras 2, 4-8, 16.

<sup>20</sup> ERN D0534265-D0534328, listed in annex A to the Prosecution motion.

records for Green 071 and Purple 231, as well as additional telecommunications data received from Alfa pertaining to the Grey mobile.<sup>21</sup>

14. The Trial Chamber has held that the telecommunications evidence received from Alfa—including cell site evidence and call data records—is generally *prima facie* reliable.<sup>22</sup> Ms Kamei and other Prosecution analysts have testified and been cross-examined as to the production of call sequence tables,<sup>23</sup> and the administrator of the Prosecution SQL database has testified and been cross-examined regarding the design, implementation, maintenance and repair of the SQL database that enables call record analysis.<sup>24</sup> The Merhi Defence has not questioned the reliability of the call sequence table, and the Trial Chamber is satisfied that Ms Kamei produced this table by following the same standardized procedure that Prosecution analysts have consistently used in creating such tables. The Trial Chamber is satisfied that the tendered call sequence table is *prima facie* reliable.

15. Counsel for Mr Merhi made the strategic choice to introduce the Grey mobile into the proceedings in an effort to suggest that Mr Merhi did not use Green 071, and the table is relevant to rebutting that suggestion. The Prosecution now contends that Mr Merhi used Green 071, Purple 231 and the Grey mobile, and it submits that the table ‘demonstrates the geographic profiles’ of these three numbers. The Trial Chamber is therefore satisfied that the table is relevant to and—in light of its *prima facie* reliability—probative of assessing whether Green 071, Purple 231 and the Grey mobile in fact had a single user during the relevant time period. The Trial Chamber therefore finds that the call sequence table is admissible under Rule 154.

16. The Trial Chamber has previously established that evidence pertaining to the Grey mobile would not radically transform the case and would not require pleading in an indictment or a pre-trial brief.<sup>25</sup> It therefore finds, under Rule 149 (D), that the probative value of the tendered call sequence table is not substantially outweighed by the need to ensure a fair trial.

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<sup>21</sup> Prosecution motion, annex A.

<sup>22</sup> F2767, Written Reasons for Admitting Witness PRH707’s Statements and Annexes into Evidence, 10 October 2016, para. 49.

<sup>23</sup> Ms Kamei, Mr Donaldson, and Prosecution analysts Ms Helena Habraken (PRH371), Mr Lachlan Christie (Witness PRH313) and Mr Christian Carnus (Witness PRH377) testified from 20 to 22 July 2015 and were cross-examined from 16 to 19 November 2015.

<sup>24</sup> SQL (Structured Query Language) is a special programming language for databases. The Prosecution’s SQL database enables call data record analysis. The Prosecution’s database administrator, Mr Spartak Mkrtychyan (Witness PRH111), testified on 14 September 2015.

<sup>25</sup> Transcript of 8 November 2017, p. 78.

17. With respect to the addition of the table to the Prosecution exhibit list, the Trial Chamber is unmoved by the Merhi Defence's protestations that the Prosecution has introduced this evidence at an inappropriately late stage in the proceedings. The possible co-location of Green 071 and the Grey mobile was first raised by co-counsel for Mr Merhi in the cross-examination of Mr Donaldson in October 2017. The Trial Chamber has admitted into evidence, on the application of the Merhi Defence, a call sequence table and two related documents presenting the call data records for Green 071 and the Grey mobile—but not Purple 231.<sup>26</sup> The Prosecution's tendering of a call sequence table presenting the call data records for Green 071, Purple 231 and the Grey mobile therefore provides the Trial Chamber with a more complete picture of the evidence first introduced by the Merhi Defence.

18. The Prosecution call sequence table does not concern material that is new to the Merhi Defence, as the Merhi Defence discovered the existence of the Grey mobile in the call data records disclosed by the Prosecution. The Merhi Defence had already compared the Grey mobile with Green 071 and could have compared it with Purple 231. The Trial Chamber has seen nothing suggesting that the Prosecution was negligent in not determining the relationship between the Grey mobile and other numbers attributed to Mr Merhi before Defence counsel raised the matter, and it is proper for the Prosecution to respond to evidence introduced by the Defence during the Prosecution case. The Trial Chamber therefore finds that there is good cause for the Prosecution to amend its exhibit list at this stage in the proceedings to add the tendered call sequence table.

### **WITNESS STATEMENT**

#### *Prosecution submissions*

19. The Prosecution seeks the admission into evidence of Ms Kamei's witness statement under Rule 155. The statement details Ms Kamei's methodology in creating the tendered call sequence table and the source material on which she relied, and it is relevant to the reliability of that table. It does not concern the acts and conduct of the Accused as charged in the indictment. The statement displays the necessary indicia of reliability as it complies with the

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<sup>26</sup> F3463, Decision Admitting into Evidence Call Sequence Tables Tendered by the Ayyash and Merhi Defence - Exhibits 1D453, 3D431, 3D433, 3D436 and 3D437 Marked for Identification, 7 December 2017 (with respect to exhibit 3D437 MFI); transcript of 2 October 2017, pp 78, 86, admitting into evidence exhibits 3D438 and 3D439.

requirements of the Rule 155 Practice Direction.<sup>27</sup> Ms Kamei should not be required to appear for cross-examination, as she has previously testified and been cross-examined on the production of call sequence tables. The Prosecution does not seek the addition of the statement to its exhibit list because the Trial Chamber has previously held that to do so would be unnecessary where the witness appears on the Prosecution witness list and the Defence have notice of the scope of the witness's evidence.<sup>28</sup>

#### *Merhi Defence submissions*

20. The Merhi Defence opposes the admission into evidence of the statement, and its arguments on this matter are consistent with its submissions on the admissibility of the call sequence table (see paragraphs 11-12 above).<sup>29</sup> It made no submissions as to whether Ms Kamei should appear for cross-examination.

#### *Discussion and decision*

21. Ms Kamei's witness statement<sup>30</sup> pertains to two call sequence tables she produced—the tendered call sequence table and a separate call sequence table concerning only the Grey mobile. She states that she created these tables using the same methodologies described in her statement of 14 January 2015 (exhibit P516). The tendered statement is therefore relevant to and probative of the reliability of the tendered call sequence table. It complies with the Rule 155 Practice Direction and bears sufficient indicia of reliability, and it does not concern the acts and conduct of the Accused as charged in the amended consolidated indictment. The Trial Chamber therefore finds that Ms Kamei's witness statement is admissible under Rule 155.

22. The Merhi Defence has not responded to the Prosecution application that Ms Kamei not appear for cross-examination. Ms Kamei has previously testified and been cross-examined on the production of call sequence tables, and she states that the production of the tendered calls sequence table used the same methodologies. The Trial Chamber therefore finds that the interests of justice and the demands of a fair and expeditious trial exceptionally warrant the admission of Ms Kamei's witness statement without cross-examination.

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<sup>27</sup> STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010.

<sup>28</sup> Prosecution motion, paras 1, 5, 21-24.

<sup>29</sup> Merhi Defence response, paras 2-4, 9-12, 14, 16.

<sup>30</sup> ERN 60326298-60326302, listed in annex D to the Prosecution motion.



## CONFIDENTIALITY

### *Prosecution submissions*

23. The Prosecution submits that its motion and annexes contain confidential information—specifically, the telephone numbers used by third parties to the proceedings—and requests that the Trial Chamber maintain the confidential status of the annexes.<sup>31</sup>

### *Merhi Defence submissions*

24. Counsel for Mr Merhi filed their submission confidentially, as it responds to the confidential Prosecution motion. They submit that nothing in the Prosecution motion or their response must remain confidential.<sup>32</sup>

### *Discussion and decision*

25. The Trial Chamber reiterates the principle of the public nature of proceedings before the Special Tribunal, and stresses that documents should, wherever possible, be filed publicly. The Prosecution and Merhi Defence submissions contain identifying information regarding the Grey mobile. The Trial Chamber will order the Prosecution and the Merhi Defence to file public redacted versions of their submissions and annexes, and urges the Parties to cooperate in this regard.

## DISPOSITION

**FOR THESE REASONS**, the Trial Chamber:

**DECLARES** admissible, under Rule 154, the call sequence table listed in annex A to the Prosecution motion and, under Rule 155, the witness statement listed in annex D to the Prosecution motion, and decides that it will, at a suitable stage in the proceedings, admit these documents into evidence; and

**ORDERS** the Prosecution and the Merhi Defence to file public redacted versions of their submissions and annexes, and urges the Parties to cooperate in this regard.

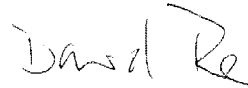
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<sup>31</sup> Prosecution motion, para. 26.

<sup>32</sup> Merhi Defence response, para. 15.

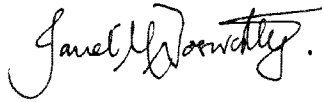
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,  
The Netherlands  
12 December 2017



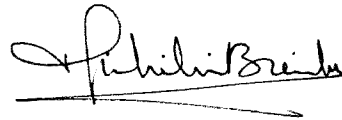
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Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

