



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

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Classification: Public

THE PROSECUTOR

v.

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

**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**

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

INTRODUCTION

1. The Prosecution case against the Accused, Mr Hassan Habib Merhi, is that he used what is pleaded in the amended consolidated indictment as a ‘green’ network mobile—termed ‘Green 071’—in planning and carrying out the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005. The Prosecution has presented evidence suggesting that he also used what it pleads is a ‘purple’ (or personal) mobile—termed ‘Purple 231’—one that allegedly he and his family used, that ‘co-located’¹ with Green 071.² That is how he is identified as the user of Green 071.

2. In an attempt to demonstrate that the green mobile had an alternative user who was not Mr Merhi, co-counsel for Mr Merhi cross-examined a Prosecution analyst, Mr Andrew Donaldson, suggesting that a third mobile—now termed the ‘grey phone’—co-located with Green 071. Defence co-counsel also introduced into evidence a combined call sequence table³ of the grey mobile and Green 071—exhibit 3D437⁴—suggesting to Mr Donaldson their possible co-location, thereby intending to cast doubt on the Prosecution’s case that Mr Merhi was the user of the network mobile, Green 071.⁵

3. Thus, on this basis alone—namely, the co-location of the green and grey mobiles—co-counsel concluded, the user of the green network mobile could have been someone other than Mr Merhi.

¹ The Prosecution defines co-location analysis as a form of attribution evidence where multiple telephones are attributed to a single user. It is an analytical technique designed to determine whether an identified person consistently uses two or more telephones, at least one of which is a mobile phone. *See* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (‘Amended consolidated indictment’), para. 14 (c).

² Amended consolidated indictment, paras 18-19.

³ Call sequence tables present chronological sequences of calls relating to a relevant telephone number over a specified period of time, comprising relevant call data records and cell site information. *See* STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, 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 (‘Decision of 6 May 2015’), para. 2. A combined call sequence table combines individual call sequence tables of target telephone numbers into one chronological table of sequences of calls.

⁴ *See* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, 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.

⁵ Mr Donaldson provides general analytical Prosecution evidence concerning 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. These are exhibits P1949, P1953, P1962 MFI, P2023 MFI and P2026.1 MFI.

4. As a result of this exchange in cross-examination, the Prosecution did a forensic ‘cell dump’⁶ on the three mobiles, green, purple and grey—an exercise that Mr Merhi’s co-counsel had apparently overlooked. She asked no questions of Mr Donaldson concerning the grey mobile’s possible co-location with the purple personal mobile. Having investigated this new grey mobile, the Prosecution prepared its own combined call sequence table for the grey phone, Green 071 and Purple 231.

5. The Prosecution then reengaged its cell site analysis expert, Mr John Edward Philips (Witness PRH435), to examine the results and to report on whether the three mobiles could have had a single user.⁷

J. E. PHILIPS’ REPORT – ITS ANALYSIS AND CONCLUSIONS

6. Using cell site analysis, Mr Philips reached precisely this point, concluding that the three mobiles could have had a single user between 24 September 2004 and 15 February 2005. Within this period he analysed 1832 calls to and from the three mobiles, and identified 266 ‘pairs’ of calls made adjacently within one hour by any of the three.⁸ He also identified the ‘top ten’ cells used for these calls and marked a Google Earth map of Beirut, Lebanon, showing the best server coverage of each of the ten cells.⁹

7. He further analysed each pair of calls made by these mobiles within one hour of each other and their relative locations within the predicted best server coverage of each cell used at the start of each call.¹⁰

8. Mr Philips concluded that 168 pairs of calls (around 63% of the 266) used the same cell to make and receive calls. The balance (around 37%) did not use the same cell but the time between each pair allowed the user to travel the distances between where the calls occurred. He concluded that these 168 pairs ‘could be co-located’—that is, the multiple mobiles could have had a single user.¹¹

⁶ A cell dump is a forensic technique of obtaining a list of calls of mobile telephones using specified cells of interest over a particular time period from each telecommunications network provider in order to identify calling patterns; *see* exhibit P549, An Introduction to Cell Site Analysis as Applied to GSM Networks, by J.E. Philips, 24 September 2012, section 9.

⁷ Transcript of 8 November 2017, pp 7-8, 11-12.

⁸ 46 calls (2.5 % of these 1832 calls) related to Green 071, 896 calls (48.9 %) related to Purple 231 and 890 calls (48.6 %) related to the grey mobile. *See* transcript of 9 November 2017, pp 31-32; exhibit P2120 MFI, p. 2.

⁹ Transcript of 9 November 2017, pp 32-34, 59-60; exhibit P2120 MFI, pp 2-3, 18-24, 190, *see also* pp 180-189.

¹⁰ *See e.g.* transcript of 9 November 2017, pp 35-44, 47-59; exhibit P2120 MFI, pp 25-174.

¹¹ Transcript of 9 November 2017, pp 59, 69-70; exhibit P2120 MFI, pp 3, 190.

9. Of the remaining 98 pairs, he concluded that he ‘would not preclude’ co-location, that is, the possibility of the three mobiles having a single user. Finally, he concluded that no pair was in a category that ‘may preclude’ or ‘would preclude’ their having a single user.¹²

10. In analysing each call he observed that none of the three mobiles called each other, and only once did calls to or from any two mobiles overlap—namely, one for Green 071 (the outgoing call) and one for Purple 231 (the incoming call)—and only for a second on 30 September 2004 when both connected to the BRANJE2 cell in Beirut, for 113 and 20 seconds, respectively.¹³

11. One pair of calls of Purple 231 and the grey mobile suggested the possible ‘dislocation’ of the two handsets because they used two different cells in Beirut, BOSTAN2 and SFEIR3, where the time between the calls, around 2.25 minutes, was too short for the user to travel the 7.25 kilometres between the centres of the best server coverage of the two cells. However, based on analysis of further adjacent calls, Mr Philips excluded this possible dislocation, by explaining that signals from BOSTAN2 could have been picked up within the area of SFEIR3, due to anomalous radio signal propagation.¹⁴

12. Mr Philips concluded that the calling characteristics of the three mobiles for the period of 24 September 2004 to 15 February 2005 ‘very strongly support’ their use by a single person.¹⁵

13. The Prosecution disclosed its combined call sequence table and Mr Philips’ report to the Defence, as soon as it was available on 3 November 2017, and sought the admission of the report into evidence on 9 November 2017.¹⁶

14. On 8 November 2017, on the Prosecution’s application, the Trial Chamber allowed the Prosecution to recall Mr Philips to testify about the possible co-location of the green, purple

¹² Transcript of 9 November 2017, p. 59; exhibit P2120 MFI, pp 3, 190.

¹³ According to Mr Philips, this one second overlap between the first (outgoing) call and the second (incoming) call signifies that the first call was immediately terminated on the receipt of the second call. *See* transcript of 9 November 2017, pp 39-40, exhibit P2120 MFI, pp 36, 38, 190.

¹⁴ Transcript of 9 November 2017, pp 48-50, exhibit P2120 MFI, pp 114-115.

¹⁵ Exhibit 2120 MFI, pp 2-4, 190.

¹⁶ Transcript of 8 November 2017, p. 8; transcript of 9 November 2017, p. 18; F3412, Prosecution Motion for the Admission of a Call Sequence Table Related to the Accused Merhi pursuant to Rule 154 and related witness statement pursuant to Rule 155, 14 November 2017 (confidential with confidential annexes) (‘Prosecution motion’) paras 6-7, 25.

and grey mobiles. The Trial Chamber held that Mr Philips' evidence (at that point and without more) went to rebutting the Merhi Defence's analysis.¹⁷

15. On 9 November 2017, Mr Philips testified and co-counsel for Mr Merhi briefly cross-examined him.¹⁸ The Trial Chamber also marked for identification—as exhibit P2120 MFI—Mr Philips' report entitled, 'Demonstration of single person use of 3150071, 3575231, [grey phone] using cell site analysis, Suspect 3' dated 7 November 2017.¹⁹

SUBMISSIONS

16. The Prosecution submits that the report is relevant as it refutes the Merhi Defence's suggestion putting Green 071 in another person's hands based on its co-location with the grey mobile. It is also probative because it assists the determination that Green 071 and Purple 231 had a single user. The Prosecution does not assert that the grey mobile is a network mobile used in the planning, preparation and execution of the attack against Mr Hariri. Its role therefore need not be pleaded in the amended consolidated indictment.

17. The Prosecution could not, realistically, know and perform a 'cell dump' for every number in its database.²⁰ As the Defence had introduced the grey number during the Prosecution case, it should be addressed before its close. Once this number and its significance became apparent, the Prosecution acted without delay to investigate it. The evidence has not been collected in violation of the Accused's rights, and its admission would not compromise the integrity of the proceedings.²¹

18. In a subsequent motion, the Prosecution sought the admission into evidence of the combined call sequence table and evidence supporting its reliability, and the Trial Chamber's authorisation to add the call sequence table to its exhibit list. There, the Prosecution also

¹⁷ Decision Allowing the Prosecution to Recall Mr Edward Philips (Witness PRH435) to Testify ('Decision of 8 November 2017'); Addendum to Decision Allowing the Prosecution to Recall Mr Edward Philips (Witness PRH435) to Testify ('Addendum'); *see* transcript of 8 November 2017, pp 64-66, 78-80. On 9 November 2017, the Trial Chamber denied the Merhi Defence's application for certification to appeal this decision; *see* transcript of 9 November 2017, pp 1-11.

¹⁸ Transcript of 9 November 2017, pp 14-18, 28-74.

¹⁹ Transcript of 9 November 2017, p. 28.

²⁰ This refers to the Prosecution 'structured query language' or 'SQL' database that enables call data record analysis. SQL is a special programming language for databases.

²¹ Transcript of 8 November 2017, pp 8, 12-21, 59-64; transcript of 9 November 2017, pp 17-18, 24-26.

repeats its (oral) application for the admission of Mr Philips' report, but without additional arguments, and requests authorisation, if necessary, for adding the report to its exhibit list.²²

19. Counsel for Mr Merhi object to the admission of the report arguing that it lacks relevance and probative value. The Prosecution knew of the grey mobile as the number existed in its database where the Defence discovered it. After ten years of investigation, four years of trial and several opportunities to examine Mr Philips, the Prosecution has not shown good cause to present Mr Philips' evidence. Instead, it uses its own negligence as an argument to support its application. The Prosecution did not attribute the grey mobile to Mr Merhi or plead its role in the amended consolidated indictment, the pre-trial brief or its opening statement.²³

20. Moreover, the report is new evidence attributing a new mobile number to Mr Merhi through single user analysis, or, it at least paves the way for the Prosecution to attribute the grey mobile to the Accused. It thus radically transforms the Prosecution case against Mr Merhi, which relies heavily on mobile attribution, and should be pleaded in the amended consolidated indictment. As it is not, the introduction of this new evidence causes irreparable damage to the Defence, and the only remedy is its exclusion under Articles 21 (2) and 28 (2) of the Special Tribunal's Statute and Rules 149 (D) and 162 (A) of its Rules of Procedure and Evidence.²⁴

²² Prosecution motion, paras 1, 25 in particular.

²³ Amended consolidated indictment; STL-13-04/PT/PTJ, *Prosecutor v. Merhi*, F0052, Annex A, Prosecution's Pre-Trial Brief, 8 January 2014 (confidential); transcript of 18 June 2014, pp 14-70.

²⁴ Transcript of 9 November 2017, pp 18-23; transcript of 8 November 2017, pp 23, 26-29, 34-40, 45-54, 56-59, referring to International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Simić*, IT-95-9-A, Judgement, 28 November 2006, para. 71; *Prosecutor v. Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014, para. 575. The Merhi Defence—informed the Trial Chamber senior legal officer in an email of 8 November 2017 that it also relied on *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, paras 88, 114, 121; International Criminal Tribunal for Rwanda, *Muvunyi v. Prosecutor*, ICTR-2000-55A-A, Judgement, 29 August 2008, paras 165-166; *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 125; *Prosecutor v. Ntagerura et al.*, Judgement, 7 July 2006, para. 22; *Prosecutor v. Bagosora*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, paras 17-18. See transcript of 8 November 2017, pp 41-43. Article 21 (2) of the Special Tribunal's Statute states that '[a] Chamber may admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.' Article 28 of the Statute provides relevantly that in adopting or amending the Special Tribunal's Rules of Procedure and Evidence, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial. Under Rule 149 (D), '[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of [...] the accused as set out in the Statute and the Rules.' The Trial Chamber must exclude evidence, under Rule 162 (A), 'if [it has been] obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously

21. In response to the Prosecution motion, counsel for Mr Merhi reiterate their oral submissions adding, relevantly, that the Prosecution has not provided any reason for adding Mr Philips' report to its exhibit list at this late stage of the proceedings. The Prosecution has failed to demonstrate the relevance, probative value and reliability of the report. Allowing the Prosecution to add it to its exhibit list would render meaningless the timelines foreseen in Rule 91 (for disclosure and filing pre-trial briefs and other documents under a 'working plan' put in place by the Pre-Trial Judge). The cumulative effects of amending the exhibit list cause prejudice to the Defence.²⁵

DISCUSSION AND DECISION

22. This Prosecution application arises only as a result of a deliberate strategic forensic decision by co-counsel for Mr Merhi to introduce this new grey mobile number into the case and to cross-examine Prosecution analyst Mr Donaldson on a call sequence table showing its possible co-location with the green network mobile. The Prosecution was unaware of the existence of the grey mobile until co-counsel for Merhi cross-examined Mr Donaldson about it. Until that moment it was not in issue in the case.

23. The Prosecution's obvious response to this Defence forensic decision was to prepare a call-sequence table of the green, purple and grey mobiles and, finding possible co-location, to commission an expert report that concluded that the three mobiles could have co-located and hence had a single user—on the Prosecution case, namely Mr Merhi.

24. The Trial Chamber has previously acknowledged the legal principles on the admission of expert reports. These are that (i) the author of the report must be classified as an expert; (ii) the report must meet the minimum standard of reliability, be relevant and of probative value; and (iii) the content of the report must fall within the witness' area of expertise.²⁶ The Trial Chamber has also acknowledged the legal principles on amending a party's exhibit list.²⁷ These are applicable here.

damage, the integrity of the proceedings. In particular, under Rule 162 (B), it must exclude evidence 'if it has been obtained in violation of international standards on human rights, including the prohibition of torture.'

²⁵ 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), paras 2, 4-8, 10-14.

²⁶ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1610, Decision on Expert Witness PRH120, Professor Fouad Hussein Ayoub, and Expert Witness PRH508, Dr. Issam Mansour, 7 July 2014, paras 3-6.

²⁷ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra* 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.

25. In August 2015, the Trial Chamber declared Mr Philips, under Rule 161, as an expert in telecommunications and cell site analysis, and in global system for mobile telecommunications (GSM) technology as applied to cell site analysis. It then heard expert evidence from him, including his reports demonstrating single person use of multiple mobile phones using cell site analysis,²⁸ including one related to Mr Merhi, which is now exhibit P1938.²⁹ In his new report Mr Philips further developed his single user report on Mr Merhi—adding the grey mobile to the analysis, and using the same methodology—but without analysing the ‘end cells’, the cell to which a mobile connects at the end of a call.³⁰ The report, exhibit P2120 MFI, clearly falls within Mr Philips’ area of expertise. This is unchallenged.

26. Mr Philips’ report is relevant both to rebut the suggestion made by Defence counsel that Green 071 was not used by Mr Merhi, and further, to demonstrate that the green, grey and purple mobiles had a single user. Mr Philips confirmed that he had prepared and signed the report, and it contains his analysis and conclusions.³¹ The Trial Chamber is therefore satisfied of the report’s *prima facie* reliability. It is probative of whether Green 071 and Purple 231 had a single user in Mr Merhi.

27. The Trial Chamber has already held that the report does not radically transform the Prosecution case or had to be pleaded in the indictment or pre-trial brief.³² It has also acknowledged that the ‘call data records [...] are voluminous, and without extraction of the relevant data into a readable format, meaningless’.³³ One form of making them readable is analysing them in a report, as Mr Philips has done. Accepting the report into evidence merely adds a potential new piece of evidence in relation to attributing use of Green 071 to Mr Merhi.

28. Irrespective of whether the Prosecution was ignorant of the existence of the grey mobile, the Merhi Defence obviously was entirely cognisant of it as it had prepared its own

²⁸ Decision Qualifying Mr Philips (PRH435) as an Expert under Rule 161 in the Field of Telecommunications and Cell Site; Decision Qualifying Mr Phillips (PRH435) as an Expert under Rule 161 in the Field of GSM; transcript of 18 August 2015, pp 8, 38-39. Mr Philips 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. See e.g. exhibit P1111, Demonstration of single person use of multiple mobile phones using Cell Site Analysis, Suspect 1, by J.E. Philips, dated 19 December 2014; exhibit P1112, Demonstration of single person use of multiple mobile phones using Cell Site Analysis, Suspects 4, 5, 6, 7, & 8, by J.E. Philips, dated 6 December 2013; exhibit P1937, Demonstration of single person use of multiple mobile phones using Cell Site Analysis, Suspect 2, by J.E. Philips, dated 6 November 2012.

²⁹ Exhibit P1938, Demonstration of single person use of multiple mobile phones using Cell Site Analysis (with end cells), Suspect 3, by J.E. Philips, dated 5 September 2014.

³⁰ Exhibit P2120 MFI, Executive summary.

³¹ Transcript of 9 November 2017, p. 17.

³² Addendum.

³³ Decision of 6 May 2015, para. 113.

combined call sequence table of Green 071 and the grey mobile (excluding Purple 231)—exhibit 3D437—well *before* Mr Philips was asked to prepare an additional report specific to the three mobiles.

29. The Trial Chamber is therefore unconvinced by the Merhi Defence’s argument that the Prosecution should have known about the grey mobile simply because its database included the relevant call data records. Its database is voluminous³⁴—numbering in the billions—and finding a relationship between different mobiles requires cell dumps on numerous numbers. The Prosecution and Defence must invariably be selective in this task.

30. The Trial Chamber has not detected any prosecutorial negligence in the Prosecution’s obliviousness to any relationship between the possible users of the green and grey mobiles *until after* the Defence raised the matter in cross-examination.

31. Further, even if the Prosecution—theoretically at least—could have discovered the relationship between the three mobiles earlier, it is not too late in the Prosecution case for it to elicit evidence in response to Defence call sequence tables.

32. Moreover, the Merhi Defence, acting with due diligence, could have discovered for itself any relationship of co-location between the three mobiles. The Prosecution application to tender this additional evidence—it is emphasised—is a response to the Defence cross-examination of Mr Donaldson. The Prosecution did what any competent and ethical Prosecutor would do; it investigated the grey mobile, and had it discovered anything exculpatory it would have been obliged to disclose it under Rule 113. Alternatively, had it discovered anything incriminating it would in the normal course of events have applied to add the evidence to its case.

33. Regarding any potential prejudice to Defence preparations for trial—and especially at this late stage of the trial—the following considerations are relevant: the Prosecution disclosed the new report to the Defence as soon as it could. Further, counsel for Mr Merhi were able to cross-examine, and indeed cross-examined, Mr Philips without seeking adjournment of the trial for further Defence preparation, and did so straight after the Prosecution’s examination in chief had concluded.

³⁴ Decision of 6 May 2015, para. 113.

34. Another pertinent consideration is that because Defence co-counsel introduced the combined call sequence table of Green 071 and the grey mobile into evidence and had obviously researched its existence before choosing to cross-examine on it, the Merhi Defence must have had familiarity with not just its existence, but also the grey mobile's calling patterns and locations.

35. But most importantly, by adding the purple mobile to the mix and reaching the same conclusion about the three mobiles—green, grey *and* purple—Mr Philips' report merely takes an analytical step further from what was already obvious to co-counsel for Mr Merhi—and was indeed part of their case. Namely, that co-location between the green and grey mobiles was possible, and hence they may have had a single user. To this Mr Philips merely added Purple 231. As the Merhi Defence could also easily have done.

36. For these reasons, the Trial Chamber is satisfied that admitting the new report into evidence does not breach Rule 149 (D) in requiring its exclusion on the basis of its probative value being substantially outweighed by the need to ensure a fair trial.

37. Similarly, Rule 162 (A) is inapplicable. There is no suggestion that the evidence was 'obtained by methods which cast substantial doubt on its reliability'. And, in the circumstances described above of the Prosecution commissioning the report in response to Defence cross-examination, its admission cannot be antithetical to, and would not seriously damage, the integrity of the proceedings. Therefore, there is no reason to exclude it from admission into evidence and it will be admitted into evidence.

38. The Trial Chamber has already held that the Prosecution had demonstrated good cause to recall Mr Philips to testify.³⁵ The Trial Chamber further considers that the Prosecution had the same good cause for not seeking to add the report to its exhibit list at an earlier stage, specifically, the reason for commissioning the report only arose during Mr Donaldson's cross-examination. In other words, absent this line of cross-examination, Mr Philips would not have been recalled or have written his new report.

39. On the issue of adding the report to the Prosecution's exhibit list, Mr Philips' evidence on the report, including cross-examination, took less than a day in court, thereby causing no delay to the proceedings. Adding the report to the exhibit list could be in the interests of justice, for this and the reasons referred to above, notwithstanding the advanced stage of the

³⁵ Decision of 8 November 2017; transcript of 8 November 2017, p. 66.

proceedings. However, in the circumstances—namely, it has been marked for identification for admission into evidence and the relevant witness has already testified to its contents—the Trial Chamber considers it unnecessary to formally add the report to the Prosecution’s exhibit list.

40. The Parties filed their submissions confidentially. The Trial Chamber will address this in its decision determining the Prosecution application for the admission of the combined call sequence table of the green, purple and grey mobiles.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

ADMITS the report ‘Demonstration of single person use of 3150071, 3575231, [grey phone] using cell site analysis, Suspect 3’ dated 7 November 2017 into evidence as exhibit P2120.

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

Leidschendam,
The Netherlands
12 December 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

