

**THE TRIAL CHAMBER**

**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:** 8 November 2017

**Original language:** English

**Classification:** Public

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**DECISION ALLOWING THE PROSECUTION TO RECALL MR EDWARD PHILIPS (WITNESS PRH435) TO TESTIFY**

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(Extract from Official Public Transcript of Hearing on 8 November 2017, page 64, line 7 to page 66, line 18)

On 18th of August, 2015, the Trial Chamber found that Mr. John Edward Philips was an expert in relation to telecommunications and cell site analysis. Having made that determination, the Chamber received into evidence some reports he wrote in relation to that particular field and he testified and was cross-examined at some length by counsel for the accused.

Today, the Prosecution made an application before the Trial Chamber to recall Mr. Philips to present additional evidence in relation to the possible co-location of two mobile phones attributed to the accused Mr. Hassan Habib Merhi in the indictment and amended consolidated indictment and pre-trial brief - namely, Green 071 and Purple 231 - with a third mobile which has been called the Grey Phone.

The so-called Grey Phone came to the attention of the Prosecution, and indeed the Trial Chamber, during the cross-examination of a Prosecution analyst, Mr. Andrew Donaldson, by counsel for Mr. Merhi last month. In their cross-examination, counsel for Mr. Merhi put to Mr. Donaldson that the possibility that Green 071 and the Grey Phone were co-

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locating, therefore meaning that Green 071, which the Prosecutor was attempting to attribute to Mr. Merhi by evidence that he was the user of Purple 231, which is alleged to be his personal phone, meaning that whoever was using the Grey Phone was possibly also using the Green 071 and it wasn't Mr. Merhi.

As a result of the cross-examination, which was accompanied by a call sequence table of the Grey Phone and Green 071, the Prosecution made its own call sequence table of the three phones and had their expert, Mr. Philips, examine the calls made by the three phones between two dates, the 24th of September, 2004, and the 15th of February, 2005.

Mr. Philips, in a report dated Friday, the 3rd of November, 2017, entitled "Demonstration of Single Person Use of Green 071, Purple 231, and the Grey Phone Using Cell Site Analysis Suspect 3," concluded in relation to the usage of the three phones from call data records within five minutes of each other or an hour of each other, that in all cases he could not preclude co-location and in no cases could co-location be precluded.

The additional report of Mr. Philips has resulted solely from questions that Defence counsel put to Mr. Donaldson in cross-examination.

The Prosecution has made an application to recall Mr. Philips and to tender his report into evidence, arguing that good cause exists to do so; namely, that the evidence is not cumulative and it is relevant and it has some probative value; it is not a material fact that has to be pleaded in the indictment or the pre-trial brief but is simply evidence of possibly significant nature.

The good cause the Prosecution has argued is that that they only performed what is called a cell dump after the Defence cross-examined Mr. Donaldson on the possible co-location of Green 071 and the Grey Phone because it was not obvious at the time and the evidence didn't exist, and as a result of the Defence cross-examination, they performed further investigations which are permissible under international law criminal procedural law principles.

The Defence of Mr. Merhi, supported by the Defence of the other three accused, opposed the application, specifically arguing that the report would constitute a material fact which wasn't pleaded in the amended consolidated indictment, nor in the pre-trial brief, and allowing the evidence would represent a radical transformation of the Prosecution case such as to prejudice Mr. Merhi's fair trial rights.

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The Chamber has carefully considered the arguments of both parties and is satisfied that in the circumstances I've just outlined that good cause exists to recall Mr. Philips for the limited purpose of receiving the report into evidence and hearing further evidence in relation to the possible co-locations of those three phones, and the Chamber will of course hear further submissions later about the time the Merhi Defence need to prepare for cross-examination of Mr. Philips.

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