

**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

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

(Extract from Official Public Transcript of Hearing on 8 November 2017, page 78, line 3 to page 80, line 3)

This is an addendum to the a decision the Trial Chamber issued in court earlier today in relation to the Prosecution's application to recall Mr. John Edward Philips for further examination and to tender into evidence a report he wrote on Friday, the 3rd of November, 2017.

Counsel for the accused Mr. Hassan Habib Merhi have asked the Trial Chamber to elaborate in relation to a motion they made in court today to exclude the evidence.

While the Trial Chamber is satisfied that its decision to allow the evidence implicitly of itself and evidently must mean that it is rejecting the application by the Defence to exclude the evidence, nonetheless we will accede to the request and provide the following additional reasons, again, ex tempore, while in the courtroom.

The Trial Chamber in making its decision emphasizes that the Foreshadowed evidence of Mr. Philips at this point only goes to rebutting a discussion made in cross-examination by co-counsel for Mr. Merhi, that is Ms. Le Fraper du Hellen, to the effect that the user of Grey

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Mobile, identified by counsel for Mr. Merhi in their cross-examination, could also be the user of Green 071 and therefore not Mr. Merhi.

This is not, in the Trial Chamber's view, evidence which would radically transform the case. The Trial Chamber is not convinced that this particular piece of evidence is a new material fact which requires pleading in an indictment or a pre-trial brief. In the Trial Chamber's view, it is a piece of evidence which the Chamber would be admitting only at the moment to rebut a suggestion made by Defence counsel in cross-examining Mr. Andrew Donaldson.

This evidence relates to possible co-location of Green 071, Purple 231, and the Grey Phone. It does not go to attributing usage of the Grey Phone to Mr. Merhi. The Prosecution does not propose to lead any evidence of that at this point, nor does the Trial Chamber believe that the Prosecution has any evidence of this.

Further, the cases Ms. Le Fraper du Hellen cited in support of her submissions today concerned, substantially, notice and pleading and the requirements of the Prosecution to provide notice of material facts and evidence. The Trial Chamber, as it is not convinced that this new piece of evidence is a material fact, is not of the view that these cases are on point and are therefore distinguishable. But in any event, the Defence now has notice of the additional pieces of evidence the Prosecution wishes to lead during the course of the trial. And if there is any prejudice caused by the late disclosure based upon the Prosecution investigating something which arose only as a result of Defence cross-examination of Mr. Donaldson, the Trial Chamber is of the view that the potential prejudice is curable in the normal way by providing the Defence with the requisite time to cross-examine Mr. Philips.

Moreover, most of the cases cited have recognized that non-pleading may be rectified and may be remedial by adjournments and so on.

Further, the Chamber is not convinced of the evidence that the Defence led under Article 16(4) of the Statute that the counsel for the accused have not been given the requisite notice of this new evidence.

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