SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No.:	**STL-11-01/PT/AC/AR126.4**
Before:	**Judge David Baragwanath, Presiding** **Judge Ralph Riachy** **Judge Afif Chamseddine** **Judge Daniel David Ntanda Nsereko** **Judge Ivana Hrdličková, Judge Rapporteur**
Registrar:	**Mr Daryl Mundis**
Date:	**2 October 2013**
Original language:	**English**
Classification:	**Public**

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

PUBLIC REDACTED VERSION OF 19 SEPTEMBER 2013 DECISION ON APPEAL BY COUNSEL FOR MR ONEISSI AGAINST PRE-TRIAL JUDGE'S "DECISION ON ISSUES RELATED TO THE INSPECTION ROOM AND CALL DATA RECORDS"

Prosecutor:
Mr Norman Farrell

Legal Representatives of Victims:
Mr Peter Haynes
Mr Mohammad F. Mattar
Ms Nada Abdelsater-Abusamra

Head of Defence Office:
Mr François Roux

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan
Mr Emile Aoun

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
Mr John Jones

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse
Mr Yasser Hassan

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaël Mettraux

INTRODUCTION

1. We are seized of an appeal filed by counsel for Mr Oneissi[1] against two aspects of a decision of the Pre-Trial Judge.[2] In the Impugned Decision, the Pre-Trial Judge dismissed, in part, the Defence's joint request for the inspection of certain Call Data Records ("CDRs") pursuant to Rule 110 (B) of the Special Tribunal for Lebanon's Rules of Procedure and Evidence ("Tribunal" and "Rule", respectively) which counsel claim are in the possession of the Prosecutor and are material to the preparation of their defence. The first aspect concerns the application of the first of three limbs of Rule 110 (B), which entitles the Defence to documents material to their preparation for trial. The second relates to the application of Rule 121 (A) as to the form in which CDRs are to be disclosed. While it is possible that the Pre-Trial Judge applied Rule 110 (B), the reasons for the decision do not demonstrate clearly that he did so correctly. It is also unclear whether the order for disclosure complies with Rule 121 (A). We therefore remand the Defence request for inspection of the CDRs to the Pre-Trial Judge for reassessment consistent with this decision.

BACKGROUND

2. Since this appeal relates to a number of technical issues, in particular with respect to so-called CDRs, we find it useful to refer to the explanatory overview provided by the Pre-Trial Judge in the Impugned Decision:

> 4. CDRs refer to information in the Prosecution's possession and related to communication via either a fixed or mobile telephone, and include Short Message Service or "SMS" records. The primary purpose of a CDR is to generate records, and they include the dates, times and durations of calls made, type of call (voice or SMS), the callers and recipients of the calls, as well as the identities of the cell towers used to transmit the call (in the case of mobile telephony) which provides information on the telephone handset's location when the call was made. It may also include other technical information, depending on the service provider, such as the IMEI numbers of the handsets used to place and receive the calls. SMS content is not stored in CDRs. CDRs in respect of landline telephone phone numbers are similar to those generated for mobile telephones but tend to contain less information.
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> 5. To the extent that CDRs relate to the Prosecution's case against the accused, they have been provided to the Defence in two formats.

[1] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.4, The Defence for Hussein Hassan Oneissi Appeal to the Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records" Dated 18 June 2013, Confidential, 19 August 2013 ("Appeal").
[2] STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/PTJ, Decision on Issues Related to the Inspection Room and Call Data Records, Confidential, 18 June 2013 ("Impugned Decision").

6. The first format is original information or "Raw Data" which was provided to the Prosecution by the relevant service providers in Lebanon, pursuant to a series of requests for assistance ("RFA" or "RFAs"). The Raw Data contains records for one or more phone numbers and/or cell towers, as well as other technical information. The Raw Data is voluminous and largely unintelligible without further analysis.

7. The second format is processed or analysed information, in the form of a database, against which searches and analysis can be performed more easily. Since the programming language used by the Prosecution for processing and managing the Raw Data in this case was a 'structured query language' or SQL, the resulting database is referred to herein as the "SQL Database".

8. For the purposes of this decision, it is understood that copies of the CDRs in either format are accessible in three locations. The first location is in the Office of the Prosecutor's evidentiary holdings. The second location is in the Inspection Room. The third location is the Z:\ Drive, the nature of which is explained in paragraph 10 below.

9. The SQL Database is generated and controlled by the Prosecution. The Defence has access to it in the "Inspection Room", a facility created within the Tribunal for that purpose. It is noteworthy that the SQL Database relates to a smaller subset of Raw Data than the Prosecution has in its possession. This is because the Prosecution has only analysed and/or uploaded those CDRs which it considers are relevant to its case, and which in its opinion the Rules require it to provide for inspection. Furthermore, data [REDACTED].

10. The Parties have also made use of a restricted-access drive on the Tribunal's network called the Z:\ Drive, which serves two purposes. First, the Z:\ Drive is used to enable the Prosecution to provide to the Defence materials in addition to the CDRs which would — but for their size — ordinarily be provided to the Defence via the Tribunal's Legal Workflow System ("LWS"). This is because LWS does not support the transmission of data above a specific size limit. Second, the Z:\ Drive is the location of the Raw Data which underlies the SQL Databases, and which the Prosecution has provided to the Defence. The Z:\ Drive therefore contains two categories of material: CDRs, on the one hand, and other material that the Prosecution has disclosed or made available for inspection, pursuant to Rules 91, 110 and 113, on the other.[3]

3. The procedural background of this matter is set out exhaustively in the Impugned Decision.[4] In essence, after negotiations between the parties, the Defence filed a joint motion before the Pre-Trial Judge, requesting access to certain CDRs from the Prosecutor pursuant to Rules 91 and 110 (B).[5] In the Impugned Decision, the Pre-Trial Judge granted the request, but

[3] Impugned Decision, paras 4-10 (footnotes omitted); *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, Prosecution Response to the Oneissi Defence's Appeal of the Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records" of 18 June 2013, Confidential, 30 August 2013, ("Prosecution Response"), paras 8-10.
[4] Impugned Decision, paras 11-22.
[5] STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ, Defence Submissions Regarding the Prosecution's Inspection Room and Call Data Records on the "Z Drive", Confidential, 18 March 2013 ("Defence 18 March Submissions"), paras 20-25.

only in part.[6] Counsel for Mr Oneissi sought and received certification to appeal one limited aspect of the decision, namely

> whether the Pre-Trial Judge's determination of (1) the relevant time period—namely 1 January 2003 to 1 October 2005—for which the Defence should be granted access to CDRs in SQL format was correct; and (2) if so, where the Prosecution is not in possession of CDRs in SQL format falling within the relevant time period, whether it can be required to provide them in SQL format.[7]

4. Counsel for Mr Oneissi subsequently filed an appeal brief within the time limit required by the Rules, elaborating the two grounds of appeal.[8] The Prosecutor responds that the appeal should be dismissed.[9]

DISCUSSION

I. Confidentiality

5. We note that the appeal was filed confidentially "pending the Pre-Trial Judge's resolution of the issue of confidentiality of all the filings giving rise to this appeal".[10] The Pre-Trial Judge has not yet issued an order in this regard. We stress the importance of the public nature of the proceedings before this Tribunal.[11] Indeed, in the Impugned Decision, the Pre-Trial Judge referred to the need for transparency.[12] However, he considered that the Impugned Decision "contain[s] material that reveals the inner workings of the Prosecution and the Defence" and asked the parties for submissions on the issue.[13] We find that, in the circumstances, it is prudent for us to await the Pre-Trial Judge's assessment on the matter before issuing a public version of our decision, redacted if need be.

II. Standard of review

6. Rule 176 (A) provides for an appeal on the following grounds: (1) "An error on a question of law invalidating the decision"; or (2) "[a]n error of fact that has occasioned a

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[6] Impugned Decision, Disposition.
[7] STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ, Decision on the Defence for Hussein Hassan Oneissi's Request for Reconsideration and Certification of the "Decision on Issues Related to the Inspection Room and Call Data Records" Dated 18 June 2013, Confidential, 9 August 2013 ("Certification Decision"), Disposition.
[8] Appeal, para. 2.
[9] Prosecution Response, para. 50.
[10] Appeal, para. 49
[11] *See* STL, *In the matter of El Sayed*, CH/AC/2013/01, Public Redacted Version of Decision on Appeal by the Prosecutor Against Pre-Trial Judge's Decision of 11 January 2013, Dated 28 March 2013, 28 March 2013, para. 9 (with further references).
[12] Impugned Decision, para. 101.
[13] *Ibid.*

miscarriage of justice".[14] Counsel for Mr Oneissi argue that for this appeal we should apply the standard of review applicable to legal errors.[15] On the other hand, the Prosecutor submits that the

> appeal relates to the Pre-Trial Judge's decision on Defence access to CDRs in SQL format. The Appeals Chamber of the ICTY and ICTR, tribunals with rules governing disclosure that are nearly identical to those of this Tribunal, has recognized that decisions involving disclosure are matters that relate to the general conduct of trial proceedings, and thus fall within the discretion of the first instance chamber or judge. [. . .] Therefore, the correct standard of review for the appeal is the standard for discretionary decisions, not that applicable to an alleged error of law.[16]

Indeed, we agree with the Prosecutor that the appeal is not limited to legal errors, and that the Impugned Decision involves an evaluation of various factors. The question whether certain records are "material to the preparation the defence"[17] requires a broader assessment of the factual circumstances of the case.

7. However, because we ultimately base both aspects of our decision on questions of law, we apply the following standard this Chamber has previously adopted and applied to alleged errors of law:

> A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law. [...] The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[18]

III. Applicable law

8. At issue here are the interpretation and application of Rule 110 (B). We reproduce the subrule and have added bracketed numbers and emphasis:

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[14] *See* Rule 176 (A) STL RPE.
[15] Appeal, paras 11-13.
[16] Prosecution Response, para. 11.
[17] *See* Rule 110 (B) STL RPE.
[18] *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, para. 19 (internal citation omitted). We further note that, even if we were to follow the enunciated standard of appellate review for fact-intensive decisions, the issue here would be whether the Pre-Trial Judge "based his decision on an incorrect interpretation of the governing law." *See* STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR126.1, *Corrected Version* of Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 5.

> The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are [1] material to the preparation of the defence, *or* [2] are intended for use by the Prosecutor as evidence at trial *or* [3] were obtained from or belonged to the accused.

There are clearly three distinct categories of documents which the Defence are entitled to inspect. Here, the application by the Defence relied on the first. The issue is whether the Impugned Decision shows that the first limb was duly applied.

A. First ground of appeal - temporal extent to which CDRs must be disclosed

9. The first issue the Pre-Trial Judge certified for appeal was whether the time period set forth by the Pre-Trial Judge as relevant for CDR disclosure in SQL format was correct.[19]

10. The Defence request to the Pre-Trial Judge was that, pursuant to the first limb of Rule 110 (B),[20] the Prosecutor be ordered to make available for their inspection certain raw and SQL CDRs material to the preparation of the defence.[21] The Pre-Trial Judge answered the request by ordering production of both raw and SQL CDRs for what he assessed as the "relevant time period" for disclosure, namely from 1 January 2003 until 1 October 2005.[22] He determined this range by applying the earliest and latest specific dates alleged in the Prosecutor's Indictment for "the existence of [one of] several networks of [. . .] telephones that were used in the attack on 14 February 2005".[23]

11. Counsel for Mr Oneissi challenge what they argue was the Pre-Trial Judge's reasoning—that the only CDRs the Defence was entitled to receive in SQL format were, in counsel's submission, "those that fall within the temporal scope of the Indictment *and* on which the Prosecution would rely [. . .] at trial".[24] We note that these were not the Pre-Trial Judge's words and we will have to interpret precisely his reasons for the decision. Counsel submit that such reasoning arose from a "failure by the Pre-Trial Judge to distinguish between the requirements of the first and second limbs of Rule 110(B)".[25] They argue that the Judge conflated the first limb, materiality (which in fact relates to the preparation of *the Defence*), and the second limb (which concerns intended use *by the Prosecutor*). The

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[19] "Certification Decision", Disposition.
[20] "The Prosecutor shall, on request, permit the Defence to inspect any [items] in the Prosecutions's custody or control [. . .] *material to the preparation of the defence*." Rule 110(B) STL RPE (italics not in original).
[21] Defence 18 March Submissions, paras 22-23.
[22] Impugned Decision, paras 51-52.
[23] *Ibid.*
[24] Appeal, para. 17 (emphasis added).
[25] *Id.* at para. 23.

Prosecutor submits in response that the "[a]ppeal fails to demonstrate that the Pre-Trial Judge erred in defining the relevant temporal range for the provision of access to [CDRs] to be inspected in [SQL] format by the Prosecution".[26] The Prosecutor argues that the Pre-Trial Judge properly applied Rule 110 (B).[27]

12. Since Rule 110 (B) requires disclosure by the Prosecutor of any item in the Prosecutor's custody or control that falls under any one of its three limbs,[28] if counsel for Mr Oneissi are correct in their contention that the Pre-Trial Judge conflated the first and second limbs, there has been an error of law. Equally, if the Impugned Decision does not make clear either that the first and second limbs were properly distinguished, or that Rule 110 (B) was duly considered, there has been an error of law. We have concluded that the reasoning in the Impugned Decision is not clear and that therefore an error of law is established, necessitating reference of the case back to the Pre-Trial Judge.

13. The parts of the Impugned Decision relevant to this appeal made no specific reference to the first limb of Rule 110 (B). Since the competing submissions concern what inferences should be drawn from the Pre-Trial Judge's words, we reproduce the relevant passages. The Impugned Decision stated:

> **Discussion**
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> 40. The Prosecution's case is based largely on the use of mobile telephones and their alleged attribution. The parties disagree, however, on the temporal scope of the CDRs to be provided to the Defence in SQL format.
>
> [. . .]
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> 43. The Pre-Trial Judge considers that the determination of the pertinent temporal scope of the CDRs to be made available for inspection in SQL format requires that a distinction be drawn between two discrete purposes for which they have been used by the Prosecution, namely: analysis and attribution.
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> 44. Where the Prosecution has analysed the CDRs in order to investigate patterns of calls made between specific phones, or specific groups of phones, thereby leading to the identification of certain networks of telephones in use at specific times and locations, the CDRs for the period of this analysis — together with their being reflected in the SQL database — are required.
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> 45. The attribution of a telephone number to a person, on the other hand, relies on evidence that supports the assertion that a specific telephone number was used by a specific person during a particular time period or on a particular occasion. The

[26] Prosecution Response, para. 1.
[27] *Id* at paras 21, 26.
[28] *See* Rule 110 (B) STL RPE.

attribution of specific telephone numbers to certain individuals is ordinarily a simple matter where accurate and reliable subscriber details relate to the phone number in question. Where these details are inaccurate or unreliable, attribution may require recourse to supplementary information.

[. . .] **The temporal scope of CDRs for analysis**

46. According to the Rules, the Prosecution is obliged to make available to the Defence copies of:

a. the material supporting the Indictment when its confirmation was sought (pursuant to Rule 110(A)(i)); and

b. the list of exhibits it intends to offer at trial, together with copies of the exhibits so listed or access thereto (pursuant to Rule 91(G)(iii)).

47. To the extent, then, that the Prosecution relied on CDRs when seeking confirmation of the Indictment, or on which it intends to rely [. . .] at trial, data relating to these CDRs ought already to have been provided to the Defence. Indeed, the Prosecution asserts that it has discharged this obligation.

48. The Pre-Trial Judge notes that, with respect to the analysis of the CDRs, the Prosecution has either disclosed, or provided for inspection, all the CDRs necessary for a specific time period which it has in SQL format. This conforms to the obligations incumbent on the Prosecution; the Defence must have effective access to all CDRs in SQL format for the relevant time period that allows it to conduct its own analysis.

49. On the other hand, where the Prosecution has relied on CDRs outside of the relevant time period of analysis in order to support its attribution of telephone numbers to certain individuals, it has provided the Raw Data, as well as the relevant CDR or CDRs to the Defence on an individual basis.

50. The questions, then, are what this relevant time period is, and whether the Prosecution is under an obligation to include CDRs in SQL format in the Inspection Room which fall outside that relevant time period.

51. The Prosecution does not specify, in its submissions in this matter, what it considers the relevant time period to be. The Pre-Trial Judge nevertheless notes that, in the Indictment, the Prosecution alleges the existence of several networks of mobile telephones that were used in the attack of 14 February 2005, at least one of which came into existence on or by 30 September 2004, and at least one of which remained active until 1 October 2005. A further specific group of phones was used from at least 1 January 2003 until 16 February 2005. In its letter of 20 February 2013, the Prosecution states that it "does not rely on the large CDRs for [a certain time period]".

52. From this information, the Pre-Trial Judge considers the relevant time period to be from 1 January 2003 until 1 October 2005. This determination is subject to two caveats, however. First, the Pre-Trial Judge has previously determined that the Prosecution is not obliged to perform analyses or to create work products which are not in its custody or control, possession or actually known to it. The Prosecution cannot disclose or allow the inspection of materials that it does not have. Where the

> Prosecution is not in possession of CDRs or analysis of Raw Data in SQL format falling within the relevant time period, it cannot be required to provide them.[29]

14. Notably, paragraph 40 of the Impugned Decision refers to the parties' dispute as concerning "the temporal scope of the CDRs to be provided to the Defence in SQL format". Paragraphs 43 and 44, which address the determination of such temporal scope, focus on the "purposes for which [CDRs] have been used by the Prosecution". This might be an implicit reference to the second limb of Rule 110 (B), or to another Rule. But while such reference could be indirectly relevant to the first limb of Rule 110 (B)—materiality to the preparation of the defence—it does not concentrate specifically on that limb.

15. Subsequently, paragraph 46 of the Impugned Decision—which concerns what the Prosecution is "obliged to make available to the Defence"—refers only to Rules 110 (A) and 91 (G) and makes no specific reference to Rule 110 (B). Nor does paragraph 46 make clear allusion to the first limb of Rule 110 (B) on which the Defence relied. Further, paragraph 47 may indeed be said to either refer back to paragraph 46 or to the second limb of Rule 110 (B)—matters "intended for use by the Prosecutor as evidence at trial". Paragraph 48 states, in part, that

> with respect to the analysis of the CDRs, the Prosecution has either disclosed, or provided for inspection, all the CDRs necessary for a specific time period which it has in SQL format. This conforms to the obligations incumbent on the Prosecution; the Defence must have effective access to all CDRs in SQL format for the relevant time period that allows it to conduct its own analysis.[30]

It can be argued both from the context of the immediately preceding paragraph 47, perhaps concerning the second limb of Rule 110 (B), and also from its own terms, that paragraph 48 could be dealing with the first limb of Rule 110 (B). But if this is the case, it fails to do so with clarity. Paragraph 48 refers to a "specific time period", which is not defined, and "the relevant time period that allows [the Defence] to conduct its own analysis". Such references *could* be taken as an allusion to a time period which embraces documents "material to the preparation of the defence". The same may be said of paragraphs 51 and 52, which narrowly concern phone networks whose existence is alleged in the Prosecutor's Indictment. Fairness of process, however, requires that there be no reasonable doubt that the rights of the accused in this critical area have been ensured.

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[29] Impugned Decision, paras 40, 43-52 (internal citations omitted).
[30] *Id* at para. 48.

16. The crucial point is that in determining a "relevant time period" for which CDRs had to be disclosed by the Prosecution, the Pre-Trial Judge never referred to Rule 110 (B),[31] even though the Defence had expressly relied on that Rule when making its application.[32] Nor did the Pre-Trial Judge explicitly examine whether or not the requested CDRs were "material to the preparation of the defence". Any real doubt whether items "material to the preparation of the defence" have been duly disclosed requires a clear resolution. The Impugned Decision has not done this. The Impugned Decision does not clarify whether disclosure of "all CDRs necessary for a specific time period" relates to the Prosecutor's obligation to provide CDRs on which he has relied in some way, or to an obligation to provide CDRs material to the preparation of the defence pursuant to Rule 110 (B). The same is true in regards to the Pre-Trial Judge's "relevant time period". Indeed, with regard to the latter it appears that the Pre-Trial Judge, when determining such time period, simply considered those records that the Prosecutor explicitly or implicitly said he had analysed or on which he would rely or not rely for trial.[33] The Impugned Decision does not allow us to resolve the above essential issues. Put simply, the Impugned Decision does not make the legal standard applied clear.

17. In his response, the Prosecutor argues that "[i]t is in the context of [the Defence's] Rule 110(B) request that the Pre-Trial Judge's decision on the relevant time period [. . .] *should* be understood".[34] The Prosecutor asserts that the Pre-Trial Judge did not base his determination on Prosecution reliance because the

> Prosecution does not intend to rely on all CDRs in its possession that it has processed in SQL format from 1 January 2003 through October 2005 at trial. Moreover, the Prosecution does not intend to use the SQL database as a tool for the presentation of evidence at trial, as it is not suited for this purpose.[35]

18. The Prosecutor adds that "the Pre-Trial Judge issued the Impugned Decision knowing that the Prosecution had made CDRs available to the Defence in SQL format that extended beyond the relevant time period, and had disclosed many CDRs from 2003 [REDACTED] in their original format".[36] Noting the Pre-Trial Judge's conclusion, in the section addressing "the temporal scope of CDRs for attribution", that "'the Prosecution continues to respond to

[31] The Pre-Trial Judge referred to this Rule in another context. *See* Impugned Decision, paras 59-60.
[32] Defence 18 March Submissions, paras. 21-22 ("The relevance of the entirety of the telephone records in the possession is clearly *material to the preparation of the defence* against the charges in the indictment. [. . .] The Accused must be given meaningful access to this data to be able to investigate and examine those records *for the preparation of their respective defences*." [emphasis added]).
[33] *See* e.g., Impugned Decision at paras 9, 43-44, 51-52.
[34] Prosecution Response, para. 20 (emphasis added).
[35] *Id* at para. 21 (internal citation omitted).
[36] *Id.* at para. 26.

Defence requests, made pursuant to Rule 110(B), for CDRs for particular telephones for periods outside that available in the inspection room where they are 'material to the preparation of the defence'"", the Prosecutor further submits that

> [i]t follows that while the Pre-Trial Judge considered that requests for particular phones may meet the materiality requirement under Rule 110(B), he did not consider that the Defence had demonstrated that all CDRs related to [REDACTED] for which the Prosecution possessed CDRs were material to the preparation of the defence.[37]

19. Having reviewed carefully the Prosecutor's context-based reading of the Impugned Decision, we cannot agree with him. We are simply unable to determine from the entirety of the Impugned Decision that the "relevant time period" set by the Pre-Trial Judge was based on an examination of the "materiality" condition, the controlling legal standard set out in Rule 110 (B). Even if, as the Prosecutor argues, the Pre-Trial Judge had Rule 110 (B) in mind, there is no explicit or implicit explanation in the Impugned Decision for why certain requested CDRs falling outside the "relevant temporal period" were not material to the preparation of the defence. We consider that "[n]either the Appeals Chamber nor the Parties can be required to engage in speculation on the meaning of the [Pre-Trial Judge's] findings" regarding which Rule was applied and how.[38] From the Impugned Decision, we can only conclude that the Pre-Trial Judge did not apply Rule 110 (B)'s "materiality" condition, and thus committed an error of law. We emphasize that we are not deciding the ultimate correctness of the Pre-Trial Judge's "relevant time period", but rather conclude that he did not apply the Rule in question.

20. Finding such error, based on the reasons above, we are unable to endorse the Pre-Trial Judge's order that

> the Prosecution either [...] provide to the Defence all CDRs in Raw Data Format and SQL format for the period from 1 January 2003 until 1 October 2005, or [...] clarify that it is not in possession of any CDRs falling within this time frame which have not been disclosed or made available for inspection in these formats.[39]

We thus set aside that order and remand the Defence's CDR request to the Pre-Trial Judge for reconsideration and application of Rule 110 (B)'s "materiality" condition. We are of the view

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[37] *Id.* at para. 25.
[38] *See* ICTY, *Prosecutor v Krajisnik*, IT-00-39-A, Judgement, 17 March 2009, para. 176; ICTY, *Prosecutor v. Oric*, IT-03-68-A, Judgement, 3 July 2008, para. 56; *see also* STL, *In the Matter of El Sayed*, CH/AC/2012/02, Decision on Partial Appeal by Mr El Sayed Against Pre-Trial Judge's Decision of 8 October 2012, 23 November 2012, para. 15 (noting that it is appropriate for initial determinations to be made by the actor best-placed in terms of expertise).
[39] Impugned Decision, Disposition.

that the Pre-Trial Judge is best placed to make this fact-intensive decision at first instance. Conscious of our responsibility to set the correct legal standard and considering that this issue was raised in the appeal and responded to by the Prosecutor,[40] we offer the following discussion relating to Rule 110 (B)'s "materiality" condition to assist the Pre-Trial Judge's determination of the request.

21. We recognize that before us is a matter of first impression. Neither Rule 110 (B) nor any other Rule offers guidance as to the interpretation of "materiality" in this context. Therefore, because Rule 110 (B) mirrors or is substantially similar to corresponding rules of the International Criminal Tribunal for Rwanda ("ICTR"), International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Court ("ICC"),[41] we turn to the useful case-law of these tribunals. We find the following approach to be persuasive which has consistently been taken by these tribunals: (1) The defence must demonstrate *prima facie* that what is requested is "material to the preparation of the defence";[42] and (2) the test for "materiality" under Rule 110 (B) is whether the books, documents, photographs or tangible objects are *relevant* to the preparation of the defence case.[43]

22. The Appeals and Trial Chambers of the ICTY, ICTR and ICC have recognized that "preparation is a broad concept"[44] and that relevant items, in this context, need not be "directly linked to exonerating or incriminating evidence"[45] or "related to the Prosecution's case-in-chief".[46] We acknowledge the ICTY and ICTR case-law appropriately cited by counsel for Mr Oneissi,[47] as well as other apposite decisions, and agree that the concept of relevance, under Rule 110 (B), is not necessarily confined by the "temporal scope of an

[40] *See* Appeal, paras 20, 24-34; Prosecution Response, paras 28-39.
[41] Rule 66(B) ICTR RPE; Rule 66(B) ICTY RPE; Rule 77 ICC RPE.
[42] *See* ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ("First *Karemera* Decision"), para. 12, ICTR, *Karemera et al. v. The Prosecutor*, ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, paras 12-13; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012 ("*Karadžić* Decision"), paras 6-9.
[43] *See* ICTR, *Prosecutor v Bagosora et al*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 ("*Bagosora* Decision"), para. 9; *see also* ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06 OA 11, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008 ("*Lubanga* Decision"), para. 77; First *Karemera* Decision, para. 14; ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, 23 January 2013 ("*Banda and Jerbo* Decision"), para. 12 ; *Karadžić* Decision, para. 9.
[44] *See e.g*, *Karadžić* Decision, para. 9; *Lubanga* Decision, paras 77-78; First *Karemera* Decision, para. 14; *Bagosora* Decision, para. 9.
[45] *See Lubanga* Decision, para. 77.
[46] *See Karadžić* Decision, para. 9; *Bagosora* Decision, paras 8-9.
[47] Appeal, para 25, fns 28-31.

indictment", nor is it necessarily limited to "material relevant in countering the prosecution['s] evidence".[48] Counsel for Mr Oneissi cites apt examples of what might be material—items that could inform the defence's decision whether to call a particular witness or assist in developing cross-examination strategy.[49] Nevertheless, Rule 110 (B) does not invite a fishing expedition. Accordingly, we accept (with deletion of the word "necessarily") a recent ICC Trial Chamber clarification that "Rule 77 [of the ICC's Rules of Procedure and Evidence, corresponding to Rule 110 (B) of the Tribunal's Rules,] does not [. . .] provide for an unfettered 'right to inspection', triggered by any unsubstantiated claim of relevance made by the defence".[50] Rather, Rule 110 (B) demands a context-specific application by the chambers of first-instance, which is uniquely situated to determine whether the defence has sufficiently demonstrated materiality by making the requisite showing that items sought are relevant to the preparation of the defence case.[51] We note that this approach is also supported by relevant domestic case-law.[52]

23. Accordingly, we remand the issue of "materiality" under Rule 110 (B) to the Pre-Trial Judge who should reassess the Defence request in light of the approach enunciated in the previous two paragraphs.

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[48] *See id* at para. 25.
[49] *Ibid.*
[50] *See Banda and Jerbo* Decision, para. 15; *see also* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, paras 23, 26.
[51] *See Bagosora* Decision, para. 9.
[52] For example, interpreting a rule of criminal procedure substantially similar to Rule 110 (B), the Eleventh Circuit Court of Appeals held in *United States v. Jordan*, "An item [. . .] need not be disclosed unless the defendant demonstrates that it is material to the preparation of the defense. A general description of the item will not suffice; neither will a conclusory argument that the requested item is material to the defense. [. . .] Rather, the defendant must make a specific request for the item together with an explanation of how it will be 'helpful to the defense.' [. . .] '[H]elpful' means relevant to the preparation of the defense and not necessarily exculpatory". United States, Eleventh Circuit Court of Appeals, *United States v. Jordan*, 316 F.3d 1215, 1250 (6 January 2003) (internal citations omitted). In a similar context, addressing what must be alleged in a defence request for disclosure, the House of Lords stated in *R v H* that, "respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good". United Kingdom, House of Lords, *R v. H*, 2 A.C. 134 (5 February 2004) ("*R v. H 2004*"), para. 35. For other examples, *see* United States, Ninth Circuit Court of Appeals, *United States v. Mandel*, 914 F.2d 1215, 1219 (14 September 1990); United Kingdom, Court of Appeal (Criminal Division), *R. v Keane*, 1 W.L.R. 746, 752 (14 March 1994); Canada, Supreme Court of Canada, *R v Taillefer*, 2003 CarswellQue 2765 (12 December 2003), paras 79-70; Australia, High Court of Australia, *Mallard v R*, 224 C.L.R. 125 (15 November 2005), para. 81; New Zealand, Human Rights Review Tribunal, *Andrews v. Commissioner*, NZHRRT 6 (4 March 2013), paras 41. 49-51.

B. Second ground of appeal – access to CDRs in SQL format

24. After setting the "relevant time period" governing obligatory CDR disclosure, the Pre-Trial Judge further concluded that, concerning CDRs falling *within* that period, the Prosecution was "not obliged to perform analyses or to create work products which are not in its custody or control, possession or actually known to it".[53] Therefore, "[w]here the Prosecution is not in possession of CDRs or analysis of Raw Data in SQL format falling within the relevant time period, it cannot be required to provide them".[54] Consequently, the Pre-Trial Judge ordered the Prosecution to provide all CDRs in its possession from the "relevant time period" that had not already been disclosed.[55]

25. Upon reviewing the subsequent submissions from counsel for Mr Oneissi and the Prosecutor, the Pre-Trial Judge certified the following issue for appeal: [W]here the Prosecution is not in possession of CDRs in SQL format falling within the relevant time period, [. . .] can it be required to provide them in SQL format?[56]

26. Counsel for Mr Oneissi assert that "the Pre-Trial Judge erred in law by finding that where the Prosecution is not in possession of CDRs in SQL format it cannot be required to provide them in SQL format".[57] Counsel's submission insists that, pursuant to Rule 121 (A), when the Prosecution discloses material in electronic form, it must also provide "appropriate computer software" for searching the material.[58] SQL, it contends, is computer software under Rule 121 (A), the provision of which does not involve performing analyses or creating any work product.[59] In his response, the Prosecutor submits that the Pre-Trial Judge did not "abuse his discretion in determining that the Prosecution cannot be ordered to make CDRs for the relevant time period available to the Defence in SQL format where the Prosecution does not possess them in SQL format".[60] The Prosecutor further argues that "[t]he Oneissi Defence misinterprets [. . .] Rule 121".[61] Importantly, the Prosecutor also notes that, because it "will

[53] Impugned Decision, para. 52.
[54] *Ibid*
[55] *Id.* at p. 27.
[56] Certification Decision, Disposition.
[57] Appeal, para. 36.
[58] *Id.* at para. 39.
[59] *Id* at paras 42-43.
[60] Prosecution Response, p. 13.
[61] *Id.* at para. 44.

have processed all bulk CDRs in its possession for the relevant time period and provided them to the Defence in SQL format [by the end of September 2013]", this issue is moot.[62]

27. As a preliminary matter, we substantially concur with the Pre-Trial Judge's assertion—not challenged by counsel for Mr Oneissi or the Prosecutor—that the Prosecution generally "is not obliged to perform analyses or to create work products which are not in its custody or control, possession or actually known to it" and that the Prosecution "cannot disclose or allow the inspection of materials that it does not have".[63] This certainly holds true for Rule 110 (B) and follows the consistent practice of other international tribunals with similar provisions where Chambers have stressed that the sought material must be in the custody or control of the Prosecutor.

28. For example, the ICTR Trial Chamber in *Bagilishema* noted in this context that the words "known" and "possession" used in other rules are synonymous with "custody or control". With respect to Rule 68 of the ICTR's Rules of Procedure and Evidence (corresponding to the Tribunal's Rule 113), it stated that "the obligation on the Prosecutor to disclose exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of the said evidence. The Prosecutor cannot disclose that which she does not have".[64]

29. So there can ordinarily be no obligation to create new material. In *Halilović*, the ICTY Trial Chamber refused a request for production of certain indices of disclosed material, holding that "the Rules do not require an index of the documents disclosed or of relevant material made available to be provided to the Defence".[65] In *Stanišić and Simatović*, the Trial Chamber rejected a Defence request to receive, pursuant to Rule 66 (B) of the ICTY's Rules of Procedure and Evidence (corresponding to the Tribunal's Rule 110 (B)), certain material in hard copy format, noting the Prosecution's explanation that this would impose an unfair

[62] *Id* at para. 41.
[63] Impugned Decision, para. 52 (without specifying to which Rule he was referring).
[64] ICTR, *Prosecutor v Bagilishema*, ICTR-95-1A-T, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z, and AA, 8 June 2000, para. 7; *see also* ICTR, *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001, paras 13-14.
[65] ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Decision on Motion for Enforcement of Court Re Electronic Disclosure Suite, 27 July 2005, p. 4.

burden "considering the fact that it does not keep hard copies of Rule 66 material it discloses".[66]

30. In *Popović et al.*, the ICTY Trial Chamber also stated that "material held by a third party independent from the Prosecution, cannot be said to be within the 'custody or control' of the Prosecution on any reading. The fact that the Prosecution has a good relationship with the third party is not relevant unless it can be established that the Prosecution has some ability to direct and control the relevant person or organization".[67]

31. Domestic jurisdictions with comparable requirements take similar approaches. Interpreting the meaning of "possession, custody, or control", United States federal courts have rejected defence requests for production of non-existent material or new analysis.[68] The High Court of New Zealand has also rejected a request for the disclosure of information theretofore not in recorded form.[69] Similarly, Canadian courts have found no obligation to disclose material the prosecution does not have or to provide material in the specific format preferred by the defence.[70]

32. As pointed out above, the underlying legal principle here is not at issue. What the Prosecutor does not have, he cannot generally be ordered to provide. But there are further considerations to be weighed. For instance, the Pre-Trial Judge may consider that fairness requires the Prosecutor to provide certain CDRs in SQL format.

33. Additionally, one means of conveying information to the Defence is via Rule 121 (A), which permits a party "to fulfil some or all of its disclosure obligations in electronic form, *together with appropriate computer software to allow for searching of the material*".[71] The question that then arises is whether data in "SQL format" is in fact a new product or, as counsel for Mr Oneissi assert in the appeal, merely a search tool. This distinction could

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[66] ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, Decision on Defence Motion to Receive Hard Copies of Rule 66 Material, 11 March 2005, p. 3.
[67] ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Popović's Motion for Disclosure Pursuant to Rule 66 (B) and Request to File an Addendum to Professor Stojković's Expert Report, 6 October 2008, para. 11.
[68] *See e.g.*, United States, Fourth Circuit Court of Appeals, *United States v Caro*, 597 F.3d 608, 621 fn. 13 (17 March 2010); United States, First Circuit Court of Appeals, *United States v Amaya-Manzanares*, 377 F.3d 39, 42-43 (27 July 2004), United States, Fifth Circuit Court of Appeals, *United States v Kahl*, 583 F.2d 1351, 1354 (16 November 1978); United States, District Court of Arizona, *United States v. Rigmaiden*, 2012 WL 1150532, at *1 (5 April 2012); United States, District Court of Maine, *United States v. Cameron*, 672 F. Supp.2d 133, 137 (7 October 2009).
[69] New Zealand, High Court of New Zealand, *Drew v Police*, NZHC 1009 (14 May 2012), para. 24.
[70] Canada, Alberta Court of Appeal, *R v Diaz*, 2010 CarswellAlta 2426 (14 December 2010), para. 41; Canada, Saskatchewan Provincial Court, *R v Akinchets*, 2011 SKPC 88 (20 June 2011), para. 21.
[71] Emphasis added.

determine the applicability of Rule 121 (A), which on its face does not create new disclosure obligations and is merely a way for the Prosecutor to discharge existing obligations efficiently,[72] including the provision of software already in its possession for searching the disclosed material. We recall that the Defence did not raise the applicability of Rule 121 (A) in their CDR request. We find, however, that the Pre-Trial Judge should nonetheless have explicitly considered it.

34. The Pre-Trial Judge seems to have found that SQL data is a new work product, hence his determination that where the Prosecutor "is not in possession of CDRs or analysis of Raw Data in SQL format falling within the relevant time period" such material cannot be provided to the Defence.[73] On the other hand, counsel for Mr Oneissi argue that SQL is a database for storage and searching of bulk data. They thus argue that it is merely "a type of computer software within the meaning of Rule 121 (A)" and that the Prosecutor "would not be performing any analyses or creating any work product".[74] The Prosecutor responds that

> [t]he requirement in Rule 121 that a party provide appropriate computer software to allow for searching of the material is to ensure that material disclosed electronically is accessible and searchable. It does not require that the Prosecution manipulate evidence received in a specific format (CDRs in Raw Data format) and process it into another format (SQL database format) to facilitate Defence investigations. Nor does Rule 121 require that the Prosecution create a database to enable the Defence to manipulate or compare disclosed evidence. It simply requires software that enables the evidence to be read and searched. [. . .] The Oneissi Defence has not demonstrated that it cannot access or search Raw Data CDRs. The CDRs in their Raw Data format are text files that can be read and searched by suitable text reader software, such as Microsoft UltraEdit, which has been provided to the Defence. Moreover, CDRs are capable of being compared without conversion into SQL database format by use of such readily available software as Excel.[75]

35. We first consider that, lacking the expertise and insight of a first-instance trier of fact, it is not appropriate for us to conclusively decide this factual issue—whether data in SQL format is a new product—on appeal for the first time. Indeed, it fell to the Pre-Trial Judge to

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[72] *Cf.* ICTR, *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material, 1 December 2004, para. 9 ("Rule 68 (B) [ICTR RPE, the equivalent to Rule 121 (A) STL RPE] creates no new disclosure obligation on the Prosecution [. . .] The Rule merely permits the Prosecution to use modern technology to discharge its disclosure obligations under Rule 68 (A) [ICTR RPE, the equivalent to Rule 113 (A) STL RPE) and any other Rule such as Rule 66 [ICTR RPE, the equivalent to Rule 110 STL RPE])."); *see also* ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 12 ("Rule 68 (B) does not establish a distinct disclosure obligation. Rather, it simply provides for a possible modality of conveying exculpatory material to the defence, in an electronic format [...].").

[73] *See* Impugned Decision, para. 52

[74] Appeal, paras 42-43.

[75] Prosecution Response, paras 45-46.

make this decision. However, the Pre-Trial Judge did not consider Rule 121 (A) and what potential impact this Rule might have on the matter in contention before him.

36. We note in this respect that there are a number of ambiguities in the Impugned Decision regarding the nature and status of the data in question. For instance, despite pronouncing that "the Prosecution is not obliged to perform analyses or to create work products which are not in its custody or control" and that "[w]here the Prosecution is not in possession of [...] analysis of Raw Data in SQL format falling within the relevant time period, it cannot be required to provide [such analysis]",[76] the Pre-Trial Judge seemingly ordered the Prosecution to provide certain CDRs in SQL format that did not already exist in SQL format.[77] In fact, it is not entirely evident from the Impugned Decision and the submissions of the parties which records exist in which format. The Pre-Trial Judge has referred to a letter sent by the Prosecution to the Defence on 15 January 2013, which appears to include more information in this respect.[78] However, this letter is not on the record.

37. We find the Impugned Decision is too unclear as to the nature of CDRs in SQL format, and that the Pre-Trial Judge is better situated than the Appeals Chamber to determine this question at first instance and to consider the applicable Rule or Rules. In these circumstances, we remand to the Pre-Trial Judge for determination consistent with this decision the question of whether the Prosecutor must provide CDRs in SQL format in the case where the CDRs to be disclosed are possessed by the Prosecutor only in raw data format. The Pre-Trial Judge should clarify the nature of data in SQL format relative to raw data and should then consider whether raw data deemed material to the preparation of the defence pursuant to Rule 110 (B) must be made available in SQL format to the Defence under either Rule 110 (B) or Rule 121 (A) as "appropriate computer software" for searching.

CONCLUSION

38. In sum, on both the first and second issues, we allow the appeal to the extent of setting aside the determinations of the Pre-Trial Judge. However, we reject the remedy requested in the appeal, i.e., we do not find it appropriate in this case to order disclosure ourselves. Instead, we remand the Defence's specific request for disclosure to the Pre-Trial Judge for reassessment consistent with this decision.

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[76] Impugned Decision at para. 52.
[77] *See id.* at para. 55; Prosecution Response, paras 18, 41.
[78] Impugned Decision, fn. 57.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

ALLOWS the Appeal insofar as:

(1) It finds the Pre-Trial Judge committed an error of law by failing to apply or misapplying Rule 110 (B);

(2) It finds the Pre-Trial Judge failed to make clear the nature of CDRs in SQL format in applying Rule 110 (B) and to consider the applicability of Rule 121 (A) to the Defence's CDR disclosure request;

DISMISSES the Appeal in all other aspects;

REMANDS the Defence's specific request for disclosure at issue here to the Pre-Trial Judge for reassessment consistent with this decision.

Done in Arabic, English and French, the English version being authoritative.
Dated 2 October 2013
Leidschendam, the Netherlands

Judge David Baragwanath
Presiding