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

THE TRIAL CHAMBER

Case No.:	**STL-11-01/PT/TC**
Before:	**Judge David Re, Presiding** **Judge Janet Nosworthy** **Judge Micheline Braidy** **Judge Walid Akoum, Alternate Judge**
The Registrar:	**Mr. Daryl Mundis**
Date:	**4 December 2013**
Original language:	**English**
Classification:	**Public**

THE PROSECUTOR

v.

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

DECISION ON CALL DATA RECORDS AND DISCLOSURE TO DEFENCE (ON REMAND FROM APPEALS CHAMBER)

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INTRODUCTION

1. This decision concerns how much of the Prosecution's database containing Lebanese telecommunications records must be made available to Defence counsel for inspection for their trial preparation and, if so, in what particular electronic format. In a decision in June 2013, the Pre-Trial Judge identified what he termed the 'relevant time period' as the date range specified in the amended indictment, namely between 1 January 2003 and 1 October 2005. He then ordered the Prosecution to make accessible to the Defence for inspection all call data records in that period[1] – and in a particular electronic format. On appeal, however, the Appeals Chamber held that the Pre-Trial Judge had erred in how he had chosen this time period, and had not identified an appropriate format for disclosure, and remanded these issues to him for reassessment.[2] As a result of the transfer of the case file on 25 October 2013 the Trial Chamber must now answer these two questions.[3]

BACKGROUND INFORMATION

2. The Prosecution has a database containing certain Lebanese telecommunications call data records of telephone calls made and text messages sent within Lebanon over certain periods. Counsel for Mr. Hussein Hassan Oneissi want access to these records from 2003 onwards in a specified electronic format (SQL Server).

3. Call data records[4] are the technical records that communications service providers (telecommunications companies) generate – primarily for billing purposes – of mobile and fixed telephone communications. These include records of:

- Dates,
- Times,
- Duration of calls,
- Type of call (voice or SMS),
- The numbers of the outgoing and incoming calls,
- The identities of the cell towers used to transmit the call, providing the location of mobile telephones, and

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[1] Or to clarify that the Prosecution did not possess any undisclosed call data records from within that time period; *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/PT/PTJ, Decision on issues related to inspection room and call data records, Confidential, 18 June 2013.

[2] STL-11-01/PT/AC/AR126.4, 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", Confidential, 19 September 2013. A public redacted version of the Appeals Chamber Decision was filed on 2 October 2013.

[3] STL-11-01/PT/TC, *Rapport du Juge de la mise en état établi conformément à l'article 95, paragraphe A) du Règlement de procédure et de preuve, Confidentiel*, 25 octobre 2013.

[4] Abbreviated as 'CDR' in previous decisions.

- With some mobile telephones, the unique identifying number, or international mobile equipment identity (IMEI) number, and international mobile subscriber identity number.

4. The Prosecution has the information contained in the call data records in two electronic formats. The first is in the raw data format of the Lebanese telecommunications providers. This information, consisting of the call logs of billions of calls, is voluminous and, without further analysis, largely unintelligible. Each batch contains the records of multiple telephone numbers and or mobile telephone towers. It also includes records of text messages, or short message service (SMS). The call data records are divided by year and by their source. Each is in a separate electronic folder.

5. The raw format call data records can be read and searched using different text editor software, including UltraEdit.[5] This text editor, however, has limited analytical capacity and advanced searching is time-consuming. Recognising this, the Prosecution created itself a second database by using another software, Microsoft Structured Query Language Server (SQL).[6] In SQL Server the raw call data records are converted into a searchable database from which call record patterns can be analysed. A specific search query of, say, a number, a cell tower, or various combinations, permits near instantaneous searching across folders and databases, and then analysis of the information retrieved. A user can thus make advanced queries of the database and produce tables of call sequences. Both UltraEdit and SQL Server are inexpensive to purchase. The Prosecution, however, says that converting the call data records in raw format into SQL Server is time-consuming.

6. The Prosecution's case against the four Accused is in part based upon their alleged use of certain mobile telephones operating within specified 'networks'. During its investigation the Prosecution used SQL Server to analyse call data records it deemed relevant. The Prosecution created search queries of the records and then used the results to construct the case alleged in the amended indictment.

7. Call data records in raw data format – for both the relevant time period identified by the Pre-Trial Judge of 1 January 2003 to 1 October 2005, and for a period beyond that – are accessible to the Defence in the inspection room. There, Defence counsel may use UltraEdit to view and search the records, folder by folder. The Prosecution has also made accessible to

[5] A product of IDM Computer Solutions Inc.
[6] This is a relational database management system (RDBMS), software designed to store and retrieve data from other software applications.

the Defence, in the same inspection room – and in SQL Server format – the call data records for the entire relevant time period identified by the Pre-Trial Judge (until 1 October 2005) but, additionally, the call data records for 2006. That is, for fifteen months beyond the relevant time period.[7]

8. The Trial Chamber, pursuant to Rule 53, convened a meeting between the Parties on 26 November 2013 in the Prosecution's inspection room, during which the Prosecution demonstrated how searches are made of the databases of call data records in raw format, UltraEdit and SQL Server. The Prosecution also explained it would take some months to accede to the Defence demand to convert the additional call data records into SQL Server, and without the Defence demonstrating the materiality of any request, it was not prepared to use its resources to do this.

PROCEDURAL BACKGROUND

9. The Pre-Trial Judge issued his decision on 18 June 2013 and, on 9 August 2013, granted certification for counsel acting for Mr. Oneissi to appeal two issues. The Appeals Chamber rendered its decision on 19 September 2013. The Prosecution and counsel for Mr. Oneissi subsequently filed submissions on the two remanded issues.[8] The Prosecution filed a motion to strike arguments raised in the Defence submission on the basis that they raised issues outside of the remand by the Appeals Chamber,[9] and attached a foreshadowed

[7] The Trial Chamber obtained some of this information on 26 November 2013 in a meeting with the Parties in the Prosecution's inspection room in which the Prosecution demonstrated the access of the Defence to their database. The submissions of the Parties were partly unclear as to the exact materials held by the Prosecution and to what the Defence had access.

[8] Pre-Trial Judge's Scheduling Order, 23 September 2013; Prosecution Submissions in Accordance with the Scheduling Order of the Pre-Trial Judge of 23 September 2013, Confidential, 4 October 2013; The Defence for Hussein Hassan Oneissi Submissions on call data records Pursuant to the Scheduling Directive of the Pre-Trial Judge Dated 23 September 2013, Confidential, 4 October 2013. On 30 September 2013, the Prosecution filed a Notice of Compliance with the Decisions and 10 September 2013 on Issues Related to the Inspection Room and call data records; Prosecution Notice of Compliance with the Decisions of 18 June 2013 and 10 September 2013 on Issues Related to the Inspection Room and call data records, 30 September 2013.

[9] Prosecution Motion to Strike Arguments, or, in the alternative Motion to Respond to New Arguments raised by the Oneissi Defence in their Filing of 4 October 2013, 18 October 2013.

response in a confidential annex.[10] The Defence responded,[11] and the Prosecution then requested leave to reply to the response.[12]

10. In their submissions, counsel for Mr. Oneissi also sought access to some SMS records in the Prosecution's database. This was not in the Appeals Chamber's remand to the Pre-Trial Judge, and the Prosecution opposed it both procedurally and substantively.

APPEALS CHAMBER DECISION

11. The Pre-Trial Judge certified two questions for appeal – (1) whether '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'. Or, in other words regarding the second question, whether the Prosecution must convert into SQL format the raw format call data records for the correct relevant time period – whatever it may be – and then make them available to the Defence.

12. The Appeals Chamber allowed the appeal. It found two errors of law in the Pre-Trial Judge's decision. First, the Pre-Trial Judge had failed to apply or had misapplied the test for 'materiality' in Rule 110 (B). Second, in applying Rule 110 (B) he had failed to make clear the nature of call data records in SQL format and to consider the applicability, if any, of Rule 121 (A) to the Defence's call data record disclosure request. The Appeals Chamber remanded these two specific issues to the Pre-Trial Judge for reassessment consistent with its decision.

13. In explaining why, the Appeals Chamber held that the Pre-Trial Judge had failed to specify why the date range of 1 January 2003 to 1 October 2005 was the date material to *defence preparations* as opposed to the date range *relevant to the Prosecution's case* at trial – as specified in the amended indictment. In so doing, he failed to apply the 'materiality' condition of Rule 110 (B). The Pre-Trial Judge should also have explicitly examined, but did

[10] Prosecution Response to the New Arguments on the materiality of all CDRs and access in SQL Server format in "The Defence for Hussein Hassan Oneissi Submissions on call data records Pursuant to the Scheduling Direction of the Pre-Trial Judge dated 23 September 2013", 18 October 2013.
[11] The Defence for Hussein Hassan Oneissi Response to "Prosecution Motion to Strike Arguments, or, in the alternative Motion to Respond to New Arguments raised by the Oneissi Defence in their Filing of 4 October 2013", 18 October 2013, 4 November 2013.
[12] Prosecution Request for Leave to Reply to the Oneissi Defence Response of 4 November 2013, 7 November 2013.

not, why certain call data records the Defence requested outside of that period were not material to Defence preparation.[13]

14. The Trial Chamber must therefore decide what information is material to the Defence preparations under Rule 110 (B), and in what format the Prosecution must give the Defence access to inspect it. Call data records relevant to Defence preparations could mean call data records within a specified time period – such as that of either the indictment period, or another time frame – or records for specified telephone numbers, or telephones or cell towers, or a combination.

15. Rule 110 (B) provides:

> 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 material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

16. The Appeals Chamber interpreted the Rule, consistent with international case law, to mean that,

> (1) The defence must demonstrate *prima facie* that what is requested is "material to the preparation of the defence"; 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.[14]

17. The Appeals Chamber reiterated that 'preparation is a broad concept',[15] and that what is material to defence preparations need not be strictly limited to being 'directly linked to exonerating or incriminating evidence',[16] or 'related to the Prosecution's case-in-chief'.[17]

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[13] Appeals Chamber Decision, para. 19.

[14] Appeals Chamber Decision, para. 21. The emphasis is the Appeals Chamber's. On demonstrating materiality *see* ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ('First *Karemera* Decision'), paras 12, 14; *Karemera 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; *Prosecutor v. Bagosora*, 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; *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; *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, para. 12.

[15] *See e.g., Karadžić* Decision, para. 9; *Lubanga* Decision, paras 77-78; First *Karemera* Decision, para. 14; *Bagosora* Decision, para. 9.

18. The Prosecution is responsible – before disclosing evidence falling within Rule 110 (B) – for determining whether that evidence is material for the Defence.[18] The Defence may seek judicial intervention if it believes the Prosecution has withheld evidence material to its preparation, but may not rely on unspecific and unsubstantiated allegations or a general description of the information.[19] When assessing the Prosecution's disclosure obligations for defence requests for materials related to preparing for cross-examining a witness, the Prosecution should consider, among other things, 'whether the material could reasonably lead to further investigation by the Defence and the discovery of additional evidence'.[20] International case law has also consistently held that 'fishing expeditions' are not permitted.[21]

19. The Trial Chamber must therefore determine whether the Defence has sufficiently demonstrated materiality by showing that the disclosure sought is relevant to the preparation of its case.

REASSESSMENT OF PRE-TRIAL JUDGE'S DECISION

Defence submissions

20. Defence counsel seek to inspect 18 specified sets of call data records – but in SQL Server format – and after 1 October 2005.[22] According to their submissions, the Prosecution's conversion into SQL Server format of some call data records of calls made after the indictment period, and their subsequent analysis of the results means that these records are material to the Defence case preparation. The Defence thus needs to ascertain why the Prosecution examined those particular call data records.[23] And, because the analysis of call data records is integral to the Prosecution case, Defence counsel 'must be allowed access to

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[16] *See e.g.*, *Lubanga* Decision, para. 77.
[17] *See e.g.*, *Karadžić* Decision, para. 9; *Bagosora* Decision, paras 8-9.
[18] *See e.g., Prosecutor v. Sesay,* SCSL-2004-15-T, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004 ('*Sesay* Decision'), para. 28; *Prosecutor v. Delalić*, IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996 ('*Delalić* Decision'), para. 25; *The Prosecutor v. Ndayambaje*, ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001, para. 11.
[19] *Sesay* Decision, paras 26-27; *Delalić* Decision, para. 9; *Kamuhanda v. The Prosecutor*, ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14.
[20] *Nahimana v. The Prosecutor*, ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 And EB, Public Redacted Version, 27 November 2006, ('*Nahimana* Decision'), para. 16, citing to *Prosecutor v. Krstić,* IT-98-33-A, *Confidential* Decision on the Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66 (C), 27 March 2003, p. 4.
[21] *See e.g.*, *Karadžić* Decision, para. 8; *Nahimana* Decision, para. 11; *see also* Appeals Chamber Decision, para. 22.
[22] Joint Defence Submission, 18 March 2013, paras 23-24; *see also* Defence Response, para. 58.
[23] Defence Submission, para. 31.

this material not only to identify the weaknesses in the Prosecutor's theory, but also to identify alternative theories'.[24]

21. The Defence preparations for trial would be severely prejudiced if they did not have access to post-indictment call data records in SQL Server format. Having this material would allow them to;

- establish patterns of communications between Prosecution witnesses,
- test hypotheses,
- corroborate information regarding the conduct of certain Prosecution witnesses after 1 January 2007,
- adequately prepare for witness interviews,
- check the credibility of Prosecution witnesses,
- test the conclusions of Prosecution witnesses,
- instruct experts to analyse these call data records,
- draw inferences to counter the Prosecution's inferences,
- prepare for cross-examination of Prosecution witnesses,
- cross-examine Prosecution witnesses,
- establish links that would not otherwise be evident, and
- elicit new leads and conduct preparations similar to those carried out by United Nations Independent Investigation Commission.

22. To demonstrate the materiality of these records, the Defence submissions identified two specified telephone numbers, and submitted that the call data records of these numbers – of calls made after the indictment period – are material to their preparation for trial.[25] They also offered to provide further examples to the Chamber on an *ex parte* basis.[26]

Prosecution submissions

23. The Prosecution submitted that the Defence submissions failed to show that their having access to call data records in SQL Server format – for calls made from 2007 onwards – is material to their case preparation. Rather, the request is a speculative 'fishing expedition' suggesting nothing more than the possibility of discovering relevant material within the

[24] Defence Submission, para. 30.
[25] Pre-Trial Judge's decision, para. 52.
[26] Defence Submission, para. 32.

records.[27] The Defence can already conduct relevant investigations by searching the call data records in UltraEdit.[28] Accepting these speculative arguments would effectively remove the Defence's burden to demonstrate materiality, and transform the disclosure regime into an 'unfettered right of inspection of the Prosecution's evidentiary holdings on the basis of a mere theoretical showing of a possible use of entire categories of evidence'.[29]

24. Taking these speculative arguments at their highest could only demonstrate that some call data records involving some specific telephones *may* be relevant to the preparation of the defence case. Relevance cannot be demonstrated by listing hypothetical uses for call data records as the Defence has done. The Defence must demonstrate the specific materiality of each and every call data record requested, and this cannot be satisfied by speculative submissions listing hypothetical uses.[30] With respect to requiring access to the requested call data records for the purpose of preparing for witness cross-examination and assessing witness credibility, these exercises must be limited to those telephones relevant to the witnesses concerned. Defence counsel can already do this as they have 'access to call data records in SQL Server format for the relevant time period as well as call data records in raw data format for other time periods, including whole years of data'.[31]

25. The Prosecution's mere possession of call data records does not of itself demonstrate relevance to Defence trial preparations. Rule 110 (B) requires that the evidence sought is material to the preparation of the defence, not whether it is material to the Prosecution's preparation, as Rules 91 and 110 (A) already require the Prosecution to disclose evidence material to the Prosecution case. Call data records are like any other category of evidence.[32] The Prosecution also opposed the offer to provide the Chamber *ex parte* with further concrete examples arguing that this would deprive the Prosecution of its right to be heard on the issue of materiality.[33]

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[27] Prosecution Submission, para. 13.
[28] Prosecution Submission, paras 2, 13.
[29] Prosecution Response, paras 10, 13.
[30] Prosecution Response, paras 3, 9.
[31] Prosecution Submission, para. 14.
[32] Prosecution Response, paras 1, 11-13, 16, citing Defence Submission, paras 29-31.
[33] Prosecution Response, para. 18.

First question – the relevant time period for access to call data records which are 'material to the preparation of the defence' under Rule 110 (B)

26. The Pre-Trial Judge determined the period between 1 January 2003 and 1 October 2005 to be relevant to Defence preparation based, it appears, on what is charged against the four Accused in the amended indictment. The amended indictment 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 by 30 September 2004, and another that remained active until 1 October 2005. A further specific group of telephones was used from 1 January 2003 until 15 February 2005. The Prosecution had also informed the Defence that it was not relying on call data records for 2007 to 2010.[34] From this, it appears, the Pre-Trial Judge determined that this was the relevant time period for the Defence to have access to these call data records in SQL Server format. The Defence also, however, has access to the 2006 call data records in SQL Server format.

27. Some call data records in the post-indictment period – and specifically beyond 2006 – *may* be relevant to Defence preparation and thus material under Rule 110 (B). Defence counsel have provided examples of two specific telephones used in the post-indictment period and explained why the call data records relating to those numbers are material to their trial preparation.[35] The Trial Chamber is satisfied that the Defence has *prima facie* established the materiality to defence preparation of those two specific examples, and that these materials must thus be disclosed, or made accessible with appropriate software under Rule 121 (A). The latter has already occurred.

28. The Defence submissions, however, go far beyond the examples of these two specific numbers and extrapolate that because those two numbers are relevant to trial preparation, the *entirety* of the call data records held by the Prosecution must therefore be material to their preparation for trial, *and thus accessible to the Defence in SQL Server format*. But they do this without attempting to further refine the request. The 12-point list extracted above shows that Defence counsel are interested in the *possible* use for information that may *potentially* be obtained from analysing call data records after 1 October 2005.

29. Defence counsel must show how the information to which access is sought is material to their case. Asserting that everything is potentially relevant, as they submit, does not *prima*

[34] Pre-Trial Judge's decision, para. 52, citing a Prosecution letter of 20 February 2013, p. 2.
[35] Defence Submissions, paras 33-34.

facie demonstrate that the information sought is material to trial preparation. Rather, this 12-point list demonstrates that the request amounts to a fishing expedition. It is a wish list of possible uses *if* something is found in the call data records. This argument of extrapolation is misconceived.

30. The Trial Chamber acknowledges that what is material to the Defence under Rule 110 (B) may differ from what is relevant to the Prosecution under Rule 110 (A). However, the Trial Chamber cannot determine – on the basis of a generalized request seeking access to billions of call data records, supported by a list of possible uses for information that may or may not exist – whether something within the call data records database could be relevant and thus material to Defence preparations for trial. The Defence have thus far failed to demonstrate how having access to call data records outside of the period specified by the Pre-Trial Judge is material to their trial preparation – except in the case of the two specified numbers already referred to.

31. The Appeals Chamber remanded to the Pre-Trial Judge the issue of determining 'materiality' to the Defence under Rule 110 (B). The Defence submissions argued that having access to call data records in a period beyond that specified by the Pre-Trial Judge was necessary for their trial preparation; for example, to examine call patterns for telephones attributed to the Accused by the Prosecution, to test the validity of Prosecution hypotheses, and to present alternative explanations for the patterns within the indictment period.[36]

32. Because Defence counsel already have access to call data records in SQL Server until 31 December 2006, determining a fixed period for materiality (as the Pre-Trial Judge did) will be an artificial exercise unless the Trial Chamber decides that the period encompasses call data records of periods beyond that date.

33. The Trial Chamber is not persuaded that materiality has been demonstrated beyond that date, or even into 2006. The Trial Chamber is prepared to accept that a limited, but reasonable, period beyond that specified in the amended indictment and relied upon by the Prosecution and specified by the Pre-Trial Judge (that is, until 1 October 2005) is material to Defence preparations – for example, to allow testing of the Prosecution hypotheses. In these circumstances the Trial Chamber holds that a period of three month beyond that relied on by

[36] Defence Submissions, paras 24-25.

the Prosecution – and found by the Pre-Trial Judge to be material – is material to Defence preparations under Rule 110 (B) that is until 31 December 2005.

34. With the exception of the two specified numbers, counsel for Mr. Oneissi have failed to show the materiality of the call data records beyond 1 January 2006. The Trial Chamber, however, stresses that the Defence has access to the relevant call data records until 31 December 2006 in SQL Server format.

35. Rule 121 (A) provides that, 'A Party may choose to fulfil some of its disclosure obligations in electronic form, together with appropriate computer software to allow for searching of the material'. No complaint has been made that the Defence does not have access to this material with the 'appropriate computer software' as the Rule requires in the period identified by the Pre-Trial Judge. The Trial Chamber reiterates that the Defence has access to these call data records in SQL Server format from 1 January 2003 to 31 December 2006. And, moreover, it is emphasised that this period extends for twelve months beyond that found to be material to the Defence under Rule 110 (B).

36. Specified call data records for particular telephone numbers beyond 31 December 2006 – such as those two mentioned in the Defence submissions – *may* be material to Defence preparations. The Defence have been provided with access to these call data records using UltraEdit and the Prosecution has provided them with access to searches in SQL Server format. The Defence can thus perform searches in UltraEdit to determine the relevance of other numbers.

Second question – Rule 121 (A) and 'appropriate software'

37. The Trial Chamber has had a demonstration of the two different types of software the Prosecution and Defence are using to search the call data records database, namely UltraEdit and SQL Server. Defence counsel can retrieve the information they seek from the call data records from 1 January 2007 using UltraEdit and a Microsoft Excel table. However, using UltraEdit, as compared to SQL Server, is time-consuming and it cannot perform advanced simultaneous searches over multiple folders in the database.

38. The demonstration has convinced the Trial Chamber that UltraEdit is appropriate software under Rule 121 (A) for primary searching to identify potential information necessary to Defence preparation. However, because more advanced searches may be required, and across multiple folders of call data records, SQL Server is a superior product

for conducting these advanced searches. The question is thus whether the Prosecution should be ordered to convert its call data records for the Defence into SQL Server format for periods beyond those already found to be material for Defence preparations.

39. Counsel for Mr. Oneissi submit that they have neither the time nor resources to do their own conversion to SQL Server format. The Prosecution's response is that it would have to divert its own resources – and perform some months of work – to satisfy the Defence demands and to build a SQL Server database for the Defence. In deciding this, the Trial Chamber must balance the public interest of diverting Prosecution resources from trial preparation to this task against that of any inconvenience caused to the Defence in its being unable to perform advanced searches across different folders in a database to which it already has access but to which it has not yet demonstrated materiality.

40. Moreover, the Prosecution has agreed to provide the results of queries to the Defence in SQL Server format where the Defence has demonstrated the materiality of the information sought in relation to specified search queries for individual numbers, telephones and cell towers. This, it says, can be done in days.

41. Defence counsel have no right of access to the entirety of the Prosecution's call data records database in a particular electronic format unless they have demonstrated its materiality to their preparations and that the format requested is 'appropriate'. So, should the Prosecution thus be compelled to provide access to *all of these records* in SQL Server? For the reasons already given, Defence counsel have not discharged their onus in showing that having access in SQL Server to *all records* beyond 1 January 2007 is material to their preparations – although they may be able to demonstrate materiality for individual numbers, telephones or cell towers, or a combination thereof.

42. As the Defence has not demonstrated the materiality of searching the *entire* database in SQL Server format beyond 31 December 2006, the Trial Chamber will not make the order sought against the Prosecution to convert the entirety of its call data record database into SQL Server format. The Trial Chamber does not agree with the Prosecution that doing so would transform the disclosure regime into a fishing expedition but only because, here, the Defence already has access to the call data records database in another format (searchable with UltraEdit).

43. The Trial Chamber further holds that because of its superior utility in performing the advanced searches that Defence counsel may require, SQL Server is the appropriate software

for providing this information to the Defence *where it has demonstrated the materiality of its requests*. The Prosecution should therefore continue to provide this information to Defence counsel in SQL Server format.

SMS records

44. The Defence submissions also seek access to certain SMS records held by the Prosecution. The request was vigorously opposed by the Prosecution on the basis that it was not within the Appeals Chambers' remand and, moreover, the issue was decided by the Pre-Trial Judge in his decision of 18 June 2013 and was not appealed. The Prosecution sought to strike these arguments. The Trial Chamber agrees, and will not consider these issues.

Confidentiality

45. The Trial Chamber stresses the public nature of proceedings before this Tribunal and orders the Parties to file publicly redacted versions of their filings as soon as practicable.

DISPOSITION

FOR THESE REASONS,

THE TRIAL CHAMBER

PURSUANT TO the Appeals Chamber decision of 19 September 2013,

DECIDES

(i) that the relevant time period for the Defence to have access to call data records which are 'material to the preparation of the defence' under Rule 110 (B) is between 1 January 2003 and 31 December 2005,

(ii) that the appropriate software under Rule 121 (A) for providing the Defence with access to call data records which are 'material to the preparation of the defence' under Rule 110 (B) is Microsoft SQL Server,

ORDERS the Prosecution to continue to provide to the Defence in Microsoft SQL Server format the results of any requests for searches that are agreed between the Parties to be material, under Rule 110 (B) after 31 December 2005; and

ORDERS the Parties to file public versions of their filings as soon as practicable.

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

Leidschendam
The Netherlands
4 December 2013

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy