

**THE PRE-TRIAL JUDGE**

Case No.: **STL-11-01/PT/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr. Daryl Mundis**

Date: **25 February 2014**

Original language: **English**

Classification: **Public**

**THE PROSECUTOR**  
v.  
**SALIM JAMIL AYYASH**  
**MUSTAFA AMINE BADREDDINE**  
**HUSSEIN HASSAN ONEISSI**  
**ASSAD HASSAN SABRA**

**PUBLIC REDACTED VERSION OF “DECISION ON THE ONEISSI DEFENCE’S  
REQUEST FOR DISCLOSURE OF SMS CONTENT FOR A TELEPHONE  
NUMBER” DATED 25 OCTOBER 2013**

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Mr. David Young



## **I. INTRODUCTION**

1. In this decision, the Pre-Trial Judge grants the request by the Defence for Hussein Hassan Oneissi (the “Oneissi Defence) for disclosure of Short Message Service (“SMS”) content for a telephone number (the “Request”).<sup>1</sup>

## **II. PROCEDURAL BACKGROUND**

2. On 26 September 2013, the Oneissi Defence filed the Request.

3. On 10 October 2013, the Prosecution filed its response (the “Response”).<sup>2</sup>

4. On 16 October 2013, the Oneissi Defence filed a request for leave to reply to the Response (the “Request for Leave to Reply”).<sup>3</sup>

5. On 21 October 2013, the Prosecution filed its response to the Request for Leave to Reply (the “Response to the Request for Leave to Reply”).<sup>4</sup>

## **III. SUBMISSIONS**

### **A. The Request**

6. The Oneissi Defence recalls that on 9 September 2013, pursuant to Rules 110(B) and 113 of the Rules of Procedure and Evidence (the “Rules”), it requested the Prosecution to disclose all SMS content in its possession and related to a specific phone number.<sup>5</sup> However, the Oneissi Defence avers that on 16 September 2013, the Prosecution corresponded with the Oneissi Defence and effectively refused to “accede to the Defence’s request on the grounds that it lacked specificity and materiality”.<sup>6</sup>

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<sup>1</sup> STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, the Defence for Hussein Hassan Oneissi Request for Disclosure of SMS Content for Telephone Number [...], Confidential, 26 September 2013 (“Request”). All further references to filings and decisions relate to this case number unless otherwise stated.

<sup>2</sup> Prosecution Response to “The Defence for Hussein Hassan Oneissi Request for Disclosure of SMS Content for Telephone Number [...]”, Confidential, 10 October 2013 (“Response”).

<sup>3</sup> The Defence for Hussein Hassan Oneissi Request for Leave to Reply to the “Prosecution Response to the Defence for Hussein Hassan Oneissi Request for Disclosure of SMS Content for Telephone Number [...]” dated 10 October 2013, Confidential, 16 October 2013 (“Request for Leave to Reply”).

<sup>4</sup> Prosecution Response to Oneissi Defence Request for Leave to Reply to the “Prosecution Response to the Defence for Hussein Hassan Oneissi Request for Disclosure of SMS Content for Telephone Number [...]” dated 10 October 2013”, Confidential, 21 October 2013 (“Response to Request for Leave to Reply”).

<sup>5</sup> Request, para. 2.

<sup>6</sup> *Id.* at para. 3.

7. According to the Oneissi Defence, its Request meets the three cumulative requirements of Rule 110(B) namely: specificity, materiality and possession.<sup>7</sup> The SMS content is also alleged to be *prima facie* exculpatory in nature under Rule 113 of the Rules.<sup>8</sup> In this respect, the Oneissi Defence recalls that the user of the relevant phone number is on the Prosecution's witness list as witness "PRH073" and [REDACTED].<sup>9</sup>

8. The Oneissi Defence further submits that since "[t]he word 'statement' is not defined in the Rules[,] [...] [it] should therefore be accorded its ordinary meaning, which is 'a definite or clear expression of something in speech or writing'".<sup>10</sup> As such, the disclosure of such material is essential for the Oneissi Defence to prepare its case effectively.<sup>11</sup> The Oneissi Defence therefore asks the Pre-Trial Judge to order the Prosecution to disclose all SMS content in his possession for the relevant phone number.

9. As for the Request for Leave to Reply, the Oneissi Defence wishes to address four issues raised by the Prosecution in the Response. The first issue is related to the Prosecution's submission that the Oneissi Defence did not comply with the *inter partes* procedure for Rule 110(B) requests (or "Specific Disclosure Regime") as established by the Pre-Trial Judge in the Order on a Working Plan and on the Joint Defence Motion regarding Trial preparation issued on 25 October 2012 (the "Working Plan Order").<sup>12</sup> The next two issues relate to material that the Prosecution claims not to possess, and to the subscription period of the phone number for which SMS content is sought.<sup>13</sup> The fourth issue refers to the Prosecution's restrictive approach of Rule 110(B) disclosure obligations as far as SMS related to individual(s) called [REDACTED] are concerned.<sup>14</sup>

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<sup>7</sup> *Id.* at paras 7-28.

<sup>8</sup> *Id.* at paras 29-32.

<sup>9</sup> [REDACTED].

<sup>10</sup> *Id.* at paras 35-36.. The Oneissi Defence actually refers to the customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties which gives priority to the interpretation of law in accordance with its ordinary meaning.

<sup>11</sup> *Id.* at para. 27.

<sup>12</sup> Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012 ("Working Plan Order"), para. 24. In this order the Pre-Trial Judge formulated "a general approach to disclosure, and how it must be effected" and stated *inter alia* that "only where exceptional circumstances justify it, may the Parties seize the Pre-Trial Judge with a request to vary the foregoing time limits, in respect of a specific request for disclosure from the Defence".

<sup>13</sup> Request for Leave to Reply, para. 5.

<sup>14</sup> [REDACTED].

## **B. The Response**

10. The Prosecution first submits that the Oneissi Defence's conduct is not consistent with the regime established by the Pre-Trial Judge in the Working Plan Order,<sup>15</sup> according to which the Pre-Trial Judge should not have been seised of "any litigation relating to a Rule 110(B) request before the Prosecution complies, or refuses to comply, with that request in accordance with the Working Plan Order".<sup>16</sup> The Prosecution further avers that the Oneissi Defence has not demonstrated that pursuant to Rule 110(B) of the Rules, all SMS content related to the phone number concerned is material to the preparation of the Defence's case.<sup>17</sup>

11. The Prosecution submits that the review of the SMS content related to the relevant phone number revealed that it had no SMS related to Witness PRH073's proposed testimony regarding the [REDACTED].<sup>18</sup> Moreover, the Prosecution considers that nothing in the Oneissi Defence's request establishes that in accordance with Rule 113 of the Rules "the SMS content sought is *prima facie* exculpatory in nature".<sup>19</sup> Lastly, pursuant to Rule 110(A) and the Appeals Chamber's jurisprudence, the Prosecution recalls that SMS do not fall within the definition of a "witness statement".<sup>20</sup>

12. As for the Response to the Request for Leave to Reply, the Prosecution submits that, as none of the four issues put forward by the Oneissi Defence is new,<sup>21</sup> the Oneissi Defence has failed to meet the requirement for obtaining leave to file a reply.

## **IV. DISCUSSION**

### **A. The Request for Leave to Reply**

13. It is established that a reply must generally be limited to circumstances where new issues arise out of the respondent's brief.<sup>22</sup> Having carefully considered the four issues identified by the Oneissi Defence in its Request for Leave to Reply, the Pre-Trial Judge

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<sup>15</sup> Response, paras 4-9.

<sup>16</sup> *Id.* at para. 6.

<sup>17</sup> *Id.* at paras 10-18.

<sup>18</sup> *Id.* at paras 14, 18.

<sup>19</sup> *Id.* at para. 20.

<sup>20</sup> *Id.* at paras 21-23.

<sup>21</sup> Response to Request for Leave to Reply, para. 3.

<sup>22</sup> STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.1, Order on Defence Request for Leave to File a Reply, 8 October 2012, para. 3. Exceptional circumstances may nevertheless justify a departure from this general principle.

observes that these issues are closely connected to the submissions contained in the Request since they are all related to the disclosure obligations of SMS content pursuant to Rules 110(B) and 113 of the Rules. Consequently, the Pre-Trial Judge concludes that no new issues were raised in the Response. As such, the Request for Leave to Reply fails.

## **B. The Request**

14. Where the Prosecution is or may be in possession of the materials sought, the Pre-Trial Judge recalls its Working Plan Order, and in particular that it created a Specific Disclosure Regime that regulates disclosure requests to the Prosecution pursuant to Rule 110(B). In particular, the Working Plan Order specifies that cooperation between the Parties is encouraged, and also specifies the manner in which the Prosecution is required to respond to the request(s), and the time in which written responses must be provided.

15. The Pre-Trial Judge considers that the Request effectively concerns two categories of material. The first is material which the Prosecution does not possess and hence cannot disclose, namely SMS content emanating from phones provided by the Alfa telephone company and during the period from [REDACTED]. The second category of material is SMS content sent from MTC phones to the relevant number between [REDACTED].

16. The Pre-Trial Judge notes that regarding its possession of the material sought by the Oneissi Defence, the Prosecution provided, in its Response, the following information:

- The relevant “phone number [...] is from the Alfa [telephone] company” and except for one SMS that is unreadable, the Prosecution [REDACTED];<sup>23</sup>
- “There is no other SMS content for the [relevant] phone number [...] in the Prosecution’s possession which relates to the Witness’s proposed testimony regarding the [REDACTED] of Oneissi”,<sup>24</sup>
- As for the SMS content sent from MTC phone numbers to the phone number concerned, the Prosecution is in possession of material for the period between [REDACTED].<sup>25</sup> As such, the Prosecution informed the Oneissi Defence that it will “make available the SMS messages sent by the users of the phones who identified

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<sup>23</sup> Response, para.15.

<sup>24</sup> *Id.* at para. 18.

<sup>25</sup> *Id.* at paras 15, 16.

themselves as being called [REDACTED] or who referred to a third person called [REDACTED] to the Witness's phone";<sup>26</sup>

- It "will disclose the SMS content in its possession that may be said to be of relevance to the Witness's [...] testimony on Oneissi's presence [REDACTED]."<sup>27</sup>

17. In relation to the foregoing, and to the extent that the Prosecution has clarified that it does not possess some of the relevant materials, it therefore appears that the Prosecution has already responded effectively to these aspects of the Oneissi Defence disclosure requests.

18. With respect to the remaining aspects of the Request, and after careful consideration of the Request, the Pre-Trial Judge is satisfied that the Oneissi Defence has demonstrated that pursuant to Rule 110(B) of the Rules, the material sought is *prima facie* material to the preparation of its case. As stated by the Oneissi Defence in the Request, Pre-Trial Judge notes that the Prosecution's allegations against Oneissi are supported by this content and that this material will be necessary for the Defence investigations on PHR073, for the preparation of its interview and for the preparation of the witness's cross-examination.<sup>28</sup> As such, the Pre-Trial Judge orders the Prosecution within five working days of this decision, either (a) to disclose to the Oneissi Defence the material it seeks to the extent the Prosecution possesses it, or (b) to respond in writing specifying a date on which this material will be disclosed or (c) to respond in writing, explaining the Prosecution's reasons as to why the material will not be disclosed, as the case may be.

## V. CONFIDENTIALITY

19. The filings in this matter have all been made confidentially in light of the need to refer to the confidential evidentiary material it concerns. Nevertheless, the Pre-Trial Judge has sought to render this decision in such a way as to enable its classification as public. Should the Parties file no objection within five working days hereof, together with such redactions as they consider necessary, this decision shall be reclassified as public.

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<sup>26</sup> *Id.* at para. 17.

<sup>27</sup> *Id.* at para. 18.

<sup>28</sup> Request, paras 24,26.

**VI. DISPOSITION**

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO** Rules 77(A), 110(B) and 113 of the Rules;

**DENIES** the Request for Leave to Reply;

**GRANTS** the Request;

**ORDERS** the Prosecution, consistent with the Working Plan Order, within five working days of this decision, either:

- (a) to disclose to the Oneissi Defence the material it seeks, or
- (b) to respond in writing specifying a date on which this material will be disclosed, or
- (c) to respond in writing, explaining the Prosecution's reasons as to why the material will not be disclosed, as the case may be;

**RECALLS** that the Parties remain bound by the requirements of the Working Plan Order when dealing with requests for disclosure; and

**ORDERS** the Parties to submit the redactions they propose to this decision within five working days hereof, failing which this decision shall be reclassified as public.

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

Leidschendam, 25 February 2014.



  
Daniel Fransen  
Pre-Trial Judge

