

**THE TRIAL CHAMBER**

Case No.: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis, Registrar

Date: 28 February 2014

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THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION PARTIALLY RESCINDING THE 'DECISION ON URGENT
REQUEST FOR AUTHORISATION TO TRANSFER CALL DATA RECORDS
OFFSITE' OF 10 FEBRUARY 2014**

Office of the Prosecutor:

Mr Norman Farrell

Defence Office:

Mr François Roux

**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Eugene O'Sullivan, Mr Emile Aoun &
Mr Thomas Hannis**Counsel for Mr Mustafa Amine Badreddine:**Mr Antoine Korkmaz, Mr John Jones &
Mr Iain Edwards**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothee Le Fraper
du Hellen & Mr Khalil Jad**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Larochelle**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts

1. On 4 February 2014, counsel for Mr Mustafa Amine Badreddine filed what was styled as an urgent request to authorise their telecommunications experts to copy certain data held on the premises of the Special Tribunal in Leidschendam, The Netherlands, and to take it to a laboratory in the United Kingdom for analysis.¹ The application was filed *ex-parte* and confidential to the Prosecution, despite the Prosecution being the custodian of the data.
2. Defence counsel had sought authorisation to copy ‘the full content of the Z drive’ and to allow the transfer of the work product of their expert to the Special Tribunal’s defence data inspection room. In doing so, they relied upon two decisions of the Pre-Trial Judge that they represented as a precedent for this. The ‘Z-drive’ is a restricted-access drive on the Special Tribunal’s network, which is used to enable the Prosecution to provide to the Defence materials relevant to the case against the five Accused which would—but for their size—ordinarily be provided via the Special Tribunal’s Legal Workflow System.²
3. The request was expressed as ‘urgent’ on the basis that the Defence expert would be on the premises of the Special Tribunal on 10 February 2014. For that reason, the Trial Chamber issued a confidential order on 10 February 2014 conditionally allowing the request, but subject to any submission being received from the Prosecution by 12 February 2014.³
4. On 11 February 2014, the Prosecution responded, expressing strong concerns about the request and decision and sought the rescission of the Trial Chamber’s decision.⁴
5. On 12 February 2014, the Trial Chamber suspended its order in relation to authorising the transfer of the full content of the Z-Drive, requesting counsel for Mr Badreddine to file any reply to the Prosecution’s response by 13 February 2014.⁵ Later on 17 February 2014, they filed a notice requesting the reclassification of their initial request from ‘Confidential and *Ex Parte* Defence only’ to ‘Confidential and *Ex Parte* Defence and Prosecution only’.⁶

¹ *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, Case No. STL-11-01/T/TC, Decision on Urgent Request for Authorisation to Transfer Call Data Records Offsite, 10 February 2014.

² STL-11-01/PT/PTJ, Decision on issues related to the inspection room and call data, 18 June 2013, para.10.

³ Decision on Urgent Request for Authorisation to Transfer Call Data Records Offsite, 10 February 2014.

⁴ Prosecution’s Submissions Regarding “Decision on Urgent Request for Authorization to Transfer Call Data Records Offsite”, 11 February 2014.

⁵ Email from the Legal Officer of the Trial Chamber to the Prosecution and counsel for Mr. Badreddine, 12 February 2014.

⁶ Badreddine Defence notice to reclassify the ‘Urgent request for authorization to transfer CDR data offsite per ‘Decision on issues related to the inspection room and call data records’, 17 February 2014.

6. On 13 February 2014, counsel for Mr Badreddine filed a reply opposing the Prosecution's concerns regarding the transfer of the data from the Tribunal's premises.⁷
7. On 17 February 2014, the Registrar, at the Trial Chamber's invitation, filed submissions under Rule 48 (C) making pertinent observations as to the ambit and technical considerations involved in granting the Defence request. The Registry raised concerns as to the risk posed to the Special Tribunal and to Lebanon if the data were to be compromised, and regarding what the Registry considers inadequate security measures proposed for the data's transit from the seat of the Special Tribunal to the expert's offices, and possibly its storage at that location.⁸
8. In an attempt to better understand the technical issues, the Trial Chamber, on 18 February 2014, convened a meeting with counsel for Mr Badreddine, counsel and technical advisers for the Prosecution, legal representatives of the Registrar, and the head of the Special Tribunal's information technology section. During the meeting the information technology experts explained that the Defence request would involve copying data equivalent to 50 personal computers, or 460 truckloads of documents or 576 USB flash drives of 8 gigabytes each. The amount of data would exceed 4.5 terabytes. The Prosecution also outlined that they had serious concerns about the security of transporting sensitive electronic data away from the Special Tribunal's secured premises.
9. Counsel for Mr Badreddine, at the meeting, also clarified that they had not actually intended to seek to copy the entirety of the Z-drive (despite this being stated in paragraph 15 of their motion and under the heading 'Relief requested'), but rather, that they sought to copy call data records, and in particular those related to SMS content in the Prosecution's possession.
10. Counsel also explained that the Head of the Defence Office had declined to authorise the payment of around €5,000 to pay a technical assistant to create a data base for Defence use on the Special Tribunal's secured premises in Leidschendam, The Netherlands.⁹
11. The Trial Chamber's interim decision regarding the transfer of the entire content of the Z-drive was based upon its misapprehension of the extent of the request and its apparent urgency. Having now fully reviewed all of the circumstances and having had the benefit of submissions from the

⁷ Badreddine Defence reply to Prosecution's submissions regarding "Decision on urgent request for authorization to transfer call data records offsite", 13 February 2014.

⁸ Registry submissions pursuant to Rule 48 (C) regarding the decision on urgent request for authorization to transfer call data records offsite with confidential *ex parte* annex.

⁹ Meeting with counsel for Mr Badreddine, counsel and technical advisers for the Prosecution, and legal representatives of the Registrar, and the head of the Special Tribunal's information technology section, 18 February 2014.

Registry and Prosecution, the Trial Chamber will rescind the decision with respect to transferring the full content of the Z-drive.

12. In doing so, the Trial Chamber makes several observations connected with this aspect of the litigation. First, the Defence submission was misleading in stating that the request was made ‘pursuant to the Pre-Trial Judge’s “Decision on Issues Related to the Inspection Room and Call Data Records”’ of 18 June 2013.¹⁰ That decision, which relates to auditing the inspection room and how data is accessed, has no relevance to the portion of this Defence request relating to the Z-drive. Another decision cited in support is likewise irrelevant, as it related to counsel for the Accused, Mr Salim Jamil Ayyash, being authorised to extract ten excel files of their own work product from the inspection room in the Special Tribunal’s premises.¹¹

13. Second, the alleged urgency was connected with the presence of the Defence expert on the Special Tribunal’s premises on 10 February 2014 as ‘this would be the ideal opportunity’ for him ‘to extract the Transfer Data’. This was also misleading because the request failed to specify that the expert was scheduled to be working on the premises for ten days.¹²

14. Third, the request should not have been made *ex-parte* the Prosecution and Registrar. There was nothing in the request that should have been withheld from either organ of the Special Tribunal and both were entitled to make submissions on an issue that carried some serious information security implications for the Special Tribunal. Finally, the relief requested, namely copying the 4.5 terabyte content of the Z-drive far exceeded what Defence counsel actually wanted, that is, they requested a form of relief greatly excessive to their requirements. And despite some attempted clarifications by Defence counsel during the meeting, the Trial Chamber is still uncertain as to precisely what Defence counsel actually want.

15. During the meeting on 18 February 2014, the Trial Chamber requested representatives from the Defence Office to attend. The Trial Chamber then asked them to consider revisiting their decision refusing payment for the Defence expert assistant to work internally on the Special Tribunal’s premises. The Trial Chamber believes that this is a possible solution to this issue, assuming that Defence counsel can properly refine and identify what data they seek to copy and analyse. It is

¹⁰ Decision on Issues Related to the Inspection Room and Call Data Records, 18 June 2013.

¹¹ Decision on Urgent Defence Requests Regarding the Extraction of Information from the Inspection Room, 25 July 2013. See Urgent Request for Authorisation to transfer CDR data offsite per ‘Decision on issues related to the Inspection Room and Call Data Records’, 4 February 2014, para. 5.

¹² Meeting with counsel for Mr Badreddine, counsel and technical advisers for the Prosecution, legal representatives of the Registrar, and the head of the Special Tribunal’s information technology section, 18 February 2014.

essential that Defence counsel be provided all assistance and support deemed necessary to protect the interests of the Accused. Defence counsel would be entitled to appeal a negative decision of the Head of the Defence Office exceeding payment of €4,999.¹³

16. The application and the subsequent submissions were filed confidentially. The application should have been filed publicly with a confidential annex. The Parties and Registrar are directed to file publicly redacted versions as soon as practicable.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

RESCINDS the portion of the ‘Decision on urgent request for authorization to transfer call data records offsite’ dated 10 February 2014 relating to the Z-drive;

INVITES the Head of the Defence Office to find a solution allowing a Defence expert for Mr Mustafa Amine Badreddine to work on the premises of the Special Tribunal in The Netherlands as identified in paragraph 15; and

DIRECTS the Parties and the Registrar to file their submissions in a public form as soon as practicable.

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

Leidschendam,
The Netherlands,
28 February 2014

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



¹³ STL/BD/2009/03/REV.3, Directive on the Appointment and Assignment of Defence Counsel (Amended on 18 March 2013), Art. 43 (C).