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

THE TRIAL CHAMBER

Case No.:	**STL-11-01/T/TC**
Before:	**Judge David Re, Presiding** **Judge Janet Nosworthy** **Judge Micheline Braidy** **Judge Walid Akoum, Alternate Judge** **Judge Nicola Lettieri, Alternate Judge**
Registrar:	**Mr. Daryl Mundis**
Date:	**9 April 2014**
Original language:	**English**
Classification:	**Public**

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

DECISION ON DISCLOSURE OF LIST OF STUDENT INFORMATION

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INTRODUCTION

1. On 21 January 2014, counsel for Mr. Hussein Hassan Oneissi requested the Trial Chamber to order the Prosecution to disclose to them the full list of students—containing names and telephone numbers—who attended a Lebanese university between 2003 and 2006.[1] The list is purportedly material to Defence preparations in relation to a Prosecution witness who attended the university during this time period and provides relevant evidence against Mr. Oneissi. The Prosecution opposed the motion.[2]

2. The Trial Chamber, on 21 February 2014, held an *inter partes* meeting to ascertain whether there was any common ground between counsel for Mr. Oneissi and the Prosecution on this disclosure request. Defence counsel then sent a targeted request to the Prosecution seeking disclosure of extracts from the list of information related to (i) the witness, (ii) the identities of students whose telephones had contacted the witness' telephone between 2004 and 2010, and (iii) the identities of students attending the same faculty as the witness at the same time.[3] A week later the Prosecution gave counsel for Mr. Oneissi an extract from the list pertaining to the witness, (i), but refused to disclose any information related to (ii) and (iii), arguing that it was not material to the Defence preparation.[4]

3. Defence counsel then filed an addendum to their motion seeking, in addition to their original order, Prosecution disclosure of: (i) the identities of students whose telephones had contacted the witness' telephone between 2004 and 2010; and, (ii) the identities of students attending the same faculty as the witness at the same time.[5] The Prosecution responded by requesting that the Trial Chamber dismiss the motion because the Defence had not established the materiality of the information sought.[6]

4. The motion and the addendum seek disclosure under the first category of disclosure pursuant to Rule 110 (B) of the Rules of Procedure and Evidence, namely, that the list is material to Defence

[1] STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/T/TC, The Defence for Hussein Hassan Oneissi Request for Disclosure of the Full List of [...] Students from 2003 to 2006, Confidential, 21 January 2014.
[2] STL-11-01/T/TC, Réponse du Bureau du Procureur à la requête des conseils de la Défense Hussein Hassan Oneissi sollicitant la communication de l'intégralité de la liste des étudiants inscrits de 2003 à 2006 [...], confidentiel, 5 février 2014.
[3] Sent 21 February 2014, *see* Annex B to the addendum.
[4] Sent 28 February 2014, *see* Annex C to the addendum.
[5] STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, Addendum to "The Defence for Hussein Hassan Oneissi Request for Disclosure of the Full List of [...] Students from 2003 to 2006" Dated 21 January 2014, Confidential, 12 March 2014.
[6] STL-11-01/T/TC, Réponse du Bureau du Procureur à l'addendum à la requête de la Défense de M. Hussein Hassan Oneissi sollicitant la divulgation de l'intégralité de la liste des étudiants inscrits de 2003 à 2006 [...], confidentiel, 19 mars 2014.

preparation for trial. The Prosecution possesses the list of students, so the issue for determination is whether it is material to Defence preparation for trial, and if so, how much of the list.

APPLICABLE LAW

5. The Trial Chamber must decide what information is material to the Defence preparations under Rule 110 (B), 'Disclosure by the Prosecutor', which 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.

6. The Trial Chamber has previously ruled on the parameters of disclosure under Rule 110 (B).[7] There, the Trial Chamber noted that the Appeals Chamber had interpreted the Rule—consistent with international criminal law 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'.[8] The Appeals Chamber reiterated that 'preparation is a broad concept',[9] and that what is material to defence preparations need not be strictly limited to being 'directly linked to exonerating or incriminating evidence',[10] or 'related to the Prosecution's case-in-chief'.[11] The Prosecution is responsible—before disclosing evidence falling within Rule 110 (B)—for determining whether that evidence is material for the Defence.[12] The

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[7] STL-11-01/PT/TC, Decision on Call Data Records and Disclosure to Defence (On Remand from Appeals Chamber), 4 December 2013 ('Trial Chamber Decision'), paras 16-18.

[8] STL-11-01/PT/AC/AR126.4, 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", 2 October 2013 ('Appeals Chamber Decision'), paras 21-22. 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.

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

[10] *Lubanga* Decision, para. 77.

[11] *Karadžić* Decision, para. 9; *Bagosora* Decision, paras 8-9.

[12] *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'), paras 26-27; *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. 9.

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.[13] 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'.[14] This international case law has also consistently held that 'fishing expeditions' are not permitted and Rule 110 (B) does not provide an unfettered right to inspection triggered by unsubstantiated claims of relevance.[15]

DISCUSSION

Submissions

7. The Defence of Mr. Oneissi submitted that the information on the list of students is material to their preparations for trial, and specifically, in relation to the witness' status as a student and his contacts. The Defence is duty bound to investigate the witness, to contextualise his communication patterns, to prepare to interview him, and to devise a strategy of cross-examination. Knowing who communicated with the witness is therefore crucial to these investigative efforts. Moreover, the Prosecution received the list for legitimate investigative purposes; therefore, not allowing the Defence access to it would contravene the principle of equality of arms. As an alternative, they argued that the list is also subject to disclosure under Rule 113 (Disclosure of exculpatory material) because to the extent that the list does not support the witness' statement, it affects his credibility.

8. The Prosecution argued that that the motion was vague, hypothetical and unpersuasive, and did not establish that the *entire* list was material to the Defence preparations. On the purported need to contextualise the witness' communications, the Defence already has access to all call data and SMS (short message service) records for the witness' telephone. The motion does not satisfy the required threshold for disclosure under Rule 113, and non-disclosure does not violate the principle of equality of arms.

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[13] *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.
[14] Trial Chamber Decision, para. 18; *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.
[15] Appeals Chamber Decision, paras 21-22; *Karadžić* Decision, para. 8; *Nahimana* Decision, para. 11.

9. In their addendum, Defence counsel argued that the Prosecution's notion of materiality is unduly restrictive and compromises the right of the Accused to a fair trial. Referring to earlier findings of the Trial Chamber and the Pre-Trial Judge which declared that the witness' call data and SMS records are material to Defence preparation, they submit that it would be illogical for such a list to be immaterial to Defence preparation. The list is needed to identify those in contact with the witness, which is important to Defence preparation. The Prosecution's refusal to disclose the list on the basis that the witness will testify about events in late 2004 and early 2005 does not accurately reflect the anticipated testimony. Any concerns regarding the privacy rights of persons who appear on the list are addressed by the codes of professional conduct applicable to counsel.[16]

10. The Prosecution responded that the request for disclosure was unsubstantiated, hypothetical and speculative, and should be dismissed because the materiality of the list had not been established. The request to disclose the entire list and the two extracts is overly broad and effectively amounts to a fishing expedition. Additionally, the witness statement relates to events in late 2004 and early 2005, supporting the conclusion that the request for disclosure is too wide. The Prosecution would disclose information relevant to the preparation of the Defence on the proviso that it is well targeted and connected to the witness.

Are the extracts and the student list 'material to the preparation of the defence' under Rule 110 (B)?

11. The witness is expected to testify on an important part of the Prosecution case, and in particular against Mr. Oneissi. The Prosecution is obliged to consider whether the material could reasonably lead to further investigation by the Defence and the discovery of additional evidence. The Trial Chamber is satisfied that Defence counsel could find investigative leads from contacting students who attended the university at the same time as the witness, and especially those who were in his faculty and, presumably attended classes with him. This, however, does not automatically mean that *all* of the information sought is material to the preparation of the Defence.

The entire list of students

12. The Defence wants access to the records of all students who attended the university between 2003 and 2006. This is partly argued on the basis of equality of arms. However, arguing prejudice in

[16] STL/CC/2012/03, Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, adopted 14 December 2012; and, A Code of Professional Conduct for Counsel appearing before the Tribunal, adopted 28 February 2011.

not having the same access to a list that the Prosecution obtained for legitimate investigative purposes misapprehends this concept.

13. The Prosecutor in international criminal law proceedings both investigates and prosecutes,[17] and normally casts a wide net in finding information relevant to an investigation and any eventual prosecution. The Prosecutor has a far broader role in investigating the possible commission of crimes falling within a court or tribunal's jurisdiction than Defence counsel do in defending someone accused of committing such a crime. An international Prosecutor will inevitably amass far more information than is needed to prosecute an individual accused charged on distinct counts of an indictment related to specified crimes. International Prosecutors—acting as investigators—typically accumulate information not leading to indictments or prosecutions, even if it could prove the commission of crimes. This is inherent in their statutory role. The Defence has a much narrower role in defending an accused person and Rule 110 (B) does not entitle them to view all information in the Prosecutor's possession. Because of the difference in their respective roles, the Prosecutor's *mere possession* of information sought by the Defence does not of itself demonstrate its relevance to Defence preparations. The Trial Chamber reiterates 'that what is material to the Defence under Rule 110 (B) may differ from what is relevant to the Prosecution under Rule 110 (A)'.[18]

14. The Defence arguments, to some degree, are speculative in relation to the entire list, which amounts to the records of specified personal information of several thousand students. The witness used this telephone in 2004 and nothing in his statement relates to anything relevant to the case in 2006, which is well outside the time period specified in the consolidated indictment, namely, between 20 October 2004 and 14 February 2005. Rule 110 (B) does not confine materiality to the 'temporal scope of an indictment',[19] but on the other hand, asserting that everything on the list between 2003 and 2006 is potentially relevant does not *prima facie* establish that the information sought is material to Defence preparation. The scope of this request comes close to a 'fishing expedition' and, consequently, the Defence arguments do not demonstrate that having access to the information about every student on the list between 2003 and 2006 is relevant to Defence preparation, and is thus material.

15. The period in late 2004 and early 2005, however, is especially relevant to the witness' evidence. The Trial Chamber accepts that a period beyond that specified in the consolidated

[17] Article 11 (1) Statute of the Special Tribunal. *See also*, Article 16, ICTY, ICTR Statutes; Article 15, ICC Statute; Article 15, SCSL Statute.
[18] Trial Chamber Decision, para. 30. Rule 110 (A), broadly, is Prosecution evidence at trial.
[19] Appeals Chamber Decision, para. 22.

indictment is material to Defence preparations with regard to this specific witness. The Trial Chamber is thus satisfied that this period should extend until 31 December 2005. This will allow the Defence to better investigate this feature of the Prosecution's case against Mr. Oneissi. The Trial Chamber, however, is not satisfied that the Defence has demonstrated that having access to all student records in 2006—well after the relevant period in the consolidated indictment and before the witness was interviewed by the United Nations International Independent Investigation Commission in 2007, or in 2003—is material to Defence preparations for trial. Moreover, a list of students enrolled in 2004 and 2005 may also contain information relating to those enrolled in the calendar years of 2003 and 2006. By contrast, a list of those enrolled in the calendar years 2003 and 2006 may also extend to student records for 2002 and 2007; that is too wide a period to be relevant and thus material to Defence preparations.

The two extracts from the list

16. Defence counsel also seek extracts of two specific pieces of information, namely (i) students whose telephones had contact with the witness' telephone between 2004 and 2010, and (ii) students attending the witness' faculty. The information in these extracts is specifically targeted to the witness' activities and Defence counsel cite what they describe as 'apt examples of what might be material',[20] for example, how this will allow them to interview persons of interest, investigate relevant lines of inquiry, and prepare for cross-examining the witness.

17. The Trial Chamber is satisfied that allowing the Defence access to this material will provide Defence counsel with a real possibility of obtaining leads on evidence relevant to an issue in the case. Those in telephone contact with the witness or who attended his faculty could provide concrete information material to Defence preparations. But is a separate order necessary to achieve this?

Students attending the university in 2006 whose telephone contacted the witness' telephone

18. Defence counsel already have access to call data records into 2010 that should, in combination with the list of students for 2004 and 2005, provide them with the information they seek for their investigations. The narrower issue therefore is whether there are any relevant records of students attending the university in 2006 that could be material to Defence preparations. As the Trial Chamber has found the period material to Defence preparations to be 2004 and 2005, the student records for the entire calendar year of 2006 will remain accessible only to the Prosecution. However, the Prosecution can cross-check the telephone numbers in Annex B of the Defence addendum against

[20] Appeals Chamber Decision, para. 22.

those in the list of students attending the university between 2003 and 2010. The Prosecution is accordingly ordered to provide the Defence with access to the relevant information relating to any student who was enrolled at the university in 2006 and whose telephone number appears in Annex B.

Records of students who attended the same faculty

19. The same reasoning applies in relation to students who attended the same faculty as the witness in 2004 and 2005. This information is a sub-set of that in the wider list of students who attended the university at that time; these more limited records are closer to the witness than the entire list of university students and hence potentially more relevant to Defence preparations. However, it is evident from Annex A to the Defence addendum that the information sought, that is the faculty attended, appears in the records for 2004 and 2005 to which access has been ordered. It is thus unnecessary to make any specific order.

CONFIDENTIALITY

20. The Trial Chamber reiterates that motions and responses should, wherever possible, be filed publicly. Counsel should—the Trial Chamber repeats—file motions publicly with any confidential information in a confidential annex. The motion and addendum should have been written and filed in this manner. The Parties are therefore ordered to file public redacted versions of their filings as soon as practicable.

DISPOSITION

FOR THESE REASONS, the Trial Chamber under Rule 110 (B) of the Rules of Procedure and Evidence:

ORDERS the Prosecution to provide the Defence of Mr. Hussein Hassan Oneissi with access to:

(1) the list of students attending the university specified in the Defence motion of 21 January 2014 and addendum of 12 March 2014, for the years 2004 and 2005;

(2) information identifying any student enrolled at the university in 2006 whose telephone number appears in Annex B to the Defence addendum filed on 12 March 2004; and

ORDERS the Prosecution and Defence counsel to file public redacted versions of their submissions as soon as practicable.

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

Leidschendam,
The Netherlands,
9 April 2014

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy