

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 May 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 PROSECUTION WITNESS EXPENSES

**Office of the Prosecutor:**

Mr. Norman Farrell, Mr. Graeme Cameron  
& Mr. Alexander Milne

**Victims' Legal Representatives:**

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. Jad Khalil

**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



## INTRODUCTION

1. This decision concerns the payment of witness expenses to witnesses of the Parties. The question for determination is whether the Prosecution must disclose to the Defence payments made to certain Prosecution witnesses. The case law of the international criminal courts and tribunals holds that witnesses are entitled to receive ‘reasonable expenses’ and that the Prosecution may provide ‘reasonable expenses’ to their witnesses without disclosing these to the Defence. The issue here is whether the Prosecution has paid certain witnesses anything that must be disclosed. The answer is no.

## BACKGROUND

2. In October 2013, counsel for the Accused, Hussein Hassan Oneissi, wrote to the Prosecution seeking information about any payments to a witness who had provided statements to the Prosecution and was on its witness list to testify at trial.<sup>1</sup> The Prosecution wrote back, saying that it had nothing remaining undisclosed that was subject to disclosure under Rule 110 (B) of the Special Tribunal’s Rules of Procedure and Evidence. Counsel for Mr Oneissi then asked the Prosecution to clarify whether (i) no payments had been made or advantages given, or that (ii) payments had been made or advantages given to those witnesses.<sup>2</sup> They also requested the same information for another witness. The Prosecution provided a similar response, declining to provide the clarification sought, asserting that the request had no legal basis.<sup>3</sup>

3. Counsel for Mr Oneissi subsequently—on 15 April 2014—filed a motion requesting the Trial Chamber to order, pursuant to Rule 110 (B) as ‘material to the preparation of the defence’ and Rule 113 (A) as ‘affect[ing] the credibility of the Prosecutor’s evidence’, the Prosecution to disclose all records in its possession, control or knowledge of:<sup>4</sup>

- a. Payments or direct or indirect non-pecuniary benefits afforded to [two named witnesses] or any member of their families, from the Lebanese authorities, the UNIIIC, or the Prosecution, in relation to their involvement in the *Ayyash* case; and

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<sup>1</sup> Referred to in STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, STL-11-01/T/TC, The Defence for Hussein Hassan Oneissi Request for Information Relating to Payments and Benefits Relating to [two named witnesses], 15 April 2014, para. 3.

<sup>2</sup> Referred to in Defence motion, para. 4.

<sup>3</sup> Referred to in Defence motion, para. 6.

<sup>4</sup> Defence motion.

- b. Future payments or direct and/or indirect non-pecuniary benefits, on an ongoing basis, afforded to [two named witnesses], or any member of their families, from the Lebanese authorities, the UNIIC, or the Prosecution, in relation to their involvement in the *Ayyash* case.

4. They submitted that an order was necessary because the Prosecution's responses to their letters in October and November 2013 were unsatisfactory. The Prosecution responded submitting that it was aware of its disclosure obligations and had appropriately responded to the Defence's inquiries.<sup>5</sup> At the Trial Chamber's request,<sup>6</sup> the Prosecution then filed a copy of its 'Standard Operating Procedure: Witness Expenses Incurred in the Field', setting out its principles of paying expenses for Prosecution witnesses.<sup>7</sup>

### DISCUSSION

5. In national and international legal systems witnesses incur expenses in providing statements or information to parties, investigating judges or courts, and in testifying in court. A large percentage of witnesses who testify in international criminal courts and tribunals must travel to do so. Standard procedure across these courts and tribunals is to pay witnesses their reasonable expenses including travel, meals and accommodation.

6. Some courts and tribunals have scales or written policies. For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY)—as an *ad hoc* United Nations institution—pays a daily allowance for incidental expenses incurred by witnesses testifying in The Hague, the Netherlands and an 'attendance allowance', set at the rate of the minimum United Nations salary in the country in which the witness lives, for lost wages, economic loss and expenses at home.<sup>8</sup> The expenses of witnesses testifying before the Special Tribunal are covered by the Special Tribunal's

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<sup>5</sup> STL-11-01/T/TC, Prosecution Response to the "Defence for Hussein Hassan Oneissi Request for Information Relating to Payments and Benefits Relating to [two named witnesses]", 29 April 2014.

<sup>6</sup> Email from the Legal Officer to the Trial Chamber to the Prosecution, 30 April 2014. Counsel for Mr Oneissi subsequently sought an extension of time to reply to the Prosecution's response in light of the Trial Chamber's request for this information; STL-11-01/T/TC, The Defence for Hussein Hassan Oneissi Request for Extension of Time to Reply to "Prosecution Response to the 'Defence for Hussein Hassan Oneissi Request for Information Relating to Payments and Benefits Relating to [two named witnesses]'", 1 May 2014. The Prosecution then confidentially filed the requested information; STL-11-01/T/TC, Annex A to Prosecution's Submission Pursuant to the Trial Chamber's Request of 30 April 2014 in Respect of the "Prosecution Response to the 'Defence for Hussein Hassan Oneissi Request for Information Relating to Payments and Benefits Relating to [two named witnesses]'", 2 May 2014. On 2 May 2014, the Trial Chamber ordered counsel for Mr Oneissi to file any reply by 6 May 2014, email from the Legal Officer to the Trial Chamber to Counsel for Mr Oneissi. Counsel for Mr Oneissi filed a reply to the Prosecution's response on 6 May 2014; STL-11-01/T/TC, The Defence for Hussein Hassan Oneissi Reply to "Prosecution Response to the 'Defence for Hussein Hassan Oneissi Request for Information Relating to Payments and Benefits Relating to [two named witnesses]'", 6 May 2014.

<sup>7</sup> Dated 10 December 2009.

<sup>8</sup> ICTY, Directive on Allowances for Witnesses and Expert Witnesses, IT/200/Rev.1/Corr.2, 10 March 2011.

Victims and Witnesses Unit—in a manner similar to the ICTY—and are based on the ‘Registry Regulations on Assistance and Allowances for Victims and Witnesses Testifying Before the Special Tribunal for Lebanon’.<sup>9</sup> These regulations address expenses for, among other things, travel, accommodation and meals.

7. The Special Tribunal’s Office of the Prosecutor has a standard operating procedure that covers the expenses of Prosecution witnesses ‘in the field’. These cover the normal expenses incurred, such as travel by public transport or private fuel costs, accommodation and meals, calculated on the basis of the United Nations published daily subsistence allowance (or ‘DSA’) for the location of the witness and the interview. The Trial Chamber would expect any other Party or Participant that intends to interview and call witnesses to establish, and adhere to, a similar procedure.

8. Other international criminal courts and tribunals have decided that witnesses are entitled to receive reasonable expenses, and—in interpreting Rules equivalent to the Special Tribunal’s Rule 113—have held that these are not disclosable either as exculpatory information or that affecting the credibility of a witness.<sup>10</sup> The policy reason is the expectation, and especially in circumstances where witnesses must travel to attend interviews or to testify, that they should not be out of pocket for doing so; in other words, paying witnesses their reasonable expenses is considered a normal part of a functioning system of justice.

9. However, information concerning any benefits paid to and or promises made to witnesses beyond that reasonably required is different; it must be disclosed as potentially affecting a witness’ credibility.<sup>11</sup> It may also be exculpatory. This could also make it ‘material’ to defence preparations for trial. As a basic hypothetical example, paying a witness his or her bus fare to attend an interview location is normal and non-disclosable; giving the witness the bus is not, and would be disclosable.

10. Examples in international criminal law of payments or benefits held to be disclosable include—to illustrate, at the Special Court for Sierra Leone (SCSL)—a one-off payment of US\$1,500 to buy

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<sup>9</sup> STL/RR/2013/01, Registry Regulations on Assistance and Allowances for Victims and Witnesses Testifying Before the Special Tribunal for Lebanon, 1 March 2013.

<sup>10</sup> ICTR, *Prosecutor v. Karemera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 7; ICTR, *Prosecutor v. Bizimungu*, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para. 13; ICTR, *Prosecutor v. Karemera*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit F: Payments Made for the Benefit of Witness G, 29 May 2008.

<sup>11</sup> *Karemera* Decision of 23 August 2005, para. 7.

a telephone, food and to pay school fees with the promise of further cash,<sup>12</sup> and a US\$1,200 monthly allowance for general ‘upkeep’.<sup>13</sup> At the International Criminal Court (ICC), where evidence exists that witnesses have received, through intermediaries, more than their ‘reasonable expenses’, the identities of the intermediaries may be disclosed to enable parties to conduct their own investigations.<sup>14</sup> Non-monetary benefits, such as assistance in avoiding repatriation proceedings or obtaining residence in another state, can also be potentially exculpatory and therefore subject to disclosure.<sup>15</sup>

11. Where a party seeks the disclosure of payments or benefits alleged to go beyond reasonable expenses, they must *prima facie* show that the information is exculpatory.<sup>16</sup> The onus of proof is on the party seeking disclosure.<sup>17</sup> The Prosecution is presumed to be acting in good faith and the onus is on the Defence to demonstrate that the Prosecution possesses and has failed to disclose specific documents.<sup>18</sup> The court will not facilitate a fishing expedition in the absence of such evidence.<sup>19</sup>

12. The Trial Chamber agrees with and adopts these principles relating to the payment of reasonable witness expenses, and further, that expenses that are not reasonable must be disclosed. The question therefore is whether the Prosecution has to disclose any additional information to the Defence under either Rule 110 or 113?

13. 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.

Rule 113 (A) provides:

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<sup>12</sup> SCSL, *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010, para. 31.

<sup>13</sup> SCSL, *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 23 September 2010, paras 18-22.

<sup>14</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Redacted Decision on Intermediaries, 31 May 2010.

<sup>15</sup> ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions, 22 November 2011, paras 24-31.

<sup>16</sup> ICTR, *Bizimungu* Decision of 28 September 2006, para. 10.

<sup>17</sup> ICTR, *Karemara* Decision of 23 August 2005, para. 8.

<sup>18</sup> ICTR, *Prosecutor v. Bizimungu*, ICTR-99-50-T, Decision on Bicumumpaka’s Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, para. 14.

<sup>19</sup> ICTR, *Karemara* Decision of 23 August 2005, para. 8.

Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence.

International criminal law case-law holds that before a chamber can order the disclosure of exculpatory material under the applicable Rule, the Party seeking disclosure must: specifically identify the material sought, present a *prima facie* showing of the probable exculpatory nature of the material, and prove that the material is in the custody or under the control of the Prosecutor.<sup>20</sup> A chamber may also, where necessary, review any expenses *ex parte* and confidentially to determine whether the information is subject to disclosure.<sup>21</sup>

14. Counsel for Mr Oneissi have requested details of all payments or benefits already made or that will be made to two specified witnesses. The Prosecution declined to provide that information and in its response to the motion has stated that no payments or benefits subject to disclosure have been made. The Prosecution also states that it has no knowledge of any future payments or indirect non-pecuniary benefits and that this information could not be in its possession. The Prosecution, it appears, is asserting that the only payments made to the two witnesses are those covered by its 'Standard Operating Procedure: Witness Expenses Incurred in the Field' and these are not subject to disclosure.<sup>22</sup>

15. The Trial Chamber has reviewed this document and is satisfied that the expenses covered in it are reasonable expenses and are consistent with those identified in international case law as falling within that category.<sup>23</sup> If the witnesses have received only those payments covered by the Prosecution's standard procedures as set out in this document, these are not disclosable under either Rule 110 or Rule 113. Only payments or benefits over and above reasonable expenses would be subject to disclosure. Counsel for Mr Oneissi, however, have provided no basis to suggest that payments or benefits beyond reasonable expenses have been made or that the Trial Chamber should disbelieve the Prosecution's statement that any such payments have been made or benefits provided. The Trial Chamber has no need to assess the information for itself confidentially and *ex parte* to determine whether it is subject to disclosure.

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<sup>20</sup> *Prosecutor v. Karemera*, Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 14 May 2008, para. 9. See also ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 179.

<sup>21</sup> ICTR, *Bizimungu* Decision of 28 September 2006, para. 13; *Karemera* Decision of 29 May 2008, para. 16.

<sup>22</sup> Prosecution response, para. 7.

<sup>23</sup> Annex A to Prosecution's submission.

16. Defence counsel have thus failed to satisfy the accepted principles for a chamber ordering disclosure of exculpatory material. They have not presented a prima facie showing of the probable exculpatory nature of the information sought or proved that the material requested is in the custody or under the control of the Prosecution.<sup>24</sup> They have also failed to demonstrate the materiality under Rule 110 (B) to the ‘preparation of the defence’ of receiving information from the Prosecution showing that the two witnesses have only received reasonable expenses covered by the Prosecution’s standard operating procedure. It appears that there is nothing for the Prosecution to disclose; the motion is therefore dismissed.

### **CONFIDENTIALITY**

17. Without providing any valid reason for doing so, Defence counsel filed their motion confidentially. The motion should have been filed publicly with, if necessary, a confidential annex. The Trial Chamber reiterates the public nature of litigation before the Special Tribunal and orders the Parties to file publicly redacted versions of their filings. The Prosecution also filed its ‘Standard Operating Procedure: Witness Expenses Incurred in the Field’ confidentially. For the moment this may remain confidential; at some point it will have to be made public.

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<sup>24</sup> *Karemera* Decision of 14 May 2008, para. 9. See also *Kordić and Čerkez* Decision, para. 179.

**DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

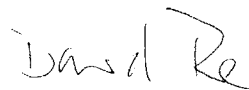
**DISMISSES** the motion;

**ALLOWS** the extension of time sought by counsel for Mr Oneissi on 1 May 2014 to file a reply; and

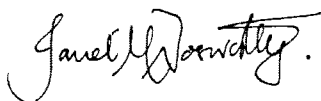
**ORDERS** the Prosecution and Defence to file publicly redacted versions of their filings as soon as practicable.

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

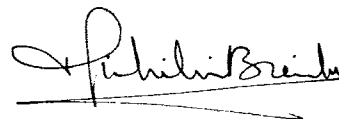
Leidschendam,  
The Netherlands  
9 May 2014



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Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

