



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:** 20 August 2014

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

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**DECISION ON DISCLOSURE OF CALL DATA RECORDS AND  
SMS CONTENT FOR FOUR TELEPHONES**

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**Office of the Prosecutor:**

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& Mr. Alexander Milne

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## INTRODUCTION

1. On 21 July 2014, counsel for Mr. Hussein Hassan Oneissi requested the Trial Chamber to order the Prosecution to disclose to them: i) all call data records from 2007 to 2010 for four specific telephone numbers;<sup>1</sup> and, ii) all short message service (text messages or ‘SMS’) content for the same four telephones.<sup>2</sup> Counsel for Mr. Oneissi argued that the call data records and SMS content are material to Defence preparations for trial, and are therefore subject to disclosure under Rule 110 (B) of the Special Tribunal’s Rules of Procedure and Evidence. Attached to the motion was a confidential annex, filed *ex parte* the Prosecution, and detailing the evidentiary reasons for the request. The Prosecution opposed the motion; with one argument raising a possible issue of legal professional privilege relating to some of the SMS communications.<sup>3</sup>

2. To allow the Prosecution to submit an informed response, the Trial Chamber, on 25 July 2014 ordered: i) counsel for Mr. Oneissi to file by 30 July 2014, and in general terms, a version of their confidential and *ex parte* annex; ii) the Prosecution to file a response by 5 August 2014; and, iii) counsel for Mr. Oneissi to file a reply by 8 August 2014 specifically addressing the issue of possible legal professional privilege (and any other matter).<sup>4</sup> Counsel for Mr. Oneissi then filed a sharply abridged version of their confidential and *ex parte* annex,<sup>5</sup> to which the Prosecution responded, again opposing the motion, and once more arguing possible legal professional privilege in connection with certain communications.<sup>6</sup> Defence counsel then filed a reply in which they asked the Trial Chamber to make an additional order against the Prosecution to explain the legality of its

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<sup>1</sup> Call data records are the technical records that communications service providers (telecommunications companies) generate—primarily for billing purposes—of mobile and fixed telephone communications. *See*, STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, 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’), para. 3.

<sup>2</sup> STL-11-01/T/TC, Defence for Hussein Hassan Oneissi Request for Disclosure of 2007-2010 CDRs and All SMS Content for Four Telephone Numbers, confidential, 21 July 2014 (‘Oneissi motion’). The Oneissi motion has a confidential Annex A, and a confidential and *ex parte* Annex B. A public redacted version of the motion was filed the same day.

<sup>3</sup> STL-11-01/T/TC, Prosecution Response to Defence for Hussein Hassan Oneissi Request for Disclosure of 2007-2010 CDRs and All SMS Content for Four Telephone numbers, confidential, 24 July 2014 (‘Prosecution response’). A public redacted version of the response was filed on 31 July 2014.

<sup>4</sup> STL-11-01/T/TC, Order in Relation to Motion for Disclosure of Call Data Records and SMS Content for Four Telephone Numbers, 25 July 2014.

<sup>5</sup> STL-11-01/T/TC, Defence for Hussein Hassan Oneissi Submissions Pursuant to the Trial Chamber’s Order in Relation to Motion for Disclosure of Call Data Records and SMS Content for Four Telephone Numbers, 30 July 2014 (‘Oneissi further submissions’).

<sup>6</sup> STL-11-01/T/TC, Prosecution Response to the Oneissi Defence’s Submissions Pursuant to the Trial Chamber’s Order in Relation to Motion for Disclosure of Call Data Records and SMS Content for Four Telephone Numbers, confidential, 5 August 2014 (‘Prosecution response to further submissions’). A public redacted version of the response has not been filed.

obtaining and retention of the data.<sup>7</sup> The Prosecution subsequently made an additional submission seeking the dismissal of that new claim for relief.<sup>8</sup>

### **APPLICABLE LAW**

3. The motion seeks disclosure under the first category of Rule 110 (B), namely, that the call data records and SMS content are material to Defence preparations for trial. The Prosecution possesses the relevant call data records and SMS content, so the issue for determination is whether this data is material to Defence preparations for trial under Rule 110 (B), ‘Disclosure by the Prosecutor’. It states that:

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.

4. The Trial Chamber has previously decided the parameters of disclosure under Rule 110 (B).<sup>9</sup> In that decision 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’.<sup>10</sup> The Appeals Chamber

<sup>7</sup> STL-11-01/T/TC, The Defence for Hussein Hassan Oneissi Reply Following the Trial Chamber’s “Order in Relation to Motion for Disclosure of Call Data Records and SMS Content for Four Telephone Numbers” of 25 July 2014, confidential, 8 August 2014 (‘Oneissi reply to Prosecution response to further submissions’). A public redacted version of the reply was filed the same day.

<sup>8</sup> STL-11-01/T/TC, Request to Dismiss New Relief inserted in “The Defence for Hussein Hassan Oneissi Reply Following the Trial Chamber’s ‘Order in Relation to Motion for Disclosure of Call Data Records and SMS Content for Four Telephone Numbers’ of 25 July 2014”, confidential, 15 August 2014 (‘Request to dismiss new relief’). A public redacted version of the request has not been filed.

<sup>9</sup> Trial Chamber Decision, paras 16-18.

<sup>10</sup> 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.

reiterated that ‘preparation is a broad concept’,<sup>11</sup> and that what is material to defence preparations need not be strictly limited to being ‘directly linked to exonerating or incriminating evidence’,<sup>12</sup> or ‘related to the Prosecution’s case-in-chief’.<sup>13</sup>

5. The Prosecution is responsible—before disclosing evidence falling within Rule 110 (B)—for determining whether that evidence is material for the Defence.<sup>14</sup> The Defence may seek judicial intervention if it believes that 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.<sup>15</sup> When assessing the Prosecution’s disclosure obligations for 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’.<sup>16</sup> This international case law has also consistently held that ‘fishing expeditions’ are not permitted and that Rules similar to Rule 110 (B) do not provide an unfettered right to inspection triggered by unsubstantiated claims of relevance.<sup>17</sup>

## **DISCUSSION**

### **Submissions of the Parties**

6. Proposed Prosecution Witness PRH073 provided a statement to the United Nations International Independent Investigation Commission (UNIIC) in 2007 and to the Prosecution in 2010. Defence counsel already have access to call data records and the SMS content associated with that witness’s telephone.<sup>18</sup> However, they now seek the call data records, from 2007 to 2010, of four specified telephones that contacted his telephone in those years, and any SMS content in the Prosecution’s possession related to these four telephones.

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<sup>11</sup> *Karadžić* Decision, para. 9; *Lubanga* Decision, paras 77-78; *First Karemera* Decision, para. 14; *Bagosora* Decision, para. 9.

<sup>12</sup> *Lubanga* Decision, para. 77.

<sup>13</sup> *Karadžić* Decision, para. 9; *Bagosora* Decision, paras 8-9.

<sup>14</sup> *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 Zejnir Delalić for the Disclosure of Evidence, 26 September 1996 (*‘Delalić Decision’*), para. 9.

<sup>15</sup> *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.

<sup>16</sup> 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.

<sup>17</sup> Appeals Chamber Decision, paras 21-22; *Karadžić* Decision, para. 8; *Nahimana* Decision, para. 11.

<sup>18</sup> Prosecution response, para. 30. *See also*, Trial Chamber Decision, para. 27.

7. Counsel for Mr. Oneissi submitted that this information is material to Defence preparations for trial. Having it, they submitted, would allow them to properly investigate any linkages between the users associated with those four telephones and the witness's anticipated testimony. They highlighted that this request for disclosure only relates to four telephone numbers from the 1,427 that contacted the witness's telephone between 2004 and 2010. In the confidential and *ex parte* annex to their motion counsel for Mr. Oneissi provided further information regarding the materiality of the four telephone numbers including the circumstances of the contacts between the four telephones and that of the witness in the context of the two statements to the UNHCR and the Prosecution.<sup>19</sup>

8. The Prosecution argued that the mere fact that those four telephones contacted the witness's telephone does not demonstrate the materiality of the call data records or the SMS content, especially as both involve the communications of the users of those four telephones with thousands of other third parties. Further, the Prosecution submitted that it is possible, if not likely, that the SMS content of one of the four telephones will contain information covered by legal professional privilege.<sup>20</sup>

9. In further submissions, counsel for Mr. Oneissi filed a confidential but abbreviated version of their confidential and *ex parte* annex.<sup>21</sup> In its response the Prosecution again argued that the Defence had not demonstrated the materiality of the call data records and the SMS content. More specifically, it submitted that nothing supported the contention that any of the users of the four telephones were connected with the witness's testimony. The Prosecution suggested that if the Trial Chamber were to consider that materiality had been established it should only order a targeted disclosure of the call data records and SMS content.<sup>22</sup> Counsel for Mr. Oneissi replied, submitting that they could not make submissions as to the privileged nature of material in the exclusive possession of the Prosecution. They also sought a new and additional order from Trial Chamber to order the Prosecution to explain the legality of its possession of this data.<sup>23</sup> The Prosecution requested that the Trial Chamber dismiss this request for new relief as it did not fall within the scope of a reply or arise from the Trial Chamber's order of 25 July 2014.<sup>24</sup>

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<sup>19</sup> Oneissi motion, paras 1-2, 7, 11, 13, 20.

<sup>20</sup> Prosecution response, paras 4-6, 24-25, 31, 33. *See also*, Rule 163.

<sup>21</sup> Oneissi further submissions.

<sup>22</sup> Prosecution response to further submissions, paras 3-6, 19.

<sup>23</sup> Oneissi reply to Prosecution response to further submissions, paras 2, 7-8.

<sup>24</sup> Request to dismiss new relief.

**Are the call data records and SMS content ‘material to the preparation of the defence’ under Rule 110 (B)?**

10. The four telephones for which call data records and SMS content are sought contacted the witness’ telephone between 2004 and 2010. The witness is anticipated to testify to an aspect of the Prosecution case of significance to Mr. Oneissi’s role as alleged in the amended indictment. The question therefore is whether the material sought could lead to further investigation by the Defence and the discovery of additional evidence. While the Trial Chamber is satisfied that counsel for Mr. Oneissi may gain investigative leads from the information sought, this does not mean that *everything* sought is material to the preparation of the Defence.

*The call data records for the four telephones between 2007 and 2010*

11. The Trial Chamber is satisfied that allowing the Defence access to the call data records between 2007 and 2010 for the four specified telephones may allow counsel for Mr. Oneissi to obtain leads on evidence relevant to an issue in the case. Having these call data records will allow analysis of the communication patterns of the four telephone users, most specifically focussed on when the witness provided his two statements to the UNIIC, and thereafter, to the Prosecution. The Trial Chamber is satisfied that this may provide concrete information which is material to Defence preparations for trial. The Prosecution is therefore ordered to disclose these call data records to the Defence.

*The available SMS content for the four telephones*

12. The arguments of counsel for Mr. Oneissi, however, are unsubstantiated in regard to having access to *all* of the SMS content sought for the four telephones. As the Prosecution correctly points out, providing access to all of the SMS content sought—and most specifically, between the four telephones and other telephone numbers with no established connection to the witness—would result in the disclosure of the personal communications records of thousands of third parties having no obvious link or relevance to these proceedings. The Defence has not demonstrated any link between these third parties’ telephones and the telephones of the four users which could establish that *all* SMS content is material to Defence preparations for trial. At this stage the request amounts to a ‘fishing expedition’.

13. Disclosure of the 2007 to 2010 call data records may provide further investigative leads for the Defence. This limited disclosure would avoid the significant and unnecessary intrusion into the private communications of unrelated third parties that would be inherent in disclosing *all* SMS

content to the Defence. If the call data records do provide such leads, Defence counsel may then claim materiality for the SMS content of *specific* records in the Prosecution's possession. The scope of the present request is too broad, and allowing such a disclosure will unnecessarily breach the privacy rights of third parties. The request for *all* of the SMS content of the four telephones is therefore dismissed.

14. However, counsel for Mr. Oneissi's argument—that having access to the SMS content of communications between the four telephones themselves, and any undisclosed SMS content between the four telephones and the witness will allow for further investigation—is persuasive. Analysing this SMS content may reveal concrete information relating to Witness 073's anticipated testimony. Accordingly, the Trial Chamber is satisfied that the SMS content of communications between these four telephones—and, any undisclosed SMS content between the four telephones and Witness 073—is material to Defence preparations for trial. The Prosecution is therefore ordered to disclose this SMS content to Defence counsel.

15. In the circumstances there is no need to decide the further claim for relief in the Defence reply asking the Trial Chamber to order the Prosecution to explain the legality of its possession of the data.<sup>25</sup> This is accordingly dismissed.

### **CONFIDENTIALITY**

16. The Trial Chamber reiterates the principle of the public nature of proceedings before the Special Tribunal, and that documents should, wherever possible, be filed publicly. In the litigation of this issue, all filings except two Prosecution submissions were submitted publicly, or, confidentially with a public redacted version.<sup>26</sup> The Prosecution is therefore ordered to file a public redacted version of these filings.

### **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 call data records between 2007 and 2010 for the four specified telephones;

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<sup>25</sup> Oneissi reply to Prosecution response to further submissions, paras 8, 13 (a).

<sup>26</sup> See, Prosecution response to further submissions; Request to dismiss new relief.

(2) the SMS content of communication between the four specified telephones; and

(3) any undisclosed SMS content between the four specified telephones and the telephone of Witness PRH073;

**DISMISSES** the remainder of the motion by counsel for Mr. Oneissi seeking access to *all* SMS content between the four telephones and other telephones (i.e., third parties);

**DISMISSES** the request to order the Prosecution to explain the legality of its possession of the specified data; and

**ORDERS** the Prosecution to file a public redacted version of its two confidential submissions.

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

Leidschendam,  
The Netherlands,  
20 August 2014

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

