



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: 25 November 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 MOTION SEEKING INTERIM RELIEF FOR LATE DISCLOSURE

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Counsel for Mr Salim Jamil Ayyash:

Mr Eugene O'Sullivan, Mr Emile Aoun
& Mr Thomas Hannis

Victims' Legal Representatives:

Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms. Nada Abdelsater-Abusamra

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. Dorothée Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux
& Mr Geoffrey Roberts



BACKGROUND

1. In 2007, the Lebanese authorities took a handwritten statement, in Arabic, from an individual who now appears as Witness PRH073 on the Prosecution's list of witnesses, filed under Rule 91 of the Special Tribunal's Rules of Procedure and Evidence. Later that year, the Lebanese authorities provided a copy of that statement to the United Nations International Independent Investigation Commission (UNIIC); and the witness also made a statement to the UNIIC in which he referred to this earlier statement. The UNIIC prepared a partial English translation of the first statement, but without recording information that identified the witness and, due to what appears to be an administrative error, the Arabic original was not registered in the UNIIC's evidentiary database.
2. On 25 October 2012, the Pre-Trial Judge ordered the Prosecution to disclose, by 30 November 2012, all material related to its obligations under Rule 110 (A) (ii), which would have included any statements made by Witness 073.¹ Rule 110 (A) (ii) requires the Prosecution to disclose, relevantly, the statements of all witnesses the Prosecution intends to call to testify at trial. On 15 February 2013, the Prosecution certified to the Pre-Trial Judge that it had done this.² The Prosecution had in fact disclosed the witness's 2007 UNIIC statement to the Defence. On 23 May 2013, counsel for the Accused Mr Hussein Hassan Oneissi—alerted by the reference in the UNIIC statement to the earlier statement taken by the Lebanese authorities in 2007—requested the Prosecution to disclose this first statement. The Prosecution responded that, based on a search for the document in its evidentiary holdings, it did not have that statement.³
3. During a later review of its holdings—sometime between 30 May 2013 and August 2014—the Prosecution found the partial English translation of the statement, and contacted the Lebanese authorities to ascertain if they had the full statement.⁴ On 18 August 2014, the Prosecution received the witness statement taken by the Lebanese authorities in 2007, prepared a complete English translation and, on 11 September 2014, disclosed both the original and the complete translation to the Defence.⁵ In doing so, the Prosecution explained that it had not received from the UNIIC a copy of the whole statement, but only a partial English translation which did not contain the family name of

¹ STL-11-01/PT/PTJ, F0496, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, Order on a Working Plan and the Joint Defence Motion Regarding Trial Preparation, 25 October 2012, para. 21 (item 5) and Disposition.

² F0725, Prosecution's Notice Regarding Disclosure, 15 February 2013, para. 7.

³ STL-11-01/T/TC, F1710, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, Defence for Hussein Hassan Oneissi Motion for Interim Relief Under Rules 114 and 130(A) for Delayed Disclosure of PRH073's Witness Statement, 20 October 2014, para. 2 (referring to Annex B). Counsel for Mr Oneissi filed a public redacted version of their motion on 20 October 2014.

⁴ Prosecution response, paras 7 and 9.

⁵ Prosecution response, para. 9.

the witness. As a result of this, the searches undertaken by the Prosecution for the purpose of meeting its disclosure obligations did not alert it to the existence of this statement.⁶ On 15 September 2014, counsel for Mr Oneissi and Mr Assad Hassan Sabra jointly wrote to the Prosecution seeking additional explanations and information—in twelve separate categories—relating to the circumstances of the late disclosure. This included providing ‘the names of all UNIIC personnel that had knowledge of this statement and those that had seen it’ and ‘the precise date when the partial English translation of the statement was transferred to the OTP’ (i.e. the Office of the Prosecutor), ‘information whether the partial English translation was registered in the UNIIC’s evidentiary database’, and ‘whether you have located the statement that was “misplaced” by UNIIC’. The Prosecution responded on 22 September 2014, providing some further explanation and additionally generally stating that the legal or factual basis for seeking the information was unclear.

4. Counsel for Mr Oneissi did not respond to the letter, but rather, four weeks later, on 20 October 2014, filed a motion alleging a breach of the Prosecution’s disclosure obligations in relation to Witness 073’s 2007 statement to the Lebanese authorities. They have moved the Trial Chamber to order as ‘interim relief’ the Prosecution to provide them and counsel for the Accused, Mr Assad Hassan Sabra, with the information and documents in the twelve categories set out in their joint letter to the Prosecution of 11 September 2014.⁷

SUBMISSIONS OF THE PARTIES

5. According to Defence counsel, the Prosecution failed to provide the Defence with the statement within the deadline set for disclosure of all documents pursuant to Rule 110 (A) (ii).

6. Furthermore, when requested by the Defence to disclose the witness statement on 23 May 2013, the Prosecution responded that it did not have it, thereby failing to properly review the evidentiary material in its possession. It was only one and a half years later, on 11 September 2014, that the Prosecution eventually disclosed the statement.⁸ As a result, the Defence considers it has been doubly prejudiced, first, by the delay in the disclosure and, secondly, ‘by the subsequent denial of explanatory information that would allow it to exercise its rights to have access to justice and to be afforded a judicial remedy for the statement’s belated disclosure’.⁹ As ‘interim relief’, and to exercise their right to seek an appropriate remedy for the Prosecution’s violation of its disclosure

⁶ F1730, Prosecution Response to Oneissi Defence Request for Interim Relief, 3 November 2014, para. 5. *See also* Redacted Version of Prosecution Response to Oneissi Defence Request for Interim Relief, 14 November 2014.

⁷ Oneissi Defence motion, Relief.

⁸ Oneissi Defence motion, paras 1-3, 10-12.

⁹ Oneissi Defence motion, para. 12.

obligations and of the Accused's right to adequate time and facilities, counsel for Mr Oneissi request the Trial Chamber to order the Prosecution to provide them with information identified in the letter dated 15 September 2014 attached to the motion.¹⁰

7. The Prosecution responded that it did not violate any disclosure obligation.¹¹ Indeed, when it found out that it did not have Witness 073's 2007 Lebanese statement, the Prosecution requested the statement from the Lebanese authorities. On 18 August 2014, as soon as it had obtained the Arabic original of the statement from the Lebanese authorities, the Prosecution translated it and then disclosed to Defence counsel the original statement and the complete English translation.¹² Moreover, according to the Prosecution, since the witness is not expected to testify before May 2015 and Defence counsel will have had the statement well in advance of the proposed testimony, counsel for Mr Oneissi cannot demonstrate any prejudice from the late disclosure.¹³

8. Counsel for Mr Oneissi replied, arguing that the Defence is not required to demonstrate, at this stage, the prejudice it has suffered as a result of the late disclosure. Furthermore, the English partial translation of the statement must be considered a statement within the meaning of Rule 110 (A) (ii), and should have therefore been disclosed to the Defence in accordance with Rule 110 (A) (ii) and the pre-trial working plan set by the Pre-Trial Judge on 25 October 2012.¹⁴ The Prosecution subsequently responded to this filing.¹⁵

DISCUSSION

9. This motion is without merit. In two letters to Defence counsel, on 11 and 22 September 2014, the Prosecution provided acceptable and reasonable explanations as to why it did not disclose a statement that it did not know the UNIIC had received. The partial English translation of Witness 073's 2007 Lebanese statement—presumably transferred to the Prosecution by UNIIC in March 2009—did not refer to the witness's name.¹⁶ Rather, it was only after 'a review of its holdings, subsequent and unrelated to its searches to meet its Rules 110 (A) (ii) deadline',¹⁷ that the Prosecution found this partial English translation and then requested the original Arabic statement

¹⁰ Oneissi Defence motion, Annex D.

¹¹ Prosecution response, para. 10.

¹² Prosecution response, paras 5-10.

¹³ Prosecution response, paras 11-19.

¹⁴ F1744, Defence for Hussein Hassan Oneissi Reply to the 3 November 2014 Prosecution Response to Oneissi Defence Request for Interim Relief, 10 November 2014, paras 4-10.

¹⁵ Prosecution Submissions on the Reply of the Oneissi Defence dated 10 November 2014, 12 November 2014, paras 3-10.

¹⁶ Prosecution response, paras 5-6.

¹⁷ Prosecution response, para. 7.

from the Lebanese authorities. For these reasons, disclosure of the statement in question did not occur within the deadline ordered by the Pre-Trial Judge.

10. The Prosecution disclosed the statement on 11 September 2014, but Witness 073 has not yet been scheduled to testify in the proceedings. The witness is not expected to be called to testify before May 2015. By then, counsel for Mr Oneissi will have had the statement for approximately eight months and will have had adequate time to prepare for cross-examination.

11. Counsel for Mr Oneissi have invoked Article 16 of the Statute and Rules 110 (A) (ii), 114 and 130 (A), as well as customary international law, and seek an interim relief aimed at exercising their rights.¹⁸ However, the general principles of international criminal procedural law, reflected for example in the case-law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda—upon which the Special Tribunal’s own disclosure rules are based—requires a Party to demonstrate material prejudice before a Trial Chamber will provide remedies.¹⁹ Defence counsel have not provided a legal basis—in the absence of any material prejudice—as to why the Trial Chamber should order the Prosecution to provide them with information such as ‘the names of all UNIIIC personnel that had knowledge of this statement and those that had seen it’ and ‘the precise date when the partial English translation of the statement was transferred to the OTP’. And counsel for Mr Oneissi have not shown any prejudice resulting from the late disclosure of Witness 073’s Lebanese statement.

12. As counsel for Mr Oneissi cannot show that the Prosecution’s inability to provide Witness 073’s statement to them has caused them any material prejudice, they are not entitled to the remedy sought from the Trial Chamber, even if it is termed ‘interim relief’. The Trial Chamber cannot see how having this information now would permit Defence counsel—but at some later stage—to seek further orders against the Prosecution. The Defence have had the relevant statement since 11 September 2014, and it is unclear how receiving the information in the twelve identified categories will assist Defence preparations for trial—much less provide the basis for seeking further relief at some later point.

13. In the absence of any material prejudice, and given that the Prosecution appears to have behaved diligently, the request for ‘interim relief’ is unjustified. Further, when all of the relevant circumstances are considered—namely, the Prosecution’s explanation and the lack of any material

¹⁸ Oneissi Defence motion, para. 4.

¹⁹ See, for instance, ICTY, *Prosecutor v. Krstić*, IT-8-33-A, Appeal Judgement, 19 April 2004, para. 153; *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Appeal Judgement, 23 May 2005, para. 262.

prejudice to the Defence—the Trial Chamber is of the view that a motion seeking such relief should not have been filed. The Defence should have further explored the issue with the Prosecution—for example, by responding to the Prosecution’s letter of 22 September 2014—before filing the motion.

DISPOSITION

FOR THESE REASONS, the Trial Chamber

DISMISSES the motion.

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

Leidschendam,
The Netherlands
25 November 2014

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

