

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
Registrar: Mr Daryl Mundis, Registrar
Date: 5 March 2015
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THE PROSECUTOR

v.

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

**DECISION GRANTING LEAVE FOR THE TRIAL CHAMBER TO
 RECONSIDER ITS 'DECISION ON THE ONEISSI DEFENCE MOTION FOR
 DISCLOSURE OF REQUESTS FOR ASSISTANCE' OF 7 NOVEMBER 2014**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
 & Mr Alexander Milne

**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 Dorothée 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 Mattraux &
 Mr Geoffrey Roberts



BACKGROUND

1. In a decision of 7 November 2014, the Trial Chamber dismissed a motion filed by counsel for the Accused, Mr Hussein Hassan Oneissi, requesting the Trial Chamber to order the Prosecution to disclose 66 requests for assistance that the Special Tribunal's Prosecutor had sent to the Prosecutor-General of Lebanon.¹
2. Eleven weeks later, on 22 January 2015, counsel filed a motion before the Trial Chamber asking it to reconsider this decision.² The Prosecution opposed the motion—both substantively and procedurally. On the latter point, it argued that the Trial Chamber should summarily dismiss the motion because it was invalidly filed before the Trial Chamber, instead of being filed before its Presiding Judge, as required by Rule 140 of the Special Tribunal's Rules of Procedure and Evidence.³ Upon the Trial Chamber's query in a court session, counsel for Mr Oneissi described this as 'an oversight', and, after the Trial Chamber invited Defence counsel to refile the motion as prescribed by the Rules,⁴ this omission was rectified with its refiling on 27 February 2015.⁵

SUBMISSIONS AND ANALYSIS

3. The Defence motion filed, first before the Trial Chamber, and then before me, requests reconsideration of the Trial Chamber's decision. The motion, however, seeks a further order that the Prosecution 'provide, for each of the CSTs [call sequence tables] on which the Prosecution intends to rely, details of the source or sources used to produce it, as well as the corresponding RFAs [requests for assistance] and responses'.⁶ The order sought is validly filed before the Trial Chamber. However,

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1739, Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance, 7 November 2014. The 66 documents also included requests for assistance and warrants issued by the Commissioner of the United Nations International Independent Investigation Commission (UNIIC).

² F1825, Request for Reconsideration of the Decision of 7 November 2014 and for Disclosure of all Requests for Assistance Relating to Telecom Data, 22 January 2015.

³ F1846, Prosecution Response to "Requête en réexamen de la Décision du 7 novembre 2014 et en communication de toutes demandes d'assistance se rapportant à des données téléphoniques", 9 February 2015, paras 2-3.

⁴ Transcript of hearing, T. 121, 26 February 2015, p. 3.

⁵ F1868, Demande d'autorisation aux fins du réexamen de la Décision du 7 novembre 2014 et requête en réexamen et en communication de toutes demandes d'assistance se rapportant à des données téléphoniques, 27 February 2015, (Application of 27 February 2015).

⁶ F1825, Request for Reconsideration of the Decision of 7 November 2014 and for Disclosure of all Requests for Assistance Relating to Telecom Data, 22 January 2015, paras 30 and 32 (b); Application of 27 February 2015, paras 34 and 37.

it is not validly (re)filed before me because the original Defence motion⁷ did not seek this particular order and, consequently, the decision did not decline to make one.

4. The original motion merely sought an order for ‘the Prosecution to disclose to the Defence the RFAs [requests for assistance] referred to in the Annex [to the motion]’. As this intended order formed no part of the decision, it should have been edited out of the (copy-pasted) application for leave for reconsideration, filed on 27 February 2015. The issue, which would have been irrelevant to my decision, however, has now become moot. In a hearing on 3 March 2015, counsel for Mr Oneissi informed the Trial Chamber (on its request) that—in light of the Prosecution’s undertaking to provide this information—they were no longer pursuing this order.⁸

5. Substantively, Defence counsel want the Prosecution to disclose 38 requests for assistance sent by the Special Tribunal’s Prosecutor, and warrants issued by the Commissioner of the United Nations International Independent Investigation Commission, related to Lebanese telecommunications data that it received. The Prosecution opposes the request, stating that the true number is 33 and, because the Prosecution will not use—in its case at trial—the data it received in response to these particular requests for assistance and warrants, these documents are not material to Defence preparations for trial under Rule 110 (B).⁹ Further, the Prosecution has disclosed—for each piece of evidence that it intends to use at trial—all warrants and requests for assistance, and their responses.

6. The application for leave to reconsider appears to be argued on two bases; first, that the Defence now intends to challenge the legality of the manner in which the Prosecution obtained *all* telecommunications data from the Lebanese authorities, and second, that the Defence cross-examination of the former Lebanese Minister for Telecommunications (between 2005-2008), Mr Marwan Hamade, on 10 and 11 December 2014, revealed information relevant to this intended legal challenge. For these reasons, Defence counsel are renewing their attempt to obtain the requests for assistance sent to Lebanon in relation to *all* telecommunications data that the Prosecution received,

⁷ F1677, Request for the Disclosure of Requests for Assistance, 25 September 2014.

⁸ Transcript of hearing, T. 123, 3 March 2015, pp. 53-54.

⁹ 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’.

as opposed to confining it to those relevant to the evidence in the case. They argue that they are entitled to view all material potentially relevant to their intended challenge.

7. Under Rule 140, ‘A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice’. The Trial Chamber is not prepared to reconsider this decision *proprio motu*.¹⁰ In a decision refusing leave to reconsider a decision of the Pre-Trial Judge, and then in a decision granting leave to reconsider a Trial Chamber decision, I accepted the following principles as relevant to my task in considering whether to grant leave for the Trial Chamber to reconsider an earlier decision:¹¹

The role of the Presiding Judge is to perform a *prima facie* examination of the request to ensure that it may ‘be admitted in terms of procedure’ and that it is not manifestly ill-founded,¹² including ‘a filtering function to prevent the filing of unwarranted requests’.¹³ The request ‘must be duly reasoned’ and ‘reconsideration may only be granted if the application is not manifestly unfounded, frivolous or aims at circumventing the Rules’.¹⁴ The Presiding Judge acts ‘as a filter to screen applications to ensure that they contain the procedural and legal justifications necessary to allow the Trial Chamber to decide an application for reconsideration on its merits’.¹⁵

8. The legal issue for determination is thus—if the application is duly reasoned—whether the motion seeking leave to reconsider the decision is not manifestly unfounded, frivolous or aimed at circumventing the Rules. My role is to filter unwarranted applications for reconsideration from reaching the Trial Chamber.

¹⁰ Transcript of hearing, T. 121, 26 February 2015, p. 3.

¹¹ F1446, Decision Denying Leave to Reconsider a Decision of the Pre-Trial Judge re Disclosure Regarding a Computer, 11 March 2014, paras 16-18; F1603, Decision on Leave to Reconsider Two Decisions on Challenges to the Form of the Indictment (Merhi Defence), 30 June 2014, para. 4.

¹² STL-11-01/PT/TC, F0976, Décision refusant à la défense de M. Badreddine l’autorisation de déposer une requête en réexamen, 2 July 2013, para. 11; F0260, Decision Authorising the Ayyash Defence and the Sabra Defence to File a Request for Reconsideration, 22 May 2012, para. 6; F0246, Decision Authorising the Badreddine Defence and the Oneissi Defence to File a Request for Reconsideration, 15 May 2012, para. 10.

¹³ STL-11-01/PT/AC, F1214, Decision on Request by Defence for Messrs Badreddine and Oneissi for Authorization to Seek Reconsideration of the Appeals Chamber’s Decision of 25 October 2013, 13 November 2013, para. 4.

¹⁴ STL-11-01/PT/PTJ, F0172, Decision on The Prosecution’s Request for Partial Reconsideration of the Pre-Trial Judge’s Order of 8 February 2012, 29 March 2012, paras 30-31.

¹⁵ STL-11-01/T/TC, F1442, Reasons for Decision Granting Leave to Reconsider Deadline for Motions Concerning Evidentiary Decisions Issued Before Joinder, 7 March 2014, para. 7.

9. Before issuing its decision, the Trial Chamber reviewed these 33, or 38, documents and decided that they were not material to Defence preparations for trial under Rule 110 (B). There thus appears to be some force in the Prosecution's arguments that this remains the case in relation to the telecommunications evidence the Prosecution intends to use at trial, and hence that leave to grant the application should be refused. However, the original Defence motion did not explicitly argue that Defence counsel wished to use these documents to mount a challenge to the legality of the material to be used at trial, and they have now argued that Mr Hamade's testimony has made their original request relevant in relation to the wider issue of challenging the legality of the evidence.

10. The application is duly reasoned and has provided some cogent grounds for granting leave to reconsider the decision. Having heard further oral submissions¹⁶—and notwithstanding the paucity of argument in the original motion alerting the Trial Chamber to any intended legal challenge against the manner in which the telecommunications data was obtained—the application, in my view, is not manifestly unfounded, frivolous or aimed at circumventing the Rules. It is therefore in the interests of justice to grant leave to reconsider the decision.

DISPOSITION

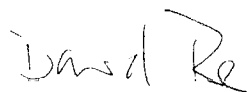
FOR THESE REASONS, I:

GRANT LEAVE for the Trial Chamber to reconsider the 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', issued on 7 November 2014.

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

Leidschendam,
The Netherlands

5 March 2015



Judge David Re, Presiding



¹⁶ Transcript of hearing, T. 123, 3 March 2015, pp. 50-59.