

**THE TRIAL CHAMBER**

**Case No.:** STL-11-01/T/TC  
**Before:** Judge David Re, Presiding  
**Registrar:** Mr Daryl Mundis, Registrar  
**Date:** 6 March 2015  
**Original language:** English  
**Type of document:** Public

**THE PROSECUTOR**

v.

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

**DECISION RECONSIDERING 'DECISION ON THE ONEISSI DEFENCE  
 MOTION FOR DISCLOSURE OF REQUESTS FOR ASSISTANCE',  
 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

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 Mr Thomas Hannis

**Counsel for Mr Mustafa Amine Badreddine:**

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 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  
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**Counsel for Mr Assad Hassan Sabra:**

Mr David Young, Mr Guénaél Mettraux &  
 Mr Geoffrey Roberts



## INTRODUCTION

1. The Trial Chamber, in a decision of 7 November 2014, dismissed a motion by counsel for the Accused, Mr Hussein Hassan Oneissi, seeking an order that the Prosecution disclose 66 requests for assistance that the United Nations International Independent Investigation Commission (UNIIC) and the Special Tribunal's Prosecutor had sent to the Lebanese Prosecutor-General seeking telecommunications data.<sup>1</sup> Counsel for Mr Oneissi, in two identical motions filed on 22 January 2015 and 27 February 2015, asked the Trial Chamber to reconsider the decision.<sup>2</sup>

## PROCEDURAL BACKGROUND

### **Defence motion requesting disclosure of certain requests for assistance**

2. On 19 August and 2 September 2014, counsel for Mr Oneissi asked the Prosecution—under Rules 110 (B)<sup>3</sup> and 113 (A)<sup>4</sup> of the Special Tribunal's Rules of Procedure and Evidence—to disclose 66 requests for assistance that the Prosecutor and the UNIIC Commissioner had sent to the Lebanese Prosecutor-General, seeking Lebanese telecommunications data for use in their investigations.<sup>5</sup>

3. The Prosecution declined to disclose some of the requests for assistance. Defence counsel then sought an order from the Trial Chamber for their disclosure.<sup>6</sup> Counsel argued that the requests for assistance were essential to Defence preparations for trial as they revealed the methods and

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<sup>1</sup> 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 (Decision).

<sup>2</sup> 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, subsequently refiled (with several additional paragraphs seeking leave to reconsider) as, F1868, Request Seeking Leave for Reconsideration of the Decision of 7 November 2014 and Request for Reconsideration and for Disclosure of all Requests for Assistance relating to Telecom Data, 27 February 2015 (Application).

<sup>3</sup> Rule 110 (B) states: '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.'

<sup>4</sup> Rule 113 (A) provides: '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.'

<sup>5</sup> Decision, paras 4 and 5.

<sup>6</sup> Decision, para. 5.

procedures that UNIIC and the Prosecution had used to identify and collect telephone data, and then to compile what are described as ‘call sequence tables’.<sup>7</sup>

4. Viewing the documents would allow the Defence to verify whether the UNIIC and the Prosecution had obtained mobile telephone call records data in accordance with the legal requirements of the Special Tribunal’s Statute and Rules and in compliance with what they termed ‘privacy rules’.<sup>8</sup> The Prosecution had opposed the motion, arguing that it had disclosed 28 of the requests for assistance, and the remainder were not demonstrated to be material to Defence preparations for trial.<sup>9</sup>

#### **Trial Chamber’s decision of 7 November 2014**

5. The Trial Chamber then obtained from the Prosecution the 38 undisclosed requests for assistance. After reviewing the documents, it dismissed the motion, finding that none were material to Defence preparations for trial, as required by Rule 110 (B).<sup>10</sup> The 38 requests for assistance were generic in nature and related to data that the Prosecution will *not* use as evidence in the trial. Moreover, the Defence had received the data produced by the requests for assistance.

#### **Testimony of Mr Marwan Hamade**

6. In December 2014, however, the Prosecution called Mr Marwan Hamade, who was the Lebanese Minister of Telecommunications between 2005 and 2008, to testify as a witness. On 10 and 11 December 2014, Defence counsel questioned him about the legal framework and the mechanism for processing UNIIC requests for assistance for telephone related data.<sup>11</sup> He provided some evidence related to these procedures.

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<sup>7</sup> Decision, para. 5. According to the Prosecution, call sequence tables are collections of relevant portions of call data business records maintained by the three Lebanese communication service providers; *see* F1831, Prosecution Motion for the Admission of Red Network-Related Call Sequence Tables and Related Statement, 28 January 2015, para. 2.

<sup>8</sup> Decision, para. 5.

<sup>9</sup> Decision, para. 6.

<sup>10</sup> Decision, paras 9 and 11.

<sup>11</sup> Application, paras 6 and 22.

**Motion for reconsideration filed 22 January 2015 - submissions**

7. On 22 January 2015, arguing that the cross-examination of Mr Marwan Hamade had resulted in a material change in circumstances, counsel for Mr Oneissi requested that the Trial Chamber reconsider its decision of 7 November 2014. Mr Hamade's evidence had, according to Defence counsel, revealed the following seven points;<sup>12</sup> (paraphrased as)

- (i) in August 2005 he had instructed the Ministry of Telecommunications to fully cooperate with the UNIIC, thereby lifting an existing 'ban',
- (ii) his Ministry had direct or indirect authority over the two telecommunications providers,
- (iii) the Lebanese authorities had provided the UNIIC and the Special Tribunal's Prosecutor with telecommunications data in response to requests for assistance,
- (iv) acting in accordance with his instructions, based on the UNIIC's warrants and requests for assistance, the companies had executed the requests themselves,
- (v) controversy, several times, caused the cessation of the transfer of information to the UNIIC and the Prosecution,
- (vi) Lebanese legal experts offer differing opinions as to whether this data transfer accorded with Lebanese law, and
- (vii) not all relevant documents have been disclosed.

Reconsideration was therefore necessary to avoid a serious injustice with regard to the non-disclosure of the 38 requests for assistance.

8. Defence counsel also requested the Trial Chamber to order the Prosecution (i) to disclose to the Defence all the warrants and requests for assistance related to telecommunications data and (ii) to provide, for each call sequence table, details of the source(s) used to produce it including requests for assistance and responses.<sup>13</sup>

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<sup>12</sup> Application, para. 22.

<sup>13</sup> Application, paras. 3 (b), 34, 37 (b).

9. The Prosecution opposed the motion, both procedurally and substantively.<sup>14</sup> Procedurally, it argued, the motion was invalidly filed before the Trial Chamber without first having obtained the Presiding Judge's leave to do so, as required by Rule 140.<sup>15</sup>

10. Substantively, Defence counsel had not demonstrated that their cross-examination of Mr Hamade caused any change of circumstances which would require reconsideration of the decision, nor shown that this was necessary to avoid an injustice. Moreover, it had already disclosed the requests for assistance relevant to the telecommunications evidence at trial. The requests for assistance sought related to other non-trial related telecommunications data; the documents were therefore not material to Defence preparations for trial.<sup>16</sup> The motion for reconsideration, however, also sought an order for disclosure unrelated to the decision, seeking disclosure of the sources used to compile call sequence tables to be used at trial. Defence counsel had not raised this issue with the Prosecution before including it in its motion, and in any event, it was moot as the Prosecution had disclosed the relevant material for the so-called 'green', 'red', 'yellow' and 'blue' networks of telephones, and intended to disclose the material relevant to the 'purple' telephones.<sup>17</sup> Moreover, the true number of undisclosed requests for assistance was 33, not 38.<sup>18</sup>

### **Oral submissions**

11. On 3 March 2015, the Trial Chamber heard oral submissions in a court session. The Prosecution reiterated that it had already disclosed the source data for the call sequence tables thus far proposed for admission into evidence, and intended to disclose the data for the remaining tables. Counsel for Mr Oneissi then withdrew their request for this new order.<sup>19</sup>

12. Counsel for Mr Oneissi argued that, to obtain the data, the Prosecution sometimes went to the Lebanese authorities and sometimes directly to relevant companies. Normally, in criminal law the Defence could access the legal instruments used to obtain information to be used against an Accused person. The Defence needed to 'appraise the reliability, the viability of the material' and 'shouldn't

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<sup>14</sup> 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.

<sup>15</sup> Prosecution response, paras 2 and 5.

<sup>16</sup> Prosecution response, para. 3.

<sup>17</sup> Prosecution response, paras 4 and 12-14.

<sup>18</sup> Transcript of hearing, T. 123, 3 March 2015, p. 57.

<sup>19</sup> Transcript of hearing, T. 123, 3 March 2015, pp. 54-55.

have our hands tied by something that's been preselected by the Prosecution'. They need to know what precautions the Prosecution took 'to ensure that the data is properly reliable'.<sup>20</sup> The Prosecution maintained its objection to disclosure of the requests for assistance related to telephone data that will not be used as evidence at trial.<sup>21</sup>

### **Granting of leave to reconsider the decision**

13. In relation to the procedural issue of the filing of the motion, both the Prosecution—in its response filed on 9 February 2015<sup>22</sup>—and the Trial Chamber, in a court session on 26 February 2015,<sup>23</sup> pointed out to counsel for Mr Oneissi that the request for reconsideration had been invalidly filed directly before the Trial Chamber without first obtaining the Presiding Judge's leave, as Rule 140 requires. Counsel informed the Trial Chamber that this was 'an oversight' and then, the following day rectified the omission by refiled a copy-pasted version of the motion for reconsideration before the Presiding Judge, but, additionally seeking leave to reconsider the decision.<sup>24</sup> On 5 March 2015, the Presiding Judge granted the necessary leave for the Trial Chamber to reconsider its decision.<sup>25</sup> The Trial Chamber will therefore consider the motion for reconsideration filed on 27 February 2015 as replacing that filed on 22 January 2015.

### **DISCUSSION**

14. The motion for reconsideration asked the Trial Chamber both to reconsider its decision, but additionally, to order the disclosure of certain call sequence table data.<sup>26</sup> As Defence counsel have now withdrawn their request for this order, it is no longer before the Trial Chamber and it will not be considered.

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<sup>20</sup> Transcript of hearing, T. 123, 3 March 2015, pp. 55-56.

<sup>21</sup> Transcript of hearing, T. 123, 3 March 2015, pp. 2-3 and 50-59.

<sup>22</sup> Prosecution response, paras 2-3.

<sup>23</sup> Transcript of hearing, T. 121, 26 February 2015, p. 3.

<sup>24</sup> Transcript of hearing, T. 121, 26 February 2015, pp. 2-3; F1868, Request Seeking Leave for Reconsideration of the Decision of 7 November 2014 and Request for Reconsideration and for Disclosure of all Requests for Assistance relating to Telecom Data, 27 February 2015.

<sup>25</sup> F1872, 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, 5 March 2015.

<sup>26</sup> Application, paras 3 (b), 34, 37 (b).

15. A Chamber may, under Rule 140, ‘*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 Appeals Chamber has emphasised that reconsideration is exceptional and that the reference to an *actual* injustice ensures that the Rule will not be used as ‘an ordinary remedy’ to redress ‘imperfections in a decision or to circumvent the unfavourable consequences of a ruling’.<sup>27</sup> The party seeking reconsideration must show an injustice that ‘involves prejudice’ and is ‘demonstrated on specific grounds’.<sup>28</sup> If prejudice or ‘an injustice’ is shown, reconsideration may be granted on grounds that include an error of law, abuse of discretion, or the existence of new facts or a material change in circumstances.<sup>29</sup>

16. The original motion requesting the disclosure of the requests for assistance—filed on 25 September 2014<sup>30</sup>—did not explicitly argue that Defence counsel intended to challenge the legality of how the Prosecution obtained the telecommunications data that it intends to use as evidence in the trial.<sup>31</sup> The motion only obliquely referred to their need to ‘verify’ whether the data had been obtained ‘according to legal requirements’ under the Special Tribunal’s Statute and Rules, and to documents that may be ‘subject to protection of privacy law’.<sup>32</sup> Counsel, however, have now made it clear that they intend to mount a challenge to the legality of the evidence and, based upon Mr Hamade’s evidence, to do so they need to understand the ‘full panoramic view’ of the telecommunications data that the Prosecution requested and received from Lebanon.<sup>33</sup>

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<sup>27</sup> STL-11-01/PT/AC/R176bis, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, F0325, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012 (Applicable Law Reconsideration Decision), paras 22-23. *See also* STL-11-01/PT/TC, F0320, Decision on Reconsideration of the Trial *In Absentia* Decision, 11 July 2012, para. 7.

<sup>28</sup> Applicable Law Reconsideration Decision, paras 24-25. *See also*, STL-11-01/PT/AC, F1258, Decision on Request by Counsel for Messrs Badreddine and Oneissi for Reconsideration of the Appeals Chamber’s Decision of 25 October 2013, 10 December 2013, para. 10.

<sup>29</sup> Applicable Law Reconsideration Decision, para. 25; F1608, Corrected version of “Decision on Merhi Defence Motion for Reconsideration of Decision of 22 May 2014 on Alleged Defects in the Form of the Indictment” of 3 July 2014, 21 August 2014, para. 8.

<sup>30</sup> F1677, Request for the Disclosure of Requests for Assistance, 25 September 2014.

<sup>31</sup> F1872, 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, 5 March 2015, para. 9.

<sup>32</sup> Oneissi motion of 25 September 2014, paras 18-19.

<sup>33</sup> Application, paras 20, 25; Transcript of hearing, T. 123, 3 March 2015, pp 55-56.

17. The relevant legal test here is whether—based on the existence of new facts, or a material change in circumstances—the Defence has demonstrated on specific grounds that leaving the decision standing would show an injustice involving prejudice.

18. The Trial Chamber is satisfied that the application has revealed some new facts, namely, the specific information in Mr Hamade’s testimony as to how the UNIIC and the Prosecution generally obtained the telecommunications data. This information, when combined with Defence counsel’s now explicitly stated intention to challenge the legality of how the Prosecution obtained the telecommunications data, and hence its admissibility as evidence in the case, is a material change in circumstances. The Defence is entitled to access to the information necessary to frame their arguments for the exclusion of the evidence. Having access to the requests for information that resulted in the data being provided to the Prosecution may assist Defence counsel in framing their application.

19. The Trial Chamber does, nevertheless, accept that the Prosecution’s submissions—arguing that these requests for assistance are not material to Defence preparations for trial under Rule 110 (B), because the data will not be evidence at trial—have some merit. The Prosecution’s interpretation may be literally correct if the Rule is construed in its narrowest sense by confining its application strictly to evidence that will be used at trial. The Trial Chamber, however, has to take a broader view of the Rule’s application and ensure that its stricter application will not cause an injustice to Defence preparations for trial.

20. The telecommunications data goes to the heart of the Prosecution’s case against the five Accused, and the Trial Chamber must ensure that the Defence may properly challenge its admission into evidence. The information in the undisclosed requests for assistance may thus—in this wider sense under Rule 110 (B)—be material to and assist Defence preparations for trial. The Trial Chamber will therefore, in the light of the new facts, interpret the Rule to include providing the material necessary to mount a challenge to the admissibility of evidence, even if those documents are not themselves intended for use as evidence at trial. On this basis, the Trial Chamber will allow the motion and reconsider its decision not to order the Prosecution to disclose the documents to Defence counsel.

21. Having now reconsidered the decision—for the reasons set out above—and in view of the new facts and the change in material circumstances, the Trial Chamber is satisfied that—to avoid an



injustice—the decision should not be allowed to stand. The Trial Chamber will therefore reverse its decision and order the Prosecution to disclose any so far undisclosed requests for assistance referred to in the annexes to the Defence motion filed on 25 September 2014—that is, either 33, or 38, documents.

### **Filing of requests for reconsideration**

22. As a procedural point, the Trial Chamber reminds the Parties to follow the bifurcated procedures specified in Rule 140 for seeking reconsideration of a decision. The Rule exists for the reasons pointed out in the Presiding Judge’s decision.<sup>34</sup> The Parties are also directed to ensure that future requests for reconsideration should not include requests for new (unrelated) orders.

### **DISPOSITION**

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

**RECONSIDERS** its decision of 7 November 2014; and

**ORDERS** the Prosecution to disclose any undisclosed requests for assistance remaining from those referred to in the annexes to ‘Request for the Disclosure of Requests for Assistance’ filed 25 September 2014.

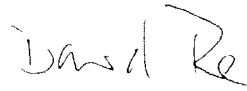
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<sup>34</sup> F1872, Decision Granting Leave for the Trial Chamber to Reconsider its ‘Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance’ of 7 November 2014, 5 March 2015, paras 7-8.

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

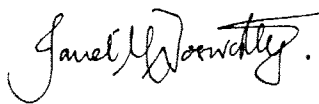
Leidschendam,  
 The Netherlands

6 March 2015



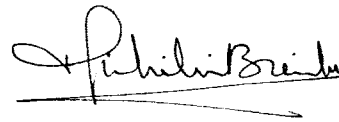

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Judge David Re, Presiding




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Judge Janet Nosworthy




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Judge Micheline Braidy

