

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: 12 July 2016

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

Public Redacted Version of 'DECISION ON ONEISSI DEFENCE MOTION FOR DISCLOSURE OF CALL DATA RECORDS AND SMS CONTENT' of 12 July 2016

Office of the Prosecutor:

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

Legal Representatives of**Participating Victims:**

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

Counsel for Mr Salim Jamil Ayyash:

Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair

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 & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaël Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. Sometime after the completion of a witness's in-court testimony,¹ counsel for the Accused, Mr Hussein Hassan Oneissi asked the Prosecution to disclose further telecommunications information. This comprises call data records from 2007 to 2010 for 14 telephone numbers attributed to eleven identified people, and the short message service (SMS) content from 2005 to 2010 for eleven of these numbers. These relate, according to the Defence, to the witness's testimony. The Prosecution refused the disclosure request. Defence counsel then moved the Trial Chamber to order the disclosure.² The Prosecution, however, opposed the motion, arguing that it was untimely and that the Defence could not demonstrate the materiality of its request to its preparations for trial.³

2. In 2013 and 2014, the Trial Chamber decided two similar requests by the Defence of Mr Oneissi seeking access to call data records and SMS content of specified numbers. The same principles are applicable here,⁴ and, notwithstanding the lateness of the request, the Trial Chamber will order disclosure of the call data records sought, and limited disclosure of the SMS content—but confined to contacts between the eleven specified numbers.

SUBMISSIONS

Defence submissions

3. Counsel for Mr Oneissi submitted that the information sought is material to the preparation of their defence case while they investigate individuals linked to the witness and others, including a family member.⁵ Telephone data between 2007 and 2010 is relevant because the witness was interviewed by the Lebanese authorities, the United Nations International Independent Investigation Commission (UNIIC) and the Prosecution, during

¹ The witness [REDACTED] was cross-examined by counsel for Mr Oneissi [REDACTED].

² STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, F2486, Oneissi Defence Motion for the Disclosure of Call Data Records and SMS Content, 10 March 2016, confidential with confidential annexes. Twelve confidential annexes were attached to the motion including the Oneissi Defence's request to the Prosecution for the same information, the Prosecution's reply and charts of telephone contacts of the eleven people specified in the motion.

³ F2517, Prosecution Response to Oneissi Defence Motion for the Disclosure of Call Data Records and SMS Content, 23 March 2016, confidential. Replies and sur-replies were also filed; F2535, Oneissi Defence Reply to the Prosecution Response to Oneissi Defence Motion for the Disclosure of Call Data Records and SMS Content, 4 April 2016, confidential; and F2543, Prosecution Sur-Reply to the "Oneissi Defence Reply to the Prosecution Response to Oneissi Defence Motion for the Disclosure of Call Data Records and SMS Content", 11 April 2016, confidential.

⁴ STL-11-01/PT/TC F1252, Decision on call data records and disclosure to Defence (on remand from Appeals Chamber), 4 December 2013; STL-11-01/T/TC F1645, Decision on disclosure of call data records and SMS content for four telephones, 20 August 2014.

⁵ [REDACTED]

this period, in relation to matters pleaded in the consolidated indictment.⁶ The Defence seeks to analyse these records for ‘a better understanding of the external elements’ which may have influenced the witness in parts of his evidence.⁷ The Oneissi Defence ‘expects’ that the analysis may produce results that would assist Defence preparations.⁸

Prosecution’s submissions

4. The Prosecution countered, arguing that the Defence has the communications evidence showing contacts between the witness and the other eleven, and communications between the eleven until 2007, the subscriber database and other evidence relevant to the attribution of telephone numbers to them. Further, Rule 150 (J) of the Special Tribunal’s Rules of Procedure and Evidence requires the cross-examining party to put a contradicting case to the witness, but counsel for Mr Oneissi had not done this.⁹ Nor did Defence counsel offer any justification for not requesting disclosure of the same material before the cross-examination of the witness, or for not putting the nature of their case to him.

5. Moreover, counsel for Mr Oneissi did not demonstrate, under Rule 110 (B), the materiality of the data sought.¹⁰ The Oneissi Defence did not explain the materiality of the entirety of the call data records and SMS content from 2007 to 2010 and from 2005 to 2010 respectively, which include thousands of contacts of these eleven individuals with persons other than the witness, his associates or relatives, or each other. The Oneissi Defence did not offer any basis to consider that access to the information for the relevant years would support any inference that they influenced the witness’s evidence. In any case, if disclosure is granted, it should be limited to communications between the eleven individuals. Additionally, the Prosecution would ask the Lebanese Internal Security Forces (ISF) to examine relevant call data records¹¹ if the motion is granted.

Replies

6. In reply, counsel for Mr Oneissi argued that Rule 150 (J) is extraneous and irrelevant to the determination of the disclosure dispute. The witness’s oral testimony called for further

⁶ [REDACTED]

⁷ [REDACTED], Oneissi motion, para. 53.

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ Rule 110 (B) of the Special Tribunal’s Rules of Procedure and Evidence obliges the Prosecutor to, 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.

¹¹ [REDACTED]

investigation into these telephone contacts, which may prompt particular lines of cross-examinations with upcoming witnesses, lead to calling witnesses or recalling the witness. However, speculation on his recall is premature. In a sur-reply, the Prosecution moved the Trial Chamber to disregard the supplementary submissions on materiality in the Oneissi reply; the fact that the witness was extensively confronted by the Oneissi Defence on his contacts¹² ‘belies the claim that this information is new’.

APPLICABLE LAW

7. The Trial Chamber, in line with the Appeals Chamber’s interpretation of Rule 110 (B), has held 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.’¹³ The Appeals Chamber acknowledged that ‘preparation is a broad concept’ and that relevant items, in this context, need not be ‘directly linked to exonerating or incriminating evidence’ or ‘related to the Prosecution’s case-in-chief’.¹⁴

8. The Prosecution must make the initial determination of materiality of evidence within its possession and, if disputed, the Defence must specifically identify evidence material to the preparation of the defence that is being withheld by the Prosecution.¹⁵ ‘This international case law has also consistently held that ‘fishing expeditions’ are not permitted and that ‘Rules

¹² [REDACTED], *see* Prosecution sur-reply, para. 10.

¹³ STL-11-01/T/TC, F1252, Decision on Call Data Records and Disclosure to Defence (on remand from the Appeals Chamber), 4 December 2013, para. 16; referring to 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’) para. 21. On demonstrating materiality, *see*: ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73.11, Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations, Public Redacted Version, 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; *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; 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; ICC, *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.

¹⁴ Appeals Chamber Decision, para. 22, referring to *Karadžić* Decision, para. 9; *Lubanga* Decision, paras 77-78; First *Karemera* Decision, para. 14; *Bagosora* Decision, paras 8-9.

¹⁵ ICTY, *Prosecutor v. Delalić*, IT-96-21-T, Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence, 26 September 1996, para. 11; SCSL, *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, para. 28.

similar to Rule 110 (B) do not provide for an unfettered right to inspection triggered by unsubstantiated claims of relevance.¹⁶

DISCUSSION

9. The issue for determination is whether the data is material to Defence preparations under Rule 110 (B).

10. Counsel for Mr Oneissi extensively cross-examined the witness including on telephone contacts with nine of the eleven persons. The Trial Chamber recognizes that the request for the data is late and probably should have been made before the witness testified. The Trial Chamber also agrees with the Prosecution that Rule 150 (J) is applicable and the Defence could have requested the same data before the cross-examination of the witness in order to put their case to him.

11. However, the Trial Chamber accepts that some matters arose in the witness's testimony that may justify further investigation, and, if necessary, the recall of the witness. But this does not mean that all telecommunications data sought in the motion is material to the preparation of the Defence under Rule 110 (B).

12. The Trial Chamber is satisfied that the disclosure of the call data records of the fourteen telephone numbers attributed to eleven individuals between 2007 and 2010 may offer further leads to the Oneissi Defence on potentially important aspects of its case. These call data records will allow analysis of telecommunications data of the eleven users for the time period when the witness provided his statements to the UNIHC and to the Prosecution.¹⁷ The Trial Chamber is persuaded of the relevance of the request and that it is material to the preparation of the defence. The Prosecution is therefore ordered to disclose the requested call data records to the Defence.

13. The Trial Chamber, on the other hand, is not convinced that access to the entirety of the SMS content for the telephone numbers is material to Defence preparations for trial. A general assertion that the entirety of the information *may* be relevant for the preparation of defence does not demonstrate the required *prima facie* materiality. For the same reasons set

¹⁶ Appeals Chamber Decision, para. 22; *See also: Karadžić* Decision, para. 8; ICTR, *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, para.11.

¹⁷ [REDACTED]

out in the Trial Chamber's decision of 20 August 2014,¹⁸ the request to access *all* SMS content is too broad. The disclosure of *all* SMS content would lead to unjustified intrusion into private communications of unrelated third parties. Therefore, the request for disclosure of *all* of the SMS content of the eleven telephones is dismissed.

14. The Trial Chamber is persuaded that a limited disclosure of the SMS content of the eleven telephones is material to preparation of the Defence case. Analysing the SMS communications *between the eleven telephones*, for the reasons argued by the Oneissi Defence, may offer further information related to the witness's evidence and is hence material to Defence preparations. The Prosecution is therefore ordered to disclose this limited SMS content to counsel for Mr Oneissi.

CONFIDENTIALITY

15. 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 were submitted confidentially. The Trial Chamber orders the Oneissi Defence and the Prosecution to file public redacted version of their filings.

DISPOSITION

FOR THESE REASONS, the Trial Chamber, under Rule 110 (B) of the Special Tribunal's Rules of Procedure and Evidence:

ORDERS the Prosecution to disclose to the Defence of Mr Hussein Hassan Oneissi:

- (1) the call data records for the fourteen telephone numbers specified at paragraphs 56 (i) and 10 (i) (l) of the Defence motion for the years 2007 to 2010; and
- (2) the SMS content of communications between the eleven telephone numbers specified at paragraph 56 (ii) of the Defence motion for the years 2005 to 2010;

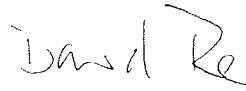
DISMISSES the request in the motion seeking access to *all* SMS content between the eleven telephones and other telephones (e.g. third parties); and

¹⁸ At para 12.

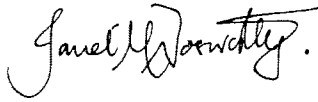
ORDERS the Parties to file public redacted version of their filings.

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

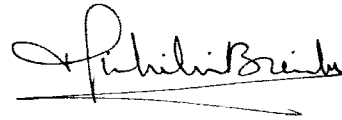
Leidschendam,
The Netherlands
12 July 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

