SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No:	**STL-11-01/T/AC/AR126.9**
Before:	**Judge Ivana Hrdličková, Presiding** **Judge Ralph Riachy** **Judge David Baragwanath** **Judge Afif Chamseddine** **Judge Daniel David Ntanda Nsereko**
Registrar:	**Mr Daryl Mundis**
Date:	**28 July 2015**
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 APPEAL BY COUNSEL FOR MR ONEISSI AGAINST THE TRIAL CHAMBER'S DECISION ON THE LEGALITY OF THE TRANSFER OF CALL DATA RECORDS

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux

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 Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yussef Hassan & Mr Philippe Larochelle

Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Guénaël Mettraux & Mr Geoffrey Roberts

HEADNOTE*

Defence Counsel for the five Accused in this case have challenged the admission of call sequence tables ("CSTs") that the Prosecution seeks to admit into evidence. The Prosecution created the CSTs using the call data records ("CDRs") pertaining to every mobile phone call and text message in Lebanon between 2003 and 2010. The CDRs were transferred from Lebanese telecommunications providers to the United Nations International Independent Investigation Commission ("UNIIIC") and the Tribunal's Prosecution. The CDRs are so-called metadata; that is, they do not contain the content of any communications but rather provide information about the communications, such as the source and destination phone numbers, the type of communication, the date and time of the calls and text messages, the duration of the calls and other relevant information. The CSTs present in an accessible form the metadata/CDRs of specific mobile phones that the Prosecution alleges belonged to the Accused.

In its Decision, the Trial Chamber did not rule on the admissibility of the CSTs, deferring that matter to such time that the Prosecutor has presented witness testimony about the collection, retrieval and storage of the CDRs and the production of the CSTs. However, it held that while the collection of telephone metadata may constitute a restriction on the right to privacy, the transfer of the CDRs was neither unlawful nor arbitrary. This was because Security Council Resolutions 1595 and 1757 establishing the UNIIIC and the Tribunal provided the necessary legal authorization for the transfer. Moreover, the transfer was necessary and proportionate to the legitimate aim of investigating the attack of 14 February 2005.

The Trial Chamber certified two issues for appeal under Rule 126(C). They are: 1) did the Trial Chamber err in concluding that the UNIIIC and the Prosecutor could legally request and obtain CDRs from Lebanese telecommunications companies without either Lebanese or international judicial authorization?; and 2) did the Trial Chamber err in concluding that the absence of judicial control does not violate any international human rights standard on the right to privacy, justifying the exclusion of the call data records under Rule 162?

Counsel for Mr Oneissi filed an appeal, arguing that the Trial Chamber erred in concluding that the CDRs had been lawfully disclosed to the UNIIIC and the Prosecution; that the transfer of the CDRs should have been authorized by an independent (judicial) authority, be it Lebanese or international, and that the absence of such controls resulted in a violation of international human rights standards, in particular the right to privacy, which warranted exclusion of the evidence under Rule 162.

The Appeals Chamber dismisses the appeal with respect to both the First and Second Certified Issues.

Under the First Certified Issue, the Appeals Chamber holds that the Trial Chamber was correct in finding that the UNIIIC and the Prosecutor could legally request and obtain the CDRs without judicial authorization because such authorization was not required under their respective governing legal instruments. The Appeals Chamber notes that the Security Council Resolutions establishing the UNIIIC and the Tribunal did not demonstrate any intention on the part of the Security Council to subject the UNIIIC or the Prosecution to the jurisdiction of judicial or other

* This Headnote does not constitute part of the decision of the Appeals Chamber. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.

authorities in their investigative endeavours. The Lebanese government requested the establishment of both the UNIIIC and the Tribunal precisely to create independent external organs to conduct investigations into the attack of 14 February 2005 and others of a similar nature without interference.

With respect to the Second Certified Issue, the Appeal Chamber holds that there is a compelling case as to the CDRs protection by international standards on the right to privacy. However, it concludes that the transfer of the CDRs in the absence of judicial control did not violate the right to privacy in this case because their transfer was provided for by law, necessary and proportionate. The Appeals Chamber notes that judicial authorization is but one means of ensuring that restrictions on the right to privacy remain proportionate. In this respect, the precise requirements necessary to adequately safeguard human rights depend on the circumstances of each case.

Here, the collection of the CDRs was lawfully carried out, not by any State, but by Lebanese companies—which were also responsible for the storage of the CDRs—for billing and customer management purposes. The CDRs were not collected and stored for the purpose of investigating future indeterminate and unspecified criminal conduct. Instead, the transfer of the CDRs took place for the investigation of concrete and specific crimes whose execution had already taken place. Furthermore, the CDRs are not accessible to any authority or State who may have cause to use such information for a variety of ends which are not generally disclosed to the wider public. They are strictly confined to a limited number of individuals and used only for the purpose of determining who carries responsibility for the attack of 14 February 2015 and others of a similar nature. As a result, the absence of judicial control did not violate any international human rights standards, justifying the exclusion of the CDRs under Rule 162.

Judge Riachy concurs with the result but—as regards the Second Certified Issue—for different reasons. Judge Baragwanath dissents with respect to the reasoning and result of the decision.

INTRODUCTION

1. Counsel for Mr Oneissi have filed an appeal[1] against the Trial Chamber's "Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution".[2] In the Impugned Decision, the Trial Chamber made a preliminary ruling on five requests from the Prosecutor seeking the admission of evidence pertaining to the alleged use of telephone networks by the Accused in this case. It held that this evidence did not fall under Rule 162 of the Rules of Procedure and Evidence ("Rules"),[3] which requires the exclusion of evidence that was "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings […][,] [i]n particular, […] if it has been obtained in violation of international standards of human rights […]".

2. Counsel for Mr Oneissi seek to have the Impugned Decision set aside and for this Chamber to order the exclusion of the material that the Prosecution ultimately seeks to admit into evidence.[4] However, we hold that neither Lebanese nor international judicial authorization was required for the material to be transferred to the United Nations Independent Investigation Commission ("UNIIIC") or the Office of the Prosecutor ("Prosecution"). Further, we find, Judge Riachy concurring in the result, but for different reasons, that in the specific circumstances of this case the absence of judicial control over the transfer of the material did not violate international human rights standards. Judge Baragwanath dissents with respect to the reasoning and result of this decision in its entirety.

BACKGROUND

3. The present appeal concerns call data records ("CDRs") with respect to every mobile phone call made and text message sent in Lebanon between 2003 and 2010.[5] As discussed by the Trial Chamber, the CDRs are so-called metadata; that is they do not contain the content of any

[1] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.9, F0003, Appeal of the "Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution", with Public and Confidential Annexes, 3 June 2015 ("Appeal").
[2] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution, 6 May 2015 ("Impugned Decision").
[3] Impugned Decision, Disposition, p. 36.
[4] Appeal, paras 105, 109.
[5] *Id.* at paras 8, 13.

communications[6] but rather provide information about the communications, such as the source and destination phone number, the type of communication (phone call or text message), the date and time of phone calls and text messages, the duration of phone calls, the IMEI number[7] of the hand set relevant to the communications, and the cell sectors[8] engaged at the beginning and end of a call.[9]

4. The CDRs were obtained by the UNIIIC, and later by the Prosecution, either directly from the three telephone communications providers that operate in Lebanon (Ogero, MTC and Alfa)[10] or pursuant to Requests for Assistance through the Lebanese authorities.[11]

5. From the raw data comprising the CDRs, the Prosecution produced what it refers to as call sequence tables ("CSTs"), which allow for the presentation and analysis of the data.[12] In five separate motions filed before the Trial Chamber, the Prosecution sought the admission into evidence of the CSTs pertaining to five different groups of mobile telephones—the Prosecution refers to them as the "red", "green", "purple", "blue" and "yellow" telephone networks.[13] The Prosecution alleges that these telephones were used by the Accused and others in the attack of 14 February 2005 from which the charges in the consolidated indictment arise.

6. Counsel for each of the Accused opposed the admission of the CSTs, on different grounds. Counsel for Mr Oneissi, in particular, argued before the Trial Chamber that the CDRs were collected, used and retained illegally in violation of international human rights standards; that the

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[6] We note that the CDRs, as defined in the Impugned Decision, did not include the content of the communications (*see* Impugned Decision, para. 2.)
[7] The International Mobile Station Equipment Identity ("IMEI") is a unique number that every mobile phone handset possesses (*see* Impugned Decision, fn. 13 (citing STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 9, fn. 28)).
[8] Impugned Decision, para. 2.
[9] Appeal, para. 14; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.9, F0006, Prosecution Response to the Oneissi Defence "Appeal of the 'Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution'", 15 June 2015 ("Response"), para. 7.
[10] These Lebanese telephone communications providers generated and stored the CDRs in the ordinary course of their business for billing and customer management purposes.
[11] *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1831, Prosecution Motion for the Admission of Red Network-Related Call Sequence Tables and Related Statements, 28 January 2015 ("Red Network Motion"), para. 28; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1832, Prosecution Motion for the Admission of Green Network Related Call Sequence Tables and Related Statement, 29 January 2015, para. 25; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1836, Prosecution Motion for the Admission of Purple Phone Related Call Sequence Tables, 30 January 2015, para. 29; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1837, Prosecution Motion for the Admission of Blue Network-Related Phone Call Sequence Tables and Related Statements, 2 February 2015, para. 25; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1840, Prosecution Motion for the Admission of Yellow Phone Related Call Sequence Tables and Related Statement, 3 February 2015, para. 26.
[12] Red Network Motion, paras 4-5.
[13] *See* above, fn. 11.

admission of the CSTs would damage the integrity of the proceedings; and that they should therefore be excluded from evidence pursuant to Rule 162 of the Rules.[14]

7. In the Impugned Decision, the Trial Chamber did not make an ultimate finding on the admissibility of the CSTs. This issue was deferred until such time that the Prosecution have called at least one witness to testify as to the collection, retrieval and storage of the CDRs, and the production of the CSTs.[15] However, the Trial Chamber did rule on whether the underlying CDRs were obtained legally by the UNIIIC and the Prosecution.[16] It held that while "the collection of telephone data *may* constitute a restriction on the right to privacy, […] the transfer of the legally-collected call data records to the UNIIIC and the Prosecution was neither unlawful nor arbitrary, [and] no violation of international standards on human rights has occurred".[17] The Trial Chamber stated that the two Security Council resolutions establishing the UNIIIC and the Tribunal provided the necessary legal authorization for the transfer of the CDRs, that the transfer was necessary and legitimate and that transferring the records and limiting access to them was proportionate to the legitimate aim of investigating the attack of 14 February 2005.[18]

8. Following a request by counsel for Mr Oneissi for certification, the Trial Chamber certified the following two issues for appeal:

> Firstly, did the Trial Chamber err in concluding that the Commissioner of the United Nations International Independent Investigation Commission and the Prosecutor of the Special Tribunal for Lebanon could legally request and obtain call data records from Lebanese telecommunications companies Alfa and MTC without either Lebanese or international judicial authorization?
>
> Second, did the Trial Chamber err in concluding that the absence of judicial control does not violate any international human rights standard on the right to privacy, justifying the exclusion of the call data records under Rule 162?[19]

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[14] *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1857, Oneissi Consolidated Response to the Prosecution Motions for the Admission of Call Sequence Tables, 16 February 2015; *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1856, Badreddine Defence Consolidated Response to Five Prosecution Motions for Admission of Call Sequence Tables and Related Statements, 16 February 2015.
[15] Impugned Decision, paras 68, 111-115.
[16] *Id.* at paras 108-110.
[17] *Id.* at para. 108 (emphasis in the original).
[18] *Id.* at para. 109.
[19] STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 20 May 2015, p. 3 (EN). We note that, although the CDRs in this case as defined by the Trial Chamber do not include the content of the communications (Impugned Decision, para. 2), text message content stored by Lebanese telephone communications providers was also transferred to, and is in the possession of, the Prosecution (*see* Impugned Decision, para. 23, fns 155, 160). Because the Trial Chamber defined the CDRs as metadata, we consider that the content of any text messages transferred to the UNIIIC and the Prosecutor is not encompassed by the certified issues. Further, counsel for Mr. Oneissi have not referred to such

9. On 26 May 2015, we granted counsel for Mr Oneissi's request for an extension of time and ordered them to file any appeal by 3 June 2015, at 4 pm.[20] We also granted an extension of the word limit for their appeal.[21] The appeal was filed on 3 June 2015, at 9.47 pm.[22] The Prosecutor filed his response on 15 June 2015.

DISCUSSION

I. Preliminary issues

A. Late filing of appeal

10. We recall our previous finding that counsel for Mr Oneissi filed their appeal late.[23] Despite our order that the appeal be filed no later than 3 June at 4 pm,[24] it was submitted only at 9.47 pm that day. In response to our subsequent order that an explanation be provided to the Chamber,[25] the Defence submitted that "[t]he late submission was the result of an administrative oversight" due to the absence of a team member but that the appeal "was nevertheless filed on 3 June 2015" and "respectfully request[ed] [our] indulgence".[26]

11. Rule 9—which allows a Chamber, *proprio motu* or upon good cause shown, to recognize as validly done any act carried out after the expiration of a time limit—affords us broad discretion in deciding whether to accept or reject a filing that was submitted late.[27] This includes, in the appropriate circumstances, the dismissal of an appeal.[28] However, in these circumstances, we will not adopt that course of action since the delay was short, did not result in any prejudice to the Prosecutor, and the Prosecutor has not raised the matter as a ground for dismissal. Further, the

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material either in their submissions before the Trial Chamber or in their Appeal. We will therefore not consider the matter in the present case.

[20] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/AC/AR126.9, F0002, Order on Request for Extension of Time and Word Limits for Filing of Interlocutory Appeal, 26 May 2015 ("Extension Order").

[21] Extension Order.

[22] *See* E-Mail from CMSS to Appeals Chamber Legal Officer, 4 June 2015.

[23] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.9, F0004, Order on Interlocutory Appeal, 4 June 2015 ("Order on Filing"), para. 1.

[24] Extension Order, Disposition.

[25] Order on Filing, Disposition.

[26] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/AC/AR126.9, F0005, Defence for Hussein Hassan Oneissi Response to "Order on Interlocutory Appeal" of 4 June 2015, 5 June 2015, paras 3-5.

[27] *See also* Art. 10 (2), Practice Direction on Filing of Documents Before the Special Tribunal for Lebanon, STL/PD/2010/01/Rev.2, 14 June 2013.

[28] *See* ICTY, *Prosecutor v. Haxhiu*, IT-04-84-R77.5-A, Decision on Admissibility of Notice of Appeal Against Trial Judgement, 4 September 2008.

issues in this appeal are of significant importance, as they go to the very heart of the case presented by the Prosecutor.

12. However, we stress that "procedural time-limits are to be respected, and that they are indispensable to the proper functioning of the Tribunal and the fulfilment of its mission to do justice".[29] As we have held previously in a similar context, "[w]e will not further tolerate violations which run counter to the Tribunal's mandate to administer justice fairly, efficiently and expeditiously."[30] In this context, we are not satisfied by counsel for Mr Oneissi's explanation for the late filing based on the absence of a team member. We note that it is counsel who carry ultimate responsibility for the case, which includes compliance with the applicable time limits, and we recall their professional obligation to "be considerate of time constraints which they have agreed upon or which have been imposed by the Tribunal".[31]

B. Scope of the certified issues

13. In his Response, the Prosecutor contends that the submissions by counsel for Mr Oneissi address matters that are above and beyond those certified for appeal by the Trial Chamber, in particular with respect to "whether CDRs fall within the right to privacy, the gathering and retention of the CDRs by the Lebanese telecommunications companies, and the necessity and proportionality of the collection of the CDRs by the UNIIIC and the OTP".[32] For that reason, the Prosecutor did not address them in his Response.[33] Nevertheless, he requests to be heard on these matters should the Appeals Chamber consider these issues.[34]

14. As we have consistently held, where the Appeals Chamber is seized of an interlocutory appeal that requires prior certification, our jurisdiction is limited to those issues that have in fact been certified.[35] In the present case, there are two such issues: 1) whether the UNIIIC or the

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[29] ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 46 (referring to the ICTR).
[30] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.2, F0007, Decision on Defence Appeals Against Trial Chamber's "Decision on Alleged Defects in the Form of the Amended Indictment", 5 August 2013 ("Indictment Appeal Decision"), para. 15.
[31] Art. 49, Code of Professional Conduct for Counsel Appearing before the Tribunal, 28 February 2011.
[32] Response, para. 13 (internal citations omitted).
[33] *Id.* at para. 13.
[34] *Id.* at para. 13, fn. 19.
[35] *See* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 ("LRV Appeal Decision"), para. 22; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.6, F0003, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on the Oneissi Defence's Request for Disclosure

Prosecution could legally request and obtain CDRs from Lebanese telecommunications companies without judicial authorization; and 2) whether the absence of judicial control violates international human rights standards on the right to privacy, thereby triggering the CDRs exclusion pursuant to Rule 162.[36]

15. These certified issues make it plain that we are not seized of any matters concerning the collection and retention of CDRs by Lebanese telephone communications providers. That is a different and separate issue than the legality of the transfer of the CDRs to the UNIIIC or the Prosecution without judicial authorization, or any consequences flowing from the absence of such judicial control in light of international human rights standards. There is no discernible link between these certified issues and the conduct of the Lebanese telephone communications providers in collecting and retaining CDRs. We therefore agree with the Prosecutor that these arguments fall outside the scope of the certified issues. We accordingly do not consider them.[37]

16. The same, however, cannot be said with respect to the remainder of the Prosecutor's objections. Indeed, the Trial Chamber's grant of certification cannot be read in the narrow manner as the Prosecutor does. In particular, the second certified issue expressly refers to potential violations of "international human rights standard[s] on the right to privacy" in the transfer of the CDRs. It would be impossible to consider a possible violation of the right to privacy without first determining whether the material in question even implicates that right. Similarly, necessity and proportionality are core factors that must be considered when scrutinizing the acts and conduct of authorities for adherence with international human rights standards, such as the right to privacy. Consequently, we will address arguments both on whether the CDRs fall under the right to privacy and whether any limitation on this right is necessary and proportionate if it is in fact affected.

17. Having held that these issues are properly before the Appeals Chamber and that we will accordingly address them, we must therefore dispose of the Prosecutor's request that he be given a further opportunity to respond.[38]

Regarding a Computer", 12 May 2014, para. 11; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.7, F0013, Decision on Appeal by Counsel for Mr Merhi Against Trial Chamber's "Decision on Trial Management and Reasons for Decision on Joinder", 21 May 2014, paras 13, 16.

[36] *See* above para. 8.

[37] *See* Appeal, paras 21-28.

[38] Response, para. 13, fn. 19.

18. We first recall that a party whose interests stand to be affected by a decision or judgment has the right to be heard before that decision or judgment is rendered.[39] This principle—*audi alteram partem*—is recognized in Lebanon[40] as in all legal systems that adhere to the rule of law. However, whether and to what extent a party chooses to exercise that right is a different question. Here, the Prosecutor identified certain matters which he believed fell outside the scope of the certified issues and therefore our jurisdiction. He then deliberately chose not to respond to them, thus foregoing the opportunity to address their substance in his Response.

19. Whilst the parties have the ultimate say on the content of their filings and their preferred strategy during litigation, they "must present their arguments in a concise and *comprehensive* manner".[41] This applies to responses. In this case, the Prosecutor did not do so. Contrary to what the Prosecutor suggests,[42] it is not proper for any party to be afforded the opportunity—barring exceptional circumstances—to submit a supplemental filing on issues that it has identified but decided not to address.

20. In sum, we hold that it was incumbent upon the Prosecutor to raise any arguments on the right to privacy in relation to the CDRs in his Response. Given his decision not to do so[43] and absent any exceptional circumstances, we deny the Prosecutor's request for a further opportunity to be heard. We note in this regard that in any event, given the outcome of our decision, the Prosecutor does not suffer prejudice.

II. Standard of review

21. The Defence contends that the Trial Chamber committed legal errors that invalidate the Impugned Decision.[44] We have previously adopted the following standard of appellate review applicable to alleged errors of law, informed by the jurisprudence of other international tribunals:

> A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of

[39] STL, *In the matter of El Sayed*, CH/AC/2013/01, Public Redacted Version of Decision on Appeal by the Prosecutor Against Pre-Trial Judge's Decision of 11 January 2013, 28 March 2013, para. 6; LRV Appeal Decision, para. 28, fn. 64.
[40] *See* Art. 372 and Art. 373, Lebanese Code of Civil Procedure.
[41] Indictment Appeal Decision, para. 14 (emphasis added).
[42] Response, para. 13, fn. 19.
[43] We also note that the Prosecutor did not, in his Response, exhaust the applicable word limit, which we had extended to 10,000 words, commensurate with the extension granted to counsel for Mr Oneissi (*see* Extension Order, para. 4).
[44] Appeal, paras 7-8.

> an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law. [...] The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[45]

22. We also recall that "not every error of law leads to a reversal or revision of a decision at first instance".[46]

III. Whether the Trial Chamber erred in concluding that the UNIIIC and the Prosecutor could legally request and obtain CDRs from Lebanese telecommunications companies Alfa and MTC without either Lebanese or international judicial authorization ("First Certified Issue")

23. The Trial Chamber concluded that Security Council Resolutions 1595[47] and 1757,[48] the Tribunal's Statute and Rules, and the Memorandum of Understanding between Lebanon and the UN[49] provided a sufficient legal basis for the transfer of the CDRs.[50] As a result, neither the UNIIIC nor the Prosecution was required to seek judicial authorization from either Lebanese or international authorities.[51] Additionally, with regard to Lebanese authorization, the Trial Chamber found that the Defence had not identified any Lebanese law requiring judicial control over the transfer of telecommunications metadata to the UNIIIC or the Prosecution.[52] In any event, the Trial Chamber also held that, even if such a law existed, Lebanese oversight would undermine the independence and ability of the UNIIIC and the Prosecution in carrying out their investigations and mandates.[53] The Trial Chamber further concluded that international authorization was not possible because the UNIIIC had no judicial competence and the Tribunal could have not performed this role as it was not established until 1 March 2009.[54]

24. In their appeal, counsel for Mr Oneissi submit that the Trial Chamber erred in finding that the interference with the privacy of the Accused and the Lebanese population was neither unlawful

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[45] *See, e.g.,* LRV Appeal Decision, para. 19; *see also* STL, *Prosecutor v. Ayyash et al.,* STL-11-01/PT/AC/AR90.1, F0020, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012 ("Jurisdiction Appeal Decision"), para. 10 (with reference to case-law of the ICTY, ICTR, SCSL and ICC).
[46] LRV Appeal Decision, para. 20.
[47] SC Res. 1595, UN Doc. S/RES/1595 (7 April 2005) ("Resolution 1595").
[48] SC Res. 1757, UN Doc. S/RES/1757 (30 May 2007) ("Resolution 1757").
[49] *See* Letter from the Secretary General to the President of the Security Council, UN Doc. S/2005/393 (16 June 2005), annexing Memorandum of Understanding between the Government of the Republic of Lebanon and the United Nations regarding the Modalities of Cooperation for the International Independent Investigation Commission ("Memorandum of Understanding between Lebanon and the UN").
[50] Impugned Decision, para. 109.
[51] *Id.* at para. 87.
[52] *Id.* at para. 88.
[53] *Id.* at para. 90.
[54] *Id.* at para. 91.

nor arbitrary.[55] This was so regardless of whether the interference stemmed from a misinterpretation of the applicable law or from the absence of a law that was sufficiently accessible, clear and precise.[56] Counsel contend that the transfer of the CDRs should have been subject to effective judicial control and authorized by either a Lebanese or international judge or by an independent body.[57] Counsel further submit that the Tribunal cannot absolve itself of the requirement of judicial control by sheltering behind Security Council Resolutions 1595 and 1757.[58]

25. The Prosecutor responds that the First Certified issue concerns whether the UNIIIC and the Prosecution, in accordance with their respective legal frameworks, were required to seek prior judicial authorization to receive the CDRs.[59] He further submits that counsel for Mr Oneissi have not identified any applicable provision in the legal framework governing the UNIIIC or the Prosecution's collection of evidence that would require judicial authorization and control over the request for and transfer of the CDRs.[60] The Prosecutor argues that neither the UNIIIC nor the Prosecution is bound by any Lebanese law that may apply to such a transfer.[61]

26. At the outset, we agree with the Prosecutor that the First Certified Issue solely concerns the legal framework that governed the UNIIIC and the Prosecution's collection of evidence. This excludes broader considerations of international human rights law, in particular with respect to the right to privacy, which fall under the Second Certified Issue. Without such a distinction, the Trial Chamber's clear separation between the two certified issues would become meaningless.

27. In the context of the UNIIIC, the applicable legal framework included Security Council Resolution 1595 and the Memorandum of Understanding between Lebanon and the UN. The Prosecution's collection of evidence was governed by Security Council Resolution 1757, the Memorandum of Understanding between Lebanon and the Prosecutor,[62] and the Tribunal's Statute and Rules. We must therefore analyse these legal instruments to ascertain whether they contained a

[55] Appeal, para. 8.
[56] *Id.* at para. 9.
[57] *Id.* at paras 8, 34-37, 40-45, 103.
[58] *Id.* at para. 40.
[59] Response, para. 14.
[60] *Id.* at paras 5, 24, 28.
[61] *Id.* at paras 20-24, 27.
[62] Art. 4 of the Memorandum of Understanding between the Government of the Republic of Lebanon and the Office of the Prosecutor of the Special Tribunal of Lebanon regarding the Modalities of Cooperation between them, 5 June 2009 ("Memorandum of Understanding between Lebanon and the Prosecutor").

requirement for the UNIIIC and the Prosecutor, respectively, to seek judicial authorization with respect to their investigative conduct.

28. Security Council Resolution 1595 established the UNIIIC as an "international *independent* commission […] to assist the Lebanese authorities in their investigation" of the attack of 14 February 2005.[63] Under the express terms of the Resolution, the UNIIIC was given "full access to all documentary, testimonial and physical information and evidence in [the Lebanese authorities'] possession" and was vested with the authority to collect "any additional information and evidence, both documentary and physical" pertaining to the attack of 14 February 2005.[64] The Security Council granted these powers to the Commission to ensure its "effectiveness in the discharge of its duties."[65]

29. Likewise, the document annexed to Security Council Resolution 1757, which established the Tribunal with an independent Prosecutor,[66] directed the Lebanese Government to "facilitate access of the Prosecutor and defence counsel to […] relevant documents required for the investigation".[67] Moreover, both the Statute and the Rules empower the Prosecutor to conduct investigations with the cooperation of the Lebanese and other authorities.[68]

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[63] Resolution 1595, para. 1 (emphasis added).

[64] *See* in particular, Resolution 1595, para. 3:

> 3. *Decides* that, to ensure the Commission's effectiveness in the discharge of its duties, the Commission shall:
>
> – Enjoy the full cooperation of the Lebanese authorities, including full access to all documentary, testimonial and physical information and evidence in their possession that the Commission deems relevant to the inquiry;
>
> – Have the authority to collect any additional information and evidence, both documentary and physical, pertaining to this terrorist act, as well as to interview all officials and other persons in Lebanon, that the Commission deems relevant to the inquiry;
>
> – Enjoy freedom of movement throughout the Lebanese territory, including access to all sites and facilities that the Commission deems relevant to the inquiry;
>
> – Be provided with the facilities necessary to perform its functions, and be granted, as well as its premises, staff and equipment, the privileges and immunities to which they are entitled under the Convention on the Privileges and Immunities of the United Nations[.]

[65] *Ibid.*

[66] Art. 11 (2) STL St.

[67] *See*, in particular, Resolution 1757, Annex – Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, Art. 15(1):

> The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.

[68] *See* Resolution 1757, Annex – Statute of the Special Tribunal for Lebanon, Art. 11(5):

> The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Lebanese authorities concerned.

30. Resolutions 1595 and 1757 were supplemented by the Memorandum of Understanding between Lebanon and the UN and the Memorandum of Understanding between Lebanon and the Prosecutor, respectively. Both memoranda underscore the independence of the UNIIIC and the Prosecutor, requiring the Lebanese government to guarantee that they are "free from interference in the conduct of [their] investigations".[69]

31. None of these legal instruments demonstrate any intention on the part of the Security Council to subject the UNIIIC or the Prosecutor to the jurisdiction of any other authority in their investigative endeavours. Had the Security Council intended for either of these bodies to be subject to judicial control in the gathering of evidence (by the Lebanese judiciary or otherwise), it would have reflected such an intention in their constitutive documents. On the contrary, it is clear from the language of the relevant Security Council Resolutions and the Statute that the Security Council sought to exempt both the UNIIIC and the Prosecutor from the routine and complex procedures that would normally apply to the collection of evidence in Lebanon or other jurisdictions. The Rules are also devoid of any provision indicating the contrary.

32. Indeed, it would have defeated the purpose of the Security Council's actions in establishing the UNIIIC and the Tribunal if authorization of another authority, judicial or otherwise, was required before the UNIIIC or the Prosecutor could obtain evidence. The Lebanese government requested the establishment of both the UNIIIC and the Tribunal precisely so as to create independent external organs to conduct the investigations.[70] Requiring Lebanese or other outside involvement in the form of judicial authorization for the collection of evidence is difficult to reconcile with this intent. Undoubtedly, such involvement would have interfered with the conduct of the investigations by the UNIIIC and the Prosecutor.

See Rule 16 (B) STL RPE:

> Where it appears to the Prosecutor that, for the purposes of investigations concerning the Hariri Attack or any other attack that may fall within the Tribunal's jurisdiction under Article 1 of the Statute, it is necessary to question witnesses, search premises, seize documents and other potential evidence, or undertake any other investigative measure in Lebanon, the Prosecutor may request the Lebanese authorities to conduct such measures or request permission to have his staff conduct such measures themselves, or a combination thereof.

See Rule 61 (iii) STL RPE:

> In the conduct of an investigation in relation to the Hariri Attack or any other attack that may fall within the jurisdiction of the Tribunal under Article 1 of the Statute, the Prosecutor may […] seek the assistance of any State authority concerned as well of any relevant international body, including INTERPOL[.]

[69] *See* Art. 3 of the Memorandum of Understanding between Lebanon and the UN and Art. 3 of the Memorandum of Understanding between Lebanon and the Prosecutor.

[70] *See* Letter dated 24 March 2005 from the Secretary General to the President of the Security Council, UN Doc. S/2005/293 (24 March 2005), annexing Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, para. 52.

33. With respect to the Prosecutor, requiring judicial authorization for his investigations would also undermine his independence as a separate organ of the Tribunal. Article 11 of the Statute provides that the Prosecutor "shall not seek or receive instructions from any Government or from any other source".[71] The judiciary of a State is part and parcel of its "Government". While the Prosecutor may, no doubt, solicit assistance or cooperation from the Lebanese government, this is not the same as seeking and receiving instructions as a matter of obligation.

34. Furthermore, neither the UNIIIC nor the Prosecutor was bound by any Lebanese law regulating the transfer of CDRs. Security Council Resolution 1595 directed the UNIIIC to "determine procedures for carrying out its investigation, taking into account the Lebanese law and judicial procedures".[72] However, a requirement to take Lebanese law into account is not synonymous with being bound by Lebanese law. Any provision in Lebanese law requiring judicial control over telecommunications metadata could have guided the UNIIIC in its pursuit of appropriate investigative procedures, but it would not constitute part of the legal framework that the UNIIIC was obliged to follow.[73]

35. In this context, we note that Article 2 of the Memorandum of Understanding between Lebanon and the UN provided for Lebanese judicial officials to advise the UNIIIC on the "appropriate procedures for the collection of evidence in accordance with the Lebanese Law".[74] However, while this article gave the UNIIIC the discretion to seek assistance from the Lebanese judiciary, it did not oblige it to do so. Similarly, the Memorandum of Understanding between Lebanon and the Prosecutor provided for the possibility of the Prosecutor seeking assistance from the Lebanese judicial authorities,[75] but did not mandate such a course. In any event, we note that these documents—which are supplemental in nature—cannot impose conditions that are not envisaged by the controlling language of the relevant Security Council resolutions.

36. In conclusion, we find that the Trial Chamber did not err in holding that the UNIIIC and the Prosecutor could legally request and obtain the CDRs without judicial authorization; such

[71] Art. 11 STL St.
[72] Resolution 1595, para. 6.
[73] The Appeals Chamber agrees with the Trial Chamber's finding at para. 88 of the Impugned Decision that Lebanese Law 140/99 applies to the interception of communications but does not extend to metadata. However, we also note the possible application of Art. 32 of Decree Law No. 127 "Post and Telecommunications – Telephone and Telex", issued on 12 June 1959, to such information, but find it unnecessary to determine this issue given our conclusion that the UNIIIC was not and the Prosecutor is not subject to Lebanese law.
[74] Art. 2 of the Memorandum of Understanding between Lebanon and the UN.
[75] Art. 4 of the Memorandum of Understanding between Lebanon and the Prosecutor.

authorization was not required under their respective governing legal instruments. We therefore dismiss the appeal with respect to the First Certified Issue.

IV. Whether the Trial Chamber erred in concluding that the absence of judicial control does not violate any international human rights standard on the right to privacy, justifying the exclusion of the CDRs under Rule 162 ("Second Certified Issue")

37. The Trial Chamber found that, although the collection of the CDRs may constitute a restriction on the right to privacy, it was neither unlawful nor arbitrary and did not violate international human rights standards.[76] The Trial Chamber stated that it could not identify any specific international standard with respect to the transfer to an investigating agency of such metadata with or without judicial authorization.[77] It nonetheless concluded that the UNIIIC and the Prosecutor are not free from judicial scrutiny as the Trial Chamber would assess the steps taken by these bodies to secure the CDRs when determining the admissibility of the CDRs and their by-product, the CSTs, under Rules 149 and 162.[78]

38. Counsel for Mr Oneissi contend that international human standards on the right to privacy required the transfer of the CDRs to be subject to judicial authorization by either a Lebanese or international judge or by an independent body.[79] Citing both regional case-law and UN documents, counsel submit that in light of the information contained in the CDRs, the right to privacy is affected.[80] Irrespective of the applicable law of the UNIIIC or the Prosecution, they argue that the absence of effective judicial control constituted a violation of international human rights standards.[81] Consequently, the CSTs—which are derived from the CDRs—are liable to compromise and seriously undermine the integrity of the proceedings and should thus be ruled inadmissible under Rule 162.[82] Finally, counsel conclude that the transfer of the CDRs was neither necessary nor proportionate because, among other things, they included the metadata of a significant number of persons for whom there was no suspicion of any criminal wrongdoing.[83]

39. The Prosecutor responds that, to succeed, counsel must demonstrate that international human rights standards can only be satisfied through prior judicial authorization when accessing the

[76] Impugned Decision, para. 108; *see also* paras 85-86.
[77] *Id.* at para. 106.
[78] *Id.* at para. 107.
[79] Appeal, paras 8, 40-45, 103.
[80] *Id.* at paras 10-20.
[81] *Id.* at paras 9, 46-94.
[82] *Id.* at para. 105.
[83] *Id.* at paras 95-103.

CDRs.[84] He submits that counsel for Mr Oneissi have not identified any authority for the proposition that international human rights standards require prior judicial control and authorization over access to CDRs and, as a result, the Impugned Decision should be upheld.[85] In this respect, the Prosecutor argues that the State practice referred to by counsel for Mr Oneissi cannot adequately demonstrate the existence of an international standard on human rights.[86] Furthermore, the Prosecutor stresses that the judicial review carried out by the Trial Chamber at the stage of the admission of evidence is an important human rights safeguard that enables the assessment of the legality of its transfer.[87]

40. We first note that the Second Certified Issue concerns the place and scope of international human rights standards on the right to privacy with respect to the transfer of the CDRs to the UNIIIC and the Prosecutor. It is therefore distinct from the First Certified Issue which addresses the question of whether there was a requirement for judicial authorization for the transfer of the CDRs under the relevant legal framework governing the establishment and operation of the UNIIIC and the Tribunal.[88] As we have held above, there was no such requirement.[89] Under the Second Certified Issue, we thus analyse whether the absence of such authorization was in violation of international human rights standards, justifying their exclusion from the *Ayyash et al.* trial proceedings. This is because Rule 162 prescribes that, among other things, "evidence shall be excluded if it has been obtained in violation of international standards on human rights".

41. At the outset, we observe that the right to privacy is recognized in various modern international human rights documents,[90] the Constitutions of numerous States around the world,[91]

[84] Response, para. 32.
[85] *Id.* at paras 6, 32-40.
[86] *Id.* at para. 39.
[87] *Id.* at para. 36.
[88] *See* above, para. 26.
[89] *See* above, para. 36.
[90] The right to privacy is enshrined in Art. 17 of the International Covenant on Civil and Political Rights ("ICCPR"), a treaty to which Lebanon acceded in 1972. Art. 17 provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." Lebanon has also ratified the Arab Charter on Human Rights, Art. 21 of which provides that violation of the sanctity of private life, which includes the secrecy of correspondence and other forms of private communication, is a crime. Art. 12 of the Universal Declaration on Human Rights ("UDHR") also protects the right to privacy. In 1948, Lebanon voted in favour of the adoption of the UDHR.
[91] *See*, *e.g.*, Art. 10 (1), Basic Law for the Federal Republic of Germany (1949); Art. 17 (1), Constitution of Iraq (2005); Art. 16, Constitution of Mexico (1917); Art. 2 (10), Constitution of Peru (1993); Section 14, Constitution of South Africa (1996); Art. 24, Constitution of Tunisia (2014); Art. 27 (2), Constitution of Uganda (1995); Art. 21, Constitution of Vietnam (1992).

and has been found to exist even in Constitutions where it is not explicitly provided for.[92] The Lebanese Constitution does not include a separate right to privacy. However, it makes express reference to the rights contained in the ICCPR and UDHR and includes the rights to liberty and freedom of expression,[93] rights which protect similar values as the right to privacy.[94] The right to privacy has similarly been considered in the jurisprudence of various international criminal tribunals.[95] Given this widespread and consistent recognition, we agree with the Trial Chamber's holding that "[t]he right to privacy undoubtedly forms part of 'international standards on human rights'"[96] which, as directed by Rule 162, are relevant to the present inquiry. As the Trial Chamber also correctly held, the right to privacy is not among those absolute rights from which no derogation is permitted; rather it can be restricted in accordance with human rights law.[97]

42. Nevertheless, despite this recognition, we must consider whether and to which extent the right to privacy is engaged: in this case, whether the CDRs collected by the Lebanese telecommunication companies and transferred to the UNIIIC and the Prosecutor fall within the ambit of this right. We recall that the CDRs do not reveal the content of any communication. Rather, they are telecommunications metadata, which only reveal information about the circumstances of the communications, for instance the numbers called, the length of the calls, and the date and time of calls.[98]

43. We first note counsel for Mr Oneissi's reliance on recent practice and case-law of a number of international bodies and courts to demonstrate that the CDRs—in light of the information they contain—should be subject to the same protections traditionally granted with respect to the content of communications.[99] The Prosecutor, as discussed above,[100] has not responded to this particular point. We also note the Trial Chamber's holding that "international human rights standards are

[92] This is the case, for example, in the United States (*see* United States, Supreme Court, *Griswold v. Connecticut* 381 US 479 (7 June 1965).
[93] *See* Arts 8, 13 of the Lebanese Constitution.
[94] *See* Report of the Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, UN Doc. A/HRC/27/37 (30 June 2014), para. 14 ("Report on the Right to Privacy in the Digital Age").
[95] *See*, *e.g.*, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 29 January 2007, paras 73-90; ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Accused's Motion to Exclude Intercepted Conversations, 30 September 2010.
[96] Impugned Decision, para. 81.
[97] *Id.* at para. 84.
[98] *See* above, para. 3.
[99] Appeal, paras 16-19.
[100] *See* above, paras 13, 16-20.

evolving to include legal protection of metadata such as call data records from unwarranted disclosure to governments and law enforcement agencies".[101]

44. We are further cognizant of current trends and discussions surrounding the collection, storage and use of metadata. As the UN General Assembly and the Human Rights Council have recently pointed out, "certain types of metadata, when aggregated, can reveal personal information and can give an insight into an individual's behaviour, social relationships, private preferences and identity".[102] Similarly, in *Digital Rights Ireland*, the Grand Chamber of the Court of Justice of the European Union ("CJEU") declared an European Union data retention directive, which required telecommunications service providers to retain the telecommunications metadata of every EU citizen and to make this available to national security agencies for investigatory purposes, to be in violation of the right to privacy as found in Articles 7 and 8 of the EU Charter of Fundamental Rights. It reasoned that metadata allows:

> very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.[103]

45. Indeed, as early as 1984, the European Court of Human Rights ("ECtHR") found that communications data is "an integral element" of private communications under Article 8 of the European Convention on Human Rights.[104] More recently, the Inter-American Court of Human Rights also found that the right to privacy protects metadata.[105]

46. While there are differences in approach taken by domestic courts,[106] recent decisions in a number of jurisdictions have recognized that privacy protections extend to metadata.[107]

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[101] Impugned Decision, para. 86.
[102] UN General Assembly, *The Right to Privacy in the Digital Age*, A/Res/69/166 (10 February 2015) ("GA Resolution on Privacy"), Preamble, para. 15; Human Rights Council, *The Right to Privacy in the Digital Age*, A/HRC/28/L.27 (24 March 2015) ("HRC Resolution on Privacy"), Preamble, para. 15; *see also* Report on the Right to Privacy in the Digital Age, para. 19.
[103] CJEU, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, et al.*, Judgment, C-293/12 and C-594/12, 8 April 2014 ("*Digital Rights Ireland*"), para. 27.
[104] ECtHR, *Malone v. UK*, 8691/79, Judgment, 2 August 1984, para. 84; *see also* ECtHR, *Weber & Saravia v. Germany*, 54934/00, Judgment, 29 June 2006, para. 79.
[105] IACtHR, *Escher et al. v. Brazil*, Judgment, 6 July 2009, para. 114. The IACtHR ultimately found the Brazilian surveillance law in question compliant with the right to privacy under Art. 11 of the American Convention on Human Rights.
[106] We note that there is some domestic judicial authority for the proposition that the right to privacy does not protect metadata in certain contexts (*see* France, Cour de Cassation, No. 01-82578, 27 June 2001; United States, Court of

47. This jurisprudence provides strong indications that metadata—information concerning communications devoid of their content—is encompassed by the right to privacy. Consequently, since the CDRs at issue in this case comprise of such information, we find that there is a compelling case as to their protection by the right to privacy.[108] Having found that this right is affected, we proceed to consider whether international human rights standards require that their transfer to the UNIIIC and the Prosecutor was subject to independent oversight, judicial or otherwise.

48. We observe that international human rights law provides a universal framework against which any interference in privacy rights must be assessed.[109] Although the right to privacy is not absolute, any limitation on this right must be provided for by law, be necessary for reaching a legitimate aim and be proportionate.[110] Without satisfying these requirements, an interference with privacy would be arbitrary and unlawful.

49. We first consider whether the transfer of the CDRs was provided for by law.[111] Under the applicable legal frameworks established by the Security Council by Resolutions 1595 and 1757, both the UNIIIC and the Prosecution were purposefully and expressly given a wide mandate to collect and transfer evidence of the criminal offences falling within their jurisdictions.[112] In light of such language, we hold that this resolution and related instruments provided the necessary legal framework for both the UNIIIC and the Prosecutor within which they carried out their mandate and under which the transfer of the CDRs was carried out. It was therefore provided by law.[113]

Appeals – 11th Circuit, *Unites States v. Davis*, No. 12-12928, 5 May 2015; United States, Court of Appeals – 5th Circuit, *In Re: Application of the United States of America for Historical Cell Site Data*, 724 F.3d 600, 30 July 2013.

[107] *See* Mexico, Supreme Court, Judgment of *Contradicción de Tesis 194/2012*, 10 October 2012; Canada, Supreme Court, *R v. Spencer*, 2014 SCC 43; US, District Court – District of Columbia, *Klayman v. Obama*, Civil Action No. 13-0851, 16 December 2013; Belgium, Cour Constitutionelle, Judgment, No. 84/2015, 11 June 2015; Argentina, Supreme Court, *Halabi, Ernesto* c/ P.E.N.- ley 25.783 - dto. 1563/04 s/amparo ley 16.986; Czech Republic, Constitutional Court, Judgment, Pl. ÚS 24/10, 22 March 2011, para. 44; Germany, Federal Constitutional Court, BVerfGE 125, 260 (319), 2 March 2010.

[108] Judge Riachy dissents from this holding and the reasoning on which it is based.

[109] GA Resolution on Privacy, Preamble, paras 12, 16, 17; HRC Resolution on Privacy, para. 12.

[110] *See* Arts 4, 17 of the ICCPR; *see also* UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,* A/HRC/13/37, 28 December 2009, para. 17.

[111] Human Rights Committee, General Comment 16 – Article 17, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 (29 July 1994), p. 21, para. 3.

[112] *See* above, paras 27-30, fns 64-69.

[113] We note that counsel for Mr Oneissi has not advanced any arguments with respect to the issue of whether the terms and language employed in the relevant frameworks of the UNIIIC and the Tribunal were sufficiently clear and precise so as to authorise the transfer of the CDRs at issue in this case.

50. An interference with a right will be considered "necessary" for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued.[114] The principle of proportionality in that sense requires that limitations on a right must be: (1) appropriate to achieve their protective function, (2) the least intrusive instrument among those available to achieve the desired result, and (3) proportionate to the interest to be protected.[115] Moreover, the limitation placed on the right must be shown to have some chance of achieving that goal and must not render the essence of the right meaningless.[116]

51. Here, the material objective for the establishment of the UNIIIC and the Tribunal—as expressed in the relevant Security Council Resolutions, the Tribunal's Statute and other documents—was to ascertain the circumstances of, and those responsible for, the attack of 14 February 2005 as well as other similar terrorist attacks on Lebanese soil. The purpose of the investigation and prosecution of these crimes was to ensure, on behalf of the Lebanese people, that the alleged attackers were identified and tried in accordance with the law and that the truth concerning these events was revealed.[117] In this way, respect for the rule of law in Lebanon would be fortified and ultimately result in the strengthening of the right to security of the Lebanese public.[118] There can therefore be little doubt that the measures put in place were crafted so as to address a pressing social need in Lebanon. In light of these factors, we hold that the transfer of the CDRs—which formed part of the investigations in the attack of 14 February 2005 and others of a similar nature—was for a legitimate and genuine aim. Indeed, the Prosecutor now seeks to rely on the information gained from the CDRs as evidence to prove his case.

52. Notwithstanding, we must consider the proportionality of the transfer in light of the legitimate aims pursued. We have already noted that the right to privacy is not absolute. This means that it must be balanced with other competing rights and interests—such as the right of citizens to live in a stable environment free of crime and the interest of the state to ensure public security. One of those balancing factors may be a requirement to seek judicial authorization before accessing metadata.

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[114] ECtHR, *Uzun v. Germany,* 35623/05, Judgment, 2 September 2010, para. 78.
[115] Human Rights Committee, General Comment No. 27, CCPR/C/21/Rev.1/Add.9 (1999), para. 14; *see* also ECtHR, *Handyside v. United Kingdom*, 5493/72, Judgment, 7 December 1976, paras 48-49.
[116] Report on the Right to Privacy in the Digital Age, para. 23.
[117] *See, e.g.*, UN Security Council, Report of the Secretary-General pursuant to paragraph 6 of Resolution 1644 (2005), UN Doc. S/2006/176 (21 March 2006), para. 13.
[118] *Ibid.*

53. We note in this regard the ECtHR's holding in *Klass*, a case dealing with the surveillance of communications, that prior judicial authorization was desirable but not always necessary. This was particularly so where the relevant authorizing body was sufficiently independent of the authorities carrying out the surveillance and was also vested with sufficient powers and competence to exercise effective and continuous control.[119] However, the ECtHR has subsequently emphasized the desirability of judicial authorization in the context of surveillance in *Kopp*[120] as did the CJEU in *Digital Rights Ireland* where it struck down an EU data retention directive concerning metadata.[121]

54. We can glean from this case-law that prior judicial authorization would normally be desirable when granting access to metadata, such as the CDRs in this case. However, our analysis cannot stop here. Indeed, to require judicial authorization is not just a formality or an end in itself. In particular, we do not understand these decisions to demand judicial authorization as an absolute necessity whose absence would *ipso facto* result in the violation of international human rights standards. Rather, judicial authorization is but one means of ensuring that restrictions on the right to privacy remain proportionate.[122] But as in every proportionality analysis, the precise requirements necessary to adequately safeguard human rights depend on the circumstances of each case.

55. With respect to the right to privacy, it is evident that, in the modern age, citizens must be afforded protections against intrusions into their private digital lives by States. It should not be the norm that organs of the State have limitless and unregulated access to the data—including metadata—of all those within their reach. Because of the levers of power the State wields, such access can engender a deep feeling of unease and can result in a "chilling effect" on various other human rights.[123] Under such circumstances, it is understandable that various courts have

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[119] ECtHR, *Klass and others v. Germany*, 5029/71, Judgment, 6 September 1978, paras 55-56.

[120] ECtHR, *Kopp v. Switzerland*, 13/1997/797/1000, Judgment, 25 March 1998, para. 74:
> [I]t is, to say the least, astonishing that [the] task [of authorizing interceptions] should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence.

[121] The CJEU did so on the basis that directive "d[id] not contain substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use." It further held that:
> [T]he access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detention or criminal prosecutions. Nor does it lay down a specific obligation on Member States designed to establish such limits. (*Digital Rights Ireland*, paras 61-62).

[122] Judge Riachy dissents from this holding and the reasoning on which it is based.

[123] Germany, Federal Constitutional Court, BVerfGE 125, 260 (335), 2 March 2010.

disapproved of the collection and storage of metadata without judicial or other independent controls. However, these same considerations are not present on the facts before us.

56. Importantly, while the transfer of the CDRs concerned the telecommunications metadata of the entire Lebanese population between 2003 and 2010, the collection of that information was lawfully carried out, not by any State, but by Lebanese companies during the ordinary course of their business for billing and customer management purposes. These same entities were responsible for the storage of the CDRs—this was not undertaken by the Lebanese State or pursuant to a directive or demand issued by the UNIIIC or the Prosecutor. Furthermore, the CDRs were not collected and stored for the purposes of investigating future indeterminate and unspecified criminal conduct as was the case with respect to the European Union's Data Retention Directive, which was challenged in many European States and before the CJEU in *Digital Rights Ireland*, or in certain cases before US courts.[124] Instead, the transfer of the CDRs to the UNIIIC or the Prosecutor took place for the investigation of concrete and specific crimes whose execution had already taken place. As the Trial Chamber held, the transfer of the CDRs had "a narrow and legitimate forensic purpose".[125]

57. Furthermore, and unlike in the circumstances of the cases cited above, the CDRs in question in this case are not accessible to any authority or State who may have cause to use such information for a variety of ends which are not generally disclosed to the wider public. Instead, the CDRs are strictly confined to the Tribunal's judges, the Prosecution, Defence Counsel, the Legal Representative of the Victims and support staff[126] involved in the *Ayyash et al.* trial and those involved in any connected cases. Moreover, access to the CDRs and their use will only be for specified reasons that are known to the entire Lebanese population and beyond: the determination of those responsible for the attack of 14 February 2005 and others of a similar nature.

58. For these reasons, the transfer of the CDRs to the UNIIIC and the Prosecutor without judicial authorization was not disproportionate.[127]

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[124] *See, e.g.,* United States, Court of Appeals – 2nd Circuit, *ACLU et al v. Clapper*, No. 14-42.cv, 7 May 2015.
[125] Impugned Decision, para. 102.
[126] We further note that, as the Trial Chamber correctly noted, such persons "have professional and ethical obligations of confidentiality" to the Tribunal (*see* Art. 5 of the Code of Professional Conduct for Counsel Appearing before the Tribunal, 28 February 2011). These obligations can result in serious consequences for those who violate them, and can ultimately result in contempt proceedings and potential disbarment from their national jurisdictions.
[127] Judge Riachy dissents from this holding and the reasoning on which it is based.

59. We stress that in this decision we deal with only broad legal matters. The Trial Chamber will, in time, consider further detailed factual issues concerning the CDRs. This will include an evaluation of the manner in which the CDRs were collected, retrieved and stored so as to determine whether or not they are admissible under Rules 149 and 162. In this context, the present decision does not prejudice the right of the defence to challenge admissibility of the CDRs and to obtain the necessary rulings from the Trial Chamber. Indeed, the Trial Chamber has deferred a decision on whether to admit this material and any related witness statements into evidence to a later point.[128] In so doing, the Chamber will provide an additional check and safeguard against abuse.

60. In sum, given this specific and distinct situation, we hold that when balancing the right to privacy with the legitimate interest of the Lebanese public and the international community to properly investigate the specific crimes under the Tribunal's jurisdiction and the right of the Lebanese to security, the absence of judicial control did not violate any international human rights standard on the right to privacy, justifying the exclusion of the CDRs under Rule 162.

61. We therefore dismiss the Appeal also with respect to the Second Certified Issue.

[128] Impugned Decision, paras 115, 118.

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rule 162;

THE APPEALS CHAMBER, Judge Baragwanath dissenting;

DISMISSES the Appeal.

Judge Riachy appends a separate and partially dissenting opinion.

Judge Baragwanath appends a dissenting opinion.

Done in Arabic, English and French, the English version being authoritative.
Dated 28 July 2015
Leidschendam, the Netherlands

Judge Ivana Hrdličková
Presiding Judge

SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE RIACHY

1. I concur with the Majority in dismissing the appeal filed by counsel for Mr Oneissi, both in respect to the First and the Second Certified Issues. However, I do not share the Majority's reasoning under the Second Certified Issue on why judicial authorization was not required for the transfer of the call data records ("CDRs/metadata")[1] to the UNIIIC and the Prosecution and why this transfer did not constitute a violation of international human rights standards. I therefore offer my reasoning, which supports the Appeals Chamber's ultimate conclusion to dismiss the appeal, but is based on different considerations.

I. Preliminary Observations

2. I fully agree with the Appeals Chamber's conclusions on the preliminary issues raised by the appeal.[2] I also support the Appeals Chamber's decision with respect to the First Certified Issue, both with respect to the reasoning and the result.[3]

3. However, even though I agree with the final result, I cannot support the reasoning adopted by the majority of my fellow judges with respect to the Second Certified Issue.[4] This issue concerns the Trial Chamber's conclusion that the transfer of CDRs to the UNIIIC and the Prosecution in the absence of judicial authorization does not violate any international human rights standard with respect to the right to privacy, and that therefore an exclusion of the CDRs pursuant to Rule 162 of the Rules of Procedure and Evidence ("Rules") is not warranted. I do not agree with the reasoning provided by the Majority, which considered that even though the CDRs relate to a core part of an individual's privacy, their collection and transfer without prior judicial authorization did not violate international human rights standards. Instead, I offer different reasons to arrive at the same result, *i.e.*, that in the circumstances of this case there was no need for such judicial authorization.

[1] I agree with my colleagues that the matter before us only concerns metadata and that the content of any communications is not encompassed by the certified issues (*see* Decision, para. 3, fns 6, 19).
[2] *See* Decision, paras 10-20.
[3] *See id.* at paras 23-36.
[4] *See id.* at para. 8.

II. The reasoning adopted by the Majority concerning the Second Certified Issue does not form a proper basis for the conclusions reached

4. The Majority concluded that the CDRs in this case are protected by the right to privacy.[5] Despite this holding, the Majority decided that judicial authorization was not required in order to transfer the metadata to the UNIIIC or the Prosecution and that the absence of such authorization did not infringe international human rights standard. I do not agree with this approach.

A. Applicable law

5. The applicable legal provisions are primarily those of the Tribunal's Statute and Rules.

6. Article 19 of the Statute states the following:

> Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers.

7. In addition, Article 28 (2) of the Statute states that:

> 1. The judges of the Special Tribunal shall, as soon as practicable after taking office, adopt Rules of Procedure and Evidence for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.
>
> 2. In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial

8. Rule 3 (A) ("Interpretation of the Rules") states the following:

> The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

[5] *See* Decision, paras 44-47.

9. Rule 162 ("Exclusion of Certain Evidence") provides that:

> (A) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.
>
> (B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture.

B. The legal reasoning of the Majority is in contradiction with the abovementioned provisions

10. The legal reasoning of the Majority leads to the following two results: i) the transfer of the CDRs is encompassed by the right to privacy under the universal framework of international human rights law against any interference with this right must be assessed; however, ii) with respect to the present case, for the specific reasons described in the decision, no international human rights standards were violated despite the absence of judicial authorization permitting the transfer of the CDRs and consequently the exclusion of evidence based on the CDRs pursuant to Rule 162 is not warranted in this case.[6] In my view, these two findings are contradictory when taking into account the relevant law.

11. It is indisputable that under international law—and in particular Article 17 of the International Covenant on Civil and Political Rights, to which Lebanon has acceded—the protection of privacy forms an integral part of international human rights standards, and that there can be no arbitrary or illegal interference with this right. Other international legal instruments express the same principle.[7]

12. The importance of protecting this fundamental right is reflected by the existence of international jurisprudence which has stressed this principle but has also permitted limited derogations in exceptional cases.[8] Indeed, under international law there are certain safeguards which guarantee that any derogation from the right to privacy is limited. Some of these safeguards are:

i) any interference with the right to privacy must be provided for by law;

ii) the interference must be motivated by a legitimate aim;

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[6] *See* Decision, para. 60.
[7] *See* Art. 12 of the Declaration of Human Rights; Arts 7 and 8 of the Charter of Fundamental Rights of the European Union; Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
[8] *See, e.g.,* Belgium, Cour Constitutionelle, Judgment, No. 84/2015, 11 June 2015.

iii) it must be proportional to the achievement of this aim; and

iv) other requirements where necessary, considering that any limitation on the right to privacy must be subject to prior control by an independent judicial organ.[9]

13. In light of the principles set out above, once the Majority recognized that the CDRs were encompassed by the right to privacy, it should have considered that their transfer to the UNIIIC and the Prosecutor of the STL was not in conformity with international law and indeed exceeded any permissible derogations because this transfer had not been subject to prior authorization by an independent judicial authority.

14. Instead, the Majority proceeded to find that no judicial authorization was required because of the specific circumstances of this case. I respectfully disagree. On the contrary, the Majority should have considered whether such independent review of the transfer of the CDRs was provided for under international or domestic Lebanese law.

15. I agree with the holding in the Decision that neither Security Council Resolution 1595 (concerning the creation of the UNIIIC) nor Security Council Resolution 1757 (concerning the creation of the STL) contain any reference to an independent control mechanism that would be able to control potential interferences with the right to privacy. However, this does not justify in any way the transfer of the CDRs without authorization, if the CDRs are indeed encompassed by the right to privacy. Rather, it would then be required to assess, as per the provisions of Article 28 (2) of the Statute, whether Lebanese law provides such protection.[10] The Majority failed to do this.

16. In this respect, it should be noted that while the First Certified Issue only concerned the applicable legal provisions relating to the establishment of the UNIIIC and the STL by the Security Council, the Second Certified Issue concerns the question of whether an international tribunal could do away with human right protections given under domestic law. Indeed, the principle is that the Security Council cannot circumvent applicable regional or domestic human rights protection by virtue of its resolutions. This was expressed by the Grand Chamber of the European Court of Human Rights in the *Al Jedda* case:

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[9] *See, e.g.*, CJEU, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, et al.*, Judgment, C-293/12 and C-594/12, 8 April 2014 ("*Digital Rights Ireland*"); Report of the Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, UN Doc. A/HRC/27/37 (30 June 2014), para. 38; ECtHR, *Klass and others v. Germany*, 5029/71, Judgment, 6 September 1978 ("*Klass et al. v. Germany*"), paras 55-56; ECtHR, *Kopp v. Switzerland*, 13/1997/797/1000, Judgment, 25 March 1998 ("*Kopp v. Switzerland*"), para. 74.

[10] *See* Art. 28 (2) STL St.

> [T]he Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.[11]

17. Under Lebanese law, there are two potentially applicable provisions: Law 140/99 on Safeguarding the Right to the Privacy of Communications Transmitted by any Means of Communication, issued on 17/10/1999, and Decree Law 127/59 Telephone and Telex, issued on 12 June 1959.

18. An analysis of Law 140/99 leads to the conclusion that it relates to the interception of communications, *i.e.* the content of phone calls (which are usually recorded). Such measures require judicial authorization. The judicial authority or "the judge charged with the investigation" mentioned in the law is usually the *juge d'instruction*. Prior to the enactment of Law 140/99 and in application of the Decree Law 127/59, it was the Prosecutor-General who had the right to give such authorization. After the enactment of Law 140/99, authorization to conduct an intercept could only be granted by a competent Tribunal or Judge.[12]

19. On the other hand, Article 32, under Section Three "On the Subscription Contract", of the Decree Law No. 127 "Telephone and Telex", issued and effective since 12 June 1959 and still in force, clearly states that "[t]he secrecy of telephone calls is inviolable. No employee or freelancer in the company can divulge it. The Administration can give a report on telephone calls on the basis of a written warrant from the judicial authorities." This "report on telephone calls'' corresponds to the CDRs addressed by the Trial Chamber in its Decision. Indeed, the "report" provides information on the identity of the telephone subscriber and can therefore be considered to contain telephone metadata, *i.e.*, data about data. It does not concern the content of the communication and its "interception", which Law 140/99 addresses. While Decree Law No. 127 was enacted before mobile phone services existed and therefore originally applied only to landline phones, it also

[11] ECtHR, *Al Jedda v. United Kingdom*, 27021/08, Judgment (GC), 7 July 2011, para. 102; *see also* para. 105 ("The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place member States within the Multinational Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. Internment is not explicitly referred to in the Resolution.").
[12] *See* Opinion of the Legislative Advisory Commission at the Ministry of Justice, No. 139/2009, 19 February 2009.

applies—by analogy—to new communication technologies and therefore mobile phones. Accordingly, in order to collect and transfer information relating to the use of such phones, *i.e.*, the CDRs, authorization from the Prosecutor-General would be required. The Prosecutor-General is not merely a party to the proceedings in the Lebanese judicial system but is also a judge. Consequently, applying Decree Law 127/59 would result in finding that transferring the CDRs was illegal because it did not follow the process required by this law.

20. Therefore, once the Majority found that the CDRs were encompassed by the right of privacy of the Lebanese population, it should have considered whether there existed a domestic Lebanese provision that safeguards the right to privacy, whether this provision was applicable in the circumstances of this case, and, if so, whether the transfer of the CDRs conformed with the requirements of this provision. This would have led to the conclusion that, under the applicable provisions of Decree Law 127/59, the transfer of the CDRs should have been subject to authorization by the Prosecutor-General, and, in the absence of such authorization, was illegal.

21. By avoiding such an assessment, the Majority failed to properly justify the result reached in its decision. However, for the reasons that follow below, despite this lack of justification, I agree with the ultimate dismissal of the appeal because in my view the CDRs in this case are not encompassed by international human rights provisions relating to the right to privacy.

III. The collection, seizure and transfer of the CDRs does not necessarily pertain to the right of privacy

22. The CDRs contain information about calls and SMS messages made and sent from mobile phones, including the time, duration and recipient of the call, the International Mobile Equipment Identity (IMEI) and International Mobile Subscriber Identity (IMSI) of the mobile phones used, and the mobile phone towers engaged during these calls. They are data about data.

23. It is not yet clear whether the right to privacy extends to CDRs or metadata as a matter of international human rights law. Privacy is a fluid concept with multiple definitions and its contours are yet to be definitively determined at both the domestic and international levels.[13] Nevertheless, some regional and domestic courts have applied the right to privacy in the context of metadata

[13] *See* R.A. Reilly, "Conceptual Foundations of Privacy: Looking Backward Before Stepping Forward", 6 *Richmond Journal of Law and Technology* 6 (1999), para. 1.

collection and concluded that the transfer of such data can give its recipients information about the everyday habits, personal activities and social encounters of the people to which the data pertains.[14]

24. However, it is up to individual courts to evaluate, in light of the specific facts of each case, whether metadata should attract protections afforded by the right to privacy. It is my opinion that the mass of metadata involved in the *Ayyash et al.* case[15] should not attract such protections. The Prosecutor's case does not appear to be concerned with the CDRs in the abstract. Rather, it focuses on the mobile phone metadata related to the alleged perpetrators of the attack of 14 February 2005 and, as a result, does not implicate the private information of ordinary mobile phone users.

25. While international human rights law generally requires prior judicial authorization when granting access to metadata,[16] I do not consider such law to be engaged in this case. It follows that the transfer and use of this information need not be subject to judicial authorization.

26. Such a finding is consistent with trends in certain jurisdictions to only afford privacy protection to the content of communications. For instance, the French Cour de Cassation, in its decisions of 27 June 2001 and 8 August 2001,[17] considered that access to metadata did not require judicial authorization as this process did not constitute an interception of correspondence under Articles 100 to 100-7 of the Criminal Procedural Code (*Code de Procédure Pénale*). The identification of phones from which calls were made and received, according to the court, constituted a "simple technical measure".[18] Similarly, it stated that the right to privacy was only concerned with communication intercepts but not with requests to identify the holders of telephone lines or subscriptions, the localization of relays and the telephone numbers dialled, as long as the technical means employed did not amount to an interception of content.[19]

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[14] *See*, *e.g.*, *Digital Rights Ireland*; ECtHR, *Malone v. UK*, 8691/79, Judgment, 2 August 1984; Canada, Supreme Court, *R v. Spencer*, 2014 SCC 43; United States, District Court – District of Columbia, *Klayman v. Obama*, Civil Action No. 13-0851, 16 December 2013.

[15] I stress again that the matter before us only concerns metadata and that the content of any communications is not encompassed by the certified issues; *see* above fn. 1.

[16] *See Klass et al. v. Germany*; *Kopp v. Switzerland.*

[17] France, Cour de Cassation, No. 01-82578, 27 June 2001 and No. 01-82490, 8 August 2001.

[18] France, Cour de Cassation, No. 01-82578, 27 June 2001, p. 5.

[19] France, Cour de Cassation, No. 01-82490, 8 August 2001, pp 3-4 («seules les interceptions de communications sont visées par ces dispositions et non les réquisitions aux fins d'identifier les titulaires des lignes ou des abonnements, la localisation des relais et les numéros appelés, ou d'obtenir le détail des facturations » […] « les policiers ont adressé des réquisitions aux opérateurs de télécommunications à seule fin d'identifier les titulaires d'autres lignes téléphoniques, la localisation des relais et les numéros appelés ; que ces dernières opérations ont été également régulières, dès lors que le procédé technique mis en oeuvre n'a pas eu pour objet l'interception de correspondances au sens des articles précités »)

27. This reasoning is also reflected in the decisions of US courts, where it has been held that there is "no reasonable expectation of privacy" in information that people voluntarily give to third parties—such as banks, phone companies, internet service providers and e-mail servers.[20] The French and American jurisprudence demonstrates that as yet there is no international customary rule that metadata should be afforded the protections of human rights law.

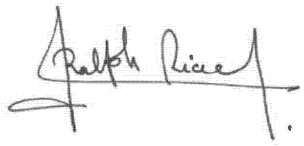
28. In sum, I disagree with the Majority's opinion that metadata are generally encompassed by the right to privacy. Each case must be considered on its own facts. In this case, I consider that the CDRs transferred to and used by the UNIIIC and the Prosecution do not implicate or reveal intimate information about mobile phone users. As a result, their transfer to and use by the UNIIIC and Prosecutor did not require judicial authorization as a matter of international human rights law.

IV. Conclusion

29. The Majority failed, as it was required, to assess whether the transfer of the CDRs to the UNIIIC and the Prosecutor was subject to the relevant provisions under Lebanese law, in particular Decree Law 127/59.

30. However, because in my view the CDRs are not protected by the right to privacy in the circumstances of this case, I find that the appeal is unfounded and should be rejected on that basis.

Done in Arabic, English and French, the English version being authoritative.
Dated 28 July 2015
Leidschendam, the Netherlands



Judge Ralph Riachy

[20] *See* United States, Supreme Court, *Smith v. Maryland*, 442 US 735, 20 June 1979; United States, Supreme Court, *Katz v. United States*, 389 US 347, 18 December 1967; United States, Supreme Court, *United States v. Jones*, 132 S. Ct. 945, 23 January 2012; *see also* United States, Court of Appeals – 11th Circuit, *United States v. Davis*, No. 12-12928, 5 May 2015; United States, Court of Appeals – 5th Circuit, *In Re: Application of the United States of America for Historical Cell Site Data*, 724 F.3d 600, 30 July 2013 (for further cases where US federal courts determined that an individual has no reasonable expectation of privacy in CDRs).

DISSENTING OPINION OF JUDGE BARAGWANATH

1. This appeal raises competing vital public interests which must be evaluated and prioritized. They are:

(i) the Prosecutor's claim that it is open to the Trial Chamber to admit potentially probative evidence drawn from metadata or call data records ("CDRs") that identify the whereabouts of specific telecommunications users at times and places material to its case; and

(ii) counsel for Mr Oneissi's claim of privacy interests in the CDRs which are relied upon to seek the exclusion of this evidence.

2. In my view, such evaluation and prioritization should take place as a three-fold enquiry with the issues of legality and admissibility being considered together:

(i) did the process employed by the UNIIIC and the Prosecution in accessing and using the CDRs accord with the law (the principle of legality)?

(ii) if so, was the UNIIIC's and the Prosecution's access to and use of the CDRs proportionate (the principle of proportionality)?

(iii) is the probative value of the evidence substantially outweighed by the need to ensure a fair trial?

3. However, given that the Trial Chamber has decided to consider questions of admissibility at a later stage, the certified issues do not extend to the whole of these matters. Nevertheless, due consideration of the principles of legality and proportionality still requires knowledge of the facts relevant to these issues. We are not informed of such facts and, while the Prosecution has offered to give further submissions on some of the issues, the Majority has decided not to order or permit them to do so.

4. It follows that to ensure due process we must allow the Defence appeal and refer the case back to the Trial Chamber so it can ascertain the relevant facts and perform legality and proportionality analyses in accordance with the directions of this Chamber. It is also my view that the Trial Chamber should have dealt with the questions of the legality of the transfer of CDRs and their admissibility as a whole before seizing us of any appeal.

5. Moreover, for the reasons next mentioned, I read the certified issues differently from my colleagues and do not agree with their characterization.

I. The Certified Issues[1]

6. The First Certified Issue is whether the UNIIIC and the Prosecution "could legally request and obtain call data records […] without […] judicial authorization". The Second Certified Issue is whether the "absence of judicial control does not violate any international human rights standard on the right to privacy, justifying the exclusion of the call data records under Rule 162".[2] Since the ultimate issue of the admission of the evidence has not been determined by the Trial Chamber, it is not before us.

7. In my view, the broad language of the Second Certified Issue encompasses not only the legality of the transfer of the CDRs but also the events that transpired after they entered into the possession of the UNIIIC and the Prosecution. This is because the Second Certified Issue simply speaks of the "absence of judicial control" and does not stipulate where or when this judicial control was to be carried out. Without any indication to the contrary, it must be read as embracing both the transfer of the CDRs and the way this material was subsequently treated by the Prosecution. The First Certified Issue is then superfluous as it covers only the legality of the transfer of the CDRs, a matter already included in the Second Certified Issue. I therefore cannot agree with the separation drawn by my colleagues between the two certified issues.

8. We are bound to deal with the essence of both issues certified by the Trial Chamber. But how we do that is a matter for the Appeals Chamber.

II. The privacy claim

9. The concept of privacy has been described as "a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings that I sometimes despair whether it can be usefully addressed at all".[3] The present arguments illustrate its complexity and could be said to mark two extremes. The Prosecution's case includes the

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[1] Under Rule 126 (C) STL RPE.

[2] *See* Rule 162 STL RPE:

(A) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

(B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture.

[3] R.C. Post, "Three Concepts of Privacy", 89 *Georgetown Law Journal* 2087 (2001).

proposition that mobile telephones were used for the purpose of planning, committing and covering up the attack of 14 February 2005 and that their use created metadata showing, among other things, where and when they were used. The Defence's case is that securing the immense volume of 7 ½ years of metadata of all telephone calls and text messages[4] made and sent within Lebanon between 2003 and 2010 without judicial oversight entails a breach of privacy of the Lebanese people so egregious that the evidence should be excluded. How are they to be approached?

10. There is now a vast jurisprudence that recognizes the importance and difficulty of such issues.[5] In addition to the international materials referred to in the Judgment and the report cited at footnote five of this Opinion, that is just what was done recently by the French Conseil constitutionnel in examining claims that a new surveillance law responding to terrorist threats did not provide adequate privacy protections for metadata and the content of electronic messages.[6] In their decision, the Conseil constitutionnel clearly implies that metadata are afforded privacy protections, which should not be subject to disproportionate limitations.[7]

11. The law's protection of metadata is evolving internationally. The opinion of Judge Riachy records the prohibition by the Lebanese legislature of disclosure of metadata without judicial authority;[8] other legislatures have adopted a similar policy. This Tribunal is required by its Statute[9] and Rules[10] to apply the highest standards of international criminal procedure. I have found of particular assistance the approach to privacy interests under Article 8 of the European Convention on Human Rights adopted by the UK Supreme Court in *Beghal v Director of Public Prosecutions*.[11] While it concerned a different context from the one we face, the Court addressed two fundamental

[4] The Prosecution are also in possession of the content of such messages but the Certified Issues do not extend to this material.
[5] *See*, *e.g.*, the discussion of European law in United Kingdom, England and Wales High Court, *R (Davis) v The Secretary of State for the Home Department* [2015] EWHC 2092 (17 July 2015); *see also A Question of Trust: Report of the Investigatory Powers Review*, David Anderson QC, Independent Reviewer of Terrorism Legislation, June 2015.
[6] France, Conseil constitutionnel, No. 2015-713 DC, 23 July 2015.
[7] *See id.* at para. 56 («Considérant, en second lieu, que cette technique de recueil de renseignement est mise en œuvre dans les conditions et avec les garanties rappelées au considérant 51 ; qu'elle ne pourra être mise en œuvre que pour les finalités énumérées à l'article L. 811-3 du code de la sécurité intérieure ; qu'elle est autorisée pour une durée de quatre mois renouvelable conformément à l'article L. 821-4 du même code ; qu'en outre, lorsque le recueil des données a lieu en temps réel, il ne pourra être autorisé que pour les besoins de la prévention du terrorisme, pour une durée de deux mois renouvelable, uniquement à l'égard d'une personne préalablement identifiée comme présentant une menace et sans le recours à la procédure d'urgence absolue prévue à l'article L. 821-5 du même code ; que, par suite, *le législateur a assorti la procédure de réquisition de données techniques de garanties propres à assurer entre, d'une part, le respect de la vie privée des personnes et, d'autre part, la prévention des atteintes à l'ordre public et celle des infractions, une conciliation qui n'est pas manifestement déséquilibrée*») (emphasis added).
[8] Separate and Partially Dissenting Opinion of Judge Riachy, paras 19-20.
[9] Art. 28 STL St.
[10] Rule 149 (B) STL RPE.
[11] [2015] UKSC 49 (22 July 2015) ("*Beghal*").

principles applicable in any case where competing interests must be weighed: the principle of legality and the principle of proportionality. The issues raised by the Trial Chamber require appraisal of each principle.

A. Principle of legality

12. The leading judgment in *Beghal* was delivered by Lord Hughes, who stated:

> It is well established that the primary constituent of the requirement that interference with an ECHR must be in accordance with the law ("legality") is [1] that there must be a lawful domestic basis for it, [2] that this law must be adequately accessible to the public and [3] that its operation must be sufficiently foreseeable, so that people who are subject to it can regulate their conduct […] The requirement of legality, however, is now established to go further than this. It calls for the law to [4] contain sufficient safeguards to avoid the risk that power will be arbitrarily exercised and thus that unjustified interference with a fundamental right will occur.[12] (numbering added)

13. In analysing whether the legality test was met, Lord Hughes concluded:

> The need for safeguards is measured by the quality of intrusion into individual liberty and the risk of arbitrary misuse of the power […] There are sufficient safeguards against arbitrary use of this power […] [and] effective controls [including] judicial review […] which prevent arbitrary use of the power or provide a correction if it should occur.[13]

14. I agree with these formulations, which are the result of a succession of carefully argued appeals.

B. Principle of proportionality

15. *Beghal*, applying earlier high authority, formulated the concept of proportionality in four questions:

> (i) is the objective sufficiently important to justify limitation upon a fundamental right?
>
> (ii) is the measure rationally connected to the objective?
>
> (iii) could a less intrusive measure have been adopted?
>
> (iv) has a fair balance been struck between individual rights and the interests of the community?[14]

16. In contrast, in the present case, the Majority propose the following test:

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[12] *Beghal*. paras 29, 30.
[13] *Id.* at para. 45.
[14] *Beghal*, para. 46 (citing *Bank Mellat v. HM Treasury (No 2)* [2013] UKSC 39, para. 20).

> An interference with a right will be considered "necessary" for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued. The principle of proportionality in that sense requires that limitations on a right must be: (1) appropriate to achieve their protective function, (2) the least intrusive instrument among those available to achieve the desired result, and (3) proportionate to the interest to be protected. Moreover, the limitation placed on the right must be shown to have some chance of achieving that goal and must not render the essence of the right meaningless.[15]

17. The Majority's formulation with the language of "pressing social need" and "some chance of achieving that goal" is vague compared to the *Beghal* criteria. Furthermore, its use of "proportionate" to define the term "proportionate" is unhelpful, while the criterion of the "least intrusive instrument" for a non-decisive factor is overly determinative. I therefore prefer the *Beghal* criteria.

18. Applying their chosen criteria, their Lordships in *Beghal* then evaluated the proportionality of the alleged privacy infringement in light of the facts of the case before them. They concluded:

> Overall, the level of intrusion into the privacy of the individual is, for the reasons which have been explained above, comparatively light and not beyond the reasonable expectations of those who travel across the UK's international borders. Given the safeguards set out above, it is not an unreasonable burden to expect citizens to bear in the interests of improving the prospects of preventing or detecting terrorist outrages. In those circumstances, the port questioning and associated search powers represent a fair balance between the rights of the individual and the interests of the community at large and are thus not an unlawful breach of article 8.[16]

C. Application of these principles in the present case

19. The Majority judgment in this case agrees that "as in every proportionality analysis, the precise requirements necessary to adequately safeguard human rights depend on the circumstances of the case."[17]

20. Yet here relevant circumstances of the case are unknown to us. That is because the Prosecution considered that the issues of whether the CDRs fall within the right to privacy and the necessity and proportionality of their transfer and use go beyond the certified issues and, as a result,

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[15] *See* Majority decision, para. 50 (*citing* ECtHR, *Uzun v. Germany,* 35623/05, Judgment, 2 September 2010, para. 78); ECtHR, *Handyside v. United Kingdom*, 5493/72, Judgment, 7 December 1976, paras 48-49; Report of the Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, UN Doc. A/HRC/27/37 (30 June 2014), para. 23 and Human Rights Committee, General Comment No. 27, CCPR/C/21/Rev.1/Add.9 (1999), para. 14.
[16] *Beghal*, para. 51.
[17] Majority Decision, para. 54.

it has not addressed them in its response.[18] It did add that, in the event that the Appeals Chamber finds it appropriate to consider these issues, it requests an opportunity to be heard.[19] But the Majority has declined that request.

21. There can be no complaint at that decision: the Trial Chamber is the appropriate forum for making findings of first impression; our role should, as far as possible, be exercised only with the benefit of its conclusions. But what should follow in my respectful view is a reference back to the Trial Chamber to make its own findings on legality and proportionality.

22. Here however the Majority makes its own evaluation of proportionality. Its proportionality analysis is based on an acceptance of the Trial Chamber's conclusions that "the transfer of the CDRs had a narrow and legitimate forensic purpose"[20] and that "the CDRs are strictly confined to the Tribunal's judges, the Prosecution, Defence Counsel, the Legal Representative of the Victims and support staff" and will only be used for "the determination of those responsible for the attack of 14 February 2005 and others of a similar nature."[21]

23. But the Appeals Chamber has neither the facts, nor Prosecution submissions and Defence reply, required to justify its decision as to proportionality. In particular, the Majority decision is made without any evidence or submissions on:

(i) how and why the UNIIIC and the Prosecution decided to acquire 7 ½ years' worth of telephone call and text message metadata, in addition to text message content, rather than making a more targeted request;

(ii) what process of examination of the metadata was selected and how it was then applied; and

(iii) whether and to what extent privacy interests were protected or affected by the UNIIIC and the Prosecution.

24. The Trial Chamber says it will consider the evidence at the admissibility stage. However, without it, for this Chamber to give affirmative answers to the certified issues entails an unjustified

[18] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.9, F0006, Prosecution Response to the Oneissi Defence "Appeal of the 'Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution'", 15 June 2015, para. 13.
[19] *Id.* at fn. 19.
[20] Majority Decision, para. 56.
[21] *Id.* at paras 56-57.

assumption that the criteria of "least intrusive instrument" and "proportionality to the interest to be protected" are satisfied. A genuine analysis of the legality and proportionality of the transfer and use of the CDRs requires knowledge of the abovementioned salient facts.

25. It may be that the Majority rely on the fact that, when deciding that legislation infringed European standards, earlier judgments as to proportionality, including the important *Digital Rights Ireland* decision of the European Court of Justice,[22] entailed a fact assessment at a high level of generality rather than grappling with the specific facts of any case. If so, I respectfully disagree that such an approach can be adopted in reverse to answer the questions posed in this appeal. It is one thing to strike down legislation expressed in general terms as risking injury to privacy interests. It is quite another thing to reason from general facts that the wholesale taking of metadata for many years, with no information as to how it was used and with what consequences, entails no significant infringement that needs to be carefully evaluated against the Prosecution's claim for its admission.

26. For these reasons, I respectfully disagree with the judgment of the Majority.

III. Conclusion

27. I am of opinion that the administration of due process of law requires both evidence of and findings upon the issues I have identified. Since we have been given neither, I would reply to the Trial Chamber that we cannot answer either of the certified issues at this time and that the case must go back to it with a direction that it consider the evidence of the matters referred to in paragraph 23. This information is required before proper consideration can be given to whether:

(i) the probative value of the Prosecution evidence is substantially outweighed by the need to ensure a fair trial;[23] and

(ii) evidence was obtained by methods which cast substantial doubt on its reliability; its admission is antithetical to, and would seriously damage, the integrity of the proceedings; or it was obtained in violation of international standards on human rights.[24]

[22] CJEU, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, et al.*, C-293/12 and C-594/12, Judgment, 8 April 2014.
[23] Art. 21 (2) STL St.
[24] Rule 162 STL RPE.

28. I accordingly dissent from the Majority decision which seeks to answer the issues posed by the Trial Chamber without the necessary information.

Done in Arabic, English and French, the English version being authoritative.
Dated 28 July 2015
Leidschendam, the Netherlands

Judge David Baragwanath