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

THE TRIAL CHAMBER

SPECIAL TRIBUNAL FOR LEBANON

Case No:	**STL-11-01/T/TC**
Before:	**Judge David Re, Presiding** **Judge Janet Nosworthy** **Judge Micheline Braidy** **Judge Walid Akoum, Alternate Judge** **Judge Nicola Lettieri, Alternate Judge**
Registrar:	**Mr Daryl Mundis**
Date:	**24 October 2017**
Original language:	**English**
Classification:	**Public**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

CORRECTED VERSION OF THE 'DECISION ON ONEISSI DEFENCE URGENT MOTION FOR AN ORDER TO COMPEL DISCLOSURE OF REQUESTS FOR ASSISTANCE RELEVANT TO THE ATTRIBUTION OF MOBILE NUMBER 3598095' OF 13 OCTOBER 2017

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Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Geoffrey Robertson & Ms Sarah Bafadhel

BACKGROUND

1. The Prosecution pleads in the amended consolidated indictment that the Accused, Mr Hassan Habib Merhi, Mr Assad Hassan Sabra and Mr Hussein Hassan Oneissi, used three private mobile telephones, color-coded and referred to as 'Purple Phones', including number 3598095 or 'Purple 095', in relation to the preparation of the attack and assassination of the former Prime Minister of Lebanon, Mr Rafik Hariri in Beirut on 14 February 2005. More specifically, the Accused used the 'Purple Phones' (from at least 1 January 2003 until 16 February 2005) to communicate amongst each other, to communicate with others outside the group and to coordinate the false claim of responsibility for the attack.[1]

2. On 29 June 2017, counsel for Mr Oneissi sent a letter to the Prosecution seeking the disclosure of requests for assistance pertaining to the attribution of number 3598095. Referring to Prosecution Analyst Mr Andrew Donaldson (Witness PRH230)'s testimony and his 'Methodology PowerPoint Presentation',[2] the Defence argues that the materiality, under Rule 110 (B),[3] of the requests for assistance sought, arises out of Mr Donaldson's evidence on the methodology which he used to attribute number 3598095 to Mr Oneissi. The Prosecution responded on 6 July 2017 to the Defence letter, stating that it had not identified any request for assistance, which was not 'generic in nature', that it had not previously disclosed. In a follow-up letter, on 12 July 2017, the Defence stated that the question of whether the sought requests for assistance were 'generic in nature' was irrelevant for the purposes of its request and referred to the Trial Chamber's reconsideration decision of 6 March 2015, in which it reconsidered its decision of 7 November 2014 and ordered the Prosecution to disclose the sought requests for assistance.[4] The Defence also expressly indicated that it intended to cross-examine Mr Donaldson on his use of requests for assistance as part of his evidence on attribution methodology.[5]

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[1] F2720, Amended consolidated indictment, paras 15-16.
[2] Exhibit P1948 MFI.
[3] Rule 110 (B) states: 'The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused'.
[4] F1739, Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance, 7 November 2014 ('Decision of 7 November 2014'); F1875, Decision Reconsidering 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', 7 November 2014, 6 March 2015 ('Decision of 6 March 2015').
[5] F3261, Oneissi Defence Urgent Motion for an Order to Compel Disclosure of RFAs Relevant to the Attribution of 3598095, 2 August 2017 ('Oneissi Defence motion'), paras 7-9; annexes A to C.

3. The Prosecution responded on 19 July 2017, maintaining its refusal to disclose the requests for assistance and stating that the 6 March 2015 reconsideration decision was distinguishable. It also requested that the Oneissi Defence provide more detail on the materiality of its request in relation to the cross-examination of Mr Donaldson and for all the requests for assistance mentioning number 3598095 and or Mr Oneissi's name. The Defence responded on 21 July 2017, stating that it had sufficiently justified the materiality of the requests for assistance and clarifying that it sought 'any [requests for assistance] containing phone number 3598095 and/or the name of Hussein Hassan Oneissi (in any of its variations), relevant to the attribution of 3598095'. The Prosecution consequently disclosed five requests for assistance on 26 July 2017 and, upon further requests for clarification from the Defence, confirmed on 1 August 2017 that it had in its possession additional undisclosed 'generic' requests for assistance which were not subject to disclosure as 'there was no evidence received' in response, and that none of these 'generic' requests for assistance had been generated by Mr Donaldson.[6]

4. The Prosecution opposed the Oneissi Defence's request to have access to the undisclosed requests for assistance, and as a result, counsel for Mr Oneissi requests the Trial Chamber to order the Prosecution to disclose them.[7] Counsel for Mr Oneissi filed supplementary submissions and the Prosecution thereafter responded.[8] The Oneissi Defence replied to the Prosecution response.[9] The Prosecution, at the Trial Chamber's request, provided it with an additional request for assistance.[10]

[6] Oneissi Defence motion, paras 10-14; annexes D to H.
[7] F3277, Prosecution Response to Oneissi Defence Urgent Motion for an Order to Compel Disclosure of RFAs Relevant to the Attribution of 3598095, 16 August 2017 ('Prosecution response'); Oneissi Defence motion, para. 14.
[8] F3311, Supplementary Submissions to "Oneissi Defence Urgent Motion for an Order to Compel Disclosure of RFAs Relevant to the Attribution of 3598095", 6 September 2017 ('Oneissi Defence supplementary submissions'); F3322, Prosecution Response to the 'Supplementary Submissions to Oneissi Defence Urgent Motion for an Order to Compel Disclosure of RFAs Relevant to the Attribution of 3598095', 13 September 2017 ('Prosecution response to Oneissi Defence supplementary submissions').
[9] F3325, Oneissi Defence Reply to Prosecution Response to Supplementary Submissions of 6 September 2017, 14 September 2017 ('Oneissi Defence reply to Prosecution response to supplementary submissions').
[10] F3327, Order to Prosecution in Relation to the Oneissi Defence Motion to Compel Disclosure of Requests for Assistance, 15 September 2017 ('Order to Prosecution').

SUBMISSIONS

Oneissi Defence application

5. The Defence submits that the use of requests for assistance was an integral element of 'collation', one of the methods employed by Mr Donaldson in attributing number 3598095 to Mr Oneissi and that the Defence intends to cross-examine the witness on this aspect of his evidence. The Defence thus requires the requests for assistance in order to effectively prepare for this cross-examination. It also argues that the disclosure application meets the threshold of Rule 110 (B), in compliance with the relevant international case law and as endorsed by the Special Tribunal's Appeals Chamber.[11]

The requests for assistance are an integral element of Mr Donaldson's evidence

6. Referring to the methodology of attribution Mr Donaldson explained in his testimony, the Defence argues that it is clear that he was closely involved in the collection of evidence and that the requests for assistance played a role in the collection process. It notes that the witness listed requests as one of two 'means of collection'. Moreover, it highlights the 'collation' technique he employed, namely, once all 'in-house' information had been collected, further evidence would be collated in order to test suspicions or move the investigation forward. Mr Donaldson explained that he has started from 'point zero', collected and presented all the information he felt was relevant to that number.[12]

The requests for assistance are disclosable under Rule 110 (B)

7. The Defence submits that the requests for assistance meet the requirements of Rule 110 (B) as these documents are integral to the attribution process which enabled Mr Donaldson to conclude that the number 3598095 is allegedly attributable to Mr Oneissi. It refers to a decision of the Special Tribunal's Appeals Chamber which held that Rule 110 (B) requires the defence to demonstrate *prima facie* that what is requested is material to the preparation of the defence. The test for materiality is whether it is relevant to such preparation, and preparation is recognised as a broad concept.[13]

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[11] Oneissi Defence motion, para. 2.
[12] Oneissi Defence motion, paras 15-18.
[13] Oneissi Defence motion, paras 20-21; *see* STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 19 September 2013.

8. The Defence notes that the Special Tribunal's Appeals Chamber has found that items that assist in the preparation of a cross-examination strategy may meet the condition of materiality under Rule 110 (B) and submits that it is currently preparing to cross-examine Mr Donaldson on his use of the requests for assistance pursuant to Rule 150 (I). Referring to the Prosecution's enquiry for more detail in relation to its request, the Defence argues that divulging its cross-examination strategy cannot be a precondition for disclosure of documents that are material to its preparation.[14]

It is in the interests of justice to order the disclosure of the requests for assistance

9. Relying on a decision of the Special Tribunal's Pre-Trial Judge,[15] the Defence submits that the Prosecution's duties under Rule 110 (B) should be interpreted to ensure respect of the Accused's fundamental fair trial rights, such as the right guaranteed in Article 16 (e) of the Special Tribunal's Statute to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The Defence argues that the Prosecution's strategy to lead detailed evidence in relation to the attribution methodology employed by Mr Donaldson, and the tools he used in this process, was presumably intended to enhance the reliability of his conclusions. Thus, it is in the interest of justice that this evidence be tested as the Defence is placed at a severe disadvantage if obliged to blindly trust an analysis produced by a Prosecution analyst, which was ultimately reviewed and approved by Prosecution lawyers before being led in court.[16]

In this instance, the question of whether the sought requests for assistance are 'generic in nature' is irrelevant for the purposes of Rule 110 (B)

10. The Defence submits that, in arguing that the requests for assistance were generic in nature and denying its request, the Prosecution misinterpreted the decision of 7 November 2014. It submits that the Trial Chamber's observation that the requests for assistance in that decision were 'generic in nature' was related to whether the requests for assistance were inherently material to the Defence's preparation. The Trial Chamber denied the disclosure request because the Trial Chamber found that the Defence did not sufficiently demonstrate the materiality of the sought requests for assistance. Noting the reasoning in the reconsideration

[14] Oneissi Defence motion, paras 21-23.
[15] F0510, Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motion for Disclosure, 8 November 2012, para. 32.
[16] Oneissi Defence motion, paras 24-27.

decision, the Defence notes that the very same requests for assistance were found to be material to defence preparations and disclosable under Rule 110 (B). This materiality arose from requisite new facts and change in material circumstances, while the nature of the requests for assistance themselves had not changed since the decision of 7 November 2014 was issued. In the instant case, the materiality of the requests for assistance is argued as arising out of Mr Donaldson's in-court testimony on 21 June 2017. Upholding the Prosecution's misinterpretation of the decision of 7 November 2014 would create an unduly restrictive barrier to Rule 110 (B) materiality.[17]

11. The Defence argues that the requests in question are distinguishable from the requests for assistance deemed 'generic in nature' as they would, presumably, involve requests for specific records, from specific sources, for a specific number (3598095) and or individual (Mr Oneissi).[18]

The requests for assistance are subject to disclosure independent of the response received, if any, thereto

12. The Oneissi Defence submits that the Prosecution's position that, since it did not generate any evidence, the requests are not disclosable is without merit as the requests themselves are subject to scrutiny independent of the outcome they produced. Given that the scope of Mr Donaldson's testimony was not limited to the evidence generated as a result of the requests for assistance, the Defence's access to them should not be limited to requests for assistance that generated evidence.[19]

13. Moreover, in arguing that in response to the requests for assistance, only material necessary to mount a challenge to the admissibility of evidence is subject to disclosure, even if those documents themselves are not intended for use as evidence at trial, the Defence submits that the Prosecution 'misread' the reconsideration decision. It contends that the documents to which the Trial Chamber refers to in its decision are the requests for assistance themselves; whether evidentiary material was received in response to those requests for assistance was not in this instance an issue expressly considered by the Trial Chamber.

14. In any event, the reconsideration decision was based on a broader principle of interpreting Rule 110 (B) to ensure that a stricter interpretation would not cause injustice to

[17] Oneissi Defence motion, paras 16-17 (citing transcript of hearing on 21 June 2017, pp 17-23) and 28-32.
[18] Oneissi Defence motion, para. 33.
[19] Oneissi Defence motion, para. 34.

the Defence preparations for trial; an interpretation which is supported by the case law of other international criminal tribunals. As a result, the Defence argues that to restrict the disclosure of requests for assistance to only those that are necessary to mount a challenge to the admissibility of evidence would constitute an unjustifiably narrow reading of the materiality threshold. It submits that the Prosecution's reading would unjustifiably constrain the Trial Chamber's ability to assess the Rule 110 (B) materiality threshold in a versatile and appropriate manner; a flexible interpretation is necessary in order to allow the Defence the freedom to prepare its case effectively. As a result, it is suggested that each Rule 110 (B) application should be assessed on its own merits, and particular set of circumstances, and not be subjected to unjustifiably rigid restrictions.[20]

15. The Defence thus notes that, according to the Prosecution, the requests for assistance are either those to which no response was received or, where a response was received, but it indicated that there was no material meeting the terms of the requests. The Defence argues that, even where the latter was the case, this is still relevant to Defence preparations and it is in the interests of justice, to both the Defence and the Trial Chamber, for this to be known. Should the Defence's disclosure request be granted, the Defence requests that the Prosecution be ordered to specify into which of the above two categories each request for assistance falls.[21]

The materiality of the requests for assistance is not contingent on whether they were generated by Mr Donaldson himself

16. The Defence argues that despite the Prosecution's assertion that Mr Donaldson did not generate the relevant requests for assistance, it is unlikely that they were sent without his knowledge, consent and or involvement given his testimony on collation and his leading role on the Prosecution's attribution analysis. In any event, the Defence notes that this is irrelevant, as Mr Donaldson is simply the Prosecution representative in relation to the attribution of telephones to the Accused, and it seeks disclosure of requests for assistance relevant to the alleged attribution of number 3598095 to Mr Oneissi.[22]

[20] Oneissi Defence motion, paras 37-38.
[21] Oneissi Defence motion, paras 39-40.
[22] Oneissi Defence motion, paras 41-43.

The urgency of the motion

17. In light of the ongoing testimony and upcoming cross-examination of Mr Donaldson, the Defence requests that the Trial Chamber reduce the time-limit to respond to this motion, pursuant to Rule 9 (A) (i), in order to allow this matter to be resolved expeditiously.[23] This request is now moot.

Prosecution response

The requests for assistance are not material to the preparation of the defence under Rule 110 (B)

18. The Prosecution notes that the Trial Chamber has previously held that requests which were generic in nature, and were simply requests for information, were not subject to disclosure as they did not contain anything that was material to the preparation of the Defence. The Prosecution argues that, in the instant case, the Defence has not demonstrated that the sought requests for assistance are material to the preparation of its defence.[24]

19. The Prosecution contends that the fact that requests for assistance are listed as a means of collecting evidence in Mr Donaldson's PowerPoint presentation, and the Defence's intention to cross-examine Mr Donaldson on his use of requests for assistance, does not automatically establish their materiality. Moreover, (1) none of the requests for assistance were generated by Mr Donaldson; (2) they are generic in nature; and (3) they did not generate any evidence. The Prosecution thus argues that information on the process by which it obtains evidence does not of itself amount to materiality, nor demonstrate that the requests for assistance are material to the preparation of the defence.[25]

20. The Defence did not demonstrate how the requests for assistance played an integral role in the attribution process, given that these generic requests generated no evidence. The Prosecution disclosed five requests for assistance to the Defence. The remaining twelve undisclosed requests for assistance sought by the Oneissi Defence did not generate any

[23] Oneissi Defence motion, para. 44.
[24] Prosecution response, paras 4-5.
[25] Prosecution response, paras 5-6.

evidence: seven were those that received no response, and five received no material meeting the requests' terms.[26]

21. The Prosecution argues that the Defence offers no basis for its assumptions about the content of the requests for assistance and that this speculation does not assist the Defence in demonstrating that the requests for assistance are material to its preparation, nor distinguish them from those requests for assistance that the Trial Chamber has previously held to be generic.[27]

The Trial Chamber's reconsideration decision of 6 March 2015 is distinguishable

22. The Prosecution submits that the current situation is distinguishable from that which resulted in the reconsideration decision of 6 March 2015, as there is neither a new fact nor a material change in circumstances which would warrant a divergence from the decision of 7 November 2014. The 6 March 2015 decision involved the existence of new facts which, combined with the Defence's explicit intention to challenge the legality of how the Prosecution obtained the telecommunications data, amounted to a material change in circumstances.[28]

23. The Defence did not demonstrate that the requests for assistance fall within the category—as identified by the Trial Chamber in the 6 March 2015 decision—of material necessary to mount a challenge to the admissibility of evidence. The requests for assistance did not generate evidence which in turn could be challenged, and requesting their disclosure in order to prepare for the cross-examination of Mr Donaldson is not a sufficient ground for departure from the original decision. The decision of 7 November 2014 thus remains applicable and the generic requests for assistance are not disclosable under Rule 110 (B).[29]

The Defence will not be severely disadvantaged by the non-disclosure of the requests for assistance

24. The Prosecution asserts that the Defence's claim that it would be 'manifestly contrary to the interests of justice' if the requests for assistance are not disclosed, as this would 'essentially allow the Prosecution to lead evidence that the Defence has no way to examine

[26] Prosecution response, paras 6-8, referring to the Decision of 7 November 2014 and the Decision of 6 March 2015.
[27] Prosecution response, paras 9-10.
[28] Prosecution response, para. 11.
[29] Prosecution response, paras 12-13.

[…]' is logically flawed. The Prosecution has already disclosed, and the Oneissi Defence has access to, all of the material which the Prosecution is relying upon as evidence at trial. The non-disclosure of the requests for assistance, which did not generate any evidence, would therefore not result in the Prosecution leading evidence that the Defence cannot effectively challenge and the Defence will not be prejudiced.[30]

Slide 29 of Mr Donaldson's Methodology PowerPoint Presentation

25. The Prosecution notes that the Oneissi Defence referenced slide 29 of Mr Donaldson's Methodology PowerPoint Presentation and its contents being described by Prosecution as an 'extract from a request for assistance'.[31] However, the document on this slide is not an actual request for assistance, but a response to a request for assistance which had generated evidence on which the Prosecution relied. Mr Donaldson intended for this extract to be an example of where evidence about a number was obtained without being looked for directly.[32]

Mr Donaldson is a Prosecution witness allowed to provide opinion evidence

26. The Prosecution submits that Mr Donaldson is neither its 'mouthpiece' nor its 'representative in relation to the attribution of telephones to the Accused'. Rather, the Trial Chamber has found him to be a Prosecution witness 'sufficiently qualified by his experience in the area to proffer an opinion on co-location and therefore *possible* attribution'. Requests for assistance that generated no evidence cannot therefore be relevant to Mr Donaldson's testimony.[33]

Defence supplementary submissions

27. Following Mr Donaldson's cross-examination by counsel for Mr Oneissi on 25 August 2017, the Defence made supplementary submissions. The Defence construed Mr Donaldson's explanation during his testimony about three requests for assistance relevant to the attribution of the number 3598095 to Mr Oneissi to mean that these requests were drafted in such a way that if the number 3598095 was listed against another name than that of Mr Oneissi, the Prosecution would not have received that information.[34]

[30] Prosecution response, paras 14-15.
[31] Slide 29 is part of Exhibit P1948 MFI.
[32] Prosecution response, para. 16.
[33] Prosecution response, paras 3, 17, citing F3172, Decision Allowing Prosecution Analyst Andrew Donaldson to Provide Opinion Evidence, 2 June 2017, paras 78, 91.
[34] Oneissi Defence supplementary submissions, para. 5.

28. The extent of Prosecution investigations into the physical locations allegedly covered by the cell sites that comprise the 'geographic profile' of the number 3598095 is relevant to Defence preparation. The evidence of Mr Donaldson also shows that, contrary to the Prosecution's position in relation to the requests for assistance, the process undertaken by the Prosecution in gathering evidence can of itself amount to Rule 110 (B) materiality.[35] The deficiencies in the attribution investigation, such as those discussed with the witness during the cross-examination on 25 August 2017, would affect the weight of Mr Donaldson's evidence.[36]

29. Based on two negative responses the Prosecution received from the Lebanese Land Registry that contradicted Prosecution allegations, the Defence concludes that the sought requests for assistance are material to defence preparations even where the Prosecution received no response or a negative response.[37]

30. Mr Donaldson testified that the requests for assistance 'directed' by him would bear his initials. The Defence however, relying on one such request for assistance that did not bear his initials, concluded that the extent of his involvement in the sending of a given request for assistance cannot be determined merely by examining whether a given request contained his initials.[38]

Prosecution supplementary response

31. The Prosecution argued that the Defence misconstrued Mr Donaldson's testimony on 25 August 2017 about the three requests for assistance relevant to the attribution of the number 3598095 to Mr Oneissi. Mr Donaldson's testimony on which the Defence relied to argue deficiencies in attribution investigation does not constitute an acceptance or an agreement that the material obtained in response to the requests for assistance was deficient as a result of 'poor' drafting of those requests.[39]

32. The Prosecution submits that it did not use, in its response to the Oneissi Defence supplementary submissions, the term 'negative response' in relation to its requests for assistance. Relying on this misquote, the Defence submitted that this alleged contradiction

[35] Oneissi Defence supplementary submissions, paras 7-8.
[36] Oneissi Defence supplementary submissions, paras 6-8.
[37] Oneissi Defence supplementary submissions, paras 10-14.
[38] Oneissi Defence supplementary submissions, paras 15-17.
[39] Prosecution Response to Oneissi Defence supplementary submissions, para. 6.

justifies its argument that the requests which produced no response should be disclosed. The Defence incorrectly equates a contradictory response with no response at all.[40]

33. The Defence fails to identify in its supplementary submissions any statement by Mr Donaldson made during the cross-examination which supports its argument that the disclosure of further requests for assistance would give a new perspective on the evidence provided so far. Further, the Defence fails to substantiate how or why the allegation that one of the requests for assistance 'directed' by Mr Donaldson did not bear his initials assists its argument for the disclosure of the twelve requests.[41]

Oneissi Defence reply

34. The Defence argued in its reply that the 'confirmation bias' that affects the requests for assistance, and by extension, the attribution process, does not necessarily relate to the material obtained in response to the requests for assistance. Rather, it relates to the fact that the requests sought documents or information in relation to Mr Oneissi, rather than in relation to the mobile number attributed to him by Mr Donaldson.[42]

35. The twelve undisclosed requests for assistance are material to Defence preparations because they would demonstrate the extent to which the 'confirmation bias' affected the attribution investigation, and by extension the Prosecution's attribution case in relation to Mr Oneissi. The Defence reiterated that the undisclosed requests for assistance to which the Prosecution received no response or received a response contradictory to its case are manifestly material to Defence preparations under Rule 110 (B).[43]

DISCUSSION

36. The Trial Chamber has previously determined that, as a general principle, requests for assistance should be disclosed under Rule 110 (B) only if the Defence is able to demonstrate that they are material to its preparations for trial.[44] In addition, materiality is essential to the

[40] Prosecution Response to Oneissi Defence supplementary submissions, paras 8-9.
[41] Prosecution Response to Oneissi Defence supplementary submissions, paras 9-10.
[42] Oneissi Defence reply to Prosecution response to supplementary submissions, para. 3.
[43] Oneissi Defence reply to Prosecution response to supplementary submissions, paras 4, 7-9.
[44] F1697, Decision on the Oneissi Defence Motion for Disclosure of Documents Referred to in the Report Related to the Hard Drive of Mr. Ahmed Abu Adass, 14 October 2014, para. 7. Regarding materiality under Rule 110 (B), *see* STL-11-01/PT/AC/AR126.4, F0004, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 19 September 2013, paras 21-23; Decision of 7 November 2014, para. 8.

satisfaction of the Accused's rights not only, as submitted by the Oneissi Defence, under Article 16 (4) (e), but also under Article 16 (4) (b), which safeguards the Accused's right to have adequate time and facilities for the preparation of his or her defence.[45]

37. The Appeals Chamber has interpreted Rule 110 (B)—consistent with international criminal law case law—to mean that, '(1) The defence must demonstrate *prima facie* that what is requested is "material to the preparation of the defence"; and (2) the test for "materiality" under Rule 110 (B) is whether the books, documents, photographs or tangible objects are relevant to the preparation of the defence case'.[46] The Appeals Chamber found that 'preparation is a broad concept',[47] and that what is material to defence preparations need not be strictly limited to being 'directly linked to exonerating or incriminating evidence',[48] or 'related to the Prosecution's case-in-chief'.[49]

38. The Defence may seek judicial intervention if it believes the Prosecution has withheld evidence material to its preparation, but may not rely on unspecific and unsubstantiated allegations or a general description of the information.[50] When assessing the Prosecution's disclosure obligations with respect to defence requests for materials related to preparing for cross-examining a witness, the Prosecution should consider, among other things, 'whether the

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[45] Article 16 (4) of the Special Tribunal's Statute provides that an Accused is entitled: (b) to have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing; (e) to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

[46] STL-11-01/PT/AC/AR126.4, F0004, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013 ('Appeals Chamber Decision'), paras 21-22. On demonstrating materiality, *see*: ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ('First *Karemera* Decision'), paras 12, 14; *Karemera v. The Prosecutor*, ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, paras 12-13; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012 ('*Karadžić* Decision'), paras 6-9; *Prosecutor v. Bagosora*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 ('*Bagosora* Decision'), para. 9; *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 11, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008 ('*Lubanga* Decision'), para. 77; *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Decision on the Defence's Request for disclosure of Documents in the Possession of the Office of the Prosecutor, 23 January 2013, para. 12.

[47] *Karadžić* Decision, para. 9; *Lubanga* Decision, paras 77-78; First *Karemera* Decision, para. 14; *Bagosora* Decision, para. 9.

[48] *Lubanga* Decision, para. 77.

[49] *Karadžić* Decision, para. 9; *Bagosora* Decision, paras 8-9.

[50] *See, e.g.,* ICTR, *Kamuhanda v. The Prosecutor*, ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14.

material could reasonably lead to further investigation by the Defence and the discovery of additional evidence'.[51]

39. To ascertain whether any of the twelve requests for assistance are material to Defence preparations for trial, the Trial Chamber ordered the Prosecution to provide them to the Trial Chamber.[52] Further, on 15 September 2017, the Trial Chamber ordered the Prosecution to search its holdings and provide it with any requests that are objectively non-generic and that were phrased in a manner that could have excluded the possibility of someone other than Mr Oneissi using 3598095. As a result, in addition to the twelve requests, the Prosecution provided it with an additional request for assistance.[53]

Are the requests for assistance an integral part of Mr Donaldson's evidence?

40. In his testimony of 20 June 2017, Mr Donaldson explained his methodology of attribution. The Defence argues that it is clear that he was closely involved in the collection of evidence and that the requests for assistance played a role in the collection process. Mr Donaldson clarified that the requests were one of two means of collection he employed[54] and that he 'directed' some of the requests of assistance while others had his initials.[55]

41. Not all the requests for assistance related to telephone attribution in relation to Mr Oneissi had Mr Donaldson's initials on them and the Trial Chamber agrees with the Defence that Mr Donaldson's involvement in the sending of a specific request for assistance cannot be determined merely by examining whether it contained his initials.

42. However, given Mr Donaldson's involvement in directing the requests for assistance to the Lebanese Prosecutor-General, his role in the collection and collation techniques he employed to attribute the number to Mr Oneissi and his reliance on them in attributing the number to Mr Oneissi, it is reasonable to conclude that the requests for assistance constitute an integral part of Mr Donaldson's evidence. The requests for assistance are relevant and

[51] ICTR, *Nahimana v. The Prosecutor*, ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, Public Redacted Version, 27 November 2006, ('*Nahimana* Decision'), para. 16, citing to *Prosecutor v. Krstić,* IT-98-33-A, *Confidential* Decision on the Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66 (C), 27 March 2003, p. 4.
[52] Email from the Trial Chamber's legal officer to the Prosecution and the Parties, 21 August 2017, and Prosecution's response providing the documents, 22 August 2017.
[53] Order to Prosecution, para. 2
[54] Oneissi Defence motion, para. 17.
[55] Oneissi Defence supplementary submissions, para. 15.

therefore material to the crucial issue of the methodology employed by Mr Donaldson and ultimately the attribution itself.

Whether the requests for assistance are generic or not is irrelevant for Rule 110 (B) purposes

43. The Defence argues that the Trial Chamber denied disclosure in its decision of 7 November 2014 because the Defence did not sufficiently demonstrate the materiality of the information requested and thus whether the sought requests were inherently material to Defence preparations. The materiality of the requests is therefore not determined by their nature of the documents themselves, but rather by the relevance of the documents to Defence preparations.[56] The Prosecution disagreed and argued that the generic nature of the requests for assistance that produced no evidence does not render them material to Defence preparations and therefore fall outside Prosecution's disclosure obligations under Rule 110 (B).[57]

44. In its decision of 7 November 2014, the Trial Chamber however addressed the meaning of the term 'generic' as applicable to requests for assistance. They were characterised as requests which by their contents 'are generic in nature and do no more than request the information that was eventually provided and that Defence counsel have'.[58] However, as each Rule 110 (B) application turns on the individual facts of its case, applying such a narrow approach and interpretation in the present case might neither be useful in determining the materiality, nor be the most appropriate in its effect, and could result in injustice or unfairness.

45. Additionally, the Trial Chamber does not agree that the nature of the request for assistance is fully irrelevant to this inquiry. The nature of the request is relevant though not amounting to a decisive factor. Moreover, whereas materiality itself does not hinge solely on the nature of the documents, in the circumstances of this case, non-generic requests for assistance could well by their contents, even unintentionally, produce a consequence or response which excludes the possibility of securing and relaying information and documents in relation to the use of number 3598095 by third parties other than Mr Oneissi.

46. Furthermore, in so far as any requests for assistance focused on Mr Oneissi as the singular and major subject of the requests, enquiries and searches, they might have prompted

[56] Oneissi Defence motion, paras 29-31.
[57] Prosecution response, para. 6.
[58] Decision of 7 November 2014, para. 11.

and produced negative results in respect of others who could have been potential users of number 3598095. This could have resulted in denying the possibility of returning information or documents in respect of third parties, including Mr Oneissi's family members. This in turn presents an incomplete picture in terms of analysis, which could ultimately impact the attribution on the number in issue. Hence, the nature and contents of the requests for assistance and the manner in which they are phrased are all pertinent matters to the determination of their materiality under Rule 110 (B).

Whether the fact that the requests for assistance generated no evidence is a bar to materiality and disclosure

47. The Defence disagrees with an interpretation of the Trial Chamber's reconsideration decision, which would entail that requests for assistance to which no response was received are subject to disclosure if and only when they are necessary to mount a challenge to the admissibility of evidence. This would constitute an unjustifiably narrow reading of Rule 110 (B) materiality threshold, inconsistent with the reconsideration decision and the established approach in other courts and tribunals.[59] In the Prosecution view, the Defence has not demonstrated that these requests fall within the category identified in the reconsideration decision because they did not generate any evidence which can be challenged.[60]

48. As a matter of practice, it is more usual that responses to requests for assistance are the subject matter of Rule 110 (B) applications. The Special Tribunal's legal framework has no strict rule that a request for assistance itself could not be the basis for such an application. It would depend on the facts and circumstance of each case. In case of both documents, it is necessary for the applicant to establish a *prima facie* materiality in order to merit disclosure. Further, in cases such as here, where it is submitted that the requests for assistance themselves prompted and produced the information or material contained in the response or an absence of response, then the requests themselves may be subject to disclosure, where the relevant conditions or criteria are satisfied.

49. The Trial Chamber therefore rejects the Prosecution's argument that the requests which did not generate any response or generated a response not meeting the criteria specified in the requests are not disclosable on that basis. To the contrary, it raises an issue as to the content of the requests themselves respecting their materiality. In this instance, the requests

[59] Oneissi Defence motion, para. 37.
[60] Prosecution response, para. 12.

and the failure to elicit a response is relevant to the methodology used and ultimate attribution. The requests are thus material to Defence preparations for raising a challenge to the neutrality of the requests and the manner of collection of evidence, methodology and attribution because the requests are the integral part of collecting attribution evidence. Here, it was not necessary for the requests for assistance to generate responses to become disclosable, given that it is the effect that they could reasonably have on limiting searches or producing a particular exclusive type of search results which is relevant for the purposes of Defence preparations.

Is the Trial Chamber's reconsideration decision distinguishable?

50. The Defence, referring to how the Trial Chamber reasoned in its reconsideration decision respecting the materiality of the requests, argues that here the materiality of the requests arises out of Mr Donaldson's testimony on 21 June 2017.[61] The Prosecution responded that the reconsideration decision involved the existence of new facts which, combined with the Defence's explicit intention to challenge the legality of how the Prosecution's telecommunications data was obtained, amounted to a material change in circumstances.[62]

51. Although the circumstance of the two cases are not identical, here the Defence asks for the requests for assistance to challenge the Prosecution evidence in respect of Mr Donaldson's methodology process concerning the collation of documents which informed his analysis leading to conclusions which resulted in the attribution of 3598095 to Mr Oneissi. The Trial Chamber therefore rejects the Prosecution submissions that these requests did not play an integral role in the attribution. Furthermore, the purpose for which they have been requested by the Oneissi Defence, when carefully examined, provides clear bases for their materiality. Equally, it was not the Trial Chamber's intention in the reconsideration decision to establish a principle that requests for assistance could become subject to disclosure under Rule 110 (B) only in cases where such requests were required to challenge the admissibility of evidence.

Determination on the specific requests to be disclosed to the Defence

52. The Trial Chamber has carefully reviewed the wording of each of the thirteen requests for assistance. For the above reasons, the Trial Chamber is of the view that the request for

[61] Oneissi Defence motion, paras 29, 31-32.
[62] Prosecution response, para. 11.

assistance dated 2 July 2013 is not only generic in nature and was formulated in a way that could have produced a response from the Lebanese Government which would not exclude the possibility that number 3598095 was used by someone other than Mr Oneissi.

53. The remaining twelve requests are clearly relevant to Mr Donaldson's methodology and analysis processes which resulted in the attribution of number 3598095 to Mr Oneissi, and are hence material to Defence preparations. The Trial Chamber will therefore order disclosure of the twelve requests for assistance.

CONFIDENTIALITY

54. The Oneissi Defence application and the Prosecution response were filed confidentially. The Oneissi Defence submitted that it filed its motion confidentially because it referred to *inter partes* confidential correspondence. The Prosecution filed its submission confidentially—as required by the Practice Directions on Filings—because the motion was confidential, but stated that it could be reclassified as public.[63] The Trial Chamber finds, in these circumstances, that in order to facilitate the public nature of these proceedings, the Prosecution and the Oneissi Defence must file public redacted versions of their confidential filings.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

ORDERS the Prosecution to immediately disclose the eleven requests for assistance listed in annex A to the Oneissi Defence motion and the request for assistance provided to the Trial Chamber in response to its Order to Prosecution in Relation to the Oneissi Defence Motion to Compel Disclosure of Requests for Assistance of 15 September 2017. The twelve requests to be disclosed are dated:

[63] Oneissi Defence motion, para. 6; Prosecution response, para. 18.

(i) 24 August 2010 (reference: 2010/RFA0544[...]);
(ii) 24 August 2010 (reference: 2010/RFA0545[...]);
(iii) 24 August 2010 (reference: 2010/RFA0546[...]);
(iv) 24 May 2011;
(v) 6 June 2011;
(vi) 26 August 2011;
(vii) 11 October 2011;
(viii) 11 January 2012;
(ix) 19 January 2012 (reference: 2012/RFA0026[...]);
(x) 19 January 2012 (reference: 2012/RFA0027[...]);
(xi) 6 August 2012; and
(xii) 7 September 2016;

ORDERS counsel for Mr Oneissi and the Prosecution to file public redacted versions of their confidential filings; and

ORDERS the Registry to reclassify the Prosecution response (filing F3277) from confidential to public.

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

Leidschendam,
The Netherlands
24 October 2017

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy