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:	**26 January 2018**
Original language:	**English**
Classification:	**Public**

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

DECISION DENYING ADMISSION INTO EVIDENCE OF TWO CALL SEQUENCE TABLES TENDERED BY THE ONEISSI DEFENCE

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Hugh Milne

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 Emile Aoun, Mr Thomas Hannis & Mr Chad Mair

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée Le Fraper du Hellen & Mr Jad Youssef Khalil

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yasser Hassan & Ms Natalie von Wistinghausen

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

INTRODUCTION AND BACKGROUND

1. The amended consolidated indictment alleges that the Accused, Mr Hussein Hassan Oneissi, was involved, between December 2004 and January 2005, in locating a person—Mr Ahmed Abu Adass—to make a false claim of responsibility for the future attack against Mr Rafik Hariri. On several days during this period, Mr Oneissi was in the vicinity of the Arab University Mosque of Beirut, also known as 'the Al-Houry Mosque', where he met Mr Abu Adass. The Prosecution's case is based, notably, on telecommunications evidence.[1]

2. The Trial Chamber found that a Prosecution investigator, Mr Gary Platt (PRH147), was qualified to give expert opinion evidence regarding matters connected with the surveillance of criminal networks and the identification and organisation of covert communications networks.[2]

3. In April 2017, during Mr Platt's cross-examination, counsel for Mr Oneissi tendered several documents into evidence. These are: a landline call sequence table[3] extracted from call data records[4] received from the Lebanese telecommunications company Ogero and filtered to show all calls to and from the Abu Adass family landline on 16 and 17 January 2005; a call sequence table listing a selection of calls of mobiles allegedly attributed to Oneissi family members—compiled from call data records provided to the Prosecution by the Lebanese telecommunications providers Alfa and MTC; and a collection of maps showing the

[1] STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), para. 23; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra,* F1077, Annex A, Prosecution's Updated Pre-Trial Brief, dated 23 August 2013, 23 August 2013 (confidential), paras 117-122 with further references.

[2] STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3345, Decision Denying Merhi Defence Application to Reconsider 'Decision Clarifying Mr Gary Platt's Area of Expertise', 2 October 2017, paras 3-4 with further references.

[3] Call sequence tables present chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time, comprising relevant call data records and cell site information. *See* F2797, Decision on Four Prosecution Motions on Call Sequence Tables Related to Salim Jamil Ayyash, Hassan Habib Merhi, Assad Hassan Sabra, Mustafa Amine Badreddine, and Five Witness Statements, 31 October 2016 ('First Decision of 31 October 2016'), para. 4; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra,* 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 ('Decision of 6 May 2015'), para. 2.

[4] Call data records are metadata that provide information about communications, such as the source and destination telephone number, the type of communication (telephone call or text message), the date and time of telephone calls and text messages, the duration of telephone calls, the IMEI number of the hand set relevant to the communications, and the cell sectors engaged at the beginning and end of a call. *See* STL-11-01/T/AC/AR126.9, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0007, Decision on Appeal by Counsel for Mr Oneissi against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, para. 3.

movements of these mobiles in the period between December 2004 and February 2005. They were marked for identification as exhibits 4D357, 4D363 and 4D364, respectively.

4. The Prosecution objected in court to their admission into evidence and the Trial Chamber deferred legal argument on the matter.[5] On 21 November 2017, counsel for Mr Oneissi filed an application for the Trial Chamber to admit these exhibits into evidence under Rule 149 (C) of the Special Tribunal's Rules of Procedure and Evidence.[6]

5. Under Rule 149 (C) evidence must be relevant and have some probative value. For evidence to have some probative value a chamber must be satisfied of its *prima facie* reliability.[7] Thus, on 24 November 2017, the Trial Chamber ordered the Oneissi Defence to provide, by 1 December 2017, the statement(s) of whoever created exhibits 4D357 MFI and 4D363 MFI, in support of their *prima facie* reliability and, accordingly, their probative value.[8] Counsel for Mr Oneissi sought clarification of the order on 27 November 2017, challenging why they should have to provide witness statements and inquiring into the legal basis of the order.[9]

6. The Trial Chamber held, in a decision on 30 November 2017, that the order was clear and no clarification was required. The Party tendering a document bears the evidentiary onus of establishing its relevance and probative value under Rule 149. The Trial Chamber may request under Rule 149 (E) verification of the authenticity of evidence obtained out of court.[10] Nothing in the rule suggests that it does not apply to the Defence when it tenders evidence.

7. On 1 December 2017, the Oneissi Defence 'responded' to the Trial Chamber order of 24 November 2017, stating that it was unable to provide the requested formal witness

[5] Transcript of 19 April 2017, pp 61-63; transcript of 7 April 2017, pp 53-54.
[6] F3419, Oneissi Defence Motion for the Admission into Evidence of Three Documents Marked for Identification, 21 November 2017 ('Oneissi Defence Application').
[7] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra,* F1955, Decision on the Admissibility of Documents Published on the Wikileaks Website, 21 May 2015, para. 11. The Trial Chamber has consistently applied this case law. *See, e.g.,* F3371, Decision Admitting into Evidence the Audio Recordings and Transcripts of the Prosecution Interview of Mr Wissam Al-Hassan (Witness PRH680) under Rule 158 and Three Related Documents under Rule 154, 20 October 2017, paras 57, 70.
[8] F3427, Order to the Oneissi Defence regarding Two Documents Sought for Admission into Evidence, 24 November 2017 ('Order of 24 November 2017'), paras 2-3.
[9] F3432, Oneissi Defence Request for Clarification regarding the Trial Chamber Order of 24 November 2017, 27 November 2017, paras 1, 4, 7.
[10] F3440, Decision on the Oneissi Defence's Application for Clarification of an Order regarding Two Documents Marked for Identification, 30 November 2017 ('Decision of 30 November 2017'), para. 3.

statements and requesting the Trial Chamber to admit exhibits 4D357 MFI and 4D363 MFI into evidence without requiring those statements.[11]

8. The Prosecution responded to the Oneissi Defence application on 7 December 2017, opposing it and submitting that the Oneissi Defence had failed to comply with the Trial Chamber's order of 24 November 2017.[12] The Trial Chamber admitted exhibit 4D364 MFI into evidence on 13 December 2017.[13] The admission of this exhibit, being demonstrative (rather than derivative) evidence, was not contingent on the admission of exhibit 4D363 MFI. On the same day, the Oneissi Defence filed a reply, seeking, pursuant to Rule 130 (A), variation of the Trial Chamber's order. Specifically, it requested varying the order to require the Defence to provide, instead of statement(s) from the creator(s) of the exhibits, 'information that is reasonably necessary to allow the Prosecution to reproduce and verify' exhibits 4D357 MFI and 4D363 MFI.[14]

9. On 14 December 2017, the Trial Chamber invited the Prosecution to respond in court to the request for variation, which the Prosecution opposed. The Trial Chamber also invited its views on whether to make a supplementary order under Rule 165[15] for a witness statement to accompany the call sequence tables. The Prosecution submitted that there was no need for a supplementary order, as there was no dispute between the Parties that the Trial Chamber had the authority to make its initial order.[16]

---

[11] F3448, Oneissi Defence Response to Trial Chamber Order of 24 November 2017, 1 December 2017 ('Oneissi Response to Order'), paras 2, 24.
[12] F3465, Prosecution Response to "Oneissi Defence Motion for the Admission into Evidence of Three Documents Marked for Identification", 7 December 2017 (public with confidential annex) ('Prosecution Response'), paras 2-3, 23, 27, 37.
[13] Decision Admitting into Evidence a Series of Maps Showing Movement of Selected Mobiles in the Area of the Arab University Mosque between December 2004 and February 2005, transcript of 13 December 2017, pp 39-41.
[14] F3482, Oneissi Defence Reply to "Prosecution Response to 'Oneissi Defence Motion for the Admission into Evidence of Three Documents Marked for Identification'" and Request for Variation of Trial Chamber Order of 24 November 2017 ('Oneissi Defence Reply'), paras 1-2, 18, 21.
[15] Rule 165 sets forth the Chambers' powers to order the production of additional evidence. It provides: 'After hearing the Parties, the Trial Chamber may, *proprio motu* or at the request of a Party, order either Party or a victim participating in the proceedings to produce additional evidence. It may, after hearing the Parties, *proprio motu* summon witnesses and order their attendance.'
[16] Transcript of 14 December 2017, pp 47-50.

SUBMISSIONS

Oneissi Defence submissions

10. Counsel for Mr Oneissi submit that exhibits 4D357 MFI and 4D363 MFI are relevant and probative of deficiencies in the Prosecution's investigations. They demonstrate that members of the Oneissi family, including Mr Oneissi himself, may have had innocent links to the area around the Arab University Mosque. Exhibit 4D357 MFI is also probative of call activity involving the Abu Adass landline on key dates. The exhibits were shown to Mr Platt in cross-examination. Their admission is necessary to allow the Trial Chamber to understand Mr Platt's answers and the context of his evidence. The exhibits are *prima facie* reliable as they are based on call data records provided to the Prosecution by Alfa, MTC Touch and Ogero. Counsel for Mr Oneissi explain how the exhibits were created. Their accuracy can easily be verified against the underlying data.[17]

11. Article 7 (C) (iii) of the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon,[18] read together with Article 6 (A) of this Code,[19] prevents Defence team members from providing witness statements. This prohibition is not extinguished once the appointment as counsel is accepted, because the conflict that the provision seeks to prevent could arise after the appointment. Since the Prosecution is able to reproduce and verify both exhibits, the only conceivable reason that it would require a witness statement would be to cross-examine the Defence team member who provided the statement. Their testimony would breach Article 7 (C) (iii) of the Code, which could constitute misconduct under Article 17 (i) of the Code. Thus, the Defence is unable to provide formal witness statement(s) of the creator(s) of the two exhibits.[20]

12. Article 4 of the Code, which provides that the Rules shall prevail over the Code in the event of any inconsistency between them, does not provide counsel for Mr Oneissi with a complete defence to a breach of Article 7 (C) (iii) of the Code because the Rules have no provision requiring that all Defence exhibits be tendered with an accompanying witness

[17] Oneissi Defence Application, paras 2-4, 15-21, 24-28. *See* Oneissi Defence Reply, paras 3-7, 10, 16, 19. *See also* Oneissi Response to Order, paras 13-23; Oneissi Defence Application, paras 30-39.
[18] Article 7 (C) (iii) specifies that counsel cannot accept an assignment if they believe that they or members of their Office could be called to appear as a witness, unless it relates to an issue connected with the 'nature and value of legal services', or an issue 'which Counsel honestly and reasonably believes will not be contested by either party'.
[19] Article 6 (A) provides that the obligations in the Code 'shall be binding on all members of the Legal Team, unless the specific nature of the obligation means that it may only be fulfilled by Counsel'.
[20] Oneissi Defence Reply, paras 11, 13; Oneissi Response to Order, paras 2, 9-12.

statement. In addition to the Code, there is a fundamental and absolute principle against core Defence team members being placed in a situation where they risk becoming witnesses to the prejudice of the Accused's interests. This principle is all the more relevant in *in absentia* proceedings.[21]

13. The Defence has complied with the order insofar as it provided enough information to allow the Prosecution to reproduce and verify the exhibits. The Oneissi Defence requests that the Trial Chamber assess the relevance and probative value of the two exhibits on their own merits, without requiring witness statements from the Defence team members who created them. When tendering call sequence tables, the Prosecution tendered accompanying witness statements, as is their prerogative. The Defence has demonstrated the relevance and probative value of the exhibits in a different manner. It is in the interests of justice to vary the order, which was issued before the Trial Chamber received all of the Parties' submissions and is not necessary for the Prosecution to be able to reproduce and verify the exhibits.[22]

Prosecution submissions

14. The Prosecution argues that the Oneissi Defence application should be dismissed on procedural grounds. The Oneissi Defence has breached a judicial order. Its argument against complying with the order could have been raised earlier. The Oneissi Defence failed to take the proper approach of asking for reconsideration of the order.[23]

15. On the merits, the Oneissi Defence has failed to demonstrate the reliability of the material underlying exhibit 4D357 MFI, which is an extract from a call sequence table that the Prosecution had withdrawn due to problems relating to the provenance, custody and incompleteness of the underlying Ogero call data records. The Defence has also failed to demonstrate the attribution of the calling number it seeks to rely upon in exhibit 4D357 MFI and has therefore failed to demonstrate the relevance of this call sequence table.[24]

16. Moreover, the Oneissi Defence has failed to provide supporting statements for exhibits 4D357 MFI and 4D363 MFI, in breach of the order. Article 7 (C) (iii) of the Code of Conduct does not prohibit counsel or their staff from becoming witnesses but rather prohibits them from accepting appointment from the outset, if they are aware of factors which may result in

[21] Oneissi Defence Reply, paras 12, 14-15.
[22] Oneissi Defence Reply, paras 9, 16-20; Oneissi Response to Order, paras 3, 13, 24.
[23] Prosecution Response, paras 19-23, 25-27.
[24] Prosecution Response, paras 3, 6-14.

them becoming witnesses, such as prior involvement with the facts of the case. In fact, the article envisages circumstances in which team members can become witnesses. It is not permissible to use a staff member to prepare call sequence tables and then purport to be unable to call that person because the team's own actions have caused a breach of the Code. Article 4 of the Code states that the Rules shall prevail over the Code, which provides counsel with a complete defence to any allegation of breach. The Code does not apply to the Trial Chamber, which can make any orders in accordance with the Rules.[25]

17. The Prosecution envisages the possibility of cross-examination, 'should certain circumstances arise'. This mirrors the cross-examination of Prosecution analysts by Defence teams on Prosecution call sequence tables. The possibility of such cross-examination should not be determinative of the need to provide witness statements as directed by the Trial Chamber.[26]

18. The Oneissi Defence application to vary the Trial Chamber's order could have been made at an earlier stage. The only submitted basis for the application is that the Code creates a difficulty for the Defence, which is an argument that the Prosecution rejects. The order is fair and reasonable. It can and should be implemented. Counsel for Mr Oneissi are requesting the variation simply because they do not want to comply with the order.[27]

DISCUSSION AND DECISION

19. The Oneissi Defence prepared exhibit 4D363 MFI from the call data records that Alfa and MTC Touch had provided to the Prosecution. It extracted exhibit 4D357 MFI from a call sequence table prepared by the Prosecution based on the Ogero call data records.[28] (Defence counsel have access to all of these call data records.)[29] The Prosecution, however, withdrew its Ogero call sequence table due to concerns regarding the provenance, custody and incompleteness of the underlying Ogero call data records.[30]

[25] Prosecution Response, paras 3, 28-33, 35-36.
[26] Prosecution Response, para. 34.
[27] Transcript of 14 December 2017, pp 47-49.
[28] Oneissi Defence Reply, para. 3; Oneissi Response to Order, paras 18-22; Oneissi Defence Application, paras 2, 4, 19-20, 24.
[29] F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 ('Decision of 25 September 2017'), para. 125.
[30] Prosecution Response, para. 6.

20. The Sabra Defence also tendered this same Ogero call sequence table into evidence. The Trial Chamber, however, denied its admission, referring in particular to concerns about the reliability and provenance of the underlying call data records. As a result, the Trial Chamber has made no finding that the Prosecution's call sequence table is *prima facie* reliable and has some probative value.[31] In these circumstances, the Oneissi Defence, as the tendering Party, bears the full evidentiary onus of establishing the *prima facie* reliability of both exhibits. It has not done so.

21. The Trial Chamber has declined to admit into evidence the call data records from which all call sequence tables are derived as they are voluminous and unreadable in their raw form. Without the underlying data in evidence, the Trial Chamber must have evidence on how the call sequence tables were created to allow it to evaluate their *prima facie* reliability. Therefore, as a matter of procedure, the Trial Chamber has required that any tendered call sequence tables are accompanied by evidence as to who prepared them and in what manner, so that the Trial Chamber and the Parties could review the methodology to ensure that they are *prima facie* reliable and have some probative value under Rule 149 (C). Consequently, whenever the Prosecution tendered call sequence tables it provided witness statements from their creators or called them to testify, in accordance with the Trial Chamber's decisions.[32]

22. The principle of equality of arms requires the Trial Chamber to ensure that neither Party is put at a disadvantage when presenting its case.[33] Rule 149 (E), which allows the Trial Chamber to request verification of the authenticity of evidence obtained out of court, applies equally to all Parties. Nothing in the Special Tribunal's Statute or Rules suggests otherwise. Further, no principle of international human rights law or international criminal law distinguishes between the Prosecution and the Defence with respect to the evidentiary onus of

[31] *See* Decision of 25 September 2017, paras 125-135; F2801, Decision on Prosecution Motions to Admit Call Sequence Tables and Witness Statements on the Purchase of a Mitsubishi Canter, the Sale of 'Red Network' Mobile Handsets and the False Claim of Responsibility, 1 November 2016, fns 3, 21 with further references.
[32] Transcript of 14 December 2017, p. 47; Decision of 25 September 2017, para. 131; F2798, Decision on the Admission of Call Sequence Tables Related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements, 31 October 2016 ('Second Decision of 31 October 2016'), paras 38, 53, 55, 75-77; First Decision of 31 October 2016, paras 74-75, 78, 88-100, 102; Decision of 6 May 2015, paras 113, 115, 118-119.
[33] *See, e.g.*, STL-11-01/I/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0047, Decision on Languages in the Case of *Ayyash et al.*, 16 September 2011, para. 43; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Defence Application II, 28 February 2007, para. 22; ICTR, *The Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), 1 June 2001, para. 69; ICTY, *Prosecutor v. D. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 48. *See also* below, para. 23.

establishing the relevance and probative value of any document they seek to tender into evidence.[34]

23. When the Prosecution objected to the admission into evidence of call sequence tables tendered by the Ayyash, Oneissi, and Sabra Defence, the Trial Chamber required the Defence to provide statements from whoever created these documents. The Trial Chamber was unaware who had created them but recognised that members of the smaller Defence teams may have more diverse tasks than individual Prosecution staff.[35] Indeed, the principle of equality of arms does not mean absolute or mathematical equality between the Parties. Its application should be fact-sensitive and bear in mind the differences between the Prosecution and the Defence.[36]

24. The Ayyash and Sabra Defence provided the Trial Chamber with signed or initialled memoranda of the call sequence tables' creator(s), explaining their production. The Ayyash Defence submitted that its memorandum was not intended for admission into evidence but rather to support the table's reliability. The Trial Chamber found that the memorandum's content sufficed to establish the table's *prima facie* reliability. The Sabra Defence provided its memorandum on the understanding that it was not filed on the record, it was not a witness statement for admission into evidence, its purpose was solely to allow the Trial Chamber to verify the authenticity of the call sequence tables, and no possibility of cross-examination arose. All of this was necessary, according to the Sabra Defence, to avoid a potential violation of Article 7 of the Code.[37] The Sabra Defence application awaits a decision.

---

[34] *See* F3443, Decision Partly Granting Fourth Sabra Defence Motion for the Admission of Documents relating to Mr Ahmed Abu Adass – the Successful Recruitment of Mr Ahmed Abu Adass, 30 November 2017, paras 28-29; Decision of 30 November 2017, para. 3.

[35] F3428, Order to the Sabra Defence and the Prosecution regarding Call Sequence Tables Submitted for Admission into Evidence, 27 November 2017, duplicate paras 4; Order of 24 November 2017, paras 2-3; F3424, Order to the Ayyash Defence and the Prosecution regarding Call Sequence Table Exhibit 1D453 Marked for Identification, 24 November 2017, paras 4-5.

[36] *See, e.g.*, ICC, *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on Defence's Request to Obtain Simultaneous French Transcripts, 14 December 2007, paras 18-19; ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para. 149; ICTY, *Prosecutor v. Orić*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7; ICTR, *The Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), 1 June 2001, para. 69.

[37] F3464, Decision on the 'Sabra Request for Clarification of the Order to the Sabra Defence and the Prosecution regarding Call Sequence Tables Submitted for Admission into Evidence', 7 December 2017 ('Second Decision of 7 December 2017'), para. 8; F3463, Decision Admitting into Evidence Call Sequence Tables Tendered by the Ayyash and Merhi Defence – Exhibits 1D453, 3D431, 3D433, 3D436 and 3D437 Marked for Identification, 7 December 2017 ('First Decision of 7 December 2017'), paras 11, 13. *See* F3471, Sabra Notification in Relation to Order to the Sabra Defence and the Prosecution regarding Call Sequence Tables Submitted for Admission into Evidence, 8 December 2017, paras 1-2; F3457, Ayyash Defence Provision of Updated Exhibit 1D00453 Marked

25. Significantly, the Merhi Defence provided, without being ordered to do so and in liaison with the Prosecution, a formal witness statement from a lawyer working on that Defence team. The Merhi Defence provided it on the condition that it would not be admitted into evidence and stated that the sole purpose of the statement was to support the *prima facie* reliability of the call sequence table.[38]

26. The Defence submissions reflect some shared concern about how the Trial Chamber might deal with the statements from the creators of the call sequence tables. The statements are intended to provide evidence in support of the *prima facie* reliability of the call sequence tables. Statements may not in all circumstances be the only way to establish *prima facie* reliability, but here the Trial Chamber has already determined that they were required, in application of the principle of equality of arms. The Trial Chamber stresses that the tendering Party bears the evidentiary onus of establishing *prima facie* reliability and Rule 149 (E) plainly authorises a Chamber to 'request verification of the authenticity of evidence obtained out of court'. That is the point of this exercise.

27. Only the Oneissi Defence persists in refusing to provide a statement in any form, contrary to the Trial Chamber's order of 24 November 2017 and despite the Trial Chamber's decision on its application to clarify the order. The only reason given for this lack of compliance is that members of the Defence may not be placed in a situation where they risk being compelled to provide evidence.

28. The first legal basis advanced in support of this argument is Article 7 (C) (iii) of the Code of Conduct, which states that counsel shall refuse a representation agreement where he believes that he or a member of his office will be called to appear as a witness during these proceedings, 'unless: (a) the testimony relates to the nature and value of legal services rendered in the case; or, (b) the testimony relates to an issue which Counsel honestly and reasonably believes will not be contested by either party'.[39]

---

for Identification and Memorandum Supporting Reliability in Compliance with Trial Chamber Order of 24 November 2017, 5 December 2017, paras 3, 5, 7.

[38] Second Decision of 7 December 2017, para. 8; First Decision of 7 December 2017, para. 7. *See* F3377, *Addendum aux « Soumissions additionnelles de la défense de Merhi conformément à l'ordonnance de la Chambre pour l'admission formelle de quatre tableaux séquentiels d'appels »*, 2 November 2017 (public with public annex A and confidential annex B), para. 3, annex B.

[39] The expression 'his office' refers to where counsel work before taking the assignment. *See* Second Decision of 7 December 2017, fn. 10. An equivalent provision of the International Criminal Court's Code of Professional Conduct for Counsel, Article 12 (3), uses the term 'associate of counsel', which refers to 'lawyers who practise in the same law firm as counsel' and does not extend to all members of a Defence team. *See* ICC, *Prosecutor v.*

29. The relevant international case law, however, does not support the Oneissi Defence's interpretation of this provision. The case law holds that counsel's personal knowledge of and or involvement in the facts under adjudication may give rise to a conflict of interest, potentially leading to counsel's withdrawal (voluntary or otherwise).[40] This must be distinguished from a situation in which the purported risk of being called to appear as a witness arises from counsel's acts during the proceedings, such as assigning the preparation of derivative evidence (call sequence tables) at trial, and where a Chamber requires verification of the authenticity of such evidence under Rule 149 (E).[41]

30. In the *Simić* case at the International Criminal Tribunal for the former Yugoslavia (ICTY), the Pre-Trial Chamber found that lead counsel for one of the five Accused had a potential conflict of interest by virtue of his involvement in the events at issue in the trial, including his presence during some incidents charged in the indictment.[42] In the *Gotovina* case, the Pre-Trial Chamber and the Appeals Chamber disqualified lead counsel for one accused (Mr Markač), whom the co-accused Mr Gotovina wished to call as a witness, on the basis of his previous position as the Croatian Minister of Justice.[43] The Appeals Chamber found:

> [Because counsel for Mr Markač] has personal knowledge directly relevant to the crimes allegedly committed by the three accused in the Indictment, he is likely to be called as a necessary witness for one of the accused. Such a conflict affects the essential fairness of the

---

Bemba Gombo et al., ICC-01/05-01/13, Decision on Prosecution Submission on the Appointment of Defence Counsel, 15 April 2015, paras 11, 16-18.

[40] *See* ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007 ('*Gotovina* Appeal Decision'), paras 4, 24, 28-29, 32-33, 37-38; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Conflict of Interest of Attorney Miroslav Šeparović, 27 February 2007 ('*Gotovina* Pre-Trial Decision'), pp 5-10; ICTY, *Prosecutor v. Simić et al.*, IT-95-9-PT, Decision on the Prosecution Motion to Resolve Conflict of Interest regarding Attorney Borislav Pisarević, 25 March 1999 ('*Simić* Pre-Trial Decision'), pp 7-9. *See also* Article 11 of the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims Appearing before the Special Tribunal for Lebanon.

[41] In some circumstances a potential conflict could become apparent well after the assignment of counsel. The Head of Defence Office of the Special Tribunal has correctly interpreted Article 7 (C) (iii) of the Code as continuing to apply beyond the moment of entering into a representation agreement and into trial. *See* STL-14-05/PT/CJ, *In the Case against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, F0095, Withdrawal of the Appointment of Ms Maya Habli as Co-counsel pursuant to Article 34 (A) of the Directive on Appointment and Assignment of Counsel, 27 January 2015.

[42] The *Simić* Chamber finding that it 'is bound to say that at the end of the day it is left with a picture of Mr. Pisarević as an attorney who had personal knowledge of, and was intimately involved in many of the events at issue in this trial. The Trial Chamber notes that the Prosecut[or] has not stated that she would not call Mr. Pisarević as a witness; on the contrary, the Prosecution's written submissions highlighted the possibility that Mr. Pisarević could be called as a witness for the Prosecution'. *Simić* Pre-Trial Decision, pp 7-8.

[43] *Gotovina* Appeal Decision, paras 2, 7, 17-18, 24, 29, 33, 38; *Gotovina* Pre-Trial Decision, pp 3, 5-10.

trial to all accused persons in this case. Cumulatively, these factors make his continued representation of Markač incompatible with the best interests of justice.[44]

31. Article 7 (C) (iii) of the Code is clearly directed towards these types of potential conflicts, namely, those arising by virtue of counsel's previous employment or involvement in matters of substance connected with the case. Nothing in its wording suggests that it was intended to impose a blanket prohibition on members of a Defence team from providing evidence at trial,[45] other than in the two circumstances explicitly set out.[46] Conceivably, this could also extend to counsel as the Trial Chamber is not prepared to exclude this possibility in *all* circumstances.

32. For example, Defence counsel, like Prosecution lead counsel or the Prosecutor himself or even the Head of Defence Office, could become a compellable witness in a case involving fraud or contempt or obstruction of justice. It is unimaginable that a code of professional conduct could operate to prevent this. A provision in a code of professional conduct that contained such a prohibition would be void for inconsistency with the Special Tribunal's Statute and Rules, as it could operate to obstruct the course of justice. This example demonstrates that the Oneissi Defence's interpretation of Article 7 (C) (iii) of the Code cannot be correct.

33. Further, it is not clear to the Trial Chamber why counsel for Mr Oneissi seemingly believe that if they provide the statements that the Trial Chamber ordered, then they or a member of their office will be called to appear as a witness during these proceedings. As stated above, the Trial Chamber did not order them to provide 'witness statements', it merely required statements from whoever created the exhibits. The argument is also irrelevant as no knowledge or involvement in the facts of the case is at stake here. It follows that the Trial Chamber sees no relevant issue relating to this Code.[47]

34. The second legal basis advanced in support of the argument is that there is a 'fundamental' and 'absolute' principle against 'core Defence team members' being placed in

[44] *Gotovina* Appeal Decision, para. 38.
[45] *See also* First Decision of 31 October 2016, paras 88-100.
[46] A court of appeal in Louisiana has interpreted an exception to a similar rule of professional conduct ('A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless [...] the testimony relates to the nature and value of legal services rendered in the case') as allowing the plaintiff's attorney and legal assistant to submit affidavits in support of a motion for summary judgment in relation to a clerical error in filing the application. *See* United States, Court of Appeal of Louisiana, *Adcock v. Ewing*, 57 So. 3d 434, 26 January 2011.
[47] *See similarly* Second Decision of 7 December 2017, para. 8.

a situation where they risk becoming witnesses to the prejudice of the Accused's interests. But no legal authority was provided in support of this supposed principle.

35. Although no definition was offered of what a 'core Defence team member' might be, the Trial Chamber of course agrees, *in principle*, that those who represent an accused should not risk becoming witnesses to the prejudice of the accused person's interests. However, and as stated above, things may differ *in practice* and there are obvious circumstances in which Defence team members ('core' or otherwise) could 'risk' becoming a witness to the prejudice of an accused's interest. For example, if lead counsel and an accused were indicted on charges of obstructing the course of justice in a case in trial, Defence team members could become compellable witnesses in any ensuing contempt trial, thereby prejudicing the interest of the accused not to be convicted of contempt.

36. The same applies to the Prosecution and Legal Representatives of Victims. A member of any 'team'—Defence, Prosecution, Legal Representative of Victims, Chambers, Registry, Victims Participation Unit, Victims and Witnesses Unit, and so on—could be a compellable witness to a charge of interference in the course of justice, for instance if they had witnessed the bribing of a witness. Suggesting that Defence 'core' team members are, solely by virtue of their employment in a Defence team or their assignment as Defence counsel, somehow immunised from ever having to testify is so contrary to the fundamentals of public policy as to amount to an absurdity.

37. Moreover, counsel for Mr Oneissi have not explained why Mr Oneissi's interests might be prejudiced by providing evidence on the methodology *of the compilation of a piece of derivative evidence, namely, a call sequence table*, and not on a fact in issue in the case—to aid the Trial Chamber's understanding under Rule 149 (E) of its reliability. The Trial Chamber cannot see how they could be. The evidence is intended to support the Defence case, not to prejudice it. But most fundamentally, Defence counsel have not identified how providing this evidence could in any way prejudice Mr Oneissi's defence.

38. Assigned Defence counsel can, if they are concerned that creating an exhibit may lead to the creator being called as a witness in the proceedings, assign the task to someone who is not a 'core Defence team member'. That would mirror the Prosecution's wise choice assigning the creation of call sequence tables to its analysts and investigators rather than counsel who appear in court.

39. There is no basis for arguing that Rule 149 (E) applies to every Party to the proceedings except the Oneissi Defence. The Oneissi Defence has provided no valid excuse for not complying with the Trial Chamber's order. By failing to provide the statements, counsel have failed to demonstrate at this stage the *prima facie* reliability and the probative value of the tendered exhibits.

40. The Oneissi Defence's application that the Trial Chamber assess the relevance and probative value of the two exhibits on their own merits is based on unconvincing arguments. When tendering call sequence tables, the Prosecution provided accompanying witness statements not out of mere choice but pursuant to the Trial Chamber's decisions, in support of the *prima facie* reliability and the probative value of these exhibits.[48] As stated above, the principle of equality of arms requires the Trial Chamber to ensure that neither Party is put at a disadvantage when presenting its case. In the circumstances here, it would be contrary to this principle to admit into evidence Defence call sequence tables without any statements from their creators on how they were created and over the objection of the Prosecution.

41. Nevertheless, the Trial Chamber took into consideration that the Oneissi Defence was not aware when preparing its call sequence tables that the Trial Chamber would order statements from their creator(s). It therefore examined whether it could satisfy itself with respect to the *prima facie* reliability of the exhibits on the basis of the submissions before it, even without the requested statements. It could not.

42. Finally, the application for variation was procedurally improper. It was made at a stage when the Oneissi Defence was already in breach of the order.[49] In addition, requesting a variation was not the correct avenue.[50] A variation involves merely changing or varying the terms or conditions of an existing decision or order, usually as a result of an alteration in circumstances or the emergence of a new fact. Reconsideration, on the other hand, involves a review of the decision or order, on its merits, to avoid injustice to a Party that 'at a minimum involves prejudice'. It requires the Trial Chamber to revisit the decision or order and to reassess its reasoning with the aim of avoiding injustice by arriving at a different result.[51]

---

[48] *See* Decision of 6 May 2015, paras 113, 115. *See also* above, para. 21.
[49] *See* above, paras 5, 8.
[50] *See* F3241, Decision Denying Certification to Appeal 'Order to Provide Submissions on the Relevance of Proposed Questions to a Witness Testifying under Rule 125 (B), as Submitted by the Oneissi and Sabra Defence', 21 July 2017, para. 3.
[51] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra,* F1446, Decision Denying Leave to Reconsider a Decision of the Pre-Trial Judge re Disclosure regarding a Computer, 11 March 2014, paras 12-13. *See* STL-11-01/T/PRES, F1618, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra,*

Since, as explained above, the requested change to the order is problematic under the principle of equality of arms, it cannot be obtained by applying to vary the order.

43. The Trial Chamber will therefore not grant the application to vary its order of 24 November 2017. Nor will it admit into evidence exhibits 4D357 MFI and 4D363 MFI at this stage. The Trial Chamber would be prepared to revisit their admission if the Oneissi Defence were to re-create (if necessary) and re-tender the call sequence tables, with adequate statements in support of their *prima facie* reliability.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Oneissi Defence application to admit exhibits 4D357 MFI and 4D363 MFI into evidence;

DISMISSES the Oneissi Defence application to vary the Trial Chamber's order of 24 November 2017; and

DECLINES to admit exhibits 4D357 MFI and 4D363 MFI into evidence at this stage of the trial.

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

Leidschendam,
The Netherlands
26 January 2018

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy

Decision on the Head of Defence Office "Request to Change the Conditions Imposed by the Decisions of 21 December 2012 and 27 March 2013 relating to the Assignment of Mr Nashabe", 14 July 2014, para. 10.