

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: 25 September 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION GRANTING, IN PART, SABRA DEFENCE MOTION FOR THE
ADMISSION OF DOCUMENTS RELATING TO MR AHMED ABU ADASS –
CHARACTER, RELIGIOUS BELIEFS AND ASSOCIATES**

Office of the Prosecutor:Mr Norman Farrell & Mr Alexander Hugh
Milne**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothee 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 Robert
Ms Sarah Bafadhel

INTRODUCTION

1. Counsel for the Accused, Mr Assad Hassan Sabra, seek the admission into evidence of 128 documents—70 of which the Trial Chamber finds to be witness statements from 45 witnesses—related to the role of Mr Ahmed Abu Adass in the attack of 14 February 2005 that killed the former Lebanese Prime Minister, Mr Rafik Hariri, and 21 others and injured 226.

2. The Sabra Defence, however, has attempted to tender the witness statements into evidence in a manner inconsistent with the Special Tribunal's Rules of Procedure and Evidence and over the Prosecution's objection. Therefore, for the reasons below, the Trial Chamber will admit 49 relevant and probative documents into evidence, but will not receive any witness statements into evidence at this stage.

3. The Prosecution alleges that Mr Abu Adass, at the behest of the Accused, appeared in a video that falsely claimed responsibility for the attack and which was broadcast shortly after the attack on 14 February 2005 on Al-Jazeera.¹ Counsel for Mr Sabra previously sought the admission of documents relating to Mr Abu Adass, but the Trial Chamber ordered them to refile their motion in light of some issues with the documents, including the presence of duplicates and documents which had already been admitted into evidence.²

4. Defence counsel then refiled their motion seeking the admission into evidence, under Rule 154, or in the alternative Rules 92 or 165, of 128 documents relating to Mr Abu Adass, and the Prosecution responded.³ However, as the Prosecution has pointed out,⁴ the refiled

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 ('Amended consolidated indictment'), paras 3 (b)-(d), 5, 23, 28-29, 44, 48 (c), 64 (f), 66 (f), 68 (h), 70 (h).

² See F2914, Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass, 16 December 2016 (confidential, with confidential annexes A-C); F2943, Prosecution Response to Sabra "Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass", 18 January 2017 (confidential, with confidential annexes A-C); F2957, Reply to "Prosecution Response to Sabra 'Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass'", 27 January 2017 (confidential); F2914, Addendum to "Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass", 8 February 2017 (confidential, with confidential annexes A-C); F3011, Prosecution Response to Sabra Addendum to "Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass", 23 February 2017 (confidential); F3015, Order on Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass, 27 February 2017 ('Trial Chamber Order').

³ F3024, Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass with updated annexes, 7 March 2017 (confidential, with confidential annexes A-D) ('Sabra motion'); F3047, Prosecution Response to Sabra "Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass", 22 March 2017 (confidential, with confidential annexes A-D) ('Prosecution response'). The Trial

motion still contains documents that duplicate evidence already admitted, despite the Trial Chamber's order to remove them.⁵ The Defence did not file a reply. The content of these documents—consisting, according to the Defence, of three witness statements⁶ and one investigator's note—are already in evidence as parts of exhibits P805, P806, P808 and P809.⁷ The Trial Chamber, therefore, need not consider their admissibility any further.

THE EVIDENCE

5. According to the amended consolidated indictment and the Prosecution's pre-trial brief, the Accused, Mr Sabra, Mr Hussein Hassan Oneissi and Mr Hassan Habib Merhi, identified and chose Mr Abu Adass as a suitable person to make a false video claim of responsibility for the attack. To that end, the Prosecution alleges that Mr Oneissi introduced himself to Mr Abu Adass as 'Mohammed' at the beginning of January 2005 at the Al Hourri Mosque of the Beirut Arab University in Beirut, and asked Mr Abu Adass to teach him how to pray. They met on several subsequent occasions.⁸

6. On 17 January 2005, 'Mohammed' (allegedly Mr Oneissi) allegedly called Mr Abu Adass' mother and informed her that he and Mr Abu Adass were in Tripoli and that their car had broken down. That evening, Mr Abu Adass' mother received another call that she believed to be from the same person, informing her that the car had not broken down and that Mr Abu Adass intended to go to Iraq and not come back. Mr Abu Adass never returned and

Chamber notes that the Sabra Defence previously submitted a reply to the Prosecution's response to its original motion. However, after the Trial Chamber ordered the Sabra Defence to refile its original motion, the Sabra Defence did not submit a reply to the Prosecution's response.

⁴ Prosecution response, para. 11.

⁵ Trial Chamber Order, paras 1-2.

⁶ These items were found admissible, under Rule 154, in STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2544, Decision on Prosecution Motion to Add Inventory and Supporting Documents Relating to the Searches of the Residence of Ahmed Abu Adass, 11 April 2016 ('Decision of 11 April 2016'). The Defence did not object to their admission under Rule 154.

⁷ These items are found at Sabra motion, annex A, item 36 (the part relied upon by the Sabra Defence is contained in exhibits P806 (at ERN L0016408-L0016411), P808 (at ERN 60002290-60002291) and P809 (at ERN 60017480-60017481)); item 37 (the part relied upon by the Sabra Defence is contained in exhibit P806 (at ERN L0016390)); item 38 (the part relied upon by the Sabra Defence is contained in exhibit P806 (at ERN L0016408)); and item 67 (the part relied upon by the Sabra Defence is contained in exhibit P805 (at ERN D0484626)).

⁸ Amended consolidated indictment, paras 3 (b)-(d), 23; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Prosecution's Submission of Updated Pre-Trial Brief pursuant to Rule 91(G)(i) and the Pre-Trial Judge's Order of 7 August 2013 and Decision of 16 August 2013, 23 August 2013 (confidential), Annex A – Prosecution's Updated Pre-Trial Brief dated 23 August 2013 ('Prosecution Pre-Trial Brief'), paras 8, 62, 112, 114, 122-123.

was reported missing on 18 or 19 January 2005.⁹ The Trial Chamber has heard and admitted evidence in relation to these allegations.¹⁰

7. The Defence submits that the tendered documents detail Mr Abu Adass' character, religious beliefs and habits. They were obtained from Mr Abu Adass' friends, family members and acquaintances, and from information gathered from a Lebanese security search and seizure of items from his home. In addition, they provide information concerning a number of his associates—in particular, Mr Khaled Taha, Mr Bilal Zaaroura, Mr Ziad Ramadan and Mr Hussam Mohsen—who the Defence alleges were, or appeared to have been, 'implicated in the selection, recruitment and subsequent disappearance of Abu Adass'.¹¹

8. The documents are witness statements, extracts from Islamic religious books and booklets, investigators' notes, audio transcripts and surrogate sheets of audio tapes, requests for assistance and responses, call sequence tables, photographs of book covers, correspondence (letters), reports and other miscellaneous documents. However, the Sabra Defence and the Prosecution disagree on the correct characterization of the various documents.

Characterization of the evidence

9. According to the Defence—and disregarding the four items whose content is already in evidence—the tendered documents comprise:¹²

- 63 statements;
- seven investigators' notes;
- two audio files of sermons (identified by surrogate sheets);
- three call sequence tables;
- 32 book extracts;
- seven transcripts of sermons;
- four Prosecution requests for assistance to the Government of Lebanon, and responses;
- two photographs; and

⁹ Prosecution Pre-Trial Brief, paras 112, 114, 122, 126, 129-130.

¹⁰ See e.g. the interviews of those who were acquainted with Mr Abu Adass (exhibits P596, P597, P760, P762, 4D213); photographs in which Mr Abu Adass was identified (P766, P767); interviews of members of Mr Abu Adass' family (P761.1, 4D212); investigations conducted by Lebanese Government authorities (P807); names of UNHCR investigators provided by witnesses in relation to the Al-Jazeera and Abu Adass investigation (4D236, 4D238, 5D239, 5D240); a diagram of the Al Hourri Mosque—where Mr Abu Adass allegedly met 'Mohammed' (4D241); a sketch of 'Mohammed'—the person who the Prosecution claims was Mr Oneissi—based on a description given by a witness (P763).

¹¹ Sabra motion, paras 38-76.

¹² Sabra motion, annex A.

- one letter;
- two ‘other’ documents;
- one report.

10. On the other hand, according to the Prosecution, the documents, minus the four items that duplicate the content of other exhibits, are:¹³

- 73 statements;¹⁴
- seven transcripts of sermons;
- two requests for assistance and a response;
- two photographs;
- one ‘other’ document;
- 32 book extracts;
- two audio files of sermons (identified by ‘surrogate sheets’);
- three call sequence tables; and
- one report.

11. There is a clear difference of opinion between the Parties as to whether some documents are actually ‘witness statements’. The Trial Chamber, after carefully reviewing international criminal law procedural case law, including that of the Special Tribunal, has held that ‘there is no single definition as to the term “witness statement”. More than one definition exists’,¹⁵

12. Whether a document is a witness statement is to be determined ‘on a case-by-case basis, according to the type of testimony the witness will give, the character of the witness, and the content, use, function and source of the document or material itself’.¹⁶ Having reviewed the material in accordance with these principles, the Trial Chamber finds that the Sabra Defence has proposed 70 witness statements and 54 other documents for admission into evidence. The Trial Chamber therefore disagrees with the Defence characterization of seven documents and finds, for the purposes of this decision, that they are witness

¹³ Prosecution response, annexes A-B.

¹⁴ As outlined in the Prosecution response, annex A, some of the statements tendered by the Sabra Defence contain statements from more than one witness. The Trial Chamber, however, will only consider those statements upon which the Defence specifically relies, as outlined in the ‘Extract of text relied upon’ column in the Sabra response, annex A.

¹⁵ F3171, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017 (‘Witness 230 Decision’), para. 47.

¹⁶ Witness 230 Decision, para. 48.

statements—rather than investigators’ notes—on the basis of their content, the relevant witness’ character and the source and function of the material.¹⁷

Witness PRH056’s statements

13. The Sabra Defence also tenders five witness statements from Witness PRH056, a relative of Mr Abu Adass. The content of two of these statements are already in evidence and the Trial Chamber has dealt with their proposed admission in paragraph 4 of this decision.¹⁸ With respect to the remaining three statements,¹⁹ the Prosecution submits that other processes must first be exhausted before further admission of statements from this witness can be sought.²⁰ The Sabra Defence did not reply to this argument.

14. As a result of the Trial Chamber’s previous decision to admit five statements of Witness 56 tendered by the Prosecution, subject to her appearance for cross-examination under Rule 156,²¹ the witness was expected to testify. In that decision the Trial Chamber also denied the admission of additional statements of Witness 56 as requested by the Sabra Defence in its response—including one the Sabra Defence now seeks to admit here²²—because of her expected appearance²² for cross-examination and the Defence’s ability to put relevant parts of any other statement to the witness and then seek their admission.²³ However, circumstances have since changed and the Trial Chamber will defer a decision on Witness 56’s three remaining statements pending further submissions from the Parties on the admission of the Prosecution’s five statements.

¹⁷ These seven documents are at Sabra motion, annex A, item 18 (which is, in effect, an addendum to a witness’ prior statement); items 19, 26, 47-48, 51 (which consist of records of questions put to witnesses and answers given); and item 46 (which contains summaries of interviews and witness/suspect statements).

¹⁸ See Sabra motion, annex A, items 37-38 (both contained in exhibit P806) (*see above* fns 6-7).

¹⁹ Sabra motion, annex A, items 18, 115, 124. The Trial Chamber notes that a part of another statement from Witness 56 appears in a separate statement sought for admission by the Sabra Defence (*see* Sabra motion, annex A, item 116). However, the Trial Chamber does not understand the Sabra Defence to be seeking the admission of any part of Witness 56’s statement in item 116; the column entitled ‘Extract of text relied upon’ for item 116 does not refer to anything in Witness 56’s statement.

²⁰ Prosecution response, para. 12.

²¹ See STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2224, Corrected Version of ‘Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087’ of 29 September 2015, 5 October 2015 (‘Witness 56 and Witness 87 Decision’).

²² See Sabra motion, annex A, item 124; F2189, Sabra Defence Response to Prosecution Motion to Admit the Statements of PRH087 and PRH056, 10 September 2015, annex A, item 10.

²³ Witness 56 and Witness 87 Decision, para. 20.

Evidence to be considered for admission

15. One hundred and twenty-one items, consisting of 67 statements²⁴ from 45 witnesses and 54 other documents²⁵ remain for consideration.

THE LEGAL PRINCIPLES

16. Rule 149 (F) provides that the Trial Chamber may receive the evidence of a witness orally or pursuant to, among other rules, Rules 155, 156 and 158 in written or other form. Admission of evidence under these Rules is discretionary.

17. Similarly, Rule 154 provides that the Trial Chamber ‘may admit evidence in the form of a document or other record’. The Trial Chamber has previously identified the applicable principles and procedural safeguards concerning the admission of documents under this Rule (i.e. ‘from the bar table’). They must be relevant and probative (Rule 149 (C)) and their probative value must not be substantially outweighed by the need to ensure a fair trial (Rule 149 (D)). *Prima facie* reliability is sufficient, and the tendering party must clearly explain how and where each document fits into its case. The weight ultimately given to the material is separate and distinct from its probative value.²⁶

18. Rule 154 is ‘subject to Rules 155, 156 and 158’. Rule 155 allows written statements and transcripts to be admitted in lieu of oral testimony, and Rule 156 allows the admission of written statements and transcripts in lieu of examination in chief but the witness must be available for cross-examination. Rule 158 relates to ‘unavailable’ witnesses and permits the admission of written statements, a transcript of a statement, or any other reliable record of what a witness has said.

²⁴ Sabra motion, annex A, items 1-10, 12-14, 17, 19-24, 26, 29-35, 39, 41-65, 68-69, 109-114, 116, 123, 126-128.

²⁵ Sabra motion, annex A, items 11, 15-16, 25, 27-28, 40, 66, 70-108, 117-122, 125.

²⁶ See STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1308, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, paras 6, 8; F1350, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, para. 7; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Mehri, Oneissi, and Sabra*, F1781, Corrected Version of “Decision on Prosecution Motion to Admit into Evidence Geographic Documents” of 8 December 2014, 10 December 2014, para. 4; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 33; 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 UNHCR and STL’s Prosecution, 6 May 2015 (‘Decision of 6 May 2015’), paras 66, 111; STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2899, Decision on the Prosecution Motion for the Admission of Records Received from the Traffic, Truck, and Vehicle Management Authority, 9 December 2016, para. 16; F2963, Decision on the Prosecution Motion to Admit Ten Witness Statements Relating to Salim Jamil Ayyash and Hassan Habib Merhi and to Admit One Exhibit, 31 January 2017, para. 30.

19. Rules 155, 156 and 158 are therefore the *lex specialis*²⁷ provisions for the admission of witness statements, or transcripts of testimony, into evidence—either with or without cross-examination.

20. The Trial Chamber, in a pre-trial decision,²⁸ however, held that as an alternative to Rule 155—referring to statements that did not comply with the Rule 155 Practice Direction:²⁹

...in appropriate circumstances, non-compliant statements could be admitted as evidence under Rule 154 (admission of documents). If documents were to be admitted in this manner, the Trial Chamber would later determine the weight to attribute to the admitted evidence.

21. The Trial Chamber, however, has not defined what constitutes ‘appropriate circumstances’, and, moreover, expressed this alternative only as a possibility.

22. The Rule 155 Practice Direction requires Rule 155 statements to include, among other things, a witness information sheet, signatures, the witness’ acknowledgement of the truthfulness and voluntariness of his or her statement, and an interpreter certification (where the assistance of an interpreter is required). The Practice Direction is aimed at assisting in determining the indicia of reliability which make a statement *prima facie* reliable and therefore having some probative value, if relevant. The Trial Chamber has thus determined the applicable principles when statements which do not comply with the Practice Direction may nevertheless be admitted into evidence.³⁰

23. Additionally, the Trial Chamber has the power, under Rules 92 and 130 (B),³¹ to gather evidence that the Parties or the victims participating in the proceedings are not in a position to collect themselves, in the interests of justice, and on an exceptional basis. Similarly, Rule 165 permits the Trial Chamber to order the production of additional evidence,

²⁷ ‘*Lex specialis*’ refers to a law that governs a specific subject matter which, generally, excludes a general rule on the same matter or modifies its application.

²⁸ STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1280, First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013 (‘Decision of 20 December 2013’), para. 14.

²⁹ See STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements for Admission in Court Under Rule 155, 15 January 2010 (‘Rule 155 Practice Direction’).

³⁰ See F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013 (‘Decision of 30 May 2013’), paras 22-31.

³¹ Rule 92 permits the Pre-Trial Judge to exceptionally gather evidence. Pursuant to Rule 130 (B), that power can be exercised by the Trial Chamber after the submission of the case file to it by the Pre-Trial Judge.

including summoning witnesses, on its own accord or pursuant to a request from the Parties or the victims participating in the proceedings.

24. Rule 146 (B) is also relevant. It provides that evidence at trial shall be presented, unless the Trial Chamber directs otherwise in the interests of justice, in the following sequence: (i) Prosecution evidence; (ii) evidence called by the Trial Chamber at the request of victims participating in the proceedings; (iii) Defence evidence; (iv) Prosecution rebuttal evidence; (v) rebuttal evidence called at the request of victims participating in the proceedings; and (vi) Defence rejoinder evidence. In this respect, under Rule 55 (C) and in the performance of his functions generally, ‘the Prosecutor shall assist the Tribunal in establishing the truth and protect the interests of the victims and witnesses’. Rule 55 (C) does not define ‘establishing the truth’, nor what could be considered as ‘the truth’.

25. Lastly, Rule 167—referring to counts in an indictment—provides that the Trial Chamber shall, at the end of the Prosecution case and after hearing from the Parties, ‘enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count.’ International criminal courts and tribunals commonly refer to this as a ‘no case to answer’ ruling.

SUBMISSIONS

Sabra motion

Evidence

26. The Sabra Defence does not contest the Prosecution’s allegation that Mr Abu Adass was not the suicide bomber responsible for the explosion of 14 February 2005, nor that the video in which he appears, and the letter which accompanied the video,³² had the purpose of falsely claiming responsibility for the attack. It does, however, contest (i) the motivation, process and circumstances by which Mr Abu Adass was identified and selected as someone suitable to make the false claim of responsibility; (ii) the circumstances of Mr Abu Adass

³² This letter, together with the video, was provided to the Al-Jazeera television news network in Beirut on the same day of the attack of 14 February 2005. See exhibit P500; F3061, Decision Admitting 10 Call Sequence Tables Related to Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi under Rule 154 and Two Related Witness Statements under Rule 155, 31 March 2017 (‘Decision of 31 March 2017’), para. 5; Amended consolidated indictment, paras 3, 5, 23, 44.

leaving his home on 16 January 2005; and (iii) that either Mr Sabra or Mr Oneissi were involved in his selection, recruitment or subsequent disappearance.³³

27. The Prosecution seeks to establish that Mr Abu Adass was manipulated and kidnapped by Mr Oneissi and Mr Sabra to falsely claim responsibility for the attack of 14 February 2005, and that Mr Abu Adass met a person called ‘Mohammed’ in the Al Hourri mosque of the Beirut Arab University in early 2005 who recruited him for this purpose. However, the Prosecution does not elaborate on Mr Abu Adass’ beliefs or those of his associates which, according to the Sabra Defence, are important to understand the real circumstances surrounding him. Mr Abu Adass followed a violent, fundamentalist form of Islam that made him a credible choice for a person to claim responsibility for the bombing and to have links with other jihadists and this ideology exposed him to those who would recruit him for the false claim of responsibility. But none of those who allegedly met Mr Abu Adass in the Al Hourri mosque in early 2005 were the supposed ‘Mohammed’. Evidence of (i) the beliefs, character and worldview of Mr Abu Adass, and (ii) those of his associates, is ‘fundamentally important for the Trial Chamber to understand the real circumstances of his recruitment and false claim of responsibility’.³⁴

28. The Defence tenders evidence in these two categories under Rule 154 or, in the alternative, Rules 92 (exceptional gathering of evidence) or 165 (order for the production of additional evidence). Although the Sabra Defence seeks to show, on the basis of information in its possession, the evidence’s relevance and how it fits into its case, it submits that relevance and weight will depend on the Trial Chamber examining the evidence as a whole once it has received all evidence on this aspect of the case. In this respect, the Prosecution’s evidence on Mr Abu Adass’ character, habits, employment and religious beliefs is ‘incomplete, selective and therefore entirely inadequate’ and is incompatible with the Prosecution’s duty under Rule 55 (C).³⁵

29. Counsel for Mr Sabra submit, on the basis of the evidence gathered from Mr Abu Adass’ friends, family members and acquaintances, that he was a radicalised, fundamentalist Salafist. He followed the violent ideology of ‘Takfir’³⁶ associated with the ‘Dinniyeh

³³ Sabra motion, paras 29-31.

³⁴ Sabra motion, paras 32-35.

³⁵ Sabra motion, paras 17-18, 36-37.

³⁶ According to the proposed Sabra Defence evidence, the ‘Takfir’ doctrine is a violent fundamentalist ideology. Its followers often label individuals, governments, or societies who do not adhere to their beliefs as being infidels who are susceptible to violence. *See* Sabra motion, para. 38; annex A, items 3-5, 24, 30-32, 59, 114.

group'.³⁷ He was either a member of Al-Qaeda, or had tried to contact them, and sympathised with violent jihad. Mr Abu Adass considered Mr Hariri 'an infidel', expressed a desire to kill him and was interested in explosives.³⁸

30. Mr Abu Adass' extremist beliefs, jihadist sympathies and interest in Mr Hariri are corroborated by the various items, including files contained in a computer used by Mr Abu Adass and his younger sister, seized by Lebanese security officials after searching their house in the aftermath of the 14 February 2005 attack. The Sabra Defence argues that these files are important to draw inferences about how Mr Abu Adass was recruited for the false claim of responsibility and the circumstances in which he left his home in January 2005.³⁹

31. The Defence submits that Mr Khaled Taha, Mr Bilal Zaaroura, Mr Ziad Ramadan and Mr Hussam Mohsen were close associates of Mr Abu Adass. They were, or appear to have been, implicated in his recruitment and disappearance. Defence counsel provide basic biographical information for each and their relationship with Mr Abu Adass.⁴⁰

32. Mr Taha, according to Defence submissions, was close to Mr Abu Adass and had a great influence on him. Mr Taha was based in Syria when not in Lebanon, and is considered a terrorist due to his armed jihadi activities in Iraq with 'Hani El Shanti'. He attended religious classes given by Mr Abu Adass and visited his family home. Mr Taha did not appear to have his own Lebanese mobile but had two Syrian mobile numbers. When in Lebanon he used his brother's and mother's mobiles and their home landline. Although Mr Taha told his family that he had moved to Turkey in June 2004, no official records of this exist. E-mail addresses which supposedly belonged to Mr Taha and were used while he was in Turkey showed signs of having been set up in Lebanon and used in Syria. Mr Taha visited Lebanon on 15 January 2005, and returned to Syria on 16 January 2005⁴¹—the day of Mr Abu Adass' alleged disappearance. Mr Taha's family left Lebanon for Syria on 14 February 2005, arriving at the border just as the attack was becoming public, and had previously left Lebanon in September

³⁷ The Dinniyeh group, according to the Sabra Defence, refers to a group affiliated with the 'Takfir wal Hijari' fundamentalist sect which attempted to seize control of several villages in northern Lebanon in 1999/2000. See STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3109, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass – The Failed Recruitment of Ahmed Abu Adass, 28 April 2017 (confidential) ('Sabra motion of 28 April 2017'), paras 8-9.

³⁸ Sabra motion, paras 38-40.

³⁹ Sabra motion, paras 41-44.

⁴⁰ Sabra motion, paras 45-46.

⁴¹ The Sabra motion refers to the date as '16 January 2015' (Sabra motion, para. 52), a clear typographical error.

2004 as the ‘Italian Embassy’ plot⁴² was foiled. The Sabra Defence will separately make further submissions on this plot and its relevance. The Sabra Defence submits that evidence of Mr Taha’s role in Mr Abu Adass’ disappearance has already been explored at trial and may be subject to further submissions.⁴³

33. Mr Zaaroura—a Palestinian—was a friend and acquaintance of Mr Abu Adass, lived in Beirut throughout 2005, attended the same religious classes given by Mr Abu Adass and was particularly close to Mr Taha. Between 15 and 17 January 2005,⁴⁴ Mr Zaaroura lived at home in Beirut and worked in a confectionary shop. Mr Zaaroura used a ‘public’ mobile number that contacted the landline number of Mr Abu Adass’ household twice on 16 January 2005 and also on 3 April 2005.⁴⁵ Counsel for Mr Sabra will make further submissions in relation to the relevance of these calls.⁴⁶

34. Mr Ramadan was acquainted with Mr Taha and was a close associate of Mr Abu Adass; others describe him as Mr Abu Adass’ best friend. Mr Ramadan attended Mr Abu Adass’ religious classes with Mr Taha and Mr Zaaroura. Information suggests that Mr Ramadan was a would-be jihadist and knew about making explosives. According to some associates, Mr Ramadan, Mr Mohsen and Mr Abu Adass ‘must have been Al-Qaeda’. Mr Ramadan, using his mobile number, contacted Mr Abu Adass’ home landline several times between 7 and 17 January 2005. Mr Ramadan was called by Mr Abu Adass—he claimed—on 13 and 14 January 2005 and visited Mr Abu Adass on 14 January 2005. On 16 January 2005, Mr Abu Adass’ mother called Mr Ramadan’s family. On 17 January 2005, after allegedly receiving a call from ‘Mohammed’, Mr Taysir Abu Adass, Mr Abu Adass’ father, claimed to have called Mr Ramadan, who visited the Abu Adass home in the evening. There is no record of this particular call to Mr Ramadan and the Defence does not rely on this information for the truth of its content.⁴⁷

35. On 30 January 2005, a number ending in 641, which was in contact with Mr Ramadan’s mobile in 2004 and 2006—the Sabra Defence will make further submissions

⁴² According to the Sabra Defence, this involved a plan to blow up the Embassy of Italy in Beirut, which was foiled in September 2004. *See* Sabra motion of 28 April 2017, paras 18-29.

⁴³ Sabra motion, paras 47-54.

⁴⁴ The Sabra motion refers to the dates as ‘15 and 17 January 2015’ (Sabra motion, para. 57), a clear typographical error.

⁴⁵ The Trial Chamber notes, however, that the document cited by the Sabra Defence in support of this proposition (Sabra motion, para. 56, fn. 108) does not contain any entries for 3 April 2005.

⁴⁶ Sabra motion, paras 55-57.

⁴⁷ Sabra motion, paras 58-63.

regarding the relevance of these calls—contacted the Abu Adass family landline. Mr Ramadan was in contact with individuals who appear to have been associated with those implicated in Mr Hariri's death. Two calls were received by Mr Ramadan's office number on 12 January 2005 from a number ending in 070, which, on 14 February 2005, contacted a mobile then used by Mr Moaz Said Shaban Jrad who lived in Tripoli. The Defence reserves the right to tender more evidence concerning Mr Ramadan.⁴⁸

36. Mr Mohsen—another of Mr Abu Adass' close associates—gave religious lessons to Mr Abu Adass and was considered by Mr Abu Adass as his spiritual leader. Mr Taha followed Mr Mohsen blindly. Mr Mohsen held extreme views and had converted from Shiism to Sunnism. Mr Mohsen's acquaintances believed that he was a Shiite spy who had infiltrated the Sunni community. Mr Mohsen was close to Mr Ahmad Al Saneh who, in September 2004, hired Mr Abu Adass on the recommendation of Mr Mohsen.⁴⁹

37. Mr Mohsen spoke on the telephone with Mr Fouad Al Masri during the period immediately before Mr Abu Adass' departure and was associated with Mr Mohammed Louai Al Bashti, someone relevant to establishing the truth of the 'Mohammed' story.⁵⁰

38. Mr Mohsen regularly contacted Mr Khodr Nabaa, who is listed as a friend of Mr Abu Adass in the Ahabash fax⁵¹ and who is linked to the Dinniyeh events. Mr Mohsen worked with Mr Muhannad Kahlous who disappeared shortly after the attack and is rumoured to have offered to take Mr Abu Adass to Iraq for jihad. Mr Mohsen was also acquainted, and in regular contact, with Mr Samer Al Ajouz—the Ahabash owner of PowerGroup—throughout August and September 2004 and then in December 2004 and January 2005 before it ceased. On 13, 28 and 31 January 2005, Mr Mohsen's mobile (a number ending in 580) contacted Mr Abu Adass' landline. On 28 or 29 January 2005, he went to the Abu Adass family home. Mr Mohsen did not appear on the Ahabash fax.⁵²

39. The tendered documents contain Lebanese interrogation records and investigative reports which are signed and dated by Lebanese officials from the Internal Security Forces (ISF), the Ministry of Justice or the Ministry of National Defence. They were transferred to

⁴⁸ Sabra motion, paras 64-66.

⁴⁹ Sabra motion, paras 67-68.

⁵⁰ Sabra motion, paras 69-70.

⁵¹ The 'Ahabash fax' refers, according to the Defence, to a document faxed by the 'Ahabash' organization, of which Mr Abu Adass was supposedly a member, to Lebanese Government authorities on 14 February 2005. *See* exhibit 5D00259; transcript of 15 July 2016, pp 72-73; transcript of 19 July 2016, pp 67-70.

⁵² Sabra motion, paras 71-76.

the Prosecution in 2009, upon the Pre-Trial Judge's order, and subsequently disclosed to the Defence. The tendered documents also contain United Nations International Independent Investigation Commission (UNIIC) witness statements and investigator notes. The witness statements bear the necessary indicia of reliability as they note the date, time, place and those present during questioning and each is signed by the person interviewed, the interviewer and, if necessary, the interpreter. Each investigator note is dated and was part of UNIIC's official investigations. They include the name(s) of the official(s) who sent and received the document.⁵³

40. The Defence relies on extracts from the documents listed in annex A to the motion, but suggests that the entire document containing each of the extracts be admitted so that the Trial Chamber can understand the evidence's full context.⁵⁴

Legal principles

41. Counsel for Mr Sabra submit that the admission of documents from the bar table is well-established before international criminal courts and tribunals. Material tendered must be relevant and probative; its probative value must not be outweighed by its prejudicial effect. *Prima facie* reliability and probative value are required, and where and how each document or record fits into the tendering party's case must be shown.⁵⁵

42. As to what substantive part of the tendering party's case may be admitted from the bar table, the Trial Chamber has previously held that this is dependent on the circumstances and is not a matter of rigid legal principle. The Trial Chamber has confirmed that a witness' oral testimony is not required to admit documentary evidence if the criteria of Rules 149 (C), (D) and 154 are met. The Prosecution shares this view.⁵⁶

43. Rule 154 motions can be filed at any time and by any Party, without the consent of the other Parties, particularly if the documents are or might be relevant to the Trial Chamber's findings under Rule 167. Case law from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) provides precedent for the

⁵³ Sabra motion, paras 77-80.

⁵⁴ Sabra motion, para. 81.

⁵⁵ Sabra motion, para. 5.

⁵⁶ Sabra motion, paras 6-7.

Defence tendering evidence through the bar table during the Prosecution case, even in the face of opposition.⁵⁷

44. Defence counsel insist that international criminal law procedural law does not require that, before evidence can be admitted from the bar table, a Party must know that the evidence may not be presented through a witness. While a Party must make the assessment in good faith, without demonstrating why particular evidence could not be tendered through a witness and what attempts had been made to do so, the Sabra Defence provides a number of factors that the Trial Chamber could consider. These are: (i) whether the opposing Party has withdrawn witnesses that were initially on its witness list and might have provided relevant evidence; (ii) whether witnesses on the Prosecution witness list were available for cross-examination; (iii) whether the opposing Party has a specific case on the issues for which the evidence is tendered; (iv) whether the requesting party had made previous efforts to cross-examine witnesses; (v) whether, in fulfilling its obligations under Rule 55 (C),⁵⁸ the Prosecution has provided a credible explanation for failing to call that evidence itself; and (vi) whether the information is relevant to the discovery of the truth and would assist the Trial Chamber in fulfilling its responsibility to arrive at the truth.⁵⁹

45. The Prosecution has consistently withdrawn witnesses and with other witnesses not being available for cross-examination, the Sabra Defence and the Trial Chamber have been deprived of relevant evidence. This has undermined the ability of the Defence to confront the Prosecution case. Further, the Prosecution does not appear to have a specific case on the issues on which the Defence submits its evidence, nor has the Prosecution provided an explanation for its failure to put evidence before the Trial Chamber on these issues. The Defence has cross-examined witnesses who could have potentially provided relevant evidence, but most of them could not.⁶⁰

⁵⁷ Sabra motion, paras 8-10 (citing ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Second Motion for Admission of Evidence from Bar Table: General Michael Rose, 17 December 2010 ('*Karadžić* Decision of 17 December 2010'); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Accused's Motion to Admit Document Relevant to Incident G4 from the Bar Table, 3 June 2011 ('*Karadžić* Decision of 3 June 2011'); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Accused's Motion to Admit Document relevant to Incident G7 from the Bar Table, 6 July 2011 ('*Karadžić* Decision of 6 July 2011'); ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1436, Decision on the Joint Defence Application for Admission of Documentary Evidence Related to the Testimony of Witness 536, 15 July 2014).

⁵⁸ Rule 55 (C) provides, relevantly, that 'the Prosecutor shall assist the Tribunal in establishing the truth and protect the interests of the victims and witnesses.'

⁵⁹ Sabra motion, para. 11.

⁶⁰ Sabra motion, para. 12.

46. Defence counsel submit that Rule 154 does not restrict the type of material that may be admitted. A Contempt Judge admitted records of interview into evidence under Rule 154 and, although different Rules provide for the admission of written statements and transcripts, the Trial Chamber has previously admitted—by reference to its own discretionary powers and under Rule 154—non-compliant statements.⁶¹

47. Further, the Trial Chamber determines the relevance of each piece of evidence at the end of the trial, when its weight, if any, is assessed in light of the totality of the evidence. Similarly, the Trial Chamber may take notice of the information presented by the Defence through other procedural rules. Rule 92 may be used to exceptionally gather evidence if the documents are not admissible under Rule 154 and it does not require an application by either Party. The Trial Chamber may also, under Rule 165, order a Party to produce additional evidence or witnesses, regardless of the position of that Party.⁶²

48. The Trial Chamber should consider the Prosecution's obligation under Rule 55 (C) to assist the Special Tribunal in establishing the truth. This obligation reflects the Special Tribunal's more inquisitorial nature in contrast to the ICTY and the International Criminal Tribunal for Rwanda (ICTR). Although the ICTY has no Rule 55 (C) equivalent, the Defence cites a decision in the *Kupreškić* case to argue that the Prosecution should present both inculpatory and exculpatory evidence. In practice, this ensures that the Special Tribunal's adversarial character does not provide justification for the Prosecution's failure to retrieve and seek the admission of 'all evidence relevant to arriving at the truth', even if the evidence contradicts the Prosecution case. The Prosecution must place such evidence before the Trial Chamber.⁶³

49. In relation to matters not expressly addressed in the Rules, the Defence cites the Prosecution's reliance on the ICTY and ICTR Appeals Chambers' adoption of general

⁶¹ Sabra motion, para. 13 (citing STL-14-05/PT/CJ, *In the case against New TV S.A.L. and Al Khayat*, F0090, Decision on Two Motions for Admission of Written Statements, 28 November 2014 ('*New TV S.A.L. and Al Khayat* Decision of 28 November 2014'); STL-14-05/PT/CJ, *In the case against New TV S.A.L. and Al Khayat*, F0120, Decision on *Amicus Curiae* Prosecutor's Motion for Admission of Evidence pursuant to Rule 154, 9 April 2015 ('*New TV S.A.L. and Al Khayat* Decision of 9 April 2015'); Decision of 20 December 2013; F1371, Second Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 30 January 2014 ('Decision of 30 January 2014')).

⁶² Sabra motion, paras 14-18.

⁶³ Sabra motion, paras 20-21 (citing ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Decision on Communications between the Parties and their Witnesses, 21 September 1998).

principles relevant to determining the Trial Chamber's authority.⁶⁴ These principles allow the Trial Chamber to admit the tendered evidence and reflect Rule 3 (A),⁶⁵ namely, that the Rules should be interpreted in a manner consistent with the Lebanese Code of Criminal Procedure, which is more liberal in admitting evidence.⁶⁶

50. To ensure a fair trial, the Trial Chamber should, at the very least, admit evidence that would have been available to Lebanese judges had the Accused been tried in Lebanon. Further, Rule 3 (B) requires that any ambiguity, after the application of Rule 3 (A), shall be resolved in the manner most favourable to the Accused. Here, the interpretation most favourable to the Accused would ensure that all evidence supporting the Defence's position is placed before the Trial Chamber. The Defence's inability to take instructions from the Accused and to call him as a witness should also be considered in deciding whether to admit the tendered evidence.⁶⁷

51. Counsel for Mr Sabra do not seek to advance an alternative theory to the Prosecution's theory concerning Mr Abu Adass. Rather, they seek the admission of relevant and probative evidence that the Trial Chamber needs to fulfil its fact-finding and truth-seeking obligations. This is relevant in assessing the Prosecution's evidence both upon a Defence Rule 167 motion for a judgment of acquittal, as already recognised by a Trial Chamber judge,⁶⁸ and at the end of the trial. To the extent that the Defence seeks to tender evidence in support of a fact it considers to be relevant to the Trial Chamber's determination of the truth, the Defence bears no burden to establish this fact. The Prosecution bears the burden to establish all the facts

⁶⁴ These include that (i) the Rules are not exhaustive as to the detailed steps or measures that may be taken in fulfilling the Special Tribunal's mandate; (ii) a decision which is in conformity with the principles of justice, even though not based on a written rule, does not prejudice the interests of the Party; (iii) the purpose of the Rules is to promote a fair and expeditious trial, and trial chambers must have the flexibility to achieve this goal; and (iv) the Special Tribunal's judges may adopt practices not expressly prohibited by the Rules as long as doing so is consistent with the objects and purposes of the Statute: Sabra motion, para. 22 (citing STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2450, Prosecution Motion for the Admission of Witness Statement signed by Witness PRH707, 12 February 2016 (public with confidential annex), paras 21-22).

⁶⁵ Rule 3 (A) provides that '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.'

⁶⁶ Sabra motion, paras 22-23

⁶⁷ Sabra motion, paras 23-24.

⁶⁸ The Defence refers to the transcript of 10 November 2016, p. 88: Sabra motion, para. 26, fn. 27. However, Rule 167 is not mentioned. Rather, the in-court discussion was about the wording of Rule 92 (C).

relevant to its case and exclude any other reasonable inferences that can be drawn from the evidence.⁶⁹

Prosecution response

Legal principles

52. The Prosecution opposes the motion. The Sabra Defence seeks to call a defence during the Prosecution case without providing compelling reasons that it is in the interests of justice to deviate from Rule 146 (B)'s sequence of evidence—which requires the Defence to present its evidence only after that of the Prosecution and participating victims.⁷⁰ The Prosecution submits that a deviation should be considered in the context of the Rules as a whole, which separate the presentation of evidence by the Parties, thus reinforcing that a deviation is exceptional and impacts various trial procedures.⁷¹

53. The Sabra Defence has provided four grounds to justify tendering evidence during the Prosecution case. These are (i) that evidence can be tendered when it is, or might be, relevant to the Trial Chamber's Rule 167 findings; (ii) that no prohibition against the admission of Defence evidence during the Prosecution case has been ordered at other international criminal courts and tribunals; (iii) that the Defence was allowed to tender evidence from the bar table during the Prosecution case at other international criminal tribunals; and (iv) that the tendered documents allow the Defence to confront the Prosecution case and provide the Trial Chamber with evidence relevant to its findings.⁷²

54. With respect to the first ground, the Defence case and its supporting evidence are irrelevant to any judgment or decision under Rule 167. Citing ICTY and ICTR case law,⁷³ the Prosecution argues that the purpose of a Rule 167 judgment or decision is to determine whether its case warrants the Defence being called to answer it and that trial chambers have

⁶⁹ Sabra motion, paras 25-27.

⁷⁰ See above para. 24.

⁷¹ Prosecution response, paras 13-14.

⁷² Prosecution response, paras 15-16, 20, 22, 24.

⁷³ The Prosecution cites ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision on Motions for Judgement of Acquittal, 6 April 2000, para. 11; ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Motion for Acquittal pursuant to Rule 98bis, 28 November 2003, para. 62; ICTY, *Prosecutor v. Brđanin*, IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98bis, 19 March 2004, para. 9; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Decision on Motions for Acquittal pursuant to Rule 98bis of the Rules of Procedure and Evidence, 27 September 2004, para. 18; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98bis of the Rules, 26 October 2004, pp 2-3.

expressly not considered evidence which may be favourable to the Defence in such decisions and judgments.⁷⁴

55. Further, on the basis of ICTY and ICTR case law,⁷⁵ the Trial Chamber is not required to evaluate the credibility and reliability of Prosecution evidence unless its case has completely broken down. The Sabra Defence does not cite legal authority, and the Prosecution has not found any, in which Defence evidence was expressly considered in ‘no case to answer’ proceedings before other international criminal tribunals. Indeed, ‘no case to answer’ decisions from the ICTY and ICTR⁷⁶ have been based solely on Prosecution evidence.⁷⁷

56. With respect to the proposition that a Trial Chamber judge has recognised the relevance of Defence evidence in the context of Rule 167, the Prosecution submits that the Defence did not provide, in its motion, a correct transcript page where the judge supposedly expressed this view. In any event, the Presiding Judge has questioned the need for Defence evidence during the Prosecution case in light of Rule 167, and the current Sabra Defence motion was not at issue when such statements were made.⁷⁸

57. As to the second ground, the Defence ignores Rule 146 (B). Since this contains an exception to the mandated sequence for the presentation of evidence, whether prohibitions against the admission of evidence during the Prosecution case exist at other international tribunals is irrelevant. Nevertheless, the Prosecution notes the ICC’s *Ruto and Sang* case, in

⁷⁴ Prosecution response, para. 16.

⁷⁵ The Prosecution relies on ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement on Motions for Acquittal Pursuant to Rule 98bis, 5 April 2004, para. 15; ICTR, *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on Defence Motion pursuant to Rule 98bis, 21 February 2007, para. 11; ICTR, *Prosecutor v. Kanyarukiga*, ICTR-2002-78-T, Decision on the Defence Motion for Judgment of Acquittal pursuant to Rule 98bis, 9 October 2009, paras 8-9.

⁷⁶ The Prosecution cites, as examples, ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98bis, 21 June 2004, para. 9; ICTR, *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98bis, 22 May 2007, para. 1; ICTR, *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Defence Motion for Judgment of Acquittal, 14 October 2010, para. 2.

⁷⁷ Prosecution response, paras 17-18.

⁷⁸ Prosecution response, para. 19 (referring to the Presiding Judge at transcript of 17 September 2015, p. 11). The Prosecution also distinguishes ICTY case law cited by counsel for Mr Sabra in their reply to the Prosecution’s response to the Sabra Defence’s initial motion, by noting that the evidence sought to be admitted here is outside of a cross-examination context: Prosecution response, para. 18, fn. 26 (citing ICTY, *Prosecutor v. Hadžihasanović*, IT-01-47-A, Appeal Judgment, 22 April 2008 (‘*Hadžihasanović* Appeal Judgment’), para. 55 (holding that Defence evidence elicited during, for example, cross-examination must be used by a trial chamber to assess whether the Prosecution case is incapable of belief in a Rule 98 bis (the ICTY equivalent of Rule 167) decision)).

which the Trial Chamber rejected a Defence motion to admit evidence during the Prosecution case.⁷⁹

58. Concerning the third ground, the ICTY case law cited by counsel for Mr Sabra did not consider ICTY Rule 85 (A)⁸⁰—the ICTY equivalent of Rule 146 (B)—and is therefore irrelevant. At best, the case law supports the proposition that a deviation from the mandated sequence for the presentation of evidence may occur. In any event, the ICTY case law is distinguishable as the admitted documents were not witness statements—unlike a vast majority of the Defence documents tendered here, a number of them were relevant to the testimony of a Prosecution witness, and furthermore, the Prosecution had not objected to the majority of them.⁸¹

59. Citing a decision in *Prlić*, the Prosecution submits that ICTY case law is not uniform on whether a Party may seek admission of evidence during the presentation of another Party's case.⁸²

60. On the fourth ground, the Prosecution does not dispute the Sabra Defence's right to confront the Prosecution case and seek the admission of evidence. However, the Sabra Defence has not shown compelling reasons to depart from Rule 146 (B) and has not shown that simply following the Rules would result in prejudice.⁸³

61. Additionally, the Prosecution presents four reasons why the Trial Chamber should follow the sequence under Rule 146 (B). First, the Prosecution cannot assess the relevance and probative value of the tendered documents in relation to the Sabra Defence case nor determine whether it wishes to cross-examine any Defence witnesses. This is because the

⁷⁹ Prosecution response, paras 20-21 (citing ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1436, Decision on the Joint Defence Application for Admission of Documentary Evidence related to the Testimony of Witness 536, 15 July 2014, paras 11-13).

⁸⁰ ICTY Rule 85 (A) provides that '[e]ach party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the prosecution; (ii) evidence for the defence; (iii) prosecution evidence in rebuttal; (iv) defence evidence in rejoinder; (v) evidence ordered by the Trial Chamber pursuant to Rule 98; and (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.'

⁸¹ Prosecution response, para. 22.

⁸² Prosecution response, para. 23 (citing ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Praljak Defence Motion for Admission of Written Statements pursuant to Rule 92 bis of the Rules, 6 February 2009 ('*Prlić* Decision of 6 February 2009'), p. 3 (stating that motions for the admission of written statements and transcripts in lieu of oral testimony should be filed in the advanced stages of a Party's own case and not during another Party's case)).

⁸³ Prosecution response, para. 24.

Sabra Defence has not yet, in accordance with the Rules, notified the Prosecution of its entire case and the information so far provided by the Sabra Defence is insufficient.⁸⁴

62. Second, the Prosecution's preliminary view is that it would need to cross-examine the witnesses included in the Sabra motion. Granting the motion would thus require the Sabra Defence to call its witnesses during the Prosecution case and cause, at a minimum, unreasonable delay since the correct provision for the admission of witness statements is Rule 155, and not Rule 154.⁸⁵

63. Third, the Sabra Defence motion, and the other similar motions it intends to file, would impede and delay the Prosecution's presentation of evidence and result in prejudice to its case. The Prosecution has a right to present its case in a manner that it determines best puts forward its evidence without undue disruption. It would be forced to both present its evidence and simultaneously respond to the Sabra Defence's presentation of its case.⁸⁶

64. And fourth, interrupting a Party's case to admit the evidence of another Party is inefficient. Allowing the motion may lead counsel for the other Accused to call evidence during their respective cases and hence also the Prosecution to seek the admission of evidence during the Defence cases without needing to reopen its own case or wait to submit rebuttal evidence.⁸⁷

65. The Prosecution further responds that counsel for Mr Sabra cannot seek the admission of witness statements under Rule 154. According to Rule 149 (F), the Trial Chamber may receive evidence of a witness orally or pursuant to Rules 93, 123, 125, 155, 156, 157 and 158 in written or other form. Since these impact other Rules, they ought to be considered in the context of the Rules in their entirety. Rule 155 is *lex specialis* for the admission of witness evidence in written form and its supremacy is recognised by Rule 154's limiting clause.⁸⁸

66. The Prosecution notes the Appeal Chamber's broad definition of a witness statement (and its endorsement by the Trial Chamber)⁸⁹ and submits that in seeking the admission,

⁸⁴ Prosecution response, para. 26.

⁸⁵ Prosecution response, para. 27.

⁸⁶ Prosecution response, para. 28.

⁸⁷ Prosecution response, para. 29.

⁸⁸ Prosecution response, paras 30-31.

⁸⁹ The Prosecution cites to STL-CH/AC/2011/01, F0005, *In the matter of El Sayed*, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011, para. 89 ('an account of a person's knowledge of a crime recorded through due procedure in the course of an investigation'); Decision of 20 December 2013, para. 15; Decision of 30 January 2014, para. 5; Prosecution response, para. 31, fns 52, 54.

under Rule 154, of evidence from 61 witnesses in lieu of oral testimony in the form of approximately 77 witness statements, the Sabra Defence submissions are at odds with Rule 149 (F) and Rule 154's limiting clause. If permitted, the integrity of the proceedings and the Prosecution's rights would be prejudiced.⁹⁰

67. The Prosecution would be deprived of its right to cross-examine under Rules 155 (A) (ii) (c) and 155 (C). If a statement cannot be admitted without cross-examination, then the Sabra Defence would have to make the witness available to testify during the Prosecution case. The statements would not be subject to Rule 155 (B) and the Rule 155 Practice Direction, which ensure that they have the required *prima facie* reliability for admission. False testimony in the statements would not be subject to contempt proceedings under Rule 152 (H). Finally, the Defence would not be required to perform its obligations under Rules 128 (i) (e), that is, to state whether its witnesses will testify in person or pursuant to a specific Rule, and under Rule 112 (A) (ii), to disclose to the Prosecution all Defence witness statements.⁹¹

68. By relying upon the statements to prove the truth of their content (except parts of three statements),⁹² the Sabra Defence seeks to prove contentious allegations concerning the character, religious beliefs, habits and associates of Mr Abu Adass, without the reliability of the information being tested under cross-examination. The Prosecution lists a number of allegations and highlights what appears to be an erroneous inference drawn by the Defence, which would have gone untested without testing the statements' reliability. The Prosecution cites ICTY case law to stress the need to ascertain the reliability of witness statements made out of court and notes that the ICTY Appeals Chamber has held that a Party cannot tender a witness statement under ICTY Rule 89 (C)—the ICTY equivalent of Rule 149 (C)—to evade the stringency of ICTY Rule 92 *bis*—a provision that is nearly identical to Rule 155.⁹³

69. The Prosecution addresses the three Sabra Defence arguments supporting its position that witness statements can be admitted under Rule 154. First, regarding the Trial Chamber's alleged admission of non-compliant statements under Rule 154, the Sabra Defence failed to

⁹⁰ Prosecution response, paras 31-32.

⁹¹ Prosecution response, para. 32.

⁹² Sabra motion, para. 63, fn. 122. *See above* para. 34.

⁹³ Prosecution response, paras 33-35 (citing ICTY, *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002).

provide any examples. In the cited decisions, the Trial Chamber admitted associated exhibits under Rule 154, but the relevant statements were admitted under Rule 155.⁹⁴

70. Second, concerning the reliance on the decisions of the Contempt Judge, the Prosecution argues that they did not address Rule 149 (F) and the limiting clause of Rule 154. Further, the principle underlying the ICTY decisions cited by the Contempt Judge—that a Prosecutor cannot compel a suspect who becomes an accused to testify due to their right to silence—does not apply to the proposed evidence. However, this principle was misapplied by the Contempt Judge in the admission of suspect statements of persons who did not subsequently become accused. In addition, one of the Contempt Judge’s decisions is distinguishable, since the Defence consented, or did not object, to the admission of some records of interviews under Rule 154. The Special Tribunal Appeals Panel’s subsequent assessment of the admitted statements—that they amounted to untested hearsay—demonstrates that Rule 154 is inapplicable.⁹⁵

71. Third, as to the Sabra Defence’s claim that the Prosecution itself stated that witness statements could be admitted through Rule 154, the Prosecution submits that this was an in-court ‘slip or inadvertence’ made by Prosecution counsel, since reference was immediately made to Rule 155. In subsequent hearings, Prosecution counsel clarified that Rule 154 was inapplicable to witness statements.⁹⁶

72. The Prosecution, citing the Presiding Judge,⁹⁷ argues that the Defence has wrongly claimed that it has no burden to establish facts for which they seek to tender evidence, as the burden applies equally to both Parties. The Sabra Defence cites to no Rule or authority in asserting the ‘factors’ it alleges to be relevant to determining whether the tendered items should be admitted. These factors are not considerations under Rule 149 (C) and (D). Further, they can or have been addressed under other Rules. They also ignore relevant Trial Chamber

⁹⁴ Prosecution response, para. 36 (citing Decision of 20 December 2013; Decision of 30 January 2014).

⁹⁵ Prosecution response, paras 37-39 (citing *New TV S.A.L. and Al Khayat* Decision of 28 November 2014; *New TV S.A.L. and Al Khayat* Decision of 9 April 2015; STL-14-05/PT/CJ, *In the case against New TV S.A.L. and Al Khayat*, F0102, Decision on *Amicus Curiae* Prosecutor’s Motion for Admission of Record of Karma Khayat’s Suspect Interview and Related Documents, 4 March 2015 (*New TV S.A.L. and Al Khayat* Decision of 4 March 2015’); ICTY, *In the case against Florence Hartmann*, IT-02-54-R77.5, Decision on Prosecution Motion for Admission of Evidence from the Bar Table pursuant to Rule 89 (C), 19 May 2009; ICTY, *Prosecutor v. Orić*, IT-03-68-T, Decision on Defence Motion to Exclude Interview of the Accused pursuant to Rules 89 (D) and 95, 7 February 2006; and STL-14-05/A/AP, *In the case against New TV S.A.L. and Al Khayat*, F0028, Public Redacted Version of Judgment on Appeal, 8 March 2016).

⁹⁶ Prosecution response, para. 40.

⁹⁷ See transcript of 15 July 2016, pp 6-7 (where the Presiding Judge stated that the burden of proving that evidence is relevant and probative under Rule 149 (C) rests on the tendering party, whether it is the Prosecution or Defence).

decisions and orders concerning the availability of specific witnesses.⁹⁸ The Sabra Defence's consideration of Rule 3 and Lebanese law, without establishing a *lacuna* or ambiguity in the Rules or after exhausting the available Rules, also ignores that, under Rule 149 (A), the Special Tribunal is obliged to apply its own rules of evidence.⁹⁹

73. The Prosecution objects to the Defence's interpretation of Rule 55 (C),¹⁰⁰ which is premised on a baseless extension of a provision that has no bearing on the admission of evidence. While it is a fundamental guiding principle, Defence counsel have not established that the Prosecution is not assisting the Special Tribunal in establishing the truth. The Prosecution's obligations are articulated in other Rules. The ICTY's *Kupreškić* decision did not establish an obligation to present inculpatory and exculpatory evidence, and the Defence has no basis to assert that what it proposes is the 'absolute truth', and that the Trial Chamber and the Prosecution must assist the Defence in retrieving and admitting such evidence. The Defence must seek the admission of evidence in support of its case with the tools provided by the Rules.¹⁰¹

74. As for the Sabra Defence's application for alternative relief under Rules 92, 130 (B) and 165, the Prosecution submits that the Sabra Defence has not established that the Trial Chamber's intervention is required and, in any event, has not identified the evidence which the Trial Chamber would supposedly gather or order to be produced. The Defence did not fulfil Rule 92's requirements, since it must show, on the balance of probabilities, that the Defence was not in a position to collect important evidence and that it was in the interests of justice for the Trial Chamber to act on its own accord to do so. In addition, Rules 92 and 165 are not vehicles to admit evidence. Rather, these are found in Rule 149 (F)¹⁰² and also in Rule 154, otherwise reliability safeguards would be overlooked. Rule 92 (B) and (C) state that the evidence gathered shall form part of the file to be submitted to the Trial Chamber under Rule 95 and thus evidence is not admitted automatically under this provision. Lastly,

⁹⁸ Specifically, F2901, Decision Admitting Statements of Witness PRH103 under Rule 158, 12 December 2016 (confidential); F2962, Order to the Registrar under Rule 13 in relation to a Witness, 31 January 2017: Prosecution response, para. 48 (ii).

⁹⁹ Prosecution response, paras 47-49.

¹⁰⁰ See above paras 24, 48.

¹⁰¹ Prosecution response, paras 51-56 (citing ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Decision on Communication between the Parties and their Witnesses, 21 September 1998).

¹⁰² Rule 149 (F) states that a 'Chamber may receive evidence of a witness orally or, pursuant to Rules 93, 123, 125, 155, 156, 157 and 158 in written or other form.'

Rule 165 only refers to orders on the production of evidence before the Trial Chamber and not its authority to admit evidence, which is found in Rules 149 (C), 154 and 155.¹⁰³

Evidence

75. The Prosecution argues that counsel for Mr Sabra failed to demonstrate the relevance, probative value and reliability of the evidence. The Sabra Defence did not fully comply with the Trial Chamber's order of 27 February 2017 insofar as it did not specify the 'ERN'¹⁰⁴ range of relevant paragraphs and pages relied upon or whose admission is sought'. The Prosecution objects to the proposed items and reiterates that it is currently unable to assess the relevance and probative value of this evidence concerning the Sabra Defence case or the need to cross-examine any of the witnesses since the Defence has yet to notify the Prosecution of its case.¹⁰⁵

76. Regarding the reliability of each item, the Prosecution identifies numerous breaches of the Rule 155 Practice Direction in respect of the proposed witness statements, and reliability deficiencies in the other documents. These are outlined in annexes A and B of the Prosecution's response. The moving Party must either resolve these breaches and deficiencies before filing its motion or address them in the motion. Given that the Defence has had the majority of the items since 2012, it has had enough time to correct the breaches. Dismissing the motion would give the Defence another chance to do so.¹⁰⁶

77. In addition, the extracts from books and booklets and audio-recordings are unreliable and thus cannot be admitted under Rule 154 because they do not provide the full and necessary context. The Sabra Defence can, at a more appropriate stage, seek to tender them in their entirety. Moreover, the Sabra Defence fails to identify and address issues that may fall under exclusionary Rules 149 (D) and 162, such as the possibility that some statements were taken while the concerned witness was in custody and under conditions which may cast doubt on their compliance with international human rights law and thus on the reliability of the statements.¹⁰⁷

¹⁰³ Prosecution response, paras 57-59.

¹⁰⁴ 'ERN' refers to 'electronic registration number' or 'evidence registration number', and is a unique identification number which is printed on each page of every document admitted, and sought to be admitted, into evidence.

¹⁰⁵ Prosecution response, paras 41-42.

¹⁰⁶ Prosecution response, paras 43-44.

¹⁰⁷ Prosecution response, paras 45-46.

78. The Prosecution submits that the Sabra Defence, as the Party calling witness evidence, must educate their witnesses about protective measures and ask whether they require them.¹⁰⁸ The absence of such enquiries potentially raises security and privacy risks to witnesses, their families and associates. Should this obligation not fall on the Parties, then it falls on the Trial Chamber—possibly in conjunction with the Victims and Witnesses Unit—to ensure that witnesses are informed and asked about protective measures.¹⁰⁹

DISCUSSION AND DECISION

Sequence for the presentation of evidence in adversarial proceedings at the Special Tribunal

79. The proceedings at the Special Tribunal are adversarial in nature. The Statute and Rules specify an adversarial and structured setting where each Party presents its own evidence in separate cases on the matters in contention at trial, although they may agree between them on specific facts. The Special Tribunal does not follow an accusatorial or inquisitorial model, in which an investigating judge collects and collates the available evidence, and where individual criminal responsibility may be determined primarily upon the content of this ‘*dossier de l’affaire*’. As the Trial Chamber has previously observed, no such dossier exists before the Special Tribunal,¹¹⁰ unlike in criminal proceedings held in Lebanon. Legal systems employing these procedural mechanisms do not feature distinct cases for the Parties; hence they lack a provision that is equivalent to Rule 167 that provides for a judgment of acquittal at the end of a formal Prosecution case, as there is none.

80. In adversarial proceedings, each Party—in this case the Prosecution—may present its case as it deems fit, subject to the Trial Chamber’s oversight. For this reason, during the presentation of its case, the Prosecution has no obligation—and should not be expected—to actively present the Defence case and address all of the Defence’s theories or preferred narrative of events. In particular, Rule 55 (C) imposes no positive obligation on the Prosecution to do this, and the Trial Chamber is not prepared to read this requirement into the Rule. Neither the Special Tribunal’s Statute, Rules nor the ‘general principles of international criminal law and procedure’ or international human rights law—under Rule 3 (A) require this. There is thus no *lacuna* requiring the Trial Chamber—as the Defence suggests—to apply the

¹⁰⁸ The Prosecution explains that whenever a Party relies upon the testimony of an individual to support its case, this person becomes that Party’s witness: Prosecution response, para. 60.

¹⁰⁹ Prosecution response, paras 60-61.

¹¹⁰ See F2899, Decision on the Prosecution Motion for the Admission of Records Received from the Traffic, Truck, and Vehicle Management Authority, 9 December 2016, para. 24

Lebanese Code of Criminal Procedure under Rule 149 (A) ‘consistent with the highest standards of international criminal procedure’. And as the Prosecution correctly observed of the Prosecutor’s duties under Rule 55 (C), this is ‘a fundamental guiding principle, not only of the Prosecutor at this Tribunal, but every public prosecutor both domestic and international.’¹¹¹

81. As noted above at paragraph 24, Rule 146 (B)—in line with the normal adversarial principles that each Party investigates its own case, collects its own evidence, and subsequently presents its own case in court—provides a sequence for the presentation of evidence, starting with ‘evidence for the Prosecutor’, then evidence for the participating victims, and thereafter, ‘evidence for the defence’. The Trial Chamber may depart from this statutory sequence ‘in the interests of justice’. The Trial Chamber did this with the presentation of the case for the participating victims, allowing them to interpose their case towards the end of the Prosecution case, on the basis that ‘if a judgement of acquittal under Rule 167 were entered, their right to participate in the manner proposed would be nullified’, thus satisfying the interests of justice test.¹¹² That was a clear exception.

82. Although the Sabra Defence has made no formal application under Rule 146 (B) to vary the sequence of evidence by allowing it to present at least part of its case during the Prosecution case, the Trial Chamber must consider whether an application to tender 67 Defence statements in the manner proposed would require such an application—or formal variation of the sequence for calling evidence—and, if ‘yes’, whether it should exercise its discretion to allow this. For the reasons set out below, the Trial Chamber finds that tendering witness statements would require varying the sequence for calling evidence, and the Trial Chamber will decline to exercise its discretion to vary the Rule 146 (B) sequence in this instance.

Admission of witness statements

83. The Special Tribunal’s Rules of Procedure and Evidence have specific rules for the admission of documents and witness statements—Rule 154 for documents and Rules 155, 156 and 158 for witness statements and transcripts of witness testimony. The Rules are explicit.

¹¹¹ Prosecution response, para. 51.

¹¹² F3260, Decision on the Legal Representatives of Victims’ Application to Call Evidence, Schedule the Presentation of Evidence and Directions on Disclosure Obligations, 31 July 2017, para. 74.

84. Defence counsel, however, tender under Rule 154 documents that they concede are witness statements. As explained at paragraphs 18-19 above, while Rule 154 governs the admission of documents, it is '[s]ubject to Rules 155, 156 and 158'. Of these, Rules 155 and 156 specifically address the admission of written statements of witnesses in lieu of oral testimony and examination in chief, under certain conditions. They are therefore *lex specialis* provisions which apply to the 67 statements proposed for admission. Further, the Rule 155 Practice Direction spells out the criteria necessary to make statements admissible under Rule 155. The policy reason for this is that witness statements must bear a *prima facie* degree of reliability to give them some probative value. The Trial Chamber has identified when it may depart from the requirements in the Practice Direction in the interests of justice and receive non-complying statements into evidence.¹¹³ The Practice Direction is aimed at ensuring that witness statements that are received into evidence without cross-examination—that is, without allowing the opposing Party to question or confront the witness—have *prima facie* indicia of reliability.

85. With one exception,¹¹⁴ the Sabra Defence seeks the admission of the statements for the truth of their content. Throughout its motion, the Sabra Defence specifically references the statements to support various factual assertions about Mr Abu Adass' religious beliefs and character and those of his supposed associates, as well as Mr Abu Adass' views concerning Mr Hariri.¹¹⁵ This illustrates the need to ensure that the statements have the necessary *prima facie* reliability to give them some probative value. In this respect, the Sabra Defence has a column entitled 'indicia of reliability' in annex A to its motion which sets out how each statement is *prima facie* reliable. For example, some of the statements are submitted to be reliable on the basis that they were taken by the UNIIC.¹¹⁶ However, where a statement is tendered for the truth of its content, the mere fact that it was taken by the UNIIC does not, of itself, render its content *prima facie* reliable, although a witness declaration acknowledging that the statement is true may provide some indicia of reliability.

¹¹³ See Decision of 30 May 2013, paras 22-31 and, particularly, para. 31.

¹¹⁴ Although the Sabra Defence has cited three items upon which it does not rely for the truth of their content (Sabra motion, para. 63, fn. 122; see above para. 34), the Trial Chamber has only been able to identify one of these in the Sabra motion, annex A, namely, item 49 (a witness statement from Mr Yasser Arafat Hassoum which includes the ERN range 60010242-60010243 as identified by the Sabra Defence; the Defence relies on another part of this statement for the truth of its content (ERN 60010246)). The remaining references to '205564 at 205571' and '60034933 at 60034943' at fn. 122 of the Sabra motion do not appear in the Sabra motion, annex A. Nor does this annex identify in the 'Motion reference' column either the paragraph or footnote number of the Sabra motion where these two remaining items were relied upon.

¹¹⁵ See Sabra motion, paras 38-40; 45-76.

¹¹⁶ See e.g. Sabra motion, annex A, items 1, 17, 20-24, 29, 43-45, 49-50, 52-59, 61-65, 123.

86. It is also apparent that most of the statements do not comply with the Practice Direction¹¹⁷ and are from people who are not on the Prosecution's witness list.¹¹⁸ As to the first, departures from the Practice Direction, i.e. non-compliance, the Trial Chamber has held:

On the other hand, however, some requirements of Articles 1 and 2 of the Practice Direction would appear to be so fundamental to establishing the indicia of reliability that it is difficult to envisage overlooking non-compliance. These could include not properly identifying a witness, or failing to warn them that they could be prosecuted for contempt or false testimony for knowingly and wilfully making a false statement, knowing that it may be used in proceedings at the Tribunal (as specified in Article 2 par. 2 (d)). (This list is non exhaustive). Where such breaches occur the Trial Chamber will examine also each application on its merits and examine the individual circumstances of each witness statement.¹¹⁹

87. As to the second, statements from people not on the Prosecution's witness list, Rule 150 (H) provides that the Trial Chamber may refuse to hear a witness whose name does not appear on a Party's list of witnesses. The Sabra Defence has not informed the Trial Chamber whether it intends to call the 45 individuals who made the 67 statements as witnesses if it, at the appropriate time, calls a case, since it has not yet submitted a Defence witness list.¹²⁰ Rule 150 (H) is discretionary, but a Party would have to provide compelling reasons for the Trial Chamber to hear the evidence of a witness whose name is not on a witness list. Normal judicial case management principles require that witness lists are submitted in accordance with the Rules. The Trial Chamber's directions concerning the potential admission of non-compliant Rule 155 witness statements pursuant to Rule 154 is premised on the witnesses being either on the Defence or Prosecution witness lists—or, in the alternative, upon the moving Party seeking to amend its witness list. That is not the case here, and the Defence has not sought to rely on this narrow possible exception to Rule 155.

88. Additionally, the Prosecution not only objects to the admission of the statements in their entirety under Rule 154, but has also expressed the preliminary view that it will seek to

¹¹⁷ See Prosecution response, para. 43; annex A.

¹¹⁸ While some of statements are from Witness 56—who is on the Prosecution's witness list—their admission has been either denied or deferred in this decision: *see above* paras 13-14.

¹¹⁹ Decision of 30 May 2013, para. 29.

¹²⁰ Rule 128 requires the Chamber to order the Defence, after the close of the Prosecution case and upon the Defence's election to present a case, to file, among other things, a list of the witnesses it intends to call during its case. The Prosecution has yet to close its case.

cross-examine the witnesses.¹²¹ These circumstances further militate against the admission of the statements as documents under Rule 154 and distinguish this case from instances where statements have been admitted under this Rule.¹²²

89. As the Trial Chamber held in its decision of 16 December 2016, evidence of this kind cannot be admitted under Rule 154 over the objections of the Prosecution and bypass, in effect, Rules 155 and 156 and the Rule 155 Practice Direction. In that decision, the Trial Chamber considered a situation where the Defence, opposed by the Prosecution, sought the admission of witness statements during the Prosecution case, albeit in response to the Prosecution seeking the admission of other evidence. The Trial Chamber noted the procedural difficulties that could potentially result, namely, of the Prosecution being forced to elect whether to cross-examine witnesses without knowing where the evidence fits into the Defence case.¹²³ Consequently, the Trial Chamber held that:

in circumstances where a Party (here, the Prosecution) is resisting the submission of statements ... during its case by the other Party (here, the Defence), it would appear that the witness statements most properly belong in the moving Party's (i.e. the Defence's) case.¹²⁴

90. Although this was in the context of a Defence application to admit, under Rule 155, witness statements during the Prosecution case—the Rule the Prosecution appears to suggest should have been relied upon by the Defence here¹²⁵—the Trial Chamber finds that the same reasoning applies. It may thus be unfair to the Prosecution to force it to elect now whether to seek to cross-examine a witness without having the Defence's witness list. Furthermore, the Trial Chamber has examined each of the witness statements and considers that, if tendered

¹²¹ Prosecution response, para. 27.

¹²² See *New TV S.A.L. and Al Khayat* Decision of 28 November 2014, para. 27 (where the Defence did not object to the admission into evidence, under Rule 154, of two records of interview); *New TV S.A.L. and Al Khayat* Decision of 4 March 2015, para. 4 (where the Defence did not file a response to the *Amicus Curiae* Prosecutor's request to admit into evidence, under Rule 154, an audiovisual recording and transcript of the Accused's suspect interview); *New TV S.A.L. and Al Khayat* Decision of 9 April 2015, para. 30 (where the Defence objected to the admission of two records of interview under Rule 154, but did not express the view that it would seek to cross-examine the individuals concerned). See also Decision of 11 April 2016 (where the Trial Chamber admitted, under Rule 154, several documents, including some statements (exhibit P806), where the Defence did not object to their admission).

¹²³ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2909, Decision on Salim Jamil Ayyash's BMW and Mobile Numbers and Ayyash Request regarding Witnesses PRH331 and PRH682, 16 December 2016 ('Decision of 16 December 2016'), para. 19.

¹²⁴ Decision of 16 December 2016, para. 20.

¹²⁵ Prosecution response, paras 27, 31-32.

under Rule 155, in the circumstances, cross-examination of some witnesses may be warranted.

91. Defence counsel have therefore chosen the wrong Rule to propose the admission of the statements of 45 potential witnesses, and the Trial Chamber cannot *proprio motu* receive them into evidence under Rule 155, as Rule 155 (C) provides that it ‘shall decide, after hearing the parties, whether to require the witness to appear for cross-examination’.

92. Moreover, should the Trial Chamber admit the witness statements, pursuant to its discretion under Rule 150 (H), it could refuse to hear them; the witnesses whose statements the Defence has tendered are not currently on any Party’s witness list. It would equally be within the Trial Chamber’s discretion to hear these witnesses, and as noted at paragraph 90 above, at least some witnesses may be cross-examined. However, as the Trial Chamber points out below at paragraph 100, cross-examination by the Prosecution of Defence witnesses during its own case would amount to a departure from the sequence of evidence presentation prescribed by Rule 146 (B) and would not—in this instance—be in the interests of justice.¹²⁶

93. The Trial Chamber is also unconvinced, in the exercise of its discretion, that using its powers under Rule 92 or Rule 165 to order the production of additional evidence or exceptionally gather evidence on its own volition is appropriate in the circumstances, or would be in the interests of justice.¹²⁷ Regarding Rule 92, the Sabra Defence has not presented any arguments on the exceptional nature of the circumstances that merit its application, as required by the Rule. Concerning Rule 165, given that the Prosecution has yet to complete its case, and that the Defence may potentially present its own case, the Trial Chamber sees no compelling reason to vary the usual sequence of presentation of evidence under Rule 146 (B).

Rule 167—application for a judgment of acquittal

94. In seeking the admission of its witness statements, the Sabra Defence has also invoked Rule 167 and the Trial Chamber’s fact-finding and truth-seeking obligations. Rule 167 provides that the Trial Chamber shall, at the close of the Prosecution case and after hearing from the Parties, enter a judgment of acquittal on any count in the indictment if there is no evidence capable of supporting a conviction on that count. In interpreting its equivalent of

¹²⁶ Decision of 16 December 2016, para. 17.

¹²⁷ See above para. 23, fn. 31.

Rule 167,¹²⁸ the ICTY Appeals Chamber in *Jelisić* framed the ‘key question’ in this context as whether the Prosecution’s evidence ‘if accepted’ could sustain a conviction beyond reasonable doubt by a reasonable trier of fact.¹²⁹ In another case, *Hadžihasanović*, it also held that Defence evidence admitted during the Prosecution case ‘must be used to assess whether the Prosecution evidence is incapable of belief’ and that it would be an error of law to ignore evidence presented by the Defence during the Prosecution case.¹³⁰

95. In this respect, the Sabra Defence’s argument that the evidence it seeks to tender is relevant to a potential Trial Chamber decision or judgment of acquittal under Rule 167, as well as to the Trial Chamber’s fact-finding and truth-seeking obligations, could be applied to all Defence evidence—including witness statements—that should be properly tendered during the Defence case. This is relevantly addressed at paragraph 117 below, when dealing with the admission into evidence of documents under Rule 154.

96. If counsel for the Accused make applications under Rule 167, the Trial Chamber will hear submissions from the Parties about the use it can make of any Defence evidence admitted during the Prosecution case in a decision or judgment pursuant to this rule. If no Rule 167 applications are made the Trial Chamber will, of course, consider all evidence on the trial record in assessing the individual criminal responsibility of the Accused with respect to the charges in the amended consolidated indictment.¹³¹

Variation of the sequence for presenting evidence under Rule 146 (B)

97. Consistent with international criminal law procedural law and the Trial Chamber’s own practice, the Trial Chamber may exercise its discretion to admit Defence evidence during the Prosecution case. The converse also applies, namely, that it may also exercise its discretion not to do so.

98. The more substantive issue here, therefore, is whether the presentation of a substantial number of Defence witness statements—irrespective of whether they have originated from the Prosecution, UNIIIC or the Lebanese investigation case-file—would require the Trial Chamber to vary the sequence for the presentation of evidence in Rule 146 (B). The Defence did not make any application under Rule 146 (B) and has therefore not requested such a

¹²⁸ Rule 98 *bis* of the ICTY Rules of Procedure and Evidence.

¹²⁹ ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Appeal Judgment, 5 July 2001, para. 37.

¹³⁰ *Hadžihasanović* Appeal Judgment, para. 55.

¹³¹ This applies to both a decision or judgment under Rule 167 and a judgment under Rule 168.

variation. The Prosecution, however, not only opposes the admission of the statements but also seeks to cross-examine those who made the statements.

99. But the Defence relies on Rule 154—which does not provide for the cross-examination of witnesses—and on the statements of 45 witnesses for the truth of their content. In these circumstances, for the reasons explained in paragraph 84 above, witness statements can only be admitted under the *lex specialis* provisions in Rules 155, 156 and 158.

100. In such circumstances, and given the sheer quantity of statements (67 from 45 witnesses) the Defence seeks to admit and the potential for the Prosecution cross-examining Defence witnesses during its own case, the admission of the tendered statements would necessarily require a variation in the sequence of the presentation of evidence. Therefore, in addition to the error in relying on Rule 154 to admit the statements, the Defence should have applied to vary the sequence of presentation of evidence under Rule 146 (B). The Trial Chamber is unconvinced by Defence arguments that the Prosecution has not addressed the ‘substance’ of its evidence, that it has not ‘explained’ why it has not presented the Defence’s evidence, that it has withdrawn relevant witnesses, or that its witnesses have not ‘provided evidential assistance’ to the Defence. Since the Prosecution has no obligation to present the Defence case or to address all of its theories or its preferred narrative of events,¹³² these Defence submissions are insufficient to displace the normal sequence for the presentation of evidence. The Defence may address any perceived failings in the Prosecution’s evidence and case, but in a manner consistent with Rule 146 (B), unless the Trial Chamber, in the exercise of its discretion, decides otherwise.

101. In this respect, according to the ICTY Appeals Chamber, a Trial Chamber must consider Defence evidence in the context of a Rule 167 judgment or decision.¹³³ This, however, does not mean that, or address the question of whether, the Trial Chamber *must*—as a matter of principle—admit Defence witness statements during the Prosecution case.

102. The Sabra Defence has used an incorrect procedural mechanism to seek the admission of statements. In particular, it made no submissions in relation to Rule 155 and why no cross-examination is required under Rule 155 (C). In turn, it is plain that the Prosecution is not obliged to respond to Rule 155 submissions that have not been made. This does not, however, affect the Defence’s right to challenge the Prosecution case and evidence.

¹³² See above para. 80.

¹³³ See *Hadžihasanović Appeal Judgment*, para. 55.

103. The Rules do not provide for the Sabra Defence to seek to admit witness statements under Rule 154 (if objected to). Accordingly, the Trial Chamber, consistent with its previous decision,¹³⁴ rejects the admission of the 67 statements¹³⁵ under Rule 154. As previously held, if the opposing Party (here the Prosecution) had not objected, the Trial Chamber in the exercise of its discretion, and consistent with its decision of 16 December 2016, referred to at paragraph 89 above, may have taken a different view.¹³⁶

104. The Trial Chamber will therefore not, in the absence of a properly reasoned application under Rule 146 (B), in conjunction with Rules 155, 156 or 158, vary the sequence for the presentation of evidence to permit the Defence to interpose its own case and tender 67 statements (or call the 45 witnesses) during the Prosecution case. As the Sabra Defence has not followed the Rules in attempting to tender witness statements into evidence, the Trial Chamber will not receive them into evidence at this stage.

105. Moreover, contrary to the Sabra Defence's submissions, receiving the evidence of some 45 witnesses and their 67 statements during the Prosecution case would significantly delay the proceedings and, in particular, the Prosecution case. To receive the evidence, the Trial Chamber would have to carefully consider, potentially, up to 67 applications under Rules 155, 156 or 158, and issue a reasoned decision in respect of the 45 witnesses the Defence proposed to call without cross-examination, either admitting the statements into evidence, or alternatively ordering the witnesses to appear for cross-examination.

106. The Trial Chamber must also consider the practical considerations—if witnesses were ordered to appear for cross-examination—of calling witnesses in international criminal proceedings, such as obtaining visas, travelling to The Netherlands, or deciding video-conference link applications. To date—towards the close of the Prosecution case—the Trial Chamber has received the evidence of 296 witnesses. It has heard live, in the Prosecution case, the evidence of 117 Prosecution witnesses, and in the case for the participating victims, seven witnesses including six participating victims. It has also received into evidence under Rules 155, 158 and 161 (C), the statements of 162 Prosecution witnesses and 26 from the participating victims. Sixteen Prosecution witnesses testified under Rule 156. If accepted, the Sabra Defence motion would add 45 witnesses to this total witness list before the close of the

¹³⁴ Decision of 16 December 2016, paras 19-20.

¹³⁵ Sabra motion, annex A, items 1-10, 12-14, 17, 19-24, 26, 29-35, 39, 41-65, 68-69, 109-114, 116, 123, 126-128.

¹³⁶ See above paras 88-89, fn. 122.

Prosecution case—thereby effectively adding around another fifteen per cent to the list—and would significantly protract the proceedings. The Trial Chamber does not believe that doing this would be in the interests of justice, and particularly the right of the Accused to receive a fair and expeditious trial as mandated by Article 16 (2) and (4) of the Special Tribunal’s Statute.

Admission of documents under Rule 154

107. Virtually all of the remaining documents come from the Prosecution, UNIIC or the Lebanese investigation case-file and were disclosed to the Defence by the Prosecution. In attacking the Sabra Defence for seeking the admission of witness statements, the Prosecution also appears to generally object to the Defence tendering documents other than witness statements under Rule 154 during the Prosecution case.¹³⁷ The Prosecution, however, concedes that the Defence may tender such documents in the context of additional statements from a Prosecution Rule 158 unavailable witness or when the Defence tenders evidence during, or pursuant to, the cross-examination of a Prosecution witness.¹³⁸

108. However, as noted by the Defence, documents other than witness statements have been admitted into evidence pursuant to Defence bar table motions during the Prosecution case, for example, at the ICTY.¹³⁹ Although the Prosecution concedes this, it challenges the relevance of those ICTY decisions to the extent that (i) they did not consider the ICTY’s Rule 85 (A)—the ICTY equivalent of Special Tribunal’s Rule 146 (B)—(ii) the majority of the documents were not witness statements, (iii) a number were relevant to the testimony of a Prosecution witness, and (iv) the ICTY Prosecution had not objected to the admission of a majority of them.¹⁴⁰ Here, the relevant documents are not witness statements and are relevant to witness testimony concerning Mr Abu Adass, but the Prosecution has objected to their admission.

109. Rule 146 (B) permits the Trial Chamber to vary the sequence of presenting evidence, in the interests of justice. This permits it to receive Defence evidence ‘out of sequence’, including through bar table motions. But considering that this practice has been accepted

¹³⁷ See Prosecution response, paras 13-24 (where the Prosecution makes no distinction between witness statements and other documents).

¹³⁸ Prosecution response, para. 15.

¹³⁹ See *Karadžić* Decision of 17 December 2010; *Karadžić* Decision of 3 June 2011; *Karadžić* Decision of 6 July 2011.

¹⁴⁰ Prosecution response, para. 22.

before other international criminal tribunals¹⁴¹ and does not present the same procedural difficulties as admitting witness statements, the Trial Chamber sees no reason, in principle, preventing the Defence from tendering the remaining 54 documents that are not witness statements, or preventing the Trial Chamber from admitting the tendered documents into evidence. In other words, a formal variation of the sequence for the presentation of evidence is not necessarily required for the Trial Chamber to receive some Defence evidence during the Prosecution case.

110. To illustrate why not, Rule 150 (J) obliges Defence counsel to put the nature of their (contradictory) case to relevant Prosecution witnesses during cross-examination—as it obliges Prosecution counsel during a Defence case. This obligation may include presenting relevant documents to a witness and questioning them during their testimony. However, ‘officially’ varying the sequence for the presentation of evidence every time Defence counsel put their case to a Prosecution witness in the form of a document which is accepted into evidence, would be cumbersome, unnecessary and would pointlessly interrupt the flow of the proceedings.

111. Moreover, a Prosecution witness neither has to adopt nor accept the contents of a Defence document for it to be admissible as evidence for the Defence case during the Prosecution case. An obvious example is confronting a witness with a prior inconsistent statement in an attempt to undermine their credibility or reliability. This demonstrates that, conceptually at least, in many instances there may be little practical difference between tendering Defence evidence through a Prosecution witness—especially where the witness disagrees with a document—or through a bar table motion. But in each instance the evidence must be relevant and have some probative value. For these reasons, the Trial Chamber, in the exercise of its general discretion to admit evidence consistent with Rules 149 (C) and (D), finds that, in principle, it may receive evidence from a Party during the opposing Party’s case.

112. The Prosecution has argued that because the Sabra Defence has not yet notified the Prosecution of its entire case, witnesses and exhibits, it cannot assess the relevance and probative value of the Defence evidence.¹⁴² The Trial Chamber, however, is unconvinced by this and believes that the Prosecution is sufficiently informed of the nature of the Sabra

¹⁴¹ The *Prlić* case, which the Prosecution cited in response to the Defence (Prosecution response, para. 23), only concerned the denial of admission of witness statements and not documents during the Prosecution case: *see Prlić* Decision of 6 February 2009.

¹⁴² Prosecution response, para. 26.

Defence case—at least in relation to Mr Abu Adass and the false claim of responsibility aspects of it—to make informed decisions about where this evidence fits into the Defence case, and hence how to deal with it.

113. The Sabra Defence has made several mid-trial summaries of its case,¹⁴³ and distributed at least one document outlining its case,¹⁴⁴ which has had the effect of informing the Parties and the Trial Chamber of the general nature of the Defence case, including of written evidence that it intends to put before the Trial Chamber.¹⁴⁵ The Prosecution has all of the relevant documents—most of which actually emanate from the Prosecution, the UNIIC or the Lebanese investigating authorities—and can assess where they fit into the Defence’s notified case.

114. Further, to the extent that this Prosecution submission relates to documents rather than witness statements, the Trial Chamber ordered the Defence to refile its original motion to, among other things, specifically address and explain both the relevance and probative value of each of the documents.¹⁴⁶ The Defence complied, thereby providing further relevant information as to where the documents fit into the Defence case,¹⁴⁷ but the Prosecution did not address those submissions.

115. The Trial Chamber therefore believes that the Prosecution has sufficient notice of the general nature of the Sabra Defence case to make any relevant submissions about the relevance and probative value of the documents. As found above, at paragraphs 88-92, deciding whether proposed Defence witnesses should be cross-examined and making submissions to that effect, are in different categories. The Trial Chamber—in making this discretionary decision for the purposes of this notice—is distinguishing between documents and witness statements.

116. Accordingly, for the reasons explained at paragraphs 118-149 below, the Trial Chamber has considered the admissibility of the 54 documents that are not witness

¹⁴³ See transcripts of 9-10 November 2016. See also transcript of 19 November 2015, pp 110-121.

¹⁴⁴ This document, entitled ‘Aide Memoire on the Crime Scene and Related Matters’, was sent by e-mail to the Parties and the Legal Representatives of Participating Victims by the Sabra Defence on 3 November 2016. See transcript of 3 November 2016, pp 1-3.

¹⁴⁵ The Parties and the Legal Representative of Victims were permitted to present in-court mid-trial thematic summaries of evidence upon the Trial Chamber’s request or with its leave: F2541, Decision on In-Court Summaries of Evidence, 7 April 2016, disposition.

¹⁴⁶ Trial Chamber Order, para. 2.

¹⁴⁷ See Sabra motion, annex A.

statements¹⁴⁸ and, in the exercise of its discretion to admit evidence under Rule 154,¹⁴⁹ finds that 49 of the documents are relevant and of probative value, and are thus admissible.

117. The Trial Chamber reiterates, however, that their admissibility is separate and distinct to the weight, if any, ultimately given to them at a later stage in assessing the totality of the evidence. In this respect, the Trial Chamber will in due course receive submissions on the use it can make, in a Rule 167 decision or judgment of acquittal, of any Defence documents admitted during the Prosecution case. In the interests of justice, the Trial Chamber will admit into evidence the ERN range of the relevant document—as identified in the ‘Full ERN Range EN/AR’ columns of annex A of the Sabra motion—unless otherwise specified.

Islamic religious books and booklets, photographs, audio transcripts and audio files

118. These documents consist of 32 extracts from Islamic religious books and booklets and two photographs of covers of other books.¹⁵⁰ In addition, they include two audio files (identified by surrogate sheets) and seven transcripts of Islamic religious sermons or lectures.¹⁵¹ These items were seized from Mr Abu Adass’ home by Lebanese police authorities on 14 February 2005.

119. According to the Defence, these documents are relevant to show that Mr Abu Adass had an interest in extremist or jihadi views and, when considered in context, show that he was easily identifiable as someone who could have credibly, even if falsely, claimed responsibility for the attack.¹⁵²

120. The Prosecution responds that the extracts do not provide full context for the material, that the Sabra Defence should tender the entire items at the appropriate time, and that, in any event, the Sabra Defence has not provided supporting material to demonstrate where in the Abu Adass home the items were seized, who in the house read the items or how they came to be there.¹⁵³

121. The Prosecution case is that Mr Abu Adass, as part of the conspiracy pleaded, was kidnapped and forced to appear in a video that falsely claimed responsibility for the attack. The Sabra Defence does not contest that Mr Abu Adass was not responsible for the explosion

¹⁴⁸ Sabra motion, annex A, items 11, 15-16, 25, 27-28, 40, 66, 70-108, 117-122, 125.

¹⁴⁹ See above paras 16-17.

¹⁵⁰ Sabra motion, annex A, items 71-72, 74-105.

¹⁵¹ Sabra motion, annex A, items 106-108, 117-122.

¹⁵² Sabra motion, annex A, items 71-72, 74-108, 117-122.

¹⁵³ Prosecution response, para. 45; annex B, items 71-72, 74-108, 117-122.

or that the video falsely attributed to him responsibility for the attack, as alleged by the Prosecution.¹⁵⁴ The documents are thus relevant to the Trial Chamber's possible findings on Mr Abu Adass' motivations for participating in the video and the circumstances surrounding its production and his disappearance. It is relevant to whether he was abducted and forced to make the video, as pleaded.

122. Furthermore, the Prosecution has not challenged the Defence's submission that they were seized from the Abu Adass household by Lebanese police authorities and has itself successfully sought the admission of related documents, including an inventory of items seized in these search and seizures.¹⁵⁵ So far as the Trial Chamber can ascertain, this Defence motion directly connected to the documents listed in this inventory. The inventory shows a chain of custody of the documents which therefore provides *prima facie* reliability. Further, when viewed in the context of the Defence case, the documents can be probative of Mr Abu Adass' religious beliefs and character and, in turn, the motivations that led to his appearance in the video claiming responsibility for the attack, whether his own or those of others.

123. As to the Prosecution's objections concerning the timing of the tendering of the material, the Trial Chamber, in exercising its general discretion to admit evidence, has already held that the Defence may submit documents under Rule 154 during the Prosecution case, provided that the regular admissibility requirements under Rule 149 are met. It is emphasized that the reception into evidence of these documents is discretionary. Finally, arguments relating to the lack of supporting material go to the weight the Trial Chamber may give to the documents at a later stage and not to their admissibility. The documents therefore possess some probative value and are admissible under Rule 154.

124. However, one of the Islamic religious book extracts¹⁵⁶ contains an ERN discrepancy; only the document in the correct ERN range will be admitted into evidence.¹⁵⁷

¹⁵⁴ Sabra motion, paras 29-30.

¹⁵⁵ See P805, P806, P806.1, P807, P808, P809, P810. See also STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Mehri, Oneissi, and Sabra*, F2477, Prosecution Motion to Add Inventory and Supporting Documents relating to the Searches of the Residence of Ahmed Abu Adass, 1 March 2016; F2544, Decision on Prosecution Motion to Add Inventory and Supporting Documents Relating to the Searches of the Residence of Ahmed Abu Adass, 11 April 2016.

¹⁵⁶ Specifically, Sabra motion, annex A, item 97.

¹⁵⁷ This discrepancy is between the ERN for the Arabic original listed the 'Full ERN Range AR' column and the English translation in the 'Full ERN Range EN' column of annex A of the Sabra motion. The correct ERN for this item is D04866669-D04866670.

Call sequence tables

125. These documents are three call sequence tables which were produced from call data records provided to the Prosecution by the Alfa, MTC Touch and OGERO Lebanese telecommunications companies and to which Defence counsel have access.¹⁵⁸

126. Two tables were produced by the Defence from the call data records and attribute telephone numbers to 14 people, Mr Abu Adass' home landline and one law firm.¹⁵⁹ The third landline table, for Mr Abu Adass' home number, was originally produced and tendered by the Prosecution, but was subsequently withdrawn. It is now proposed for admission by the Defence.¹⁶⁰

127. According to the Defence, these call sequence tables are relevant to show the interwoven relationships between Mr Abu Adass' associates, 'members of the Al Qaeda 13',¹⁶¹ and Prosecution Witness PRH073, to assist in establishing the roles of Mr Abu Adass' associates in his 'departure' after the 14 February 2005 attack and to diminish the credibility of Witness 73's account. Additionally, the Defence submits that the call sequence tables demonstrate that people linked to Mr Abu Adass contacted each other and Mr Abu Adass' home, and assist in showing that the circumstances surrounding Mr Abu Adass' disappearance was closely monitored by his close associates and suggest their involvement in facilitating his 'departure'.¹⁶²

128. The Prosecution responds that the two call sequence tables produced by the Defence do not exhibit several characteristics of the Prosecution's own call sequence tables and should

¹⁵⁸ Call data records 'are so-called metadata [and] provide information about 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 of the hand set relevant to the communications, and the cell sectors engaged at the beginning and end of a call': 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 (references omitted). Call sequence tables render the information contained in call data records legible by presenting 'chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time': Decision of 6 May 2015, para. 2. See also STL-11-01/T/TC, *Prosecutor v. Ayyash, Mehri, Oneissi, and Sabra*, F2799, Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks, 31 October 2016, para. 3.

¹⁵⁹ Sabra motion, annex A, items 15-16.

¹⁶⁰ Sabra motion, annex A, item 70. See F2672, Redacted Version of the Prosecution Notice of Withdrawal of Requests to Admit Landline Call Sequence Tables, 28 July 2016, 15 August 2016 ('Prosecution notice of 15 August 2016'), paras 1, 3; transcript of 5 December 2016, pp 9-11. See also 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, para. 21, fn. 29; Decision of 31 March 2017, paras 19, 25; fns 8, 14, 40.

¹⁶¹ The Trial Chamber notes that the Sabra Defence's submissions do not define the 'Al Qaeda 13' group.

¹⁶² Sabra motion, annex A, items 15-16, 70.

not, therefore, be properly referred to as ‘call sequence tables’. The Defence did not present evidence concerning the methodology employed to produce them—which impeded the Prosecution’s ability to verify their accuracy—no selection criteria or sources for attribution have been provided, and the call sequence tables suffer from formatting deficiencies.¹⁶³ Concerning the remaining (withdrawn) landline call sequence table, the Defence has not identified the correct sources used to produce it.

129. The Prosecution reiterates that this call sequence table was withdrawn because the Prosecution no longer has custody of the original hard disk which contained the 2004 to 2005 call data records provided by OGERO, the sole Lebanese landline provider, and it does not have a forensic copy of the raw data it originally received from OGERO. Further, OGERO was unable to confirm the provenance of the 2004 to 2005 call data records and it confirmed that the call data records produced before January 2006 were produced for testing purposes and were not one hundred percent complete.¹⁶⁴

130. The Trial Chamber finds that the call sequence tables are relevant to Witness 73’s evidence and credibility as well as to the disappearance of Mr Abu Adass before the attack for which the Prosecution alleges he falsely claimed responsibility. Nonetheless, the Trial Chamber has reservations about the admissibility of the call sequence tables, specifically as to their reliability and provenance.

131. Aside from the methodology, formatting, and accuracy verification issues, as identified by the Prosecution, concerning the two call sequence tables produced by the Defence, the Sabra Defence submitted no evidence concerning how specific numbers were attributed to specific individuals or why such attribution is *prima facie* reliable.¹⁶⁵ Further, the Defence did not reply to address this Prosecution submission. Absent such evidence, the attribution of specific numbers in the two Defence call sequence tables does not meet the *prima facie* reliability standard required for admission. The Trial Chamber may, however, revisit this issue if the Sabra Defence rectifies this deficiency. The Trial Chamber also notes the vigorous Defence opposition to the reliability of the Prosecution’s call sequence tables which resulted in the Trial Chamber requiring the Prosecution to provide contextual evidence from the analysts who produced each call sequence table.¹⁶⁶ The Defence has failed to

¹⁶³ Prosecution response, annex B, items 15-16.

¹⁶⁴ Prosecution response, annex B, item 70. *See also* transcript of 7 April 2017, pp 53-54.

¹⁶⁵ *See* Sabra motion, annex A, items 15-16.

¹⁶⁶ *See* Decision of 6 May 2015, paras 111-119.

produce similar evidence of the methodology used to produce its own tables, meaning that the Trial Chamber is unable to apply the same criteria in assessing whether they are *prima facie* reliable and hence have some probative value. The Trial Chamber has previously received into evidence call sequence tables proposed by the Defence, in some instances without Prosecution objection.¹⁶⁷ For these reasons, the Trial Chamber denies the admission of these call sequence tables into evidence.

132. As to the remaining landline call sequence table, the Prosecution has noted its withdrawal of this table and has raised various reliability and provenance issues concerning the underlying call data records from which it was derived. The Sabra Defence knew this before filing its motion, but the matter was neither addressed in its submissions nor in a reply. Although the Defence cites various Trial Chamber decisions concerning the reliability of call data records,¹⁶⁸ these decisions concern the call data records of the Alfa and Touch Lebanese mobile telecommunication companies and not OGERO.

133. The Trial Chamber has, however, found certain OGERO call data records *prima facie* reliable, but only call data records from pre-paid landline cards and not landline to landline call data records.¹⁶⁹ Here, the tendered call sequence table is derived from a combination of OGERO prepaid landline cards and regular OGERO landline call data records as well as call data records from Alfa and Touch mobiles. The Sabra Defence, however, does not rely on the call sequence table in its entirety but focuses on two categories of call data records. The first concerns a landline-to-landline call derived from OGERO call data records,¹⁷⁰ an entire category of call sequence tables that the Prosecution has withdrawn on reliability and provenance grounds.¹⁷¹ The second category concerns calls made from mobile numbers, which the Defence attributes to Mr Ramadan and Mr Mohsen, to Mr Abu Adass' home

¹⁶⁷ See 3D305 (this landline call sequence table was previously Prosecution exhibit P490 MFI, but was withdrawn in Prosecution notice of 15 August 2016; transcript of 11 January 2017, pp 45-56); 4D323 (an extract from Prosecution exhibit P1223; transcript of 23 March 2017, pp 50-51).

¹⁶⁸ Specifically, F2750, Reasons for Admitting Witness PRH705's Statements and Annexes into Evidence, 30 September 2016; F2767, Written Reasons for Admitting Witness PRH707's Statements and Annexes into Evidence, 10 October 2016; F2793, Reasons for Decision Admitting Prosecution's Cell Site Evidence, 26 October 2016. See Sabra motion, annex A, item 70.

¹⁶⁹ See Decision of 31 March 2017 (admitting landline CSTs derived from the Telecarte (prepaid landline cards) records of OGERO).

¹⁷⁰ See Sabra motion, annex A, item 70 (ERN 60219041 – call no 212).

¹⁷¹ See Prosecution notice of 15 August 2016; F2996, Public Redacted Version of Prosecution Motion for the Admission of 10 Call Sequence Tables Related to the Accused Ayyash and the Accused Merhi pursuant to Rule 154 and one related witness statement pursuant to Rule 155, 7 March 2017, para. 26: 'the CSTs for landlines no longer include landline-to-landline records from the [call data records] of OGERO'.

landline number.¹⁷² However, as with the two Defence call sequence tables, the Sabra Defence did not submit any evidence concerning how these specific mobile numbers were attributed to Mr Ramadan and Mr Mohsen or why such attribution is *prima facie* reliable.

134. Absent submissions on the matters raised by the Prosecution with regard to the reliability and provenance of OGERO call data records and the attribution of mobile numbers to Mr Ramadan and Mr Mohsen, which the Sabra Defence should have addressed in its motion, the Trial Chamber is not satisfied that the parts of the remaining landline call sequence table relied upon by the Defence meet the relevance and *prima facie* reliability standard required for admission.

135. For these reasons, the Trial Chamber denies the admission into evidence of the three tendered call sequence tables. However, should the Sabra Defence properly address the relevance and reliability issues, the Trial Chamber would be prepared to revisit the matter.

Requests for assistance and responses

136. These are four requests for assistance and responses, namely: a request for assistance sent to the Lebanese Government and call sequence tables provided to the UNIIC in response; a UNIIC request for assistance concerning information on Mr Taha and a response from the Syrian Government; a list provided by Lebanese Government authorities to the UNIIC in response to a request for assistance relating to Lebanese terrorism trials, one of which names Mr Taha as a defendant; and a Lebanese request for assistance to Interpol Turkey and the response received, which relates to Mr Taha.¹⁷³

137. The Defence argues that these documents are relevant to Mr Abu Adass' disappearance and demonstrate that he was closely associated with, and contacted by, followers of violent jihadism. In context, they show that he was easily identifiable by others as a person who could have credibly, if falsely, claimed responsibility for the attack and his 'departure' was or may have been facilitated by his close associates.¹⁷⁴ Additionally, one of the documents demonstrates that Mr Taha was untruthful with his family concerning his

¹⁷² See Sabra motion, annex A, item 70 (ERN 60219035-60219038; 60219037).

¹⁷³ Sabra motion, annex A, items 11, 25, 28, 66.

¹⁷⁴ Sabra motion, annex A, items 25, 28, 66.

whereabouts and, when considered in context, highlights the suspiciousness of his activities in Syria and Lebanon.¹⁷⁵

138. The Prosecution does not take a position with respect to the reliability of two documents¹⁷⁶ but takes issue with the English translation of the Arabic original of a third document.¹⁷⁷ It also submits that the Defence has incorrectly identified the fourth document as a statement rather than a document, submitting only that it does not conform to the Rule 155 Practice Direction.¹⁷⁸

139. In the Trial Chamber's view, three of the documents¹⁷⁹ are relevant because they concern Mr Abu Adass' disappearance and the false claim of responsibility for the attack. Furthermore, these documents are *prima facie* reliable as they are official communications from the UNIIIC and the Governments of Lebanon and Syria. In addition, the Prosecution does not contest their reliability but only the English translation of one. The Defence should therefore obtain a revised English translation of this document¹⁸⁰ before the Trial Chamber will admit it into evidence. Subject to this, the Trial Chamber considers that these three documents possess some probative value and are admissible under Rule 154.

140. However, while the fourth document¹⁸¹ appears to be an official document of the Government of Lebanon, and thus *prima facie* reliable, the Trial Chamber is not convinced of its relevance. The Sabra Defence's submissions concerning relevance and probative value focus on Mr Taha,¹⁸² without any discernable link to Mr Abu Adass or anything at issue in this case. The admission of this document is therefore denied.

Other documents

141. The remaining items consist of:

¹⁷⁵ Sabra motion, annex A, item 11.

¹⁷⁶ Prosecution response, annex B, items 25, 66.

¹⁷⁷ Prosecution response, annex B, item 28.

¹⁷⁸ Prosecution response, annex A, item 11.

¹⁷⁹ Sabra motion, annex A, items 25, 28, 66.

¹⁸⁰ Sabra motion, annex A, item 28.

¹⁸¹ Sabra motion, annex A, item 11.

¹⁸² The Sabra Defence only submits that the document demonstrates that Mr Taha lied to his family about his location and that, in context, highlights the suspiciousness of his activities in Syria and Lebanon: Sabra motion, annex A, item 11.

- two letters purportedly provided by Syrian Government authorities to the UNIIC containing information about Mr Abu Adass and his supposed responsibility for the attack of 14 February 2005;¹⁸³
- an annex to a Lebanese ISF investigations summary which lists reports and items obtained by the ISF in relation to Mr Abu Adass and the attack (stating that, among other items, six photographs of buildings similar to those at the crime scene were extracted from Mr Abu Adass' computer);¹⁸⁴
- an extract from the Lebanese Government's entry and exit records concerning Mr Taha's movements in and out of Lebanon on 15 and 16 January 2005;¹⁸⁵ and
- a summary of information, contained within other documents attached to a UNIIC internal memorandum, concerning ties between Mr Taha and Mr Abu Adass resulting from investigations carried out by the ISF.¹⁸⁶

142. The Sabra Defence submits that the documents are relevant to demonstrate that Mr Abu Adass exhibited an interest in the location of the scene of the attack and that he had internet access which contributed to his radicalization. Further, they demonstrate that Mr Abu Adass was closely associated with followers of violent jihad and establish Mr Taha's movements at the time of Mr Abu Adass' disappearance. In context, they demonstrate that Mr Abu Adass was easily identifiable as a person who could have credibly, if falsely, claimed responsibility for the attack, that Mr Abu Adass left in the company of his close associates, and the role Mr Abu Adass' associates played in his selection and in facilitating his 'departure'.¹⁸⁷

143. The Prosecution takes no position with respect to the reliability for admission of the exit and entry records.¹⁸⁸ However, it challenges the reliability of the annex to the investigation summary on the basis that the Defence has cited an erroneous ERN for the ISF's investigative report from which the document was supposedly derived; that the summary is anonymous; and that the basis for the author's knowledge of the information contained in the document is unknown. The Prosecution further challenges the document's reliability by

¹⁸³ Sabra motion, annex A, item 27.

¹⁸⁴ Sabra motion, annex A, item 40.

¹⁸⁵ Sabra motion, annex A, item 73.

¹⁸⁶ Sabra motion, annex A, item 125 (exhibit 5D251 MFI).

¹⁸⁷ Sabra motion, annex A, items 27, 40, 73, 125.

¹⁸⁸ Prosecution response, annex B, item 73.

noting that it provided the Defence access to the contents of the seized computer and submitting that the Defence should have sought the admission of the six photographs from this material. The Prosecution also notes that it conducted a non-exhaustive review and could not find the six photographs referred to in the summary.¹⁸⁹

144. The Prosecution submits that the Defence has incorrectly identified the remaining two documents¹⁹⁰ and that they are in fact witness statements. It further submits that the Defence should have tendered them under Rule 155 and that they do not conform to the Rule 155 Practice Direction.¹⁹¹

145. The Trial Chamber finds that all four documents concern the disappearance of Mr Abu Adass and the false claim of responsibility. They are thus relevant to the case and to whether the Accused are guilty as charged in the amended consolidated indictment.

146. Further, as an extract from official Lebanese Government records, Mr Taha's entry and exit records into and out of Lebanon are *prima facie* reliable and possess some probative value with respect to his movements. When viewed alongside the date of Mr Abu Adass' disappearance, these records may point to his potential involvement. This document¹⁹² is therefore admissible under Rule 154.

147. The Trial Chamber agrees with the Prosecution concerning the photographs listed in the annex list to the Lebanese investigation summary. Given that the Sabra Defence has access to the contents of the computer seized during the investigation, it should have sought the admission of the photographs rather than an annex that merely mentions their existence. But this is a matter that goes to the weight the Trial Chamber should give to the evidence, not its admissibility. The same can be said of its 'anonymous' nature and the basis for the information it contains. Further, the Prosecution does not dispute that the document originated from the ISF. The Prosecution merely points out that the Defence incorrectly cited the ISF's report of which it supposedly formed part. On the whole, and since it contains an identifying number, the Trial Chamber sees no cogent reason to question the document's authenticity. Further, the document could demonstrate that Mr Abu Adass had an interest in the location of

¹⁸⁹ Prosecution response, annex B, item 40.

¹⁹⁰ Sabra motion, annex A, items 27, 125.

¹⁹¹ Prosecution response, paras 3-4, 9 (B); annex A, items 27, 125. *See* Rule 155 Practice Direction.

¹⁹² Sabra motion, annex A, item 73.

the scene of the attack. The document is therefore admissible.¹⁹³ However, the Trial Chamber would consider favourably the admission of the photographs, should they be tendered.

148. The Trial Chamber finds that the summary of information concerning Mr Taha¹⁹⁴ is an official investigative document of the Government of Lebanon. Although the document to which it is attached is a UNIIIC internal memorandum and, in light of its content, is a statement, the document itself, as relied upon by the Defence, is not. It was provided directly by the ISF's then Director-General, General Ashraf Rifi, to the UNIIIC and has an identifying number. It therefore has *prima facie* reliability and has some probative value concerning the links between Mr Taha and Mr Abu Adass and Mr Abu Adass' ideology and beliefs. It is admissible. However, since the document is one of a number of other documents attached to a UNIIIC memorandum, the Trial Chamber will admit only certain pages¹⁹⁵ into evidence, which includes only the relevant document (in English and Arabic).

149. Concerning the last document,¹⁹⁶ although it purports to be correspondence sent to 'friendly agencies' by Syrian authorities concerning Mr Abu Adass and was given to the UNIIIC by its 'Syrian counterpart',¹⁹⁷ the letters are both anonymously signed 'Damascus' and contain no indicia of being official Syrian government records or any further identifying information. They are of unknown provenance and are not *prima facie* reliable. The Trial Chamber, in the exercise of its discretion, will therefore deny their admission into evidence.

CONFIDENTIALITY

150. The Defence considers that its motion may be made public, but has nonetheless filed it confidentially, and submits that should the Prosecution object to its reclassification, it should provide cogent reasons. The annexes to the Sabra Defence motion should remain confidential as they contain witness statements and numbers attributed to named individuals.¹⁹⁸ The Prosecution responds that the protective measures status of the affected witnesses are unknown. It submits that until the Sabra Defence has assured the Trial Chamber

¹⁹³ Sabra motion, annex A, item 40.

¹⁹⁴ Sabra motion, annex A, item 125 (exhibit 5D251 MF1).

¹⁹⁵ Specifically, ERN 308319-308331.

¹⁹⁶ Sabra motion, annex A, item 27.

¹⁹⁷ See ERN 307727.

¹⁹⁸ Sabra motion, paras 82-83.

that the witnesses were advised and asked about protective measures, the motion and its relating filings should remain confidential.¹⁹⁹

151. The Sabra Defence has not replied to the Prosecution's response addressing its protective measures concerns. The Trial Chamber proceeds on the basis that such protective measures have not, and will not, be sought. Therefore, there is no reason to maintain the confidential status of the Sabra Defence motion. Annexes A to C are to remain confidential for the reasons provided by the Defence. Annex D, which is merely a track-changed version of the Sabra Defence's motion, should be made public.

152. The Prosecution's response should similarly be made public, unless the Prosecution can demonstrate compelling reasons not to do so. Annexes A and B should remain confidential as they reveal personal information concerning various individuals. Annex C is merely a track-changed version of the Prosecution's response and thus should also be made public. Annex D consists of photographs of particular exhibits. The Trial Chamber sees no reason to maintain the confidential status of this annex.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 154, and in accordance with paragraphs 116-117 of this decision, the following items from annex A of the Sabra Defence motion and will admit them into evidence at a suitable time in the proceedings:

- **items 71-72, 74-96, 97** (ERN D04866669-D04866670), **98-108, 117-122**: Islamic religious books and booklets, photographs, audio transcripts and audio files;
- **items 25, 28** (subject to the production of a revised translation), **66**: requests for assistance and responses;
- **item 40**: annex to a Lebanese Internal Security Forces investigations summary;
- **item 73**: extract from the Lebanese Government's entry and exit records;
- **item 125** (ERN 308319-308331): a summary of information concerning ties between Mr Khaled Taha and Mr Ahmed Abu Adass;

¹⁹⁹ Prosecution response, para. 62.

DEFERS its decision on the admission of Witness PRH056's statements, pending further Prosecution submissions on the admission of, and Sabra Defence responses to, other statements of the witness;

DENIES the Sabra Defence motion in all other respects, including the admission of witness statements and the Trial Chamber's exercise of its powers under Rules 92 and 165;

ORDERS the Sabra Defence motion and its annex D to be reclassified as public;

ORDERS annexes A to C to the Sabra Defence motion to remain confidential;

ORDERS the Prosecution response and its annex C to be reclassified as public, unless the Prosecution shows, within seven days, compelling reasons not to do so;

ORDERS annex D of the Prosecution response to be reclassified as public; and

ORDERS annexes A and B to the Prosecution response to remain confidential.

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

Leidschendam,
The Netherlands
25 September 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

