



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: 30 November 2017

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Classification: Public

THE PROSECUTOR

v.

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

**DECISION PARTLY GRANTING FOURTH SABRA DEFENCE MOTION
FOR THE ADMISSION OF DOCUMENTS RELATING TO MR AHMED ABU
ADASS – THE SUCCESSFUL RECRUITMENT OF MR AHMED ABU ADASS**

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Mr Chad Mair**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
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Ms Sarah Bafadhel

INTRODUCTION

1. The amended consolidated indictment pleads that, on 14 February 2005, former Lebanese Prime Minister Mr Rafik Hariri was assassinated in an attack in Beirut that killed 21 others and injured 226 people. Shortly thereafter, the Al-Jazeera news network in Beirut received a video in which Mr Ahmad Abu Adass falsely claimed responsibility for the attack. The Accused, Mr Assad Hassan Sabra and Mr Hussein Hassan Oneissi, participated in identifying and effecting the disappearance of Mr Ahmed Abu Adass.¹ Specifically, the Prosecution alleges that Mr Oneissi introduced himself to Mr Abu Adass as ‘Mohammed’ at the beginning of January 2005 at the Arab University Mosque of Beirut, also known as ‘the Al-Houry Mosque’, and asked Mr Abu Adass to teach him how to pray. They met on several subsequent occasions. On the morning of 16 January 2005, Mr Abu Adass left his home to meet ‘Mohammed’ (allegedly Mr Oneissi). Mr Abu Adass has been missing since that day.²

2. Counsel for Mr Sabra filed six separate motions tendering—under Rule 154 of the Special Tribunal’s Rules of Procedure and Evidence or, in the alternative, under Rules 92 or 165—documents allegedly relevant to the recruitment of Mr Abu Adass and his role in the alleged false claim of responsibility.³

3. On 25 September 2017, the Trial Chamber issued its decision with respect to the first of these motions, admitting 49 documents into evidence and denying the admission into evidence of the remaining 79 documents, including all tendered witness statements and call sequence tables.⁴ The Trial Chamber has also issued decisions with respect to the second and

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 3 (b)-(c), 4-5, 23, 44, 48 (c) (i), 64 (f) (i), 66 (f), 68 (h), and 70 (h).

² Amended consolidated indictment, paras 23, 28; 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, Annex A – Prosecution’s Updated Pre-Trial Brief, dated 23 August 2013 (confidential) (‘Prosecution Pre-Trial Brief’), para. 122.

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 (public with public and confidential annexes) (‘First Sabra bar table motion’); F3057, Motion for the Admission of Documents Relating to the Claim of Responsibility - the Selection of Ahmed Abu Adass, 29 March 2017 (confidential); 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); F3165, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass - The Successful Recruitment of Ahmed Abu Adass, 31 May 2017 (confidential) (‘Sabra Defence motion’); F3205, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass - The Video and the Letter: The False Claim of Responsibility, 30 June 2017 (confidential); F3251, Motion for the Admission of Documents Relating to the Claim of Responsibility - The Fax, 26 July 2017 (confidential).

⁴ F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 (‘Decision on first Sabra

third motions, admitting a total of 11 documents into evidence and denying the admission into evidence of the remaining 102 documents.⁵

4. This decision addresses the fourth Sabra Defence motion, which tenders 27 documents relevant to the plan to recruit Mr Abu Adass following a foiled attack on the Italian embassy in September 2004 and subsequent events leading to his disappearance in January 2005. The Defence argues that the tendered documents demonstrate that Mr Abu Adass was not selected at random by Mr Oneissi, as pleaded, and that after his failed recruitment in September 2004, he was under close surveillance in preparation for his subsequent successful recruitment in January 2005.⁶

5. In particular, the Sabra Defence contends that Mr Khaled Taha, Mr Hussam Mohsen, Mr Bilal Zaaroura, and very possibly Mr Ziad Ramadan, were close associates of Mr Abu Adass and that they were called upon to maintain contact with Mr Abu Adass and eventually lure him out of his family home on 16 January 2005. According to the Defence, this entailed providing Mr Abu Adass with work following his departure in November 2004 from the Al-Risala publishing house where he had worked, and keeping in regular contact with him so that he would trust these associates and become dependent on them. In mid-January 2005, shortly before Mr Abu Adass's alleged disappearance, his contact with Mr Mohsen and Mr Ramadan intensified.⁷

Defence motion'). 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'; see STL-11-01/T/AC/AR126.9, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0007, Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, para. 3 (internal footnotes 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'; see STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution, 6 May 2015, para. 2. See also STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, 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 ('Decision on call sequence tables'), para. 3.

⁵ F3439, Decision Partly Granting Second Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Selection of Ahmed Abu Adass, 30 November 2017 ('Decision on second Sabra Defence motion'); F3442, Decision Partly Granting Third Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – The Failed Recruitment of Mr Ahmed Abu Adass, 30 November 2017 ('Decision on third Sabra Defence motion').

⁶ Sabra Defence motion, paras 6-39. The Trial Chamber also accepted a Sabra Defence 'thematic summary' as a supplement to its six evidentiary motions: F3436, Decision Allowing Sabra Defence's Supplement to its Six Evidentiary Motions, 29 November 2017.

⁷ Sabra Defence motion, paras 6-13.

6. According to Defence submissions, Mr Taha was close to Mr Abu Adass and had a significant influence on him. Mr Taha was based in Syria when he was not in Lebanon, and was involved in terrorist jihadi activities in Iraq with the ‘Hani El Shanti’ group. The Sabra Defence submits that it is a reasonable inference that Mr Abu Adass believed that Mr Taha was taking him to wage jihad in Iraq when Mr Abu Adass left on 16 January 2005. As further context, Mr Taha visited Lebanon on 15 January 2005, and returned to Syria on 16 January 2005—the day of Mr Abu Adass’s alleged disappearance. Mr Taha kept this visit to Lebanon a secret from his family which, according to the Sabra Defence, underlines the sensitive nature of the visit. Mr Taha called the Abu Adass home on the evening of 15 January 2005, although this call was subsequently either denied or forgotten.⁸

7. Moreover, on the morning of 16 January 2005, Mr Taha was in the vicinity of the Abu Adass family home in Beirut and was also taken by a close friend to the nearby Lebanese Arab University. According to the Sabra Defence, Mr Taha’s involvement in Mr Abu Adass’s disappearance is far more credible than Mr Abu Adass leaving with the fictional ‘Mohammed’ character pleaded by the Prosecution. It argues that elements which actually related to Mr Taha appear to have been transferred to ‘Mohammed’ by Mr Abu Adass’s family and friends.⁹

8. The Sabra Defence also contends that 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 2004 immediately after the ‘Italian Embassy’ plot¹⁰ was foiled. In its submission, it would be unreasonable to consider these two events as mere coincidences.¹¹

9. Following the Trial Chamber’s 25 September 2017 decision on the first Sabra Defence motion, the Prosecution filed a consolidated response to the five outstanding Sabra Defence motions,¹² the Sabra Defence filed a consolidated reply,¹³ and the Prosecution filed a

⁸ Sabra Defence motion, paras 14-17, 22-29

⁹ Sabra Defence motion, paras 18-20, 30-38.

¹⁰ According to the Sabra Defence, this involved a plan to attack the Italian embassy in Beirut, which was foiled in September 2004. *See* Decision on third Sabra Defence motion, para. 7.

¹¹ Sabra Defence motion, paras 21, 31-32.

¹² F3356, Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass, 12 October 2017 (confidential) (‘Prosecution consolidated response’).

¹³ F3374, Reply to “Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass”, 23 October 2017 (confidential) (‘Sabra Defence consolidated reply’).

consolidated sur-reply.¹⁴ As the Trial Chamber addressed many of these submissions in the decision on the second Sabra Defence motion, this decision will deal only with those submissions related to the fourth Sabra Defence motion.

10. For the reasons below, the Trial Chamber declines to revisit the admissibility of 14 documents previously tendered by the Sabra Defence, denies the admission into evidence of eight documents it finds to be witness statements tendered in a manner inconsistent with the Rules and over the Prosecution's objection, denies the admission into evidence of two other documents, and exercises its discretion to admit one document into evidence.

THE LEGAL PRINCIPLES

11. In its previous decisions on the Sabra Defence motions, the Trial Chamber decided the legal principles relevant to the Sabra Defence tendering documents during the Prosecution case—namely, the principles governed by Rules 55 (C), 92, 128, 130 (B), 146 (B), 149 (C)-(D) and (F), 150 (H) and (J), 154-156, 158, 165 and 167.¹⁵

12. Most relevantly, the Trial Chamber outlined that there is no single definition of the term 'witness statement' under international criminal law procedural law, but the Trial Chamber has previously adopted the 'broad definition' for witness statements as 'an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime'. In addition, it was improper—particularly where the Prosecution objects or seeks to cross-examine the witness—for the Defence to tender witness statements during the Prosecution case under Rule 154. Further, when the Defence is the moving party tendering the evidence of a witness for the truth of its content, the witness's evidence more properly belongs in the Defence case. Statements tendered under Rule 155 must—with limited exceptions¹⁶—comply with the Rule 155 Practice Direction,¹⁷ which sets out the formal criteria for admitting witness statements in lieu of oral testimony. The Trial

¹⁴ F3402, Prosecution Sur-Reply to Sabra Defence Reply to Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass, 3 November 2017 (confidential) ('Prosecution consolidated sur-reply').

¹⁵ Decision on first Sabra Defence motion, paras 16-25, 79-115, 117, 123; Decision on second Sabra Defence motion, paras 9-13, 24-29.

¹⁶ See F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, paras 22-31; 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, para. 14.

¹⁷ 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.

Chamber cannot *proprio motu*¹⁸ receive witness statements into evidence under Rule 155, as Rule 155 (C) provides that it must first hear from the Parties whether to require the witness to appear for cross-examination. Where the Prosecution objects to the Defence tendering a witness statement during its case and seeks to cross-examine the witness, the Defence should seek a variation of the Rule 146 (B)¹⁹ sequence for calling evidence.²⁰

13. With respect to admitting documents other than witness statements, the Trial Chamber considered that Rule 146 (B) permits it to vary the sequence of presenting evidence in the interests of justice, including by admitting Defence evidence during the Prosecution case without requiring a formal variation. Thus, consistent with Rules 149 (C) and (D), in principle and in exercising its discretion, the Trial Chamber may admit into evidence documents tendered by the Defence during the Prosecution case.²¹

TENDERED DOCUMENTS

14. The Sabra Defence tenders 27 documents in its motion. Two, both witness statements of Mr Ziad Ramadan,²² are already evidence, as exhibits P1774 and P1776.²³

15. Of the 25 remaining documents, the Sabra Defence has previously tendered 14 documents,²⁴ and the Trial Chamber has decided their admissibility in previous decisions.²⁵

¹⁸ '*Proprio motu*' refers to an action taken on the Trial Chamber's own initiative.

¹⁹ Rule 146 (B) provides that '[u]nless 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 Prosecutor; (ii) evidence called by the Trial Chamber at the request of victims participating in the proceedings; (iii) evidence for the defence; (iv) Prosecutor's evidence in rebuttal; (v) rebuttal evidence called at the request of victims participating in the proceedings; (vi) defence evidence in rejoinder.'

²⁰ Decision on first Sabra Defence motion, paras 79-106; Decision on second Sabra Defence motion, paras 28-29.

²¹ Decision on first Sabra Defence motion, paras 109-115; Decision on second Sabra Defence motion, para. 13.

²² Sabra Defence motion, annex A, items 12, 23.

²³ See transcript of 13 December 2016, p. 24. In relation to item 12, although the Sabra Defence tenders a different ERN range (ERN 50012167-50012168) than that admitted as exhibit P1774, the Trial Chamber has compared the two documents and they contain the same content, except for slight formatting differences. The Trial Chamber therefore considers that the document tendered as item 12 is the same as exhibit P1774 and will not further assess this document. The document tendered by the Sabra Defence as item 23 is already admitted as exhibit P1776.

²⁴ Sabra Defence motion, annex A, items 1, 3, 4, 7, 11, 16, 18-22, 24-26.

²⁵ Decision on first Sabra Defence motion, addressing items 1, 3, 7, 11, 16, 18-22, 24-26; Decision on third Sabra Defence motion, addressing item 4. Item 3 is the same document tendered as item 125 in the First Sabra bar table motion; see first Sabra bar table motion, annex A, item 125. In the Decision on first Sabra Defence motion, the Trial Chamber assessed this document and admitted into evidence some pages and denied the admission into evidence of the remainder; see Decision on first Sabra Defence motion, para. 148, disposition. As with the other documents it has previously considered for admission into evidence, the Trial Chamber will not further assess this document.

16. The Sabra Defence characterises the 11 newly tendered documents as eight statements,²⁶ one aide-mémoire,²⁷ a document from the Lebanese Ministry of Telecommunications,²⁸ and a report provided by the Lebanese Public Prosecutor in response to a request for assistance from the United Nations International Independent Investigation Commission (UNIIC).²⁹

17. The Prosecution characterises the 11 new documents as nine witness statements within the meaning of the Rules (the eight documents identified by the Sabra Defence as statements and the Lebanese Government response to the UNIIC request for assistance), a document based on telecommunications data (the aide-mémoire), and the document from the Lebanese Ministry of Telecommunications.³⁰

WITNESS STATEMENTS

Submissions

18. The Sabra Defence characterises many of the tendered documents as ‘statements’. The arguments are consistent with its previous submissions on this issue.³¹ Namely, it is not tendering these statements as ‘witness statements’, but the statements are meant only to undermine the Prosecution case. The witnesses are not Sabra Defence witnesses, and the Prosecution’s inability to cross-examine them goes to the weight the Trial Chamber can give to the statements rather than their admissibility. If the Trial Chamber declines to admit the tendered documents under Rule 154, it should do so under Rule 92 in tandem with Rule 130, which allow the Trial Chamber to gather evidence that the requesting Party demonstrates it is not in a position to collect, or under Rule 165, which authorises the Trial Chamber to order the production of additional evidence.³²

19. The Prosecution’s arguments also reflect its previous submissions.³³ The documents identified as ‘statements’ and the Lebanese response to the UNIIC request for assistance are all ‘witness statements’ under the Rules—or documents containing summaries of such

²⁶ Sabra Defence motion, annex A, items 6, 8-10, 13-15, 17.

²⁷ Sabra Defence motion, annex A, item 27. The Trial Chamber understands an aide-mémoire to be a written summary or outline of important items.

²⁸ Sabra Defence motion, annex A, item 2.

²⁹ Sabra Defence motion, annex A, item 5.

³⁰ Prosecution consolidated response, para. 11, annex A, ‘Sabra Motion Four’, items 2, 27, annex D, items 5-6, 8-10, 13-15, 17.

³¹ See Decision on second Sabra Defence motion, paras 20-21.

³² Sabra Defence motion, para. 5; Sabra Defence consolidated reply, paras 14-18, annex C, p. 7.

³³ See Decision on second Sabra Defence motion, paras 22-23.

statements—and should have been tendered under Rule 155. The documents do not comply with Rule 155 and the Rule 155 Practice Direction governing the admission of witness statements in lieu of oral testimony. The witnesses are Sabra Defence witnesses because the Defence has conveyed its clear intention to rely on their statements for the truth of their content. It is therefore irrelevant that the statements were given to agencies other than the Special Tribunal and or created outside the course of the proceedings. The Defence has provided no justification for varying the normal Rule 146 (B) sequence of evidence presentation, as would be required to admit Defence witness statements during the Prosecution case. Likewise, the Prosecution’s preliminary view is that it needs to cross-examine the witnesses. The lack of cross-examination goes to the weight of the evidence only after the responding Party has had a proper opportunity to cross-examine any witnesses.³⁴

Decision

20. The Parties are at variance as to whether these documents are witness statements under the Rules and whether the witnesses are Sabra Defence witnesses.³⁵ While the Defence maintains that the eight documents it characterises as ‘statements’ are not tendered as witness statements, the documents are all statements taken by Prosecution investigators, UNIIC investigators or Lebanese Government officials and recorded in the normal course of investigations.

21. These eight documents are either statements taken by investigative authorities and recorded during an investigation or documents reciting and or summarising such statements. They are therefore ‘witness statements’ and can be admitted only under Rules 155, 156, or 158. The Sabra Defence, however, has tendered these eight witness statements under Rule 154.³⁶ The Trial Chamber cannot of its own volition receive the witness statements into evidence under Rule 155 without receiving submissions from the Parties as to whether to require the witness to appear for cross-examination (see paragraph 12 above). But in any case, most of the statements appear not to comply with the Rule 155 Practice Direction³⁷ and are from individuals who are not on a Party’s witness list.

³⁴ Prosecution consolidated response, paras 12-19, annex A; Prosecution consolidated sur-reply, paras 3-10, 16.

³⁵ See paragraph 12 above and Decision on second Sabra Defence motion, paras 10, 24, 26 regarding the legal principles relevant to determining whether a document is a witness statement and whether the witness who gave a statement is a particular Party’s witness.

³⁶ See paragraph 12 above and Decision on second Sabra Defence motion, paras 11, 28, regarding the legal principles relevant to the admission into evidence of witness statements tendered by the Defence during the Prosecution case.

³⁷ See Prosecution consolidated response, annex D.

22. The Defence has tendered the eight witness statements for the truth of their content and to support its case. It follows that the witnesses are therefore effectively witnesses whose evidence should be heard in any Defence case. For the same reasons expressed in the decisions on the first and second Sabra Defence motions,³⁸ the Trial Chamber refuses to exercise its discretion to vary the Rule 146 (B) sequence of the presentation of evidence to receive these statements into evidence during the Prosecution case. Further, the Trial Chamber is not convinced of any reason in these circumstances or at this point in the proceedings to gather evidence on its own volition under Rule 92 or to exercise its discretion to order the production of additional evidence under Rule 165.

23. The Trial Chamber therefore denies the admission into evidence of these eight new witness statements.

NON-WITNESS STATEMENT DOCUMENTS

24. The Sabra Defence tenders three non-witness statement documents, under Rule 154, for admission during the Prosecution case.³⁹ The Prosecution does not, in principle, object to the Defence tendering the documents during its case, but rather addresses each document on its own merits.⁴⁰ In these circumstances, and consistent with paragraph 13 above and earlier decisions,⁴¹ the Trial Chamber will consider the admissibility of these documents.

Lebanese Government's response to the UNIIC's request for assistance

Submissions

25. The Sabra Defence submits that this document, which the Lebanese Public Prosecutor provided to the UNIIC in response to a request for assistance, is an investigation summary relating to the arrest of a network working for Al Qaeda. For the relevance and probative value of the document, the Sabra Defence refers to three paragraphs of its 'thematic summary' (see paragraph 4, footnote 6, above). In its reply, the Defence generally argues that its reference to the specific paragraphs of its 'thematic summary' provides 'ample evidence' of the relevance of each document. It further submits that the document is an official

³⁸ Decision on first Sabra Defence motion, paras 83-106; Decision on second Sabra Defence motion, paras 24-29.

³⁹ Sabra motion, annex A, items 2, 5, 27.

⁴⁰ Prosecution consolidated response, paras 1, 11, annex A, 'Sabra Motion Four'.

⁴¹ Decision on first Sabra Defence motion, paras 109-115; Decision on second Sabra Defence motion, para. 13.

investigation summary which contains information from certain individuals provided outside the course of these proceedings and an analysis of this information.⁴²

26. The Prosecution argues that it is a document comprising multiple witness statements and, for the reasons detailed above (see paragraphs 19), is not admissible.⁴³

Decision

27. The response to the UNIIC request for assistance is an investigation summary which contains some summaries of statements of alleged suspects linked to the Al Qaeda network. However, the Trial Chamber considers that the summaries were produced for the purposes of an investigation and not as properly admissible statements from the individuals interviewed.

28. With regard to the submissions concerning the document's relevance and probative value, the Trial Chamber reiterates its strong disapproval of the Sabra Defence's practice in tendering these documents. It is procedurally improper, when seeking the admission of a document, to simply refer the Trial Chamber to an unrelated filing—which does not address or analyse any specific document—and expect it to discern the tendered document's relevance and probative value. In adversarial proceedings—like the Special Tribunal's—the parties bear the evidentiary onus of establishing the relevance and probative value of any document they seek to tender into evidence.

29. As the moving party here, the Defence has this evidentiary burden and must demonstrate how each document is relevant and probative to its case. Such submissions must be tailored to every document. The Trial Chamber should not have to guess or work out for itself the relevance of a document to a Defence case. This is fundamental to good litigation. The Sabra Defence should not have left it to annex A of its reply before making its submissions on the relevance and probative value of the tendered documents. On this basis alone, the Trial Chamber could refuse to admit any document tendered in this fashion.

30. However, in the circumstances and given the stage of the proceedings, the Trial Chamber will exceptionally consider the additional submissions in this and other places where the Sabra Defence has referred to its thematic summary. Here the Trial Chamber understands the document to be relevant to and probative of Mr Taha's connections to Mr Abu Adass and his involvement in Mr Abu Adass's alleged recruitment and disappearance. Furthermore, in

⁴² Sabra Defence motion, annex A, item 5; Sabra Defence consolidated reply, para. 20, annex C, p. 7.

⁴³ Prosecution consolidated response, annex D, item 5.

the absence of any reason to doubt its authenticity, the document bears sufficient indicia of reliability as a response to a request for assistance from the UNIIC dated 27 February 2006. The Trial Chamber will therefore exercise its discretion to admit into evidence the relevant portions of the investigation summary, as outlined in the disposition, for these limited purposes and not for the truth of the content of the witness statements.

Document from the Lebanese Ministry of Telecommunications

Submissions

31. The Sabra Defence tenders a document it describes as a request for assistance which is from the Lebanese Ministry of Telecommunications inquiring about eight landline telephone numbers. It submits it was disclosed to the Defence by the Prosecution. The Sabra Defence refers to one paragraph of its thematic summary with respect to the document's relevance and probative value.⁴⁴

32. The Prosecution takes no position with respect to the reliability of the document, but it objects to the admission of the table for lack of relevance and probative value. The Sabra Defence's only submissions on this front relate to the thematic summary, which even if considered does not explain or substantiate the relevance or probative value of the table.⁴⁵

33. The Sabra Defence provided further submissions on the relevance and probative value of this document in annex A of its reply. It submits that it is relevant to show that a call was made from a public telephone booth in Tripoli to Mr Ramadan in order to establish Mr Ramadan's involvement in Mr Abu Adass's disappearance.⁴⁶

Decision

34. Even considering the Sabra Defence's further submissions in its reply regarding the relevance of this document, the Trial Chamber is not convinced of its relevance to this case based on the document itself and in the absence of further context. The Trial Chamber therefore finds that the document lacks relevance and will not admit it into evidence.

Aide-mémoire

⁴⁴ Sabra Defence motion, annex A, item 2.

⁴⁵ Prosecution consolidated response, annex A, 'Sabra Motion Four', item 2; Prosecution consolidated sur-reply, annex A, 'Sabra Motion Four', item 27.

⁴⁶ Sabra Defence consolidated reply, para. 20, annex A, 'Sabra motion four', item 2.

Submissions

35. The Sabra Defence tenders what it describes as an aide-mémoire consisting of two call sequence tables⁴⁷ relating to calls of interest involving two mobiles attributed to Mr Zaaroura and Mr Hani Al-Shanti (see paragraphs 56 above). It also refers generally to its thematic summary with respect to the document's relevance and probative value.⁴⁸

36. The Defence submissions on the creation of these documents and their reliability are consistent with the previous submissions. The Defence created these documents by extracting call data from the Prosecution's 'SQL', database,⁴⁹ analysing the call data internally, selecting records of interest, identifying fields of relevance, and conducting checks.⁵⁰ The tables are reliable because the Sabra Defence created them from call data records obtained by the Prosecution from the Lebanese telecommunications companies Alfa and MTC Touch. The Sabra Defence selected the calls listed in the tables to demonstrate contacts between individuals or to demonstrate the presence of one in a certain area on a particular date, and whether the selected calls are anomalous to the general pattern of usage has no bearing on the *prima facie* reliability of the tables. While the tables include columns titled 'A_Number', 'B_Number', and 'Call_Type' with no explanation, the Trial Chamber heard evidence on the meaning of the relevant terms from Prosecution witnesses in 2015.⁵¹ The Sabra Defence attributed the relevant mobile numbers to specific individuals on the basis of information contained in other tendered documents, primarily in the tendered witness statements.⁵²

37. The Prosecution submits that the tables are inadmissible for the same reasons as in its responses to the previous Sabra Defence motions. The Prosecution argues that the documents are not comprehensive call sequence tables—that is, tables comprising all calls for a particular mobile number over a particular period of time—but rather tables of calls manually selected by the Sabra Defence to advance its case. They include duplicated data, formatting inconsistencies, and headers that are not self-explanatory, all of which could lead to misinterpretation of the data. Duplicating data is a serious flaw that has the potential to mislead the reader as it appears to double the call count. Formatting inconsistencies could

⁴⁷ See para. 3, fn. 4 above for the Trial Chamber's definition of call sequence tables.

⁴⁸ Sabra Defence motion, annex A, item 27; Sabra Defence consolidated reply, annex B, para. 50.

⁴⁹ 'SQL', or 'Structured Query Language', is a special programming language for databases. The Prosecution's SQL database enables call data record analysis. See Decision on call sequence tables, para. 41, fn. 87.

⁵⁰ Sabra Defence motion, annex A, item 27; Sabra Defence consolidated reply, annex B, paras 1-16.

⁵¹ See transcript of 20 July 2015, p. 40; transcript of 14 September 2015, pp 14-15, 23, 49, 73-74.

⁵² Sabra Defence motion, annex A, item 27; Sabra Defence consolidated reply, paras 6-10, 13, annex A, 'Sabra motion four', item 27, annex B, paras 1-19, 40-48.

result in incorrect call counts. While the Trial Chamber has heard evidence on the Prosecution call sequence table's headers, Prosecution witnesses cannot verify the Sabra Defence's correct use of terms and headers. Further, the Sabra Defence's attribution of specific mobile numbers to specific individuals by referring to other tendered documents is insufficient, as it does not include the specific, relevant time period of attribution or indicate whether the person identified was the primary or sole user of that number. Even if the numbers could be reliably attributed to specific people, the Sabra Defence has failed to demonstrate that any contacts were 'regular'. Finally, the Sabra Defence's explanation of its methodology in creating the tables is insufficient. The Trial Chamber cannot properly verify the tables' reliability absent a witness statement from the creator and the possibility of cross-examining the creator.

38. The Prosecution moreover objects to the Sabra Defence submissions on relevance of the two call sequence tables, and in particular arguing that it continues to incorrectly, and without support, attribute a specific number to Mr Zaaroura, while this number was used as a payphone in a shop and thus is anonymous by nature.⁵³

Decision

39. The Trial Chamber denied the admission of similar tables tendered by the Sabra Defence in its previous decisions. The Trial Chamber considered that the Sabra Defence had not submitted any evidence concerning how it had attributed numbers to specific people, and therefore found that the tables did not meet the reliability standard required for admission. However, the Trial Chamber stated that it was prepared to revisit the matter should the Sabra Defence properly address it.⁵⁴

40. For the same reasons set out in its previous decisions, the Trial Chamber finds insufficient the Sabra Defence's explanation of its attribution process or its methodology for creating the tables.⁵⁵ The Trial Chamber therefore will deny the admission into evidence of the aide-mémoire. However, should the Sabra Defence properly address this issue, the Trial Chamber will revisit the matter.

⁵³ Prosecution consolidated response, para. 11, annex A, 'Sabra Motion Four', item 27; Prosecution consolidated sur-reply, paras 19-31, 33-37, annex A, 'Sabra Motion Four', item 27.

⁵⁴ Decision on first Sabra Defence motion, paras 125-135, disposition.

⁵⁵ Decision on first Sabra Defence motion, paras 125-135, disposition; Decision on second Sabra Defence motion, para. 34.

ANNEX B TO THE DEFENCE MOTION

41. The Sabra Defence makes submissions relying on both the documents it tenders and on documents the Trial Chamber has admitted into evidence or decided to admit into evidence. In annex B to its motion, the Sabra Defence lists those documents falling into the latter category.⁵⁶ The Prosecution submits that this annex contains erroneous representations and expresses concern that such representations, if permitted to go unchecked, will find their way into the Parties' final trial briefs.⁵⁷ Specifically, the Prosecution argues that the Sabra Defence incorrectly relies on portions of an October 2005 UNIIC report,⁵⁸ other than those of which the Trial Chamber has taken judicial notice.⁵⁹ The Sabra Defence did not reply to this submission.

42. The Sabra Defence has relied on material not in evidence and on evidence admitted other than for the truth of its content. The Trial Chamber has already instructed counsel for Mr Sabra not to do this in any future submissions or briefs.⁶⁰

CONFIDENTIALITY

43. The Sabra Defence filed its motion and reply confidentially, but requests the Trial Chamber to file its decision as public and reclassify its motion and reply as public, subject to any Prosecution requests for redactions.⁶¹ The Prosecution raised concerns related to reclassifying the Defence filings as public.⁶² The Trial Chamber reiterates the principle of the public nature of proceedings before the Special Tribunal, and that documents should, wherever possible, be filed publicly. The Trial Chamber issues this decision publicly and incorporates information from the Parties' confidential submissions as necessary to determine the admissibility of the documents. The Trial Chamber orders the Sabra Defence to file a public redacted version of its motion, or have it reclassified as public, and urges the Parties to

⁵⁶ Sabra Defence motion, para. 2, annex B.

⁵⁷ Prosecution consolidated response, para. 20.

⁵⁸ See S/2005/662, Letter dated 20 October 2005 from the Secretary-General addressed to the President of the Security Council, transmitting the Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005) dated 19 October 2005, referring to paras 199-202.

⁵⁹ Prosecution consolidated response, para. 20, annex G, pp 3-4. See F2665, Decision on Sabra Defence Motion Seeking Judicial Notice of United Nations Fact-Finding Mission and UNIIC Reports, 26 July 2016, Disposition, Table A, taking judicial notice of a number of specific facts not including those upon which the Sabra Defence relies.

⁶⁰ See Decision on second Sabra Defence motion, para. 53.

⁶¹ Sabra Defence motion, para. 48; Sabra Defence consolidated reply, paras 21-22.

⁶² Prosecution consolidated response, paras 22-25.

cooperate in this regard. The Trial Chamber will maintain the confidentiality of the annexes to the Defence motion.⁶³

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 154 and in accordance with paragraph 30 of this decision, the relevant portion of **item 5**, a Lebanese response to a UNIIC request for assistance (ERN 10010538T), which it will admit into evidence at a suitable time in the proceedings;

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 counsel for Mr Sabra to file a public redacted version of its motion, or have it reclassified as public; and

MAINTAINS the confidentiality of the annexes to the Sabra Defence motion.

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

Leidschendam,
The Netherlands
30 November 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

⁶³ See Decision on third Sabra Defence motion, para. 51. The Trial Chamber, in its decision on the second Sabra Defence motion, ordered the Parties to file public redacted versions of their response, reply and sur-reply respectively, or have them reclassified as public. See Decision on second Sabra Defence motion, para. 51.

