



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE TRIAL CHAMBER**

**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:** 18 December 2017

**Original language:** English

**Classification:** Public

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

**DECISION DENYING CERTIFICATION TO APPEAL FIVE DECISIONS PARTLY  
GRANTING FIVE SABRA DEFENCE MOTIONS TO ADMIT DOCUMENTS  
RELATING TO MR AHMED ABU ADASS**

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

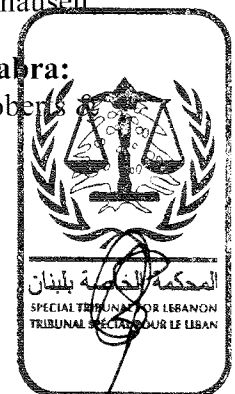
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**Counsel for Mr Assad Hassan Sabra:**  
Mr David Young, Mr Geoffrey Robert  
Ms Sarah Bafadhel



## INTRODUCTION

1. Counsel for the Accused, Mr Assad Hassan Sabra, filed six motions seeking the admission into evidence of 260 documents—165 statements and 95 other documents—related to Mr Ahmed Abu Adass,<sup>1</sup> who the amended consolidated indictment alleges appeared, at the behest of the Accused, in a video falsely claiming responsibility for the attack of 14 February 2005 that killed the former Lebanese Prime Minister Mr Rafik Hariri and 21 others.<sup>2</sup> On 25 September 2017, the Trial Chamber issued its decision on the first of these motions—denying the admission of 67 statements and five documents, but admitting 49 other documents—and it subsequently rejected the Sabra Defence’s application to certify four issues arising from that decision for interlocutory appeal.<sup>3</sup>

2. On 30 November 2017, the Trial Chamber, in another five decisions, rejected the admission of a further 98 witness statements which were tendered in the remaining five Sabra Defence motions—noting, among other things, that the statements were tendered for the truth of their content—but decided to admit 23 other documents into evidence.<sup>4</sup>

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<sup>1</sup> After the removal of duplicates, documents tendered in other filings and other improperly tendered documents, the various filings tendered statements and documents as follows: STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, 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 (‘First Sabra motion’) (tendering 67 statements and 54 other documents); F3057, Motion for the Admission of Documents Relating to the Claim of Responsibility – The Selection of Ahmed Abu Adass, 29 March 2017 (confidential) (‘Second Sabra motion’) (tendering 34 statements and nine other documents); 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) (‘Third Sabra motion’) (tendering 23 statements and 10 other documents); 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) (‘Fourth Sabra motion’) (tendering eight statements and three other documents); 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) (‘Fifth Sabra motion’) (tendering 16 statements and 12 other documents); F3251, Motion for the Admission of Documents Relating to the Claim of Responsibility – The Fax, 26 July 2017 (confidential) (‘Sixth Sabra motion’) (tendering 17 statements and seven other documents).

<sup>2</sup> F2720, Redacted Amended Consolidated Indictment, 12 July 2016, paras 3 (b)-(d), 4, 23, 44, 48 (c), 64 (f), 66 (f), 68 (h), 70 (h).

<sup>3</sup> 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 (‘First Sabra decision’); F3423, Decision Denying Certification to Appeal ‘Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates’, 23 November 2017.

<sup>4</sup> See 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 (‘Second Sabra decision’), paras 25-26, disposition; 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 (‘Third Sabra decision’), para. 24, disposition; F3443, Decision Partly Granting Fourth Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – The Successful Recruitment of Mr Ahmed Abu Adass, 30 November 2017 (‘Fourth Sabra decision’), para. 22, disposition; F3444, Decision Partly Granting Fifth Sabra Defence Motion for the Admission of Documents Relating to Mr

3. These were discretionary decisions relating to the admission of evidence, in which the Trial Chamber carefully scrutinised each document tendered and either decided to admit it or deny its admission. The Sabra Defence now seeks certification to appeal these five decisions.<sup>5</sup>

### **THE LEGAL PRINCIPLES: CERTIFICATION**

4. The Trial Chamber, under Rule 126 (C) of the Special Tribunal’s Rules of Procedure and Evidence, will certify a decision for interlocutory appeal when:

the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. The Trial Chamber must ensure that the issue meets the rule’s strict requirements: leave to appeal is exceptional; the issue must be precise and have an adequate legal or factual basis; and certification is concerned not with whether a decision was correctly reasoned but with whether Rule 126 (C) is satisfied. Once the requirements of Rule 126 (C) have been met, the Trial Chamber has no discretion to refuse certification.<sup>6</sup>

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Ahmed Abu Adass – The False Claim of Responsibility, 30 November 2017 (‘Fifth Sabra decision’), para. 26, disposition; F3445, Decision Partly Granting Sixth Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Fax, 30 November 2017 (‘Sixth Sabra decision’), para. 21, disposition, and F3486, Clarifications of and Corrigenda to Decision Partly Granting Sixth Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Fax, 15 December 2017 (‘Sixth Sabra decision clarification and corrigenda’).

<sup>5</sup> F3472, Consolidated Request for Certification to Appeals Decisions on Sabra Motions for the Admission of Documents Relating to Mr Ahmed Abu Adass, 8 December 2017 (‘Sabra certification motion’). The Trial Chamber granted a Sabra Defence request for an extension of time and word limit for its certification motion: E-mail from Trial Chamber Senior Legal Officer to the Parties and the Legal Representatives of Participating Victims, 1 December 2017.

<sup>6</sup> STL-11-01/PT/AC/AR126.1, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0012, Corrected Version of Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 8; STL-11-01/PT/AC/AR126.2, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0008, Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, paras 11-15; STL-11-01/PT/AC/AR126.5, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0003, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judge’s “Decision on Sabra’s Tenth and Eleventh Motions for Disclosure”, 6 November 2013, para. 8; STL-11-01/T/AC/AR126.6, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0003, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge’s “Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer”, 12 May 2014, paras 19-23; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1798, Decision on Application for Certification of Decision Regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, para. 13; F1841, Decision on ‘The Defence for Hussein Hasan Oneissi Request for Certification of the “Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events” of 30 December 2014’, 3 February 2015, para. 6; F2069, Decision Denying Certification to Appeal the Trial Chamber’s Decision on Issuing a Summons to Witness 012, 10 July 2015, para. 5.

## DISCUSSION AND DECISION

6. The Sabra Defence identifies two issues for certification for interlocutory appeal:

- a. Whether the Trial Chamber made an error of fact in determining that the 9[8]<sup>7</sup> Documents were tendered by the Sabra Defence for the truth of their contents; and
- b. Whether the Trial Chamber abused its discretion in failing to seek further clarification from the Sabra Defence in order to address any apparent ambiguity as to the Defence's intention [...].<sup>8</sup>

7. Concerning the first issue, the Sabra Defence did not argue in its tendering filings that it was not relying on the tendered documents for the truth of their content.<sup>9</sup> It is only now—in its application for certification—that the Sabra Defence submits that it had ‘explicitly stated that it is not relying on the documents for the truth of their contents’.<sup>10</sup> It identifies paragraph 25 of the first Sabra motion and paragraph 17 of its reply to the Prosecution's consolidated response to its five motions as the instances in which this submission was made.<sup>11</sup> But paragraph 17 of the reply says no such thing: it makes no reference to ‘the truth of their contents’. In fact, the word ‘truth’ does not appear at all in this consolidated reply. Paragraph 25 of the first Sabra motion simply states that the Sabra Defence does not advance an alternative defence theory, but presents evidence to assist the Trial Chamber in its fact-finding and truth-seeking obligations.<sup>12</sup>

8. Moreover, the Sabra Defence's submissions suggested reliance on the documents for the truth of their content. Indeed, the annexes to the six motions explained the relevance and probative value of the documents and also stated that they went to demonstrate or show a particular factual proposition.<sup>13</sup> But in only three instances in its filings did the Sabra Defence

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<sup>7</sup> The correct number of witness statements that were denied admission is 98, and not 99 as the Sabra certification motion states: *see* Sixth Sabra decision, para. 12; Sixth Sabra decision clarification and corrigenda, paras 1-2.

<sup>8</sup> Sabra certification motion, para. 3 (a)-(b).

<sup>9</sup> Sabra certification motion, para. 11.

<sup>10</sup> Sabra certification motion, para. 12.

<sup>11</sup> Sabra certification motion, fns 10-11.

<sup>12</sup> *See* Sabra certification motion, paras 11-12, fns 10-11. The Sabra Defence also references the transcript of 8 November 2016, where it made the same submission: Sabra certification motion, fn. 13. *See also* fn. 15 below.

<sup>13</sup> *See* First Sabra motion, annex A (‘Relevance and probative value’ column); Second Sabra motion, annex A (‘Relevance and probative value’ column); Third Sabra motion, annex A (‘Relevance and probative value’ column); Fourth Sabra motion, annex A (‘Relevance and probative value’ column); Fifth Sabra motion, annex A (‘Relevance and probative value’ column); Sixth Sabra motion, annex A (‘Relevance and probative value’ column).

specify that it was *not* tendering certain documents for the truth of their content.<sup>14</sup> The Trial Chamber was therefore entitled to infer from this that the Sabra Defence was relying on the remaining documents for the truth of their content.

9. However, even if the Trial Chamber erred in fact in drawing this conclusion from the Sabra Defence's submissions,<sup>15</sup> the decisions rejecting the admission into evidence of the 98 witness statements were not solely premised on their being tendered for the truth of their content. Rather, consistent with the decision of 25 September 2017,<sup>16</sup> admission was denied because the statements were impermissibly tendered under the wrong rule—Rule 154 rather than Rules 155, 156 or 158—and without seeking a variation of the order for the presentation of evidence under Rule 146 (B). Additionally, the Trial Chamber assessed each of the other documents tendered in the five Sabra Defence motions and denied the admission into evidence of 18 documents under Rule 149 (C), either for lacking relevance or *prima facie* reliability.<sup>17</sup>

10. Therefore, the first issue raised by the Sabra Defence does not properly arise from the decisions. It fails the first part of the Rule 126 (C) test and so cannot be certified for appeal. There is thus no need to consider the second part of the rule.

11. Concerning the second issue, the Trial Chamber has previously denied the admission into evidence of statements tendered by the Defence during the Prosecution's case under Rule 155, over the Prosecution's opposition, and has consistently held that Rules 155, 156 and 158 are the *lex specialis* for tendering witness statements, not Rule 154.<sup>18</sup>

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<sup>14</sup> See First Sabra motion, para. 63, fn. 122 (where the Sabra Defence explicitly states that it is not relying on the truth of the content of only *three* documents). See also First Sabra motion, paras 32-34, 38-40, 45-76 (where, after repeating the Prosecution's case concerning Mr Abu Adass, the Sabra Defence asserted that '[t]he *truth* of the matter is quite different' (emphasis added) and proceeds to set out its position on Mr Abu Adass' character, religious beliefs and associates based on various documents)

<sup>15</sup> While the Sabra Defence did submit in court that one statement was not 'necessarily' being relied upon for the truth of its content, this statement was subsequently tendered in the First Sabra motion without including this submission in that filing: see transcript of 13 January 2016, p. 33; Sabra certification motion, fn. 10.

<sup>16</sup> See First Sabra decision, paras 83-106, 118-149.

<sup>17</sup> See Second Sabra decision, paras 24-49; Third Sabra decision, paras 18-49; Fourth Sabra decision, paras 18-40; Fifth Sabra decision, paras 25-62; Sixth Sabra decision, paras 17-40.

<sup>18</sup> See F2909, Decision on Salim Jamil Ayyash BMW and Mobile Numbers and Ayyash Request Regarding Witnesses PRH331 and PRH682, 16 December 2016, paras 14-22; First Sabra decision, paras 19, 84, 99; F3441, Decision Denying Ayyash Defence Application to Admit into Evidence Witness Statements Tendered During the Cross-Examination of Prosecution Analyst Andrew Donaldson, 30 November 2017, paras 21-29.

12. The Defence submission that had the Trial Chamber sought clarification then ‘the 9[8] Documents would have been considered on their merits pursuant to Rule 154’,<sup>19</sup> is not only speculative, but ignores the Trial Chamber’s consistent decisions *not* to receive witness statements into evidence under Rule 154. Seeking clarification would therefore have made no difference to the decision. Moreover, the Trial Chamber relied upon the submissions of Defence counsel in their filings and, in particular, their positive submissions that they were *not* relying upon documents for the truth of their content in respect of only three out of 260 documents tendered.

13. Thus, this second issue cannot significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Therefore, it is also unnecessary to consider the second part of the Rule 126 (C).

14. As the application is without merit, the Trial Chamber has issued this decision without awaiting a Prosecution response.

### DISPOSITION

**FOR THESE REASONS**, the Trial Chamber:

**DISMISSES** the Sabra Defence consolidated motion for certification for interlocutory appeal.

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

Leidschendam,  
The Netherlands  
18 December 2017

*David Re*

\_\_\_\_\_  
Judge David Re, Presiding

*Janet Nosworthy*

\_\_\_\_\_  
Judge Janet Nosworthy

*Micheline Braidy*

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Judge Micheline Braidy

<sup>19</sup> Sabra certification motion, para. 16. In any event, the Trial Chamber has no obligation to seek clarification of unclear submissions or to seek supplementary submissions from the Defence.

