



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: 2 February 2018

Original language: English

Classification: Public

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

**DECISION ON SABRA DEFENCE MOTION TO ADMIT INTO EVIDENCE
EXHIBITS 5D171, 5D284 AND 5D286 MARKED FOR IDENTIFICATION**

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

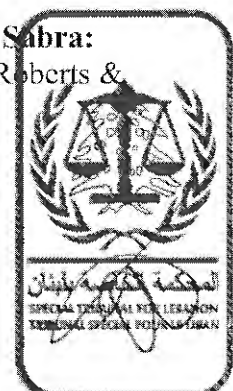
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INTRODUCTION

1. The Prosecution pleads, in the amended consolidated indictment, that four interconnected closed mobile telephone networks—colour-coded as ‘red’, ‘green’, ‘blue’ and ‘yellow’—and one group of ‘purple’ mobiles were involved in the attack of 14 February 2005 in Beirut that killed former Lebanese Prime Minister Mr Rafik Hariri and 21 others and injured 226. The Prosecution further alleges that the ‘purple’ mobile group, consisting of three mobiles, were used to coordinate a false claim of responsibility for the attack that was disseminated in its aftermath. The Accused Mr Assad Hassan Sabra, the Prosecution submits, was the user of one of the ‘purple’ mobiles— Purple 018—and used it to prepare and disseminate via the Al Jazeera television network a statement falsely ascribing responsibility for the attack to the fictitious ‘Nusra and Jihad Group in Greater Syria’.¹

2. During its cross-examination of Prosecution witnesses Mr Ghassan Ben-Jeddo, Al Jazeera’s Beirut Bureau Chief in 2005 (Witness PRH020), and Witness PRH009, a member of Mr Hariri’s convoy in February 2005, the Sabra Defence tendered three documents that were marked for identification (MFI) by the Trial Chamber as exhibits 5D171 MFI, 5D284 MFI and 5D286 MFI.²

3. The first document, exhibit 5D171 MFI, was shown to Mr Ben-Jeddo and depicts 110 call records for 61 calls and two SMS messages sent on 14 February 2005 involving his mobile. It also includes a call to Al Jazeera’s headquarters in Doha, Qatar.³

4. The second and third documents, exhibits 5D284 MFI and 5D286 MFI, are extracts from a Defence ‘aide-memoire’ and were shown to Witness 009 on 12 October 2016 during cross-examination. Exhibit 5D284 MFI shows the records for 13 calls on 2 February 2005 between 6:30 pm and 10:00 pm involving a number that the witness testified was his. Exhibit

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Redacted Amended Consolidated Indictment, 12 July 2016, paras 3 (c), 14-15, 18, 19 (d); STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Redacted Version of the Prosecution’s Pre-Trial Brief, dated 23 August 2013, 31 October 2013, para. 55.

² Transcript of 10 July 2015, p. 21 (exhibit 5D171 MFI); transcript of 12 October 2016, pp 44 (exhibit 5D284 MFI), 55 (exhibit 5D286 MFI).

³ F3446, Sabra Defence Application for Admission into Evidence of Three Agreed Documents Marked for Identification, 1 December 2017 (confidential with confidential annexes A-C) (‘Sabra application’), paras 5, 7.

5D286 MFI shows the records for 41 calls on 2 February 2005 involving a number attributed to Mr Khaled Alywan.⁴

5. The Sabra Defence seeks to admit these documents into evidence—with the supposed agreement of the Prosecution—under Rule 149 (C)⁵ of the Special Tribunal’s Rules of Procedure and Evidence. The Prosecution, however, disputes the claimed agreement and opposes the application. The Sabra Defence replied.⁶

SUBMISSIONS

Sabra Defence application

6. The documents are all ‘similar in nature and form’ to the call sequence tables⁷ which ‘have been objected to by the Prosecution in response to other Defence Motions.’ They include call data records extracted by the Sabra Defence from the Prosecution’s collection using a methodology that the Sabra Defence previously submitted to the Trial Chamber in an unrelated filing.⁸ The Sabra Defence submits that the three documents are relevant, probative and bear sufficient indicia of reliability. Further, the Prosecution agreed ‘to the full admission’ of the three documents ‘without any requirement of a written statement’ and to the *prima facie* attribution of the numbers that are in the documents.⁹ This is outlined in annex A of the application and in letters sent by the Prosecution to the Sabra Defence on 28 March and 7 November 2017 in annexes B and C.

7. Exhibit 5D171 MFI is relevant to demonstrate Mr Ben Jeddo’s contacts and, in context, to evaluate the inference that can be drawn from Purple 018’s location on

⁴ Sabra application, paras 9-10, 12, 15, 17. Mr Alywan (spelt ‘Alaywan’ in the transcripts) was, according to the Sabra Defence, in the vicinity of the shop where the telecard used to call Al-Jazeera (and Reuters) on 14 February 2005 in relation of the false claim of responsibility was purchased: transcript of 12 October 2016, p. 45.

⁵ Rule 149 (C) provides that ‘[a] Chamber may admit any relevant evidence which it deems to have probative value.’

⁶ Sabra application; F3492, Prosecution Response to the Sabra Defence Application for Admission into Evidence Of Three Documents Marked for Identification, 18 December 2017 (confidential with confidential annexes A-B) (‘Prosecution response’); F3502, Sabra Defence Reply to “Prosecution Response to Sabra Defence Application for Admission into Evidence of Three Documents Marked for Identification”, 22 December 2017 (confidential) (‘Sabra reply’).

⁷ 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’: 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 UNIIC and STL’s Prosecution, 6 May 2015, para. 2. *See also* 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.

⁸ Sabra application, paras 6, 11, 16. *See* F3374, Reply to “Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass”, 23 October 2017, annex B.

⁹ Sabra application, paras 2, 4.

14 February 2005 at around 4:00 pm to 6:00 pm.¹⁰ Exhibit 5D284 MFI is relevant to establish the time Witness 009 arrived at the residence of Mr Omar Moussali—an acquaintance of Mr Hariri—on 2 February 2005 and a subsequent confrontation between Mr Hariri’s security detail and the Lebanese Internal Security Forces (ISF).¹¹ Exhibit 5D286 MFI corroborates Mr Hariri’s security officers’ account concerning what occurred at the Moussali residence and shows that Mr Alywan was in close contact with people potentially implicated in Mr Hariri’s assassination.¹² In context, exhibits 5D284 MFI and 5D286 MFI can demonstrate the role played by ISF Director-General Mr Ali Hajj¹³ and his associates in the surveillance of Mr Hariri before 14 February 2005, in preparation for his assassination.¹⁴

Prosecution response

8. The Prosecution responds that the Sabra Defence has incorrectly stated the Prosecution’s position in the letters of 28 March and 7 November 2017. The Prosecution stipulated specific caveats before it could agree to the admission of exhibits 5D284 MFI and 5D286 MFI, which the Sabra Defence did not clearly refer to in its application or address. As for exhibit 5D171 MFI, although the Prosecution stated that it ‘could be agreed’, the Prosecution nonetheless awaited the full provenance of all three exhibits to be included in a Sabra Defence motion under Rule 154.¹⁵ The full provenance, however, is lacking. The Prosecution, therefore, does not agree to the admission of the documents and disputes the Sabra Defence’s characterization of the documents as having been agreed by the Prosecution.¹⁶

9. The Sabra Defence’s attribution of numbers to third party contacts is unreliable as it is almost entirely based on documents that are not in evidence. Even if the underlying documents had been admitted, the requisite attribution analysis is absent as the Sabra Defence failed to submit precise explanations as to why certain numbers are attributed to particular people during specific and relevant time periods.¹⁷ Further, the Sabra Defence failed to

¹⁰ Sabra application, para. 8.

¹¹ Sabra application, paras 9, 13. According to Witness PRH357, Mr Hariri’s security officers confronted members of the Lebanese ISF information branch who were monitoring them near the residence of the Mousalli family on 2 February 2005: transcript of 3 June 2015, pp 47-49.

¹² Sabra application, paras 18-19.

¹³ Mr Ali Hajj was the Director-General of the ISF from November 2004 until April 2005.

¹⁴ Sabra application, paras 14, 20.

¹⁵ Rule 154 provides that ‘[s]ubject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149 (C) and (D).’

¹⁶ Prosecution response, paras 8-10.

¹⁷ Prosecution response, paras 12-13.

address the admissibility requirements of Rule 154 which governs the admission of documentary evidence—such as the three tendered exhibits marked for identification. While Rule 149 (C) states the general principles for admitting evidence, Rule 154 is the specific provision for tendering documents. The Sabra Defence also failed to address where and how each document fits into its case.¹⁸

10. Exhibits 5D171 MFI, 5D284 MFI and 5D286 MFI are: misnamed; contain duplicates; distort the call count; misrepresent call volumes; attribute numbers with unadmitted evidence; mix attribution analysis with evidence extracted from call data records; and are selective. Additionally, the methodology used to produce them is unclear. The documents appeared to have been created for the purpose to which a call sequence table is ordinarily used, that is, to show calls of a target number between particular target times. Since their full provenance has not been shown, the Prosecution cannot agree to their admission. The exhibits can be fully agreed between the Parties only when a call sequence table for the numbers in question is reproduced that includes all calls and is free of duplicates. Further, it must be accompanied by a witness statement from its creator who can address the attribution methodology for the relevant numbers after the underlying evidence has been admitted.¹⁹

Sabra Defence reply

11. The Sabra Defence replies that the documents were marked for identification during cross-examination and are therefore no different to any other documents that are put to witnesses, marked for identification and then admitted into evidence; a written motion is unnecessary. Rule 154 allows the Parties to tender documents which have not been used with a witness and are tendered from the bar table. In any event, the admissibility requirements of Rule 154 are identical to Rule 149 (C). The Trial Chamber need only be satisfied that the documents are *prima facie* relevant and probative and that their probative value is not substantially outweighed by the need to ensure a fair trial. The Defence satisfied these criteria in its application and during its cross-examination of the witnesses.²⁰

12. The Prosecution appears to be recanting from its agreement to the documents' admission as set out in its letters dated 28 March and 7 November 2017. The Sabra Defence points to mistaken quotes by the Prosecution of the content of the letters ('could be agreed'

¹⁸ Prosecution response, paras 14-15.

¹⁹ Prosecution response, paras 16-33.

²⁰ Sabra reply, paras 3-5.

instead of ‘*can* be agreed’) and that its reference to Rule 154 in the letter of 7 November 2017 was suggestive rather than a caveat. Although it concedes that communications between the Parties are not binding, the Sabra Defence argues that the Prosecution’s agreement retraction renders moot such communications as a means to expedite the proceedings. It rejects the suggestion that the Prosecution’s position was purposefully misrepresented and notes that the relevant verbatim quotes and the letters themselves were included as annexes to its application.²¹

13. Further, *prima facie* attribution is not premised solely on the admission of documents into evidence. Although the referenced attribution materials are almost exclusively not in evidence, they are in the Parties’ evidential holdings. The comments and caveats in the Prosecution’s letter dated 28 March 2017 were made in that context. Further, the agreement on attribution through communications between the Parties was a meaningful channel to avoid unnecessary litigation. The attribution is sufficient for the purposes of the proposed exhibits and the Defence is unaware of any information which undermines or contradicts the proposed attribution ‘other than the caveats it agrees to’. Opposition to attribution based purely on the evidence’s status—without addressing its substance—is unhelpful. Any errors made by the Sabra Defence are regrettable, but no different to the errors committed by the Prosecution or any other Party.²²

DISCUSSION AND DECISION

14. Counsel for Mr Sabra submit that they reached agreement with the Prosecution concerning the admission of the documents. This is clear from the title of its application—namely, ‘Sabra Defence Application for Admission into Evidence of Three *Agreed* Documents Marked for Identification’—and how the issue was presented in the application itself.²³ Yet, the Prosecution’s letter of 28 March 2017 clearly shows that, in respect of exhibits 5D284 MFI and 5D286 MFI, its agreement was subject to caveats.²⁴

15. This was reinforced in its letter of 7 November 2017, where the Prosecution explicitly stated that it objected to the admission of exhibits 5D284 MFI and 5D286 MFI, referencing

²¹ Sabra reply, paras 6-10.

²² Sabra reply, paras 12-14.

²³ See Sabra application, para. 2 (‘the Prosecution has agreed to the full admission [of the documents]’; ‘the Prosecution [...] agreed to the *prima facie* attribution of the numbers’).

²⁴ Sabra application, annex B.

the earlier letter.²⁵ None of this detail was included in the Sabra Defence's application, nor were the Prosecution's caveats explicitly identified and addressed. Rather, the Prosecution's true position was simply included in annexes to the application.

16. The Prosecution's position concerning exhibit 5D171 MFI, however, is more vague. It appeared to agree to its admission in its letter of 28 March 2017 and then referred to this position in the later letter, while stating that the full provenance of all the exhibits 'is best demonstrated within written motions under Rules 154 or under Rule 155, made during the Defence case'.²⁶ This ambiguity should have been resolved by the Parties themselves through independent inquiries, without the need for the Trial Chamber's intervention.

17. In any event, while the Sabra Defence does not explicitly refer to the exhibits as 'call sequence tables', it does concede that they 'are all similar in nature and form to the [call sequence tables] which have been objected to by the Prosecution in response to other Defence Motions'.²⁷ Indeed, to explain how it produced the exhibits, the Sabra Defence relies exclusively on a previous filing purportedly outlining its methodology in creating call sequence tables tendered for admission in other motions.²⁸

18. Viewed in this light, and after considering its content and form, the Trial Chamber finds that exhibit 5D171 MFI is in fact a Defence call sequence table. The document contains no names or attribution information. On the other hand, while exhibits 5D284 MFI and 5D286 MFI contain the same type of information as exhibit 5D171 MFI, they also include the names of people to whom the Sabra Defence attributes specific numbers. It does this via footnotes which refer to the ERNs²⁹ of documents that purportedly support attribution. Therefore, these exhibits are call sequence tables to which the Defence has added attribution information.

19. The Trial Chamber has previously set out its position on the document the Sabra Defence relies upon to explain its methodology for producing the exhibits, which goes to their reliability. The Trial Chamber found that 'the Sabra Defence's explanation of its methodology

²⁵ Sabra application, annex C.

²⁶ Sabra application, annex C.

²⁷ Sabra application, para. 2.

²⁸ Sabra application, paras 6, 11, 16 (referring to F3374, Reply to "Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass", 23 October 2017, annex B).

²⁹ An ERN is a unique identifying number, or electronic/evidence registration number, which is printed on every item that is admitted, or sought to be admitted, into evidence before the Special Tribunal. *See* 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, fn. 104.

for creating the tables is insufficient, as it does not allow the Trial Chamber or the Prosecution to test the reliability of the tables by questioning the creator(s) of the tables'.³⁰ This also applies here.

20. In particular, the Prosecution has alluded to numerous duplicate entries in exhibit 5D171 MFI, which the Sabra Defence has not disputed or addressed. In comparable circumstances, the Trial Chamber ordered the Sabra Defence to remedy the irregularities by producing a revised call sequence table, taking into account the Prosecution's objections, together with the statement(s) of the creator(s) to support *prima facie* reliability and hence its probative value.³¹ This too applies here. The Sabra Defence is therefore ordered to do so in respect of exhibit 5D171 MFI, after which the Prosecution is to notify the Trial Chamber whether it continues to object to its admission into evidence.

21. The same order, however, would not fully address exhibits 5D284 MFI and 5D286 MFI. Even if the Sabra Defence addressed the Prosecution's concerns regarding its methodology and provided a statement from the exhibits' creator(s), this would only go to the call sequence table component of the exhibits. The attribution component would remain unaddressed. In this respect, the Sabra Defence concedes that the majority of the attribution documents have not been admitted into evidence. Additionally, aside from repeating the relevant parts of the documents that support attribution,³² the Sabra Defence 'offers no precision in explaining why it considers that certain numbers are attributable to specific individuals or for what time period'.³³

22. In combination, these factors mean that exhibits 5D284 MFI and 5D286 MFI lack the *prima facie* reliability necessary for them to have probative value pursuant to Rule 149 (C).

³⁰ 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 of 30 November 2017'), para. 34. *See also* 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, para. 46; 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, para. 40; F3444, Decision Partly Granting Fifth Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – The False Claim of Responsibility, 30 November 2017, paras 38, 40.

³¹ *See* F3428, Order to the Sabra Defence and the Prosecution Regarding Call Sequence Tables Submitted for Admission into Evidence, 27 November 2017, para. 4. *See also* F3464, Decision on the 'Sabra Request for Clarification of the Order to the Sabra Defence and the Prosecution Regarding Call Sequence Tables Submitted for Admission into Evidence', 7 December 2017.

³² Sabra application, annex A.

³³ Decision of 30 November 2017, para. 34.

Given this, it is unnecessary to consider the Prosecution's submission that Rule 154 is the appropriate rule for the admission of the exhibits.

CONFIDENTIALITY

23. The Sabra Defence submits that its application was filed confidentially as it may reveal Witness 009's identity and states that a public redacted version will be filed in due course. It filed the three annexes confidentially as they contain identifying information of protected witnesses and numbers of third parties.³⁴ With respect to its reply, the Sabra Defence submits that it was filed confidentially on the basis of the confidential classification of its application and the Prosecution's response, but that it takes no issue with it being reclassified as public.³⁵ The Prosecution's response and its two annexes were filed confidentially, but the Prosecution made no submissions on their confidentiality.

24. Proceedings before the Special Tribunal are public by nature; confidentiality is not the norm, but the exception. However, in light of Witness 009's protected status, it is appropriate that the Sabra Defence's application remain confidential and for it to file a public redacted version. The same applies to the annexes. However, its reply is to be reclassified from confidential to public. As for the Prosecution, the Trial Chamber orders it to file public redacted versions of its response and its two annexes or to have them reclassified from confidential to public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

ORDERS the Sabra Defence to provide, by close of business Monday 5 February 2018, a revised version of exhibit 5D171 MFI that takes into account the Prosecution's objections together with the statement(s) of its creator(s);

ORDERS the Prosecution, by close of business Tuesday 6 February 2018, to notify the Trial Chamber whether it continues to object to admission into evidence of exhibit 5D171 MFI and if so, why;

DISMISSES the Sabra Defence application in all other respects;

³⁴ Sabra application, paras 21-22.

³⁵ Sabra reply, para. 15.

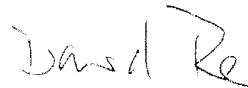
ORDERS the Sabra Defence to file public redacted versions of its application and its three annexes;

ORDERS the Sabra Defence reply to be reclassified from confidential to public; and

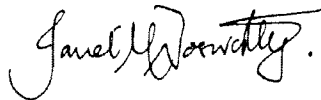
ORDERS the Prosecution to file public redacted versions of its response and its two annexes, or to have them reclassified from confidential to public.

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

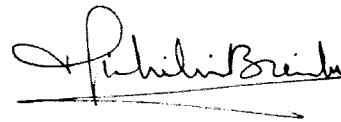
Leidschendam,
The Netherlands
2 February 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

