



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: 15 February 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**WRITTEN REASONS FOR ADMITTING INTO EVIDENCE
TWENTY TWO DOCUMENTS UPON THE SABRA DEFENCE
APPLICATION**

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

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms 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 Roberts &
Ms Sarah Bafadhel



INTRODUCTION AND BACKGROUND

1. On 7 February 2018, the Trial Chamber delivered a decision in court admitting into evidence the documents the subject of the ‘Sabra Defence Application for Admission into Evidence of Twenty Two Documents Marked for Identification’.¹ These are the written reasons for that decision.

2. The amended consolidated indictment pleads that five interconnected mobile telephone groups were involved in the attack on the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut, on 14 February 2005. It ‘colour-codes’ them and pleads that the ‘purple phones’, a group of three mobile telephone numbers, were used to coordinate the false claim of responsibility for the attack. It attributes one of them, ‘Purple 018’, to the Accused, Mr Assad Hassan Sabra.² The other two purple mobiles, ‘Purple 095’ and ‘Purple 231’, are attributed, respectively, to the Accused, Mr Hussein Hassan Oneissi and Mr Hassan Habib Merhi. The Prosecution alleges that Mr Ahmed 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.³

3. On 9 November 2017, the Trial Chamber ordered counsel for Mr Sabra to file written submissions in relation to the admissibility of documents used during the cross-examination of Prosecution witnesses, Mr Gary Platt (Witness PRH147) and Mr Andrew Donaldson (Witness PRH230), which they sought for admission into evidence.⁴ The Sabra Defence then filed an application seeking the admission into evidence of 22 documents, including 13 it described as ‘call sequence tables’, which were relied upon in the preparation of two other documents.⁵

4. According to the Sabra Defence, these documents are relevant to whether Purple 018 was properly attributed to Mr Sabra at the relevant time, and whether the user(s) of that mobile were engaged in the activities alleged against Mr Sabra in the amended consolidated

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, transcript of 7 February 2018, pp 3-4, 46-47; F3414, Sabra Defence Application for Admission into Evidence of Twenty Two Documents Marked for Identification, 16 November 2017 (public with confidential annexes A-H) (‘Sabra Defence application’).

² F2720, Amended Consolidated Indictment, 12 July 2016, paras 4, 14-18, in particular para. 15 (e); STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Annex A, Prosecution’s updated pre-trial brief, dated 23 August 2013, 23 August 2013, para. 55.

³ See amended consolidated indictment, paras 3 (b)-(d), 5, 15-18, 23, 28-29, 44, 48 (c), 64 (f), 66 (f), 68 (h), 70 (h).

⁴ Transcript of 9 November 2017, pp 107-108. Most of the documents, except for seven call sequence tables, were marked for identification rather than admitted into evidence.

⁵ Sabra Defence application, paras 1-2, 6, 76.

indictment. The Prosecution opposed the Sabra Defence's application. In particular, it objected to the admission into evidence of the call sequence tables, and two documents based on them, on the ground that the Sabra Defence did not provide any detail on the methodology of the production of the call sequence tables and that they contained irregularities.⁶

5. On 27 November 2017, the Trial Chamber ordered counsel for Mr Sabra to provide revised call sequence tables taking into account the Prosecution's objections, and the statement(s) of their creator(s).⁷ The Sabra Defence subsequently provided 'the "Statement" of the creator of the 13 [call sequence tables in the form of] a signed internal memorandum'. It did not revise the call sequence tables, submitting that the Prosecution's objections did not apply to them.⁸ After the Prosecution notified the Trial Chamber of continued objections to the admission of the documents, pointing to irregularities in some of them, the Sabra Defence revised seven call sequence tables and disclosed them, together with those which remained unchanged.⁹ The Prosecution maintained its objection to the admission into evidence of the revised and the other call sequence tables.¹⁰

THE EVIDENCE

6. The documents consist of two PowerPoint presentations prepared by the Sabra Defence, and the underlying 13 call sequence tables; one PowerPoint presentation related to the analysis of certain mobile cells and their predicted coverage; two extracts of responses to requests for assistance from the Ogero telecommunications company; a United Nations

⁶ F3422, Prosecution Response to 'Sabra Defence Application for Admission into Evidence pursuant to Rule 149 (C) of Twenty Two Documents Marked for Identification', 23 November 2017 (confidential with confidential annex A) ('Prosecution response'), paras 10, 22.

⁷ In a decision addressing a Sabra Defence request for clarification, it extended the deadline to comply with the order. *See* F3428, Order to the Sabra Defence and the Prosecution regarding Call Sequence Tables Submitted for Admission into Evidence, 27 November 2017 ('Order of 27 November 2017'); 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 ('Call sequence tables decision of 7 December 2017'), para. 7.

⁸ F3471, Sabra Notification in relation to Order to the Sabra Defence and the Prosecution regarding Call Sequence Tables Submitted for Admission into Evidence, 8 December 2017 ('Sabra Defence Notification'), paras 1, 4-5.

⁹ F3507, Prosecution Notification of its Continued Objection to the Admission of 13 Documents Tendered by the Sabra Defence, 8 January 2018 (confidential with confidential annex) ('Prosecution Notification of 8 January 2018'), paras 1, 26-32; F3511, Response to 'Prosecution Notification of its Continued Objection to the Admission of 13 Documents Tendered by the Sabra Defence', 11 January 2018 (confidential) ('Sabra Defence Response of 11 January 2018'), para. 2; disclosure batch 3484 of 11 January 2018. The Trial Chamber varied the time, under Rule 9, for the Prosecution to reply to the Sabra Defence response. *See* email from the Trial Chamber's senior legal officer to the Parties and Legal Representatives of Victim dated 15 January 2018.

¹⁰ F3532, Prosecution Second Notification to the Trial Chamber of its Continued Objection to the Admission of 13 Documents Tendered by the Sabra Defence, 23 January 2018 (confidential) ('Prosecution Second Notification'), paras 1, 26.

International Independent Investigation Commission (UNIIC) internal memorandum; an internal memorandum of the Lebanese Internal Security Forces (ISF); a spreadsheet with SMS content related to a mobile number, and an extract from this spreadsheet.

General submissions, including on applicable law

7. Counsel for Mr Sabra put these documents to Mr Platt and Mr Donaldson during their cross-examination to challenge the credibility of the Prosecution's case and the independence and impartiality of the Prosecution witnesses. They sought their admission under Rule 149 (C) of the Special Tribunal's Rules of Procedure and Evidence. The Sabra Defence relied on the Trial Chamber's decisions to argue that a variance in the order for the presentation of evidence, under Rule 146 (B),¹¹ was not necessary as the documents were put to Prosecution witnesses in the normal course of cross-examination. The Defence described their relevance and probative value when the documents were used in court.¹²

8. The Prosecution objected to the admission of the documents. First, the Sabra Defence erroneously tendered the documents under Rule 149 (C), as this provision outlines the principles under which the Trial Chamber may admit evidence but cannot be used to tender it. Further, it incorrectly stated that the documents were tendered through Mr Platt and Mr Donaldson. The documents were not produced by them, rather they were merely shown to these witnesses, who could provide, at best, only limited comments on their content. Further, one document—the ISF internal memorandum—is a witness statement and the Trial Chamber has held that tendering witness statements requires a variation in the sequence of the presentation of evidence. Trial efficiency and the interests of justice require that the tendering of Defence material during the Prosecution case be kept to a minimum. In any event, the Sabra Defence has not established the documents' relevance, reliability and probative value.¹³

9. The Sabra Defence replied that the Prosecution's assertion that tendering Defence material during the Prosecution case should be kept to a minimum has no legal or factual

¹¹ 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'.

¹² Sabra Defence application, paras 4, 24, 80-83.

¹³ Prosecution response, paras 3-8, 53.

basis. It relied on Rule 150 (I)¹⁴ and submitted that witnesses do not need to author a document for it to be tendered through them. The documents are relevant to the Prosecution's attribution of Purple 018 to Mr Sabra at the relevant time, and to its user's involvement in the activities alleged in the amended consolidated indictment. The Defence does not need to explain how exactly it will rely upon the tendered documents in its final submissions as a requirement for admission.¹⁵

Discussion on legal principles and applicable law

10. Mr Platt and Mr Donaldson are not the authors of the documents that the Sabra Defence sought to have admitted through them. The Trial Chamber agrees, however, with the case law of the International Tribunal for the Former Yugoslavia (ICTY) that a party may tender a piece of evidence through a witness who is its author, or who can speak to its origins and or content or make some other positive comments about it. Or, alternatively, when it is tendered to challenge the witness's credibility, including in situations where the witness states that they may have no knowledge of the document and may reject its contents. Nevertheless, when a witness cannot comment on a document or say anything meaningful about it, the Trial Chamber may assess that a witness cannot lay the necessary foundation for its admission.¹⁶

11. Further, while relying on the relevance and probative value described in court, the Sabra Defence provided additional information in the application. The Trial Chamber will assess whether the requirements for admission have been established.

12. The Trial Chamber agrees with the Prosecution that Rule 149 (C)—which provides: 'A Chamber may admit any relevant evidence which it deems to have probative value'—outlines the principles to admit evidence. Rule 154 'Admission of Documents' applies to the admission of evidence in the form of a document, and equally applies to admitting documents 'from the bar table' or through a witness. Material tendered under Rule 154—like any other evidentiary material—must meet the basic requirements for admission in being relevant and

¹⁴ Rule 150 (I) provides that: '[c]ross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining Party, to the subject-matter of that case'.

¹⁵ F3429, Sabra Defence Reply to Prosecution Response to "Sabra Defence Application for Admission into Evidence pursuant to Rule 149(C) of Twenty Two Documents Marked for Identification", 27 November 2017 ('Sabra Defence reply'), paras 2-4, 10.

¹⁶ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Guidelines for the Admission of Evidence through Witnesses, 19 May 2010, paras 10-11, 14, 25; ICTY, *Prosecutor v. Milutinović*, IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, fn. 49; ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Admission of Documents in connection with Testimony of Defence Witness Obrad Stevanović, 8 July 2005, p. 3.

probative, and its probative value must not be outweighed by its prejudicial effect. Therefore, the Sabra Defence's failure to identify the applicable provision does not affect the validity of its application or the Trial Chamber's power to admit the evidence.

13. The Trial Chamber has already held that varying the order for the presentation of evidence under Rule 146 (B) is not necessary for documents tendered under Rule 154.¹⁷

14. Finally, the Prosecution submitted that one document proposed for admission, the ISF internal memorandum, is a witness statement. However, it also submitted that two documents, the ISF memorandum and the UNIIC memorandum, cannot be admitted either under Rule 149 (C) or Rule 155—the provision to admit witness statements.¹⁸ The Sabra Defence, in replying to the Prosecution, rejected that both documents are witness statements.¹⁹ The Trial Chamber will consider below whether each is a witness statement.

a) 13 call sequence tables – six call sequence tables underlying exhibit 5D348 MFI and seven underlying exhibit 5D356 MFI

Submissions

15. The six call sequence tables underlying exhibit 5D348 MFI, and the seven call sequence tables underlying exhibit 5D356 MFI, are extracted from the Prosecutor's database of Lebanese call data records, specifically from one termed the 'Golden Copy Structures Query Language' (GC-SQL-02) database, using data sets, respectively, for 2004 and 2005, and for 2003, 2004, 2005 and 2006. The call sequence tables carry the same relevance and probative value as the relevant PowerPoint slides, discussed below, which are based on data taken from them. In its application, the Sabra Defence submitted that the methodology used for their creation was identical to that described in previous submissions before the Trial Chamber.²⁰

16. The Prosecution responded that the methodology previously used by the Sabra Defence was problematic and that, since the Defence failed to provide any detail on the methodology for the creation of the 13 call sequence tables, the Prosecution could only

¹⁷ 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 bar table motion'), paras 107-116.

¹⁸ Further, the Prosecution refers to the UNIIC memorandum, in one instance, as a 'witness statement'. See Prosecution response, para. 46.

¹⁹ Sabra Defence reply, paras 6-7, 9.

²⁰ Sabra Defence application, paras 1, 6, 60, 63-64, 75-77; see also Sabra Defence reply, para. 12.

assume that these call sequence tables presented the same reliability issues as those previously tendered, such as not being comprehensive and containing duplications of rows. The Prosecution submitted that, to be admissible, the tables needed to be re-made and re-tendered, accompanied by the witness statements of their creators.²¹

17. According to the Sabra Defence, the ‘internal memorandum’ it provided following the Trial Chamber’s order of 27 November 2017, allows the Prosecution to test the accuracy of the call sequence tables and the Trial Chamber to verify their authenticity. It is not filed on the record, is not a witness statement under Rule 155 and no possibility of cross-examination arises as a result. On this understanding, the Defence provided it without being ‘in potential violation of Article 7 of the Code of Conduct for Defence Counsel’.²² The Sabra Defence did not modify the call sequence tables, as it was ‘unclear as to the modifications required’ and the blanket Prosecution’s objections that they were not a chronological sequence of calls and contained duplicates did not apply to them.²³

18. The Prosecution notified the Trial Chamber of its continued objection to the admission of the call sequence tables, submitting that the Sabra Defence deliberately breached the Trial Chamber’s order of 27 November 2017 to provide revised call sequence tables and the statement(s) of their creator(s). First, the internal memorandum was not filed or made accessible through the Legal Workflow database. Therefore, it is not on the trial record or properly before the Trial Chamber, and this does not allow the Appeals Chamber to review the evidence. Secondly, the Sabra Defence failed to correct irregularities in the call sequence tables, as directed. Further, the memorandum is not a statement for the purpose of the order. It is not in accordance with the Practice Direction on witness statements.²⁴ Among other features, there is no statement of the witness’s awareness of the obligation to tell the truth and

²¹ Prosecution response, paras 9-18.

²² See STL/CC/2012/03, Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, adopted 14 December 2012, Article 7 ‘Duration of representation agreement’.

²³ Sabra Defence Notification, paras 1-5. The Sabra Defence submitted that the call sequence tables did not contain more than one record for each contact as the queried results are filtered for records with the target number as ‘A-Number’. The Defence rejected the characterization of multiple records depicting the same contact as ‘duplicate’: ‘Whereas the information regarding the date, time, direction and duration of the contact may be the same, each “duplicate” record identifies the activated cell, the associated handset and the subscriber serial number of the party listed as “A_Number”’. See Sabra Defence reply, para. 13.

²⁴ 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.

the consequences of perjury. This is in an apparent attempt to avoid scrutiny in the same manner as the Prosecution's methodology was scrutinized: through cross-examination.²⁵

19. The cross-examination of the 13 call sequence tables' creator 'may be necessary' when irregularities, or even differences in approach, occur across the tables. Further, while the Sabra Defence referred to the 'potential violation of Article 7 of the Code of Conduct for Defence counsel', there is no justification based on this Code for the creator of the call sequence tables not to provide a proper statement. Using a staff member to create evidence for a trial inevitably gives rise to the possibility of that person having to testify to explain the evidence. Finally, according to the Prosecution, the fact that the person who signed the internal memorandum created all the call sequence tables appears to be factually incorrect, because that person does not appear to have been employed at the Special Tribunal at the time of completion for at least two of them.²⁶

20. As to the irregularities, the Prosecution pointed to three call sequence tables containing duplicate rows—which result in a misrepresentation of the call volumes—and to six where the manual conversion of cell ID to cell names was not performed systematically. As the 13 call sequence tables are relied upon for geographic profiling, these irregularities undermine their reliability. Further, four call sequence tables appear to cover multiple subscriber periods, which demonstrates that there was more than one user of the given number during the time covered by the call sequence tables. In particular, one call sequence table underlying exhibit 5D356 does not cover only the subscriber period during which the third-party contact number was in contact with Purple 018. Moreover, no reference is made in the memorandum to the methodology for choosing target date ranges. The questionable properties in the call sequence tables are not adequately explained by the memorandum, which does not provide for their verification. Therefore, the call sequence tables are inadmissible.²⁷

21. The Sabra Defence responded that, for the first time the Prosecution raised specific—and new—objections, after previously pointing only to generic ones. Having reviewed the call sequence tables in this light, the Sabra Defence modified seven of them to address the flaws it had 'overlooked' related to duplication of records and conversion of cell ID to cell names. It disclosed the revised call sequence tables and sought their admission into evidence in lieu of

²⁵ Prosecution Notification of 8 January 2018, paras 1, 3-6, 17-25.

²⁶ Prosecution Notification of 8 January 2018, paras 7-8, 33-47, annex A.

²⁷ Prosecution Notification of 8 January 2018, paras 27-32; *see also* Prosecution Second Notification, para. 12, fn. 19.

those originally tendered. It submitted that the modifications do not impact the content of exhibits 5D348 MFI or 5D356 MFI or require their amendment, because the duplicates were outside the analysed time frame and the overlooked conversion of cell names concerned cells which are not subject to the Defence analysis. Further, as the modifications do not deviate from the methodology described in the memorandum, a new memorandum is not required and the Trial Chamber is able to verify the call sequence tables.²⁸

22. The criticism of the memorandum for its failure to explain the selected target date range ignores its purpose—to demonstrate the *prima facie* reliability of the call sequence tables—and relates instead to their relevance. As to the form of the memorandum, it complies with the Trial Chamber’s order of 27 November 2017. The Sabra Defence ensured that the memorandum featured the same characteristics and terms of the memorandum provided by the Ayyash Defence which the Trial Chamber, in a decision of 7 December 2017, found compliant with a similar order.²⁹ The Prosecution ignored that decision. As to the manner in which the memorandum was provided, the Trial Chamber did not instruct the Defence to tender it into evidence, and correspondence can become part of the case record, if the circumstances necessitate. The memorandum contains a detailed methodology used to create the call sequence tables and the Prosecution neglected to state that it is unable to recreate the tendered call sequence tables.³⁰

23. The Sabra Defence claimed that the Prosecution raised serious allegations against the Sabra Defence team as to its deliberate disobedience of the Trial Chamber’s order and personal accusations targeting a junior member of the team. Such allegation on falsification of information has no merit. This person was the author of the call sequence tables and a member of the Defence team in the months and years when the Prosecution questioned this based on this person’s name not being copied on Sabra Defence mail correspondence. The Sabra Defence stated that the allegations should be withdrawn from the case record immediately, and sought a Trial Chamber’s order for the withdrawal of the relevant paragraphs in the Prosecution’s filing. Irrespective of any future redactions, this allegation is

²⁸ Sabra Defence Response of 11 January 2018, paras 1-2, 17-20, fn. 25.

²⁹ See F3463, Decision Admitting into Evidence Call Sequence Tables Tendered by the Ayyash and Merhi Defence – Exhibits 1D453, 3D431, 3D433, 3D436 and 3D437 Marked for Identification, 7 December 2017 (‘Decision of 7 December 2017’).

³⁰ Sabra Defence Response of 11 January 2018, paras 11-16.

permanently on the record, accessible to many employees of the Special Tribunal and potentially harms the future employment of this Defence team member.³¹

24. The Prosecution in its reply reiterated its objection to the admission of the call sequence tables, seeking the dismissal of the filing in which the Sabra Defence notified its provision of the ‘statement’ by their creator. In the alternative, it requested the Trial Chamber to further order the Sabra Defence to comply with the order of 27 November 2017, by producing a statement of the call sequence tables’ creator(s), in the proper format, and to make that person available for cross-examination before admitting any of the call sequence tables.³²

25. The Prosecution submitted that the Sabra Defence’s ‘re-service’ of the seven amended call sequence tables, with more than 620 amendments, validates the Prosecution’s previous objections and leaves important questions unanswered. Contrary to previous Sabra Defence’s assertions that the call sequence tables contained no duplicate rows, the Defence did its manual checks only after the Prosecution raised specific issues. Further, at least one revised call sequence table still includes a duplicate row. On this basis, it is open to the Trial Chamber to conclude that these exhibits lack the preparatory care to be safely relied upon. The responsibility to be accurate and precise lies with the Party seeking the admission of material into evidence.³³

26. In addition, the content of the memorandum is insufficient to explain the Defence methodology for the creation of the call sequence tables. It contains no reference to any peer review stage—the absence of which could explain the recurrent flaws in the call sequence tables—and no explanation as to the methodology for ‘manual checks’ and manipulation to remove irregularities, including the assessment and removal of duplicates. Contrary to the Sabra Defence’s submissions, these steps deviate from the methodology outlined in the internal memorandum. The removal of duplicates by the Sabra Defence without any revision of the internal memorandum suggests that the memorandum does not fulfill its purported purpose.³⁴

27. The Prosecution reiterated its submission that the Sabra Defence breached the order by not filing a witness statement by the creator or modifier of the tendered call sequence tables

³¹ Sabra Defence Response of 11 January 2018, paras 5-11, 23.

³² Prosecution Second Notification, paras 1, 26.

³³ Prosecution Second Notification, paras 2, 6-11, 14.

³⁴ Prosecution Second Notification, paras 15-17.

and that four of them cover multiple subscriber periods. Further, the present circumstances are significantly different from those considered in the Trial Chamber's decision admitting into evidence a call sequence table tendered by the Ayyash Defence, since the Ayyash Defence obtained an ERN³⁵ and filed its internal memorandum. As to the 'questions' raised in relation to the signatory of the internal memorandum—who is not named in a public filing—there is no ground for the Prosecution to withdraw them. The Prosecution placed its concerns on the record. It made no allegations against the signatory of the internal memorandum, and only questioned the accuracy of the assertions made about that person in the filing, and therefore by Defence counsel. The questions raised would be, and may be, valid lines of cross-examination, also in consideration of the Sabra Defence's failure to clarify the role, qualifications or training of the memorandum's signatory.³⁶

28. Finally, the Sabra Defence did not withdraw the original seven call sequence tables replaced by modified versions, nor did it explain which tables are replaced by which. If there is confusion in the manner in which exhibits are tendered, the application should be simply dismissed.³⁷

Discussion and decision

29. The 13 call sequence tables are relevant to the Sabra Defence's challenge to the Prosecution case. The internal memorandum provided by the Sabra Defence is signed by a member of its team. It contains information on the methodology for the creation of the 13 call sequence tables, including on the queries used for extracting the records from the GC-SQL, the process of copying the data, the completion date for each call sequence table, the process of transfer of the spreadsheet, and the formatting such as the addition of a cell name column. Distinct from the Prosecution call sequence tables, the target number appears under the column 'A_number', and the column 'Call_Type' reflects whether the call is outgoing or incoming—and whether it was a voice call or an SMS. With regard to the formatting, the memorandum states that the results were filtered to select records with the target number as 'A number', and that, by default, 'this process eliminated any record which may depict the same telephonic activity as the selected record'.

³⁵ ERNs are 'electronic registration numbers' or 'evidence reference numbers' used to catalogue and identify the Parties' documents and other evidence. See F2035, Decision on Prosecution Motion to Admit the Statements of Witness PRH424, 30 June 2015, fn. 5.

³⁶ Prosecution Second Notification, paras 12-13, 18-21.

³⁷ Prosecution Second Notification, paras 22-24.

30. The memorandum, however, does not explain the methodology for manual checks such as the assessment and removal of duplicates, which were performed in producing the revised call sequence tables. On the contrary, based on the memorandum and previous assertions by the Sabra Defence, the originally tendered call sequence tables were not supposed to contain any duplicative records. Therefore, this reflects a deviation and apparent inconsistency in relation to the methodology described in the internal memorandum.

31. However, the Sabra Defence removed the duplicates in the flawed call sequence tables, with apparently one exception. Further, it corrected another irregularity, by converting the numerical cell ID to cell names where this was overlooked. The Prosecution did not claim that it could not recreate the call sequence tables on the basis of the Sabra Defence's internal memorandum. It did not point to any specific deficiency in the explanations provided in the internal memorandum, apart from those concerning the removal of duplicates or the absence of a peer review process, nor did it point to flaws in the call sequence tables beyond those the Sabra Defence addressed and corrected. Further, it did not respond to the Sabra Defence's submission that the duplicates—which have been removed—occurred in sections outside the timeframe analysed in the relevant PowerPoint presentation, between 1 September 2004 and 31 March 2005. For these reasons, and since the Trial Chamber is otherwise satisfied with the explanations in the internal memorandum about the methodology used to create the tables, it finds them, after having carefully reviewed their content and format, *prima facie* reliable and hence of some probative value for admission into evidence.

32. As to the Prosecution's objections that certain call sequence tables may cover multiple subscriber periods and on the methodology for choosing the target date ranges, they relate to the call sequence tables' relevance and probative value, which was argued in court and in previous written submissions. The Trial Chamber finds that the requirements for admission have been established, as also explained in paragraph 39 below. The Prosecution may raise these objections—or any other on definitive proof of reliability—in its submission on the weight to be given to these call sequence tables. Their assessment will be a matter of weight.

33. However, the Trial Chamber instructed the Sabra Defence to revise and replace the revised call sequence table for the mobile number ending in 112 with ERN 1DT5-12001-

1DT5-13288, as it contained a duplicate record which the Sabra Defence noted but failed to remove.³⁸

34. While the internal memorandum is not formally termed a ‘statement’, it is in a form which in substance is consistent with a statement. In its order of 27 November 2017, the Trial Chamber specifically ordered the Sabra Defence to provide ‘statement(s)’, and not ‘witness statement(s)’.³⁹ The internal memorandum is very similar in the form, and the type of information provided, to the document the Ayyash Defence filed upon a Trial Chamber’s order to produce a statement from the creator of a modified call sequence table.⁴⁰ The Trial Chamber found that this complied with its order.⁴¹ The Trial Chamber similarly finds that the internal memorandum provided by the Sabra Defence is in substance consistent with its order of 27 November 2017.

35. However, the internal memorandum was not filed and was not on the ‘trial record’—which the Prosecution identifies as distinguishing this case from the decision admitting the call sequence table produced by the Ayyash Defence. The Trial Chamber has held that material supporting the admission of documents into evidence need not be admitted into evidence, or moved for admission, but that the court record must sufficiently identify the documents the Trial Chamber has examined for that purpose.⁴²

36. Here, the memorandum was provided to the Trial Chamber and the Parties by email, and therefore was not properly identified in the court record. The Sabra Defence must assign an ERN to the memorandum, for it to be catalogued and identified in the court record, before the Trial Chamber will formally admit the call sequence tables and the two relevant PowerPoint presentations into evidence.⁴³

³⁸ Prosecution Second Notification, para. 9. In the decision delivered in court on 7 February 2018, the Trial Chamber instructed the Sabra Defence to revise this call sequence table and disclose it to the Trial Chamber and the Parties. This was done on that day, in disclosure batch 3506. *See* transcript of 7 February 2018, pp 3-4.

³⁹ Order of 27 November 2017. *See also* F3537, Decision Denying Admission into Evidence of Two Call Sequence Tables Tendered by the Oneissi Defence, 26 January 2018 (‘Decision of 26 January 2018’), paras 23, 33.

⁴⁰ F3424, Order to the Ayyash Defence and the Prosecution regarding Call Sequence Table Exhibit 1D453 Marked for Identification, 24 November 2017.

⁴¹ Decision of 7 December 2017, para. 13.

⁴² F2899, Decision on the Prosecution Motion for the Admission of Records Received from the Traffic, Truck, and Vehicle Management Authority, 9 December 2016, paras 25-26.

⁴³ In the decision delivered in court on 7 February 2018, the Trial Chamber instructed the Sabra Defence to assign an ERN to the internal memorandum. This was done on that day. The ERN is 1DT5-13480-1DT5-13484. *See* transcript of 7 February 2018, pp 3-4, 46.

37. The Trial Chamber also sees no relevant issue relating to the the Code of Professional Conduct for Defence Counsel. It has already decided twice on the matter.⁴⁴

38. Regarding who signed the internal memorandum, the Sabra Defence has stated that the signatory created the call sequence tables and was a member of the Defence team during periods—which were questioned by the Prosecution—when the call sequence tables were completed. On this point, the Prosecution made no specific reply. Further, as the Prosecution submitted, someone outside the Defence team may create a call sequence table.⁴⁵ Moreover, for a call sequence table’s reliability, a Party does not need to demonstrate that the creator had any particular role or qualification. The withdrawal of the relevant part of the filing is not needed—the Trial Chamber’s view is that no harm to anyone may result from it—and a public redacted version, as offered, will be filed. The signatory’s name should be redacted in the public filing.

39. As to the call sequence tables’ relevance and probative value, the Sabra Defence has explained it in relation to the two PowerPoint presentations used as demonstrative evidence. The Sabra Defence tenders them to challenge the Prosecution’s case that the cell site activities of Purple 018 lead, as the only reasonable conclusion, to its user’s involvement in the acts pleaded in the amended consolidated indictment. The Trial Chamber finds these call sequence tables relevant and *prima facie* probative of certain similarities between the cell site activities of Purple 018 and those of other numbers and of the usage of ‘COLA area’ cells by Purple 018’s contacts.⁴⁶ This will be considered in more detail in the analysis of the two documents relying upon them.⁴⁷

40. For these reasons, the Trial Chamber admitted into evidence—pending the internal memorandum being assigned an ERN—three call sequence tables marked for identification as exhibits 5D352 to 5D354, another three call sequence tables not marked for identification as originally tendered,⁴⁸ six revised call sequence tables⁴⁹ and one revised call sequence table pending its further revision as described in paragraph 33 above.

⁴⁴ See Call sequence tables decision of 7 December 2017, para. 8; Decision of 26 January 2018, paras 28-38.

⁴⁵ Prosecution Notification of 8 January 2018, para. 38.

⁴⁶ See para. 41 for an explanation of the ‘COLA area’.

⁴⁷ See below, paras 41-60.

⁴⁸ Call sequence tables with ERNs 1DT5-5118-1DT5-5790; 1DT5-5791-1DT5-6202; 1DT5-4637-1DT5-5117.

⁴⁹ Call sequence tables with ERNs 1DT5-11433-1DT5-11564, 1DT5-11565-1DT5-11693, 1DT5-13289-1DT5-13349, 1DT5-11158-1DT5-11432, 1DT5-11694-1DT5-11869, 1DT5-11870-1DT5-12000.

b) Documents marked for identification during Mr Platt's cross-examination

(i) PowerPoint presentation 'Phone numbers with cell site activities similar to Purple 018' – exhibit 5D348 MFI

41. The so-called COLA cells are three Alfa cells (COLA 1, COLA2 and COLA3) near the Arab University Mosque in Beirut. Mr Platt lists them among the cells providing coverage within a 500 metre radius of the Arab University Mosque. He lists other cells as providing coverage within a 500 to 1000 metre radius of that mosque. Mr Platt adopted the term 'in the vicinity of' to illustrate that the predicted best server coverage for an activated cell offers service within 500 metres of a particular location, and the term 'in the area of' to illustrate that the predicted best server coverage for an activated cell offers service within 500 to 1000 metres of that particular location. The Sabra Defence uses the expression 'COLA area' cells to refer to the cells listed by Mr Platt as providing coverage within a 500 and a 500 to 1000 metre radius of the Arab University Mosque.⁵⁰ To illustrate the COLA cells predicted coverage, a Google Earth satellite photograph with these cells' coverage overlaid is extracted below from slide 3 of exhibit 5D348 MFI (now exhibit 5D348).



⁵⁰ See exhibit 5D356 MFI 'Use of "Cola Area" Cells by Contacts of Mobile *018', slide 3 (which reads: "Cola area' cells defined by Mr. Platt's Annex B (D0352989 at D0353433-34)'). See exhibit P1783 (Mr Platt's 'Communications Evidence Concerning the Assassination of Rafik Hariri: Chronology Report'), paras 22-23, and its annex B 'Cell Coverage (Vicinity and Area)', paras 1273-1274.

42. This PowerPoint presentation analyses six mobile numbers with ‘cell site activities similar to Purple 018’. It is based on data from six call sequence tables⁵¹ and comprises 88 slides, containing charts, diagrams, extracts of call sequence tables, and Google Earth maps to show the predicted coverage of certain cells. Three numbers were operated by the Lebanese Telecommunications company Alfa and three by Touch.⁵² The final slide, on page 88, is a ‘Summary of Statistics’ which notes (i) whether these numbers activated COLA cells before Mr Abu Adass disappeared; (ii) whether they activated COLA cells during the ‘COLA phase’—a ten day period spanning from 29 December 2004 to 7 January 2005; (iii) for which payphones they appeared nearby on 14 February 2005, within 30 minutes of respective false claim of responsibility calls; and (iv) whether they were inactive or had reduced activities on 16 January 2005.

Mr Platt’s evidence

43. In examination in chief, Mr Platt testified that, on nine of the ten days between 29 December 2004 to 7 January 2005, either one or both purple mobiles attributed to Mr Sabra and Mr Oneissi activated the COLA cells multiple times. He described this period as the ‘COLA phase’.⁵³ Before 22 December 2004, and certainly from 1 August 2004—the date from which all cell data is available—Purple 018 and Purple 095 activated the COLA cells only on a handful of occasions, and never over a prolonged period such as this.⁵⁴ The Prosecution case is that the ‘COLA phase’ coincided with the period when the Accused (Mr Sabra and Mr Oneissi operating as a team) were searching the Arab University Mosque for a suitable individual, a scapegoat, to be used in the false claim of responsibility video.⁵⁵

44. Mr Platt also pointed to the contemporaneous inactivity of the three purple mobiles, and two associate purple mobiles, on 16 January 2005, as consistent with an operational need that they not be used on that day. The Prosecution case is that the abduction of Mr Abu Adass—chosen for the false claim of responsibility video—took place on 16 January 2005.⁵⁶ Mr Platt also described the cell activities of the purple mobiles on 14 February 2005, when

⁵¹ Transcript of 6 April 2017, pp 61-64; Sabra Defence application, paras 59-60.

⁵² Transcript of 6 April 2017, p. 63.

⁵³ Transcript of 23 March 2017, pp 40, 44.

⁵⁴ Transcript of 9 February 2017, pp 27-28.

⁵⁵ Transcript of 6 February 2017, p. 18; transcript of 8 February 2017, pp 16-17, 78-79; exhibit P1780 (‘Chronology of Relevant Events’), pp 12-15; exhibit P1782 (‘Narrative Overview of Telephone Activity and Events relevant to the Case for the Prosecution’), paras 401, 407, 410, 423.

⁵⁶ Transcript of 14 February 2017, pp 59-70; exhibit P1807 (‘Chronology Power Point 1 January to 17 January 2005’), slides 375-378.

four calls were made from four different payphones to the offices of the Reuters and Al-Jazeera news networks, in Beirut, in relation to the false claim of responsibility.⁵⁷ On 15 and 16 February 2005, all three users stopped using their purple mobiles.⁵⁸

45. During cross-examination, Mr Platt testified that he did not recall that the Prosecution analysis team identified any other number which had both a ‘COLA phase’ profile and a connection to one or more of the payphones.⁵⁹ With regard to six numbers analysed in exhibit 5D348 MFI, he stated that while these numbers did not have the same profile as Purple 018 or Purple 095 they had some similarities in relation to both the COLA cells and the payphones areas.⁶⁰

46. Mr Platt remarked on certain aspects of the analysis of the six numbers in exhibit 5D348 MFI. With regard to one number, ending in 027, he agreed that the user activated COLA cells from 13 December 2004, but pointed to the fact that the user continued to activate the COLA cells until 20 December 2005—and counsel for Mr Sabra acknowledged that the analysis only went up to the end of 2005. Further, Mr Platt agreed that this number was inactive on 16 January 2005, but underlined that it was inactive on 19 other days between 1 September 2004 and 16 February 2005 as well.⁶¹ With regard to the number ending in 920, he testified that isolating the activity for this number on 16 January 2005 was misleading, because on other days there were also only a few calls for that number.⁶²

Submissions

47. According to the Sabra Defence, exhibit 5D348 MFI sets out six mobile numbers with cell site activities similar to Purple 018. The Sabra Defence relies on the presentation as ‘demonstrative evidence’. It shows that the cell site activities relied upon by the Prosecution to incriminate the user(s) of Purple 018 reasonably allow for an innocent inference. Mr Platt’s comments ‘*further demonstrate that the discovery of the purple group cannot possibly have resulted from a statistical analysis of the call data records of telephones located within the relevant cells at the relevant time*’.⁶³

⁵⁷ Transcript of 14 March 2017, pp 75-78; transcript of 15 March 2017, pp 30-31, 36-37, 40-43, 49-52, 58-59; exhibit P1780 (‘Chronology of Relevant Events’), pp 32-33.

⁵⁸ Transcript of 7 February 2017, pp 61-62.

⁵⁹ Transcript of 6 April 2017, pp 58-59.

⁶⁰ Transcript of 6 April 2017, pp 98-99.

⁶¹ Transcript of 6 April 2017, pp 65-66, 74-76.

⁶² Transcript of 6 April 2017, p. 91.

⁶³ Sabra Defence application, para. 59 (emphasis added).

48. The presentation is based on data from call sequence tables. The place-marks on the maps reflect the geographic coordinates from the Prosecution's GPS survey; the predicted coverage plots, cell site locations and azimuth in satellite images are based on materials obtained by the Prosecution from Alfa and MTC/Touch and disclosed to the Defence as 'KMZ' files to be loaded in Google Earth.⁶⁴ The creation of this PowerPoint presentation is not different from that of Prosecution slideshows which the Trial Chamber admitted into evidence.⁶⁵

49. The Prosecution objects to the document's admission as it is based upon the challenged call sequence tables. Moreover, the PowerPoint appears to be used to draw conclusions that could only be made by an expert and therefore could only be tendered through an expert witness called by the Sabra Defence, whom the Prosecution could cross-examine. The Prosecution's PowerPoint slides are distinguishable as they were tendered through the witness who prepared them and the underlying evidence was admitted into evidence after being tendered with detailed arguments on its relevance, reliability and probative value.⁶⁶

50. The Prosecution also submitted, in court, that in contrast to the Prosecution's call sequence tables, the Sabra Defence had not verified whether the mobiles' users were the same throughout the usage period, which is relevant because a mobile may have used COLA cells for a certain period of time when its user lived in that area, and not later due to a change in its user.⁶⁷

Discussion and decision

51. The Sabra Defence relies upon exhibit 5D348 MFI as 'demonstrative evidence'. The Trial Chamber has admitted documents, upon the request of both the Prosecution and the Defence, as 'demonstrative evidence', visual aids such as charts, graphs and diagrams prepared by one Party to assist the Trial Chamber—and the other Parties—in visualizing, following and hence understanding the evidence, especially in consideration of the length and

⁶⁴ 'KMZ is a file extension for a placement file used by Google Earth. KMZ stands for Keyhole Markup language Zipped. It is a compressed version of a KML (Keyhole Markup Language) file. Keyhole was the founding company of the Earth Viewer software that Google Earth was built upon'. Exhibit P1112 ('Demonstration of Single Person Use of Multiple Mobile Phones Using Cell Site Analysis – Suspects 4, 5, 6, 7 & 8 by J.E. Philips of East Coast Services Ltd produced for the Special Tribunal for Lebanon') (confidential), para. 4.2.2.2, fn. 7.

⁶⁵ Sabra Defence application, paras 60-62.

⁶⁶ Prosecution response, paras 22, 24-25.

⁶⁷ Transcript of 6 April 2017, p. 100.

complexity of the telecommunications evidence presented in this trial.⁶⁸ With respect to the portion of the tendered document that includes Google Earth satellite photographs with cell coverage overlaid, the Trial Chamber has previously admitted into evidence images of this type, without objection from the Prosecution.⁶⁹ This cell site information is already in evidence.⁷⁰

52. The Trial Chamber finds, for the reasons described above at paragraphs 29-38, that the underlying call sequence tables are reliable. The Trial Chamber considers this PowerPoint presentation as demonstrative evidence intended to assist its understanding of certain data from the underlying call sequence tables, which are tendered to challenge the Prosecution's case that Purple 018's cell site activities lead, as the only reasonable conclusion, to its user's involvement in the acts pleaded in the amended consolidated indictment. The call sequence tables are relevant and may be probative of certain similarities between the cell site activities of Purple 018 and other numbers. The PowerPoint presentation is in some ways tantamount to Defence final trial submissions, and the Trial Chamber will exercise its discretion to admit it into evidence for the limited purpose of better understanding the Defence case.

53. The Sabra Defence's tendering of this document through Mr Platt assisted the Trial Chamber to better understand this demonstrative evidence, and the underlying evidence. The Trial Chamber is not satisfied that the call sequence tables, or the PowerPoint presentation, demonstrate that the discovery of the purple mobiles could not have resulted from a statistical analysis of the call data records of mobiles located within the relevant cells—to the extent that the Sabra Defence claims so.

54. When assessing the weight to give to the underlying call sequence tables, the Trial Chamber may take into account that the Sabra Defence has not assessed whether, for these unattributed numbers, their subscribers or users may have changed.

⁶⁸ Transcript of 7 March 2017, pp 25-28; transcript of 17 January 2017, pp 11-12; transcript of 12 January 2017, pp 23-26; transcript of 3 October 2017, pp 53-54; F3125, Decision Denying Joint Defence Motion to Prevent the Prosecution Using Demonstrative Evidence (Power Point Slides) during Mr Andrew Donaldson's Testimony, 5 May 2017, paras 1, 10, 12, disposition; *see also* 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 bar table motion'), para. 37; F3445, Decision Partly Granting Sixth Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Fax, 30 November 2017 ('Decision on sixth Sabra bar table motion'), para. 40.

⁶⁹ *See, e.g.*, transcript of 23 March 2017, p. 65.

⁷⁰ *See, e.g.*, exhibit P1123 (the DVD with shape files for Alfa cell sectors in 2005, 2007 and 2010).

*(ii) PowerPoint presentation ‘Use of “Cola Area” Cells by Contacts of Mobile *018’ – exhibit 5D356 MFI*

55. This PowerPoint presentation shows, through tables and graphs, the activation of cells within 500 metres and within 500 to 1000 metres of the Arab University Mosque by seven unattributed mobile contacts of Purple 018—identified in Mr Donaldson’s attribution report⁷¹—from 1 September 2004 to 31 March 2005. It has 12 slides and relies on the data contained in seven underlying call sequence tables related to each of those numbers.⁷²

Mr Platt’s evidence

56. Mr Platt testified that the Prosecution investigations did not establish any association of the Accused with the COLA area in Beirut. Counsel for Mr Sabra suggested that investigators should have uncovered that the contacts of Purple 018 activated the COLA area cells a ‘reasonable number’ of times. Mr Platt testified that this was a valid point with regard to one of the numbers, the one ending in 112, given the volume of its calls activating the COLA area cells, whereas the activation of COLA area cells by the other numbers was generally sparse.⁷³

Submissions

57. The Sabra Defence submits that the document is used as demonstrative evidence and shows that the user(s) of Purple 018 had contacts in this area of Beirut, thereby challenging the Prosecution’s inference that Purple 018’s activation of the COLA cells in the period leading up to Mr Abu Adass’ disappearance was anomalous to its usage pattern. The Prosecution should have thoroughly investigated Purple 018’s contacts. Evidence that those contacts significantly used the COLA area cells is relevant because it may provide a potentially innocent reason for the purple phone’s user to be in that area.⁷⁴

58. The Prosecution responds that this PowerPoint presentation is inadmissible as it relies upon the challenged call sequence tables. Further, the same objections raised for the previous PowerPoint presentation apply, including that it appears to be used to draw conclusions that can only be made by an expert. It also submits that number 112 was only Purple 018’s 111th most frequent contact; that Purple 018 had contact with it only eight times over three years—

⁷¹ See exhibit P1953 (‘Evidence of Telephone Attribution – Assad Hassan Sabra, Version 4’).

⁷² Sabra Defence application, paras 73, 75; transcript of 7 April 2017, pp 26-28.

⁷³ Transcript of 7 April 2017, pp 22-23, 39-40.

⁷⁴ Sabra Defence application, para. 74; transcript of 7 April 2017, p. 41.

all before 21 October 2004; and that, over the ‘COLA phase’, it activated the COLA cells only once. The Sabra Defence replies that someone can visit a relative, friend or associate where they live or are without necessarily calling them.⁷⁵

Discussion and decision

59. The Trial Chamber finds, for the reasons described above at paragraphs 29-38, that the underlying call sequence tables are reliable. It also finds the call sequence tables relevant to and probative of the fact that Purple 018’s contacts used the ‘COLA area’ cells—meaning cells listed in Mr Platt’s report⁷⁶ as providing coverage within a 500 metre and a 500 to 1000 metre radius of the Arab University Mosque. The PowerPoint presentation is demonstrative evidence, intended to assist the Trial Chamber’s understanding of these call sequence tables. This document is also tantamount to Defence closing submissions, and the Trial Chamber exercises its discretion to admit it into evidence for this limited purpose.

60. The Sabra Defence’s tendering of the document through Mr Platt assisted the Trial Chamber in better understanding it, in the context of his analysis. When assessing the weight to give to the underlying call sequence tables, the Trial Chamber may consider factors highlighted by the Prosecution, including the frequency of contacts, time of their occurrence or whether any call sequence tables may cover multiple subscriber periods.

(iii) PowerPoint presentation “‘Cola Area’’ Cell Analysis - Coverage of COLA cells and cells listed by Mr Platt (Annex B) as providing coverage within 500 m and 1000 m of the Arab University Mosque’ – exhibit 5D355 MFI

61. This PowerPoint presentation has 17 slides. They contain Google Earth photographs related to the COLA cells in Beirut and cells surrounding them or photographs of specific locations. Most Google Earth photographs show the relevant cells’ best predicted coverage, and some include the ‘elevation profile’.

Mr Platt’s evidence

62. Mr John Edwards Philips (Witness PRH435), the Prosecution’s cell site analysis expert, did not draft a cell site expert report in relation to Purple 018. Mr Platt was asked

⁷⁵ Prosecution response, paras 22, 24-25; transcript of 7 April 2017, pp 34-36.

⁷⁶ Exhibit P1783 (‘Communications Evidence Concerning the Assassination of Rafik Hariri: Chronology Report’).

some questions on the basis of his working knowledge, albeit not an expert one, of cell site principles. He testified that, when the cell site mast is quite high, it occasionally cannot cover the area immediately in front of the mast, and a different cell, facing from a different direction, may cover that area. Additionally, a mobile in a high building at the highest elevation, as identified in slide 9, outside the COLA1 cell predicted coverage, could use that cell; and signals more easily propagate further afield in the coast, when the terrain falls away. Also experts sometimes use elevation profiles—as used in the slides—to assess terrain coverage.⁷⁷

63. Mr Platt agreed that one slide⁷⁸ contained photographs of a building hosting a cell site, but was not familiar with the photographs. He had been to the area but had not seen the actual cell site.⁷⁹ An aerial photograph⁸⁰ shows where the COLA cell site was in 2005, in a densely populated area with high-rise buildings. This same or a similar situation existed in 2005. Another shows where the Arab University Mosque was situated.⁸¹

64. Mr Platt also commented on three photographs showing the predicted coverage of cells that, in his reports, he listed among those providing coverage within a 500 metre and a 500 to 1000 metre radius of the Arab University Mosque. The cells providing coverage within the 500 metres ‘also offer coverage to many other areas’, the furthest distance from the COLA mast being one and a half kilometers. The predicted coverage of certain cells listed as providing coverage within a 500 to 1000 metre radius of the Arab University Mosque extended as far as three kilometres away from the Arab University Mosque.⁸²

Submissions

65. These slides are demonstrative evidence. Slides 1 to 11 depict the geographical particularities of Alfa cells COLA1, COLA2 and COLA3. The telecommunications companies did not take into account these particularities when generating the predicted coverage, but they impact the actual geographical range of cell reception by these cells, highlighting a discrepancy between the predicted and actual cell coverage of a given area.

⁷⁷ Transcript of 6 April 2017, pp 104, 116-119; transcript of 7 April 2017, pp 5-9.

⁷⁸ Slide 4 ‘Google Earth photographs of the building hosting the Cola cell-site’.

⁷⁹ Transcript of 6 April 2017, pp 119, 121.

⁸⁰ Slide 5 ‘Online aerial photograph of football stadium and Arab University campus with Cola cell-site arrowed’.

⁸¹ Slide 7 ‘Google Earth photograph Arab University campus, mosque and COLA cell-site’; transcript of 6 April 2017, pp 121-125.

⁸² Transcript of 7 April 2017, pp 9-15.

This information is relevant to show that Purple 018's activation of the COLA cells does not conclusively establish that its user was in the Arab University Mosque's vicinity when those cell towers were activated.⁸³

66. Slides 12 to 17 show the predicted coverage of the cell towers surrounding the COLA cells in relation to the Arab University mosque. The considerable distance between this predicted coverage and the mosque shows that when a mobile activated the cells described as providing coverage of 'the area of' the mosque, its user 'may be a considerable distance away from one specific point on a map'.⁸⁴

67. The predicted coverage plots, cell site locations and azimuths in satellite images are based on materials obtained by the Prosecution from Alfa and disclosed to the Defence as KMZ files to be loaded into Google Earth. Although the colour and style have changed for in-court presentation, the geographical features remain the same. The photographs on three slides were retrieved in a different manner: those on slides 4 and 6 were posted by users on Google Earth, and slide 5 was retrieved through a web search against the Arab University campus.⁸⁵

68. The Prosecution opposes the document's admission as it is not fully sourced, for example in relation to the Sabra Defence statements on 'geographical peculiarities'. The sources of this information must be cited and tendered prior to its admission. Further, the objections to the other PowerPoint presentations apply, including that it appears to be used to draw conclusions that only an expert could make.⁸⁶

69. The Prosecution raised several objections in court with regard to the questioning on this PowerPoint presentation, including in relation to the fact that technical and engineering questions should have been put to Mr Philips, and not to Mr Platt. It questioned the accuracy of technical data and images from Google Earth, which were not checked and validated, and, more specifically, objected to photographs supposedly showing the building hosting the COLA cell-site. The Prosecution submitted that they were posted by random members of the public on a website—a Google Earth-connected host—and that, without hearing about their provenance, the Prosecution did not accept that they showed the COLA cell site. The Sabra Defence replied that this was 'all [their] expert could find'. And if there was any evidence as

⁸³ Sabra Defence application, paras 67-68.

⁸⁴ Sabra Defence application, para. 69.

⁸⁵ Sabra Defence application, paras 70-71.

⁸⁶ Prosecution response, paras 23-25.

to provenance or dates for the photographs, it would provide it to the Trial Chamber and ‘it will be a matter of weight’.⁸⁷

Discussion and decision

70. The Sabra Defence submits that the PowerPoint presentation is ‘demonstrative evidence’. As noted above, visual aids may assist the presentation of evidence and the Trial Chamber in visualizing it. Some of the information in these slides is not in evidence and has not been separately tendered, including photographs⁸⁸ or data on elevation profiles.⁸⁹

71. All slides, with the exception of slides 1 and 4 to 7, are Google Earth satellite photographs with cell coverages overlaid on them. The Trial Chamber has previously admitted into evidence similar photographs tendered by the Defence, with no objection from the Prosecution.⁹⁰ This cell site information is already in evidence.⁹¹ The slides with information on elevation profile (9 to 11 and 17) graphically illustrate this additional data. The photographs in slides 4 to 7 show locations of interest, most of which Mr Platt recognised.

72. The Trial Chamber considers that all of the slides are admissible as demonstrative evidence, for the purpose of making the Sabra Defence’s cross-examination of Mr Platt understandable and graphically illustrating the Sabra Defence’s submissions. This document itself is therefore tantamount to Defence submissions. The adoption and meaning of the mapping terms ‘vicinity’ and ‘area’, as defined and used by Mr Platt in the report ‘Communications Evidence Concerning the Assassination of Rafik Hariri: Chronology Report’ (exhibit P1783), were analysed in his cross-examination with the help of slides which also graphically illustrate the 500 metre and 1000 metre radius areas or other distances. Most of the slides relate to a technical area, for example on ‘halo’ cells, on which Mr Platt is not an expert.⁹²

⁸⁷ Transcript of 6 April 2017, pp 117, 120-121.

⁸⁸ Slides 4-7.

⁸⁹ See slides 9-11, 17.

⁹⁰ See, e.g., transcript of 23 March 2017, p. 65.

⁹¹ See, e.g., exhibit P1123 (the DVD with shape files for Alfa cell sectors in 2005, 2007 and 2010).

⁹² With regard to slides 15 to 16, which refer to ‘halo’ cells and ‘the outer “halo” of cells’, the Trial Chamber notes that Mr Platt testified that he had heard this expression but was not an ‘authority’ on it and suggested that Mr Philips would be best placed to explain it. Counsel for Mr Sabra did not further question Mr Platt on this point and stated that he would explore the matter with Mr Philips (see transcript of 7 April 2017, p. 14). Counsel for Mr Sabra had previously questioned Mr Philips regarding the ‘halo’ concept but did not further question him on this matter following Mr Platt’s evidence. See transcript of 26 August 2015, pp 11-13.

c) Documents marked for identification during Mr Donaldson's cross-examination

73. The Sabra Defence tenders the first four documents—the ISF internal memorandum, the extract of SMS content for number 590, the underlying spreadsheet containing the SMS content for that number, and an Ogero spreadsheet—in relation to its suggestion that another person may be Purple 018's user. An independent investigation should have been conducted to rule him out as its user. The Sabra Defence describes this person as 'alternative user 1'. 'Alternative user 1' is a male and his first name is 'Asaad'.⁹³

74. The Trial Chamber has admitted into evidence several documents that the Sabra Defence showed to Mr Donaldson relevant to this matter. These include four UNIIIC investigators' notes from late 2008 and early 2009, concerning information received from the ISF that it first attributed 018 to 'alternative user 1'.⁹⁴ According to the last of these documents, the ISF expressed reservations about this attribution and attributed another number, ending in 590, to 'alternative user 1'.⁹⁵ The Trial Chamber has also admitted into evidence Mr Donaldson's investigator's note of 2 November 2012, stating that the ISF initially named 'alternative user 1' as the suspected user of 018 and subsequently revised this attribution to Mr Sabra as a result of its continued investigation.⁹⁶

(i) ISF internal memorandum – exhibit 5D417 MFI

75. Exhibit 5D417 MFI is a letter dated 22 July 2014 and an attached document—the 'internal memorandum'. It was submitted by the ISF's Director General, via the Lebanese Ministry of the Interior and Municipalities, in response to a Trial Chamber's order to the Government of the Lebanese Republic to cooperate with the Special Tribunal by providing information that the Sabra Defence sought in requests for assistance from the Lebanese

⁹³ Transcript of 28 September 2017, pp 67-68; transcript of 29 September 2017, p. 54.

⁹⁴ Transcript of 28 September 2017, pp 69-74, 88-91, 101, 112-13; exhibit 5D413 ('Investigator's note from the UNIIIC relating to a meeting on 12 November 2008 with the Lebanese Internal Security Forces'); exhibit 5D414 ('Investigator's note from the UNIIIC relating to information received on 22 November 2008 from the Lebanese Internal Security Forces'); exhibit 5D415 ('Investigator's note from the UNIIIC relating to information received on 23 December 2008 from the Lebanese Internal Security Forces'); exhibit 5D416 ('Investigator's note from the UNIIIC regarding information received on 8 January 2009 from the Lebanese Internal Security Forces').

⁹⁵ Transcript of 28 September 2017, pp 102-103.

⁹⁶ Exhibit 5D418 ('Investigator's notes of Mr Andrew Donaldson of 2 November 2012'), para. 44 (e); transcript of 29 September 2017, pp 11-14.

Government authorities through the Head of the Defence Office.⁹⁷ According to the letter, the ISF had provided a copy of the document to the UNIIC for its investigation.

76. The internal memorandum provides information resulting from ‘studying number 018’, including about the area of Beirut where the number was active, its frequent contacts, and the messages available for this number. Two SMS incoming messages are reproduced (they coincide with messages Mr Donaldson relies upon in his attribution report). In one, the recipient 018 is addressed as ‘Assad’⁹⁸ and in the other he is addressed as ‘Asodi’. According to the document, upon verification of the names ‘registered under [the] register number’ of the person associated with the landline with which 018 was found to be in frequent contact, two persons with the name of ‘Asaad’ were found; one of them was ‘alternative user 1’. According to a follow-up and ‘extensive’ analysis of third-party contacts, 018 was in frequent contact with members of Hasan Taan Sabra’s family, who are listed in the document, as resulting from this family’s registers. This list includes Mr ‘Assad’ Hasan Sabra.⁹⁹ The document also ‘deduces’, based on the information mentioned previously, that (i) number 018 ‘belongs to Mr Assad Hasan Sabra’ and not to ‘alternative user 1’, and (ii) the names ‘Asaad’¹⁰⁰ and ‘Asodi’ in the incoming SMSs ‘refer to Assad and not Asaad’.

Mr Donaldson’s evidence

77. Mr Donaldson testified that ‘alternative user 1’ was the first person reported by the ISF as the user of number 018.¹⁰¹ By the time UNIIC had developed the capacity to investigate in Lebanon fully and was making external inquiries, the ISF had revised this attribution to Mr Sabra.¹⁰² To his knowledge, ‘alternative user 1’ was never considered a suspect by the UNIIC investigation.¹⁰³ Mr Donaldson does not agree with the initial

⁹⁷ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1471, Further Decision on Motions Under Rule 20 (A) by Counsel for Assad Hassan Sabra and Four Orders to Cooperate with the Tribunal, 31 March 2014 (public with confidential and *ex parte* annexes) (‘Decision of 31 March 2014’), annex C (confidential and *ex parte* annexes); transcript of 29 September 2017, p. 5.

⁹⁸ The English translation spells the name incorrectly (as ‘Asaad’) but in the original document, in Arabic, the name is transliterated and spelled as ‘Assad’ (see transcript of 29 September 2017, p. 8, where counsel for Mr Sabra refer to it as a ‘mistranslation’).

⁹⁹ The first name ‘Assad’ is highlighted in the document. In this instance, the name is written in Arabic script.

¹⁰⁰ In this instance, the name appears to be spelled as ‘Asaad’ both in the English translation and the original.

¹⁰¹ Transcript of 28 September 2017, pp 75-76.

¹⁰² Transcript of 28 September 2017, pp 76, 94, 97.

¹⁰³ Transcript of 28 September 2017, p. 96; transcript of 29 September 2017, p. 15.

attribution of Purple 018 and was not aware of evidence which ‘credibly suggests that alternative user 1 [was] the user of 018’.¹⁰⁴

78. With regard to the ISF internal memorandum, specifically, Mr Donaldson was aware of the information but had not seen the document before.¹⁰⁵ As to the Defence’s suggestions that the ISF reasoning in the memorandum is poor, that ‘alternative user 1’ should have remained a viable candidate and an independent investigation should have been conducted to rule him out, he testified that an independent investigation was completed and collected evidence which, in his opinion, incriminated Mr Sabra as 018’s user.¹⁰⁶ Further, while he looked at the evidence in its totality, the Defence is selective, and he could not constructively comment upon a document whose author or background he did not know or upon the Defence’s own analysis. Negative inquiries are generally not put into evidence unless they are considered to be serious.¹⁰⁷

Submissions

79. The Defence submits that the ISF internal memorandum outlines the two reasons why the focus of the Lebanese investigation shifted from ‘alternative user 1’ to ‘Assad Sabra’ as the user of (Purple) 018. One is the difference in the first name between ‘alternative user 1’ and Mr Sabra (‘Asaad’ versus ‘Assad’—which in Arabic are different names), because the user of 018 is addressed as ‘Assad’ in the SMS relied upon, as opposed to ‘Asaad’. Counsel for Mr Sabra, however, suggest that these reasons do not rule out ‘alternative user 1’ as a user of 018.¹⁰⁸

80. The document was submitted by the ISF’s Directorate General. As the cover letter is signed and stamped by the ISF’s Director General and states that the report is taken from the ISF archives, the document originated within the ISF. Although it was prepared by ‘unnamed sources’ within the ISF, the Prosecution has relied on similar documents, which the Trial Chamber has admitted into evidence. The document tendered is an English translation

¹⁰⁴ Transcript of 28 September 2017, pp 103, 110.

¹⁰⁵ Transcript of 29 September 2017, pp 6-7.

¹⁰⁶ Transcript of 29 September 2017, pp 42, 53-54.

¹⁰⁷ Transcript of 29 September 2017, pp 54-55. Counsel for Mr Sabra referred to exhibit P1948 (PowerPoint presentation ‘Analysing attribution’), slide 31; *see*, in this regard, transcript of 19 September 2017, pp 28-29.

¹⁰⁸ Transcript of 29 September 2017, pp 7-9, 33, 40-42.

provided by the Language Services Section of the Special Tribunal, and contains highlights which were added to reflect those in the original document.¹⁰⁹

81. The Prosecution responds that this document is anonymous and is not signed or sourced. It is a piece of internal product from the ISF containing summaries of evidence and the writer's conclusions and opinions. For this reason, it is a witness statement, which does not comply with Rule 155 and the requirements of the relevant Practice Direction. It should be tendered during the Sabra Defence case, when the witness is made available for cross-examination.

82. While the Sabra Defence describes the document as outlining the reasons for the Lebanese investigation's shift in focus from 'alternative user 1' to Mr Sabra, it does not point to them. The Trial Chamber should dismiss the application based on the Sabra Defence's failure to provide sufficient information on its relevance, *prima facie* reliability and hence probative value, as it has previously done with regard to other documents. While relying on Mr Donaldson's evidence, Mr Donaldson had no views on this document's reliability, probative value or relevance.¹¹⁰

83. The Defence replies that the Prosecution stretches the concept of a witness statement: a document is not a statement simply because it was created by a person. The internal memorandum is an internal report, as confirmed by the ISF Director General's signature. As to the Prosecution's challenge to the document's probative value, the identification of the Purple mobiles was carried out by the ISF—as repeatedly stated during the Prosecution case—and not by the Prosecution of the Special Tribunal, to which it was transmitted. The reasons for the ISF attribution of Purple 018 to Mr Sabra are very important for the reliability of this attribution and also for the question as to whether this number's user was implicated in the assassination of Mr Hariri. It is vital for the Trial Chamber to understand, in a circumstantial case, the steps the Prosecution took to analyse the reliability and credibility of this evidence.¹¹¹

¹⁰⁹ Sabra Defence application, paras 29-35, in particular para. 34, referring to F3371, Decision Admitting into Evidence the Audio Recording and Transcripts of Interview of Mr Wissam Al-Hassan (Witness PRH680) under Rule 158 and Three Related Documents under Rule 154, 20 October 2017 ('Decision of 20 October 2017').

¹¹⁰ Prosecution response, paras 53-57.

¹¹¹ Sabra Defence reply, paras 7-8, 11.

Discussion and decision

84. The Parties differ as to whether this document is a witness statement under the Rules. The Trial Chamber has held that there is no single definition of the term ‘witness statement’ and that whether a document is a witness statement is to be determined on a case-by-case basis, according to several factors, including the content, use, function and source of the document or material itself.¹¹² While the document itself is anonymous and undated, it was provided by the ISF’s Director General to the Special Tribunal in response to a Trial Chamber’s order to the Lebanese Government to cooperate with the Special Tribunal by providing information the Sabra Defence had sought in requests for assistance of the Lebanese authorities. The letter to which the document is attached is signed by the ISF’s Director General.

85. In relation to a Defence request—seeking information concerning the attribution of 018, including the underlying material which led the ISF to initially name ‘alternative user 1’—the letter states that no ‘documented report’ was found in the archives. However, a document was identified pertaining to the request, a copy of which was provided to the UNIIC ‘to be used in the comprehensive investigation’.¹¹³

86. While the Prosecution describes it as the ISF’s internal product, according to the accompanying letter, it was provided to the UNIIC. In any event, having considered its source, content and function, the Trial Chamber is not satisfied, based on the Prosecution’s arguments, that the document is a witness statement. The document is not a witness statement merely because it summarizes evidentiary material or contains someone’s analysis, conclusions or opinions. It is not ‘an account of a person’s knowledge of a crime which is recorded through due procedure in the course of an investigation’, according to the Trial Chamber’s definition.¹¹⁴ The document, in considering its source and taking into account its nature, is *prima facie* reliable. The Trial Chamber however notes that it is not a documented report, or a detailed or sourced analysis.

87. The Sabra Defence submits that the document provides the ISF’s ‘reasons’ for revising the attribution of Purple 018 from ‘alternative user 1’ to Mr Sabra. To support this, however, it points to passages that the document describes as ‘deductions’, based on

¹¹² Decision on first Sabra bar table motion, paras 11-12, referring to F3171, Decision on Merhi Defence Request for Disclosure of Documents concerning Witness PRH230, 2 June 2017, para. 47.

¹¹³ Transcript of 29 September 2017, pp 6-7.

¹¹⁴ Decision on second Sabra bar table motion, para. 10.

previously provided information.¹¹⁵ At this stage, however, the Trial Chamber does not need to assess the Sabra Defence's interpretation of the memorandum or provide its own interpretation. It will admit the memorandum into evidence as it has already admitted into evidence other documents, from the UNIIC, relating to the initial attribution of Purple 018 to 'alternative user 1' and finds the memorandum and accompanying letter relevant as—according to the Defence case—it goes to Purple 018's possible alternative attribution.

88. Since counsel for Mr Sabra pointed to an alleged 'mistranslation' in the document, resulting in the name 'Assad' being spelled 'Asaad' in one instance,¹¹⁶ the Trial Chamber orders the Sabra Defence to seek a verification from the Language Services Section of the original document's translation.

(ii) Excerpt of SMS content for number 590 – exhibit 5D423 MFI

89. This document contains three SMS messages involving number 590—which the Sabra Defence submits is *prima facie* attributable to 'alternative user 1' from early 2007—with the dates and time of the messages, numbers of respective senders and recipients, and draft translations. The name 'Assad' appears in the three messages, in both the transliterated Arabic original version—in Latin script—and the English translation. The first message, sent by number 590, reads 'Hi [...] how are you? This is my new number, Assad'.¹¹⁷ It is dated 5 March 2007. The third message, sent to 590, reads 'call me now Assad, it is urgent'.¹¹⁸ It is dated 7 July 2009. In the second message, of which 590 is the sender, the name 'Assad' appears to identify a third party, and not the sender himself. No questions were put to Mr Donaldson about this message.

90. The messages are extracted from a spreadsheet with the SMS content for mobile 590, from 14 June 2005 to 31 May 2010, which was created by a Prosecution analyst and disclosed to the Defence under Rule 110 (B). This underlying spreadsheet is also tendered into evidence.

¹¹⁵ Transcript of 29 September 2017, p. 7.

¹¹⁶ See above footnote 98; transcript of 29 September 2017, p. 8. As the name is transliterated in the original Arabic version, this does not appear to be a matter of translation but, apparently, of reproduction of a name.

¹¹⁷ Transcript of 29 September 2017, pp 44-45.

¹¹⁸ Transcript of 29 September 2017, p. 48.

Mr Donaldson's evidence

91. Mr Donaldson testified that the claimed attribution of number 590 to 'alternative user 1' is 'analytical',¹¹⁹ as he did not believe there was any evidential basis. He confirmed that the name 'Assad' appeared in the text content of the messages. The witness agreed that, if 'alternative user 1' were the user of 590, he used the same spelling for his name as that used in the SMS sent to 018 and relied upon by the ISF and the Prosecution.¹²⁰ Mr Donaldson testified that he looked at number 590, did not ignore it, but he had 'not managed to complete the attribution for 590'.¹²¹

92. Counsel for Mr Sabra pointed to two messages of 9 May and 19 December 2004, relied upon by Mr Donaldson in his attribution report. In both, the senders addressed the user of 018 as 'Assad'.¹²² Mr Donaldson agreed with the Sabra Defence's suggestion that—when taking it in pure isolation—one cannot positively affirm, without confirming it with the senders of the two messages, that they did not address 'alternative user 1'—rather than Mr Sabra—but spelled 'alternative user 1's first name with two 'Ss' and one 'A'. He provided the same answer with regard to the message of 14 November 2004, where the user of 018 was addressed as 'Asodi'.¹²³

Submissions

93. The Sabra Defence submits that the reasons for the revised attribution of 018 in the ISF internal memorandum do not rule out 'alternative user 1' as a candidate in light of the various ways in which 'alternative user 1's given name may be correctly or incorrectly translated or spelled in English. To demonstrate this, it tenders this document.¹²⁴

94. The document is relevant to show the UNIIC's and Prosecution's failure to properly investigate the telephone activity of 'alternative user 1' as compared to the usage of Purple 018 and, in particular, the Prosecution's failure to eliminate 'alternative user 1' as a viable

¹¹⁹ Mr Donaldson distinguished between 'intelligence or analytical attributions and evidential ones'. See transcript of 29 September 2017, pp 14, 43.

¹²⁰ Transcript of 29 September 2017, pp 14, 42-46, 48.

¹²¹ Transcript of 28 September 2017, pp 103, 110.

¹²² See exhibit P1953 ('Evidence of Telephone Attribution – Assad Hassan Sabra, Version 4'), paras 28 (a) and (d).

¹²³ Transcript of 29 September 2017, pp 50-51.

¹²⁴ Transcript of 29 September 2017, p. 42.

candidate as the user of Purple 018. The messages are taken from a spreadsheet of SMS content that the Prosecution created, based on material provided by MTC/Touch.¹²⁵

95. The Prosecution responds that, if the Sabra Defence seeks to present a positive case attributing 590 from 2007 onwards, it should do it during the Sabra Defence case. Number 590 was not in contact with 018, 546 or 547 during the time the Prosecution attributes them to Mr Sabra. The Sabra Defence makes no cohesive argument as to how the use of the number 590 from 2007 onwards by ‘alternative user 1’ is either relevant to the analysis of the attribution of 018, 546 and 547 to Mr Sabra or probative of any proposition.¹²⁶

Discussion and decision

96. The *prima facie* reliability of the document is not contested. It is an extract from a document with SMS content for number 590 that the Prosecution created and disclosed to the Defence. The Trial Chamber rejects the Prosecution’s objection to the relevance of the document on the ground that number 590 was not a third-party contact to any number the Prosecution attributes to Mr Sabra, including Purple 018. While the Sabra Defence’s submissions on this matter may not be very well organized or clear, the Trial Chamber understands that it tenders this document to show that the reliance on a different name, ‘Assad’ vs. ‘Asaad’—which in its view is one of the reasons for the ISF revised attribution of Purple 018—does not rule out ‘alternative user 1’ as a viable user of Purple 018. On this basis, it argues that the Prosecution should have, but did not, eliminate ‘alternative user 1’ as a viable user of Purple 018. In a separate motion, the Sabra Defence has sought the admission into evidence of documents relevant to attributing number 590 to ‘alternative user 1’.¹²⁷

97. The first and the third messages in the extract, where the user of 590 signs off or is addressed as ‘Assad’—when considered together with the documents seeking to attribute 590 to ‘alternative user 1’—may support the Sabra Defence’s theory. The document, therefore, may be relevant—although the second SMS contained in it does not appear to be—to assessing the quality of the UNIIC’s or the Prosecution’s investigation and analysis. The Trial Chamber will admit it for this limited purpose. However, as already noted, the Trial Chamber does not take any position on the interpretation of the ISF memorandum—on the merits of which the Prosecution has not responded in its submissions. The Trial Chamber will

¹²⁵ Sabra Defence application, paras 39-42; transcript of 29 September 2017, pp 22, 29. *See also* pp 26, 53-55.

¹²⁶ Prosecution response, paras 36-39.

¹²⁷ F3392, Motion for the Admission of Three Documents relating to a Phone Number, 30 October 2017 (‘Sabra Defence motion of 30 October 2017’).

assess the weight to be given to the document when considering it with the totality of the evidence.

(iii) Spreadsheet containing the SMS content for number 590 from 14 June 2005 to 31 May 2010 — exhibit 5D424 MFI

98. As noted above at paragraph 90, this is the spreadsheet with the SMS content for mobile 590, from 14 June 2005 to 31 May 2010, from which exhibit 5D423 MFI is derived. The Prosecution created and disclosed it under Rule 110 (B). While the extract was put to Mr Donaldson, this underlying document was not.

Submissions

99. The Sabra Defence submits that the document has the same relevance and probative value as its extract. Responding to the Prosecution's objection on relevance based on the document's time range, the Defence relies on a Trial Chamber holding that evidence outside the period of the amended consolidated indictment can be relevant to the attribution of phone numbers to a person, including third-party contacts.¹²⁸ In a separate motion, the Sabra Defence also relies on messages from this document to attribute number 590 to 'alternative user 1'.¹²⁹

100. The Prosecution reiterates its objections concerning exhibit 5D423 MFI. It rebuts that, while the Trial Chamber's decision cited by the Sabra Defence related to a third-party contact number of Purple 018, 590 has never been in contact with any of the numbers the Prosecution attributes to Mr Sabra. Further, the document was not shown to Mr Donaldson.¹³⁰

Discussion and decision

101. The Trial Chamber has already rejected—in relation to the extract from this document—the Prosecution's objection to relevance on the ground that number 590 is not a third-party contact to any number the Prosecution attributes to Mr Sabra. The same applies here. The Trial Chamber therefore finds this document relevant and *prima facie* reliable and hence of some probative value for the same reasons as its extract adopted above at paragraphs 96 and 97. Thus, any objection based on the alignment of the dates of the SMS and the

¹²⁸ Sabra Defence application, paras 43-48, referring to F2965, Decision on the Prosecution Motion for the Admission of 36 Documentary Exhibits and Four Witness Statements, 31 January 2017 ('Decision of 31 January 2017'), para. 19.

¹²⁹ Sabra Defence motion of 30 October 2017, para. 7, fns. 5-6, annex A.

¹³⁰ Prosecution response, paras 40-42.

alleged attributable period of a number to an Accused, or the amended consolidated indictment period, is not relevant.

(iv) Extract from Ogero response to Sabra Defence request for assistance – exhibit 5D420 MFI

102. This document is a spreadsheet sent by the Ogero telecommunications company in response to the Trial Chamber’s order to the Lebanese Government to cooperate with the Special Tribunal by providing information to the Sabra Defence.¹³¹ The document contains 27 rows of numbers and related names, addresses and dates of activation, discontinuation or change. A name appears on the first row of the document—the middle and family names are the same as those of ‘alternative user 1’. The first name is ‘Asad’. The document reads: ‘no Tel. subscription in this name on the landline network’. The Sabra Defence submits that the difference with ‘alternative user 1’’s first name—the name in the document is ‘Asad’ instead of ‘Asaad’—results from a typographical error.¹³²

Mr Donaldson’s evidence

103. Mr Donaldson testified that these records are in Arabic and—as the name in the Ogero record is ‘a translation of “Asad”’—in order to meaningfully comment on the query run by Ogero, he would need to know what Arabic string, what name, was provided to the telecommunications company. Counsel for Mr Sabra commented that this was a fair point.¹³³ Generally, Mr Donaldson rejected the assertion that the Defence’s requests for assistance highlighted a lacking in the investigation.¹³⁴

Submissions

104. According to the Sabra Defence, the document is relevant to show that before focusing solely on Mr Sabra, the Prosecution did not take diligent steps in eliminating other viable users of Purple 018. This document comes from the same source as exhibits 5D399 and 5D404, and a narrative outline of the chain of custody was provided to the Prosecution.¹³⁵

105. The Prosecution responds that the document only demonstrates that a person with the name appearing on the first row was not recorded as being registered with a landline number.

¹³¹ Decision of 31 March 2014.

¹³² Transcript of 29 September 2017, p. 23.

¹³³ Transcript of 29 September 2017, p. 23.

¹³⁴ Transcript of 29 September 2017, p. 30.

¹³⁵ Sabra Defence application, paras 36-38.

The Defence has not demonstrated how the lack of a landline registration for that name is relevant to the analysis of the attribution of numbers 018, 546 and 547 to Mr Sabra. Purple 018 does not appear in the document. Further, Mr Donaldson did not provide any specific comment,¹³⁶ and the documents shown to the witness did not have the spelling of ‘alternative user 1’'s first name reflecting their apparent position on the matter.¹³⁷

Discussion and decision

106. The document was provided by Ogero in a response to the Trial Chamber’s order to the Lebanese Government to cooperate with the Sabra Defence. It is *prima facie* reliable as an Ogero record.

107. The Sabra Defence’s submissions are scarce. The Defence does not explain how the lack of a landline registration for the name on the document is relevant to undermining the Prosecution’s attribution of Purple 018 to Mr Sabra. However, in seeking the admission of another document, exhibit 5D419, Defence counsel submitted that, in consideration of his similar profile to Mr Sabra, whether ‘alternative user 1’ had any telephone should have been investigated as it is relevant to whether or not he was more likely to have been Purple 018’s user, or at least a candidate.¹³⁸ Analogously to exhibit 5D419, this document may be relevant to assessing the quality of the Prosecution’s investigation and the Trial Chamber exercises its discretion to admit it into evidence for this limited purpose. It will determine at a later stage the weight, if any, to be given to it, within this limited scope. At that stage, any submission concerning the spelling of the name in the document may be considered.

(v) UNIIC internal memorandum on Mr Wissam Al-Hassan – exhibit 5D426 MFI

108. The document is a UNIIC internal memorandum dated 3 October 2008 drafted by an anonymous author, addressed to two UNIIC officials with the subject: ‘Wissam Al Hassan Alibi’. The author describes the memorandum as a response to a request from the UNIIC Director of Investigations ‘to review the status of a possible suspect in the Hariri killing’ with the aim of shedding light on Mr Al-Hassan, the former ISF Chief of Information, and ‘the plausibility of his alibi’. The memorandum refers to ‘other potential issues’ with Mr Al-Hassan but does not address them.

¹³⁶ Prosecution response, paras 31-35.

¹³⁷ Transcript of 29 September 2017, p. 28.

¹³⁸ Sabra Defence application, paras 36-38; transcript of 29 September 2017, pp 22, 29.

109. The memorandum has three pages, divided in five sections. After the ‘Introduction’, the section ‘Who is Wissam Al Hassan?’ describes Mr Al-Hassan’s employment and functions from 1992 to the date of the memorandum. The third section, ‘WAH’s Witness Statement to UNIIC (09/07/2005)’, summarizes Mr Al-Hassan’s statement on his whereabouts on 14 February 2005 at the time of the explosion: namely, that he was sitting for an exam at the Lebanese University. The fourth section, ‘Flaws in WAH’s Alibi’, contains the author’s analysis of the information provided in Mr Al-Hassan’s statement and additional information. In the ‘Conclusion’, the author states, among other things, that Mr Al-Hassan’s ‘alibi is weak and inconsistent’, that Mr Al-Hassan is ‘a key interlocutor for the Commission – he is in a unique position to influence our investigation’, and that if he was somehow involved in the Hariri killing, ‘the network might resolve to eliminate him’.

110. The Trial Chamber has admitted into evidence the audio recordings and transcripts of the Prosecution interview of Mr Al-Hassan under Rule 158 as a deceased and therefore unavailable witness.¹³⁹

Mr Donaldson’s evidence

111. Mr Donaldson testified that he could not comment upon unsourced assertions or the document in general. The memorandum lacks an evidential basis and credibility, the author did not speak for the UNIIC and it does not present the view of anyone the witness worked with at the time. He described it as someone’s unsupported thoughts. He knew that the memorandum was ‘maliciously’ leaked to the Canadian Broadcasting Corporation news site and published by it.¹⁴⁰

112. Mr Donaldson rejected the suggestion that UNIIC superiors had real concerns about Mr Al-Hassan’s integrity and loyalty. He was aware that accusations levelled against Mr Al-Hassan were investigated and put aside long before he arrived in Beirut. His understanding was that the alibi had been investigated and there was no basis for any further investigations. He reviewed the results of earlier inquiries about Mr Al-Hassan’s possible role and was satisfied there was no basis to suggest that he had any involvement in the assassination. He

¹³⁹ Decision of 20 October 2017, disposition. See exhibit P2121 (Audio recording and transcript of the Prosecution’s interview of Mr Wissam Al-Hassan dated 17-06-2012); exhibit P2122 (Audio recording and transcript of the Prosecution’s interview of Mr Wissam Al-Hassan dated 16-06-2012).

¹⁴⁰ Transcript of 29 September 2017, pp 60-64.

was not aware of any different information. He was never warned by any of his superiors to treat with caution any information passed on by Mr Al-Hassan or via the ISF.¹⁴¹

113. Mr Donaldson never met the author of the memorandum. He was aware of the name, but did not recall it. He also never met Mr Al-Hassan. Mr Donaldson agreed that the UNIIC took information directly from Mr Al-Hassan and aligned its own investigation with it, ‘such as a focus on the Purple group’, but all the information he tested could be independently corroborated and taken further; if it works, ‘it does not matter who gives you the first lead’.¹⁴²

Submissions

114. The Sabra Defence does not tender the memorandum to prove the truth of its contents but rather to show that concerns surrounding Mr Al-Hassan’s reliability as a source of information were known to the ‘seniority of the UNIIC’ during and after the period he was relied upon as a source of Prosecution investigations. It highlights concerns within sections of the UNIIC as to Mr Al-Hassan’s potential involvement in the plot to kill Mr Hariri on 14 February 2005, or the cover-up of those involved.¹⁴³

115. The Prosecution’s initial objections to the document’s admission¹⁴⁴—related to the anonymity of the author and the fact that the document was leaked and thus is inadmissible under Rule 162—are not valid. The author is not entirely anonymous as Mr Donaldson testified that he knew the name of the person who wrote the memorandum but could not recall it. The Prosecution should be able to identify the author of the report and inform the Trial Chamber of their identity instead of raising ill-founded objections to it. With regard to its second objection, the leaking of information does not ‘seriously damage the integrity of proceedings’ and Rule 162 is therefore inapplicable. The information is publicly available and ‘the manner in which it has appeared in public domain is a matter of weight’. Further, relying on a statement of the Presiding Judge to this effect, the Sabra Defence submits that if the witness were alive, the Prosecution would have been under an obligation to disclose the document because it goes to the witness’s credibility.¹⁴⁵

¹⁴¹ Transcript of 29 September 2017, pp 63-67.

¹⁴² Transcript of 29 September 2017, pp 64, 69-71.

¹⁴³ Sabra Defence application, paras 49-50, 56.

¹⁴⁴ As expressed in a letter from the Prosecution to the Sabra Defence dated 7 November 2017, annexed to the application (see annex E to the Sabra Defence application).

¹⁴⁵ Sabra Defence application, paras 51-58. See transcript of 29 September 2017, p. 69.

116. The Prosecution submits that the document is not relevant to Mr Donaldson's independent analysis of verifiable attribution evidence, is probative of no fact and is inadmissible under Rules 149 (C), 155, and 162. It is a piece of internal work product containing the author's conclusions and opinions. The Sabra Defence clearly relies on the document for the truth of its contents and its reliability is highly questionable. It is anonymous, there are no properly cited sources, it states that it is not 'a detailed analysis of all the information on the issue', and—while the Sabra Defence claims that it tendered this document through Mr Donaldson—he expressed his concerns on its reliability.¹⁴⁶

117. The document was not disclosed by the Prosecution, and was illegally obtained. Coupled with its unreliability, it is inadmissible because it offends against the integrity principles of Rule 162 (A). Further, it would never have been disclosable under either Rule 110 (A) (i) or Rule 111 as internal work product, or under Rule 113, as it is merely an opinion contained in a piece of internal work product. The actual information, or primary evidence, is Mr Al-Hassan's statement of 9 July 2005, which the Prosecution disclosed to the Defence under Rule 113.¹⁴⁷

118. The Defence replies that the document is not a witness statement but is an analytical report prepared by a UNIIC analyst. In addition, the Prosecution's assertion that the document would not be subject to disclosure or was illegally obtained does not impact its admissibility. As to the Prosecution's challenge to the document's probative value, identification of the Purple mobiles—as repeatedly stated during the Prosecution case—was carried out by the ISF and not by the Prosecution, to which it was transmitted. The credibility of whoever provided the information to the Special Tribunal, including Mr Al-Hassan, is thus important to the reliability of the attribution of Purple 018 and to the question as to whether this number's user was implicated in the assassination. It is vital for the Trial Chamber to understand, in a circumstantial case, which steps the Prosecution took 'to analyse the credibility and reliability of this evidence'.¹⁴⁸

Discussion and decision

119. The UNIIC memorandum contains the author's analysis and observations regarding Mr Al-Hassan's statement to the UNIIC on his whereabouts on the day of the attack, namely

¹⁴⁶ Prosecution response, paras 43-47, 52.

¹⁴⁷ Prosecution response, paras 48-51.

¹⁴⁸ Sabra Defence reply, paras 7-8, 11.

the reasons for him not being with Mr Hariri at the moment of the explosion. The memorandum notes that Mr Al-Hassan stated: ‘if I wasn’t sitting for that exam, I would have been with Mr Hariri [...]’, and that on the evening of 13 February 2005, Mr Al-Hassan asked Mr Hariri for permission to take leave the following day to sit for the exam at the Lebanese University. The author describes it as Mr Al-Hassan’s ‘alibi’, and refers to Mr Al-Hassan as ‘a possible suspect’. Although the memorandum contains one section on a statement given by Mr Al-Hassan, it analyses information from this statement and other unsourced information. The Trial Chamber does not consider the memorandum itself to be a witness statement.

120. The author acknowledges that the memorandum is not intended to be a detailed analysis of all the information on the issue, and that such an analysis and further investigation needs to be carried out if the memorandum leads to a policy decision to this effect. No final analysis or conclusion by the author, or by the UNIIC, was drawn in the memorandum in relation to Mr Al-Hassan, including identifying him as a suspect. The primary evidence related to Mr Al-Hassan’s whereabouts on 14 February 2005—his statement of 9 July 2005—is the main source analysed in the memorandum. However, it is not in evidence and neither Party has requested its admission.

121. In relation to the Prosecution’s argument that the memo is inadmissible under Rule 162 (A) as a document which was illegally obtained, Rule 162 (A) provides that: ‘[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings’.¹⁴⁹ Case law from international criminal courts and tribunals is consistent that documents which have been illegally obtained may be admitted if they are reliable, relevant and probative, and if their admission is not antithetical to and would not seriously damage the integrity of the proceedings.¹⁵⁰

¹⁴⁹ See also ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011 (public redacted version), para. 61; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Admission of Material from the “Bar Table”, 24 June 2009, para. 39; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 (public redacted version with annex I), paras 84-86; ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence”, 3 October 2003 (‘*Brđanin* Decision of 3 October 2003’), paras 54-55, 61-62, 64; ICTY, *Prosecutor v. Delalić*, IT-96-21-T, Decision on the Tendering of Prosecution Exhibits 104 - 108, 9 February 1998 (‘*Delalić* Decision of 9 February 1998’), para. 19.

¹⁵⁰ See *Brđanin* Decision of 3 October 2003, paras 54-55; *Delalić* Decision of 9 February 1998, paras 19-20; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, 2 September 1997, para. 41. See also SCSL, *Prosecutor v. Charles Taylor*, SCSL-03-1-T, Decision on the Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents relating to the Relationship between the United States Government and the Prosecution of Charles

122. The Trial Chamber has no information on how the document came to be in the public domain, namely, whether it was a deliberate, inadvertent or accidental publication. Moreover, the mere fact that documents may have been leaked does not of itself make their publication by others illegal. But this of course may vary between jurisdictions and will depend upon the specific circumstances and the information in the document. For example, publishing or republishing confidential witness information contrary to a court order—irrespective of whether it was ‘illegally’ obtained—may amount to a contempt of the court. The Trial Chamber explored some of these principles in its WikiLeaks decision referred to in paragraph 121 above. The Trial Chamber emphasises that the document is publicly available on the internet. In the specific circumstances, the Trial Chamber does not consider that the memorandum was obtained by methods which cast substantial doubt on its reliability, nor will its admission be antithetical to, or seriously damage, the integrity of the proceedings. The Trial Chamber therefore will not exclude its admission into evidence on this ground and will proceed to consider its admission based on relevance, probative value and reliability.

123. The Trial Chamber finds that the memorandum bears sufficient indicia of reliability as a United Nations document despite not knowing who drafted it. It has admitted into evidence, pursuant to Rule 154, multiple memoranda authored by UNIIC officials.¹⁵¹ For example, the Trial Chamber admitted into evidence as exhibit 5D254 an undated UNIIC memorandum authored by Mr Alasdair Macleod (Witness PRH486), a Prosecution investigator who testified in these proceedings, for the ‘very limited’ purpose of assessing the quality of the UNIIC investigation but not for the truth of its contents.¹⁵²

124. Similarly, in this instance, the Trial Chamber will admit the memorandum into evidence as relevant to show that the possibility of investigating Mr Al-Hassan’s reasons for not being in Mr Hariri’s convoy on 14 February 2005 and related matters were analysed, and in this case, apparently recommended by someone within the UNIIC. As the Trial Chamber

Taylor, 27 January 2011, pp 2, 4-6 (wherein the SCSL admitted into evidence two U.S. diplomatic cables leaked on the WikiLeaks website, finding that the documents were relevant and that their reliability was ‘susceptible of confirmation’). *See generally* F1955, Decision on the Admissibility of Documents Published on the WikiLeaks Website, 21 May 2015, paras 22-39, 44.

¹⁵¹ *See, e.g.*, Decision on second Sabra bar table motion, paras 40, 43, 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, paras 31, disposition; Decision on sixth Sabra bar table motion, paras 28, disposition.

¹⁵² Decision on second Sabra bar table Motion, paras 20, 40, 43.

has admitted into evidence the audio recordings and transcripts of Mr Al-Hassan's Prosecution interview,¹⁵³ the memorandum may be relevant to this witness's credibility.

(vi) Extract from Ogero response to Sabra Defence request for assistance – exhibit 5D404 MFI

125. The document is a spreadsheet sent by Ogero—in response to the Trial Chamber's order to the Lebanese Government to cooperate with the Special Tribunal—providing information to the Sabra Defence.¹⁵⁴ The document contains 27 rows of subscriber numbers and related names, addresses and dates of activation, discontinuation or change. The name 'Ali Hasan Sabra' appears four times associated with four different landline numbers.

Mr Donaldson's evidence

126. Mr Donaldson attributes a number ending in 144 to Mr Ali Sabra, who is Mr Assad Sabra's brother.¹⁵⁵ According to Mr Donaldson's analysis, this number had 162 contacts with Purple 018 and this supports its attribution to Mr Assad Sabra.¹⁵⁶

127. Mr Donaldson testified that he was not aware of these numbers being associated with Mr Ali Sabra or of inquiries into them, and that these numbers may refer to more than one person. Agreeing with a comment from a Judge,¹⁵⁷ he also pointed to the oddity of one of the numbers starting with '1'—which would identify a landline in Beirut—being associated with an address in South Lebanon—where a landline number would begin with a '7'.¹⁵⁸

Submissions

128. According to the Sabra Defence, the document outlines the results of Ogero's search in its database for records relating to anyone named 'Ali Sabra' and shows that Mr Ali Hassan Sabra is registered in connection with three numbers. Mr Donaldson was unaware whether these numbers were ever subject to inquiry.¹⁵⁹ This is relevant to Mr Donaldson's analysis of

¹⁵³ Decision of 20 October 2017, disposition.

¹⁵⁴ Decision of 31 March 2014.

¹⁵⁵ Mr Donaldson relies on an Alfa subscriber note (exhibit P902).

¹⁵⁶ See exhibit P1953 ('Evidence of Telephone Attribution – Assad Hassan Sabra, Version 4'), p. 14, para. 32 (e); transcript of 27 June 2017, pp 70, 86; see also exhibit P1952 ('Power point presentation related to the mobile referred to as "Purple 018"'), slide 36; transcript of 28 June 2017, p. 27.

¹⁵⁷ Judge Walid Akoum; corrected transcript of 27 September 2017, pp 35, 106.

¹⁵⁸ Transcript of 27 September 2017, pp 35-36.

¹⁵⁹ Counsel for Mr Sabra questioned Mr Donaldson on the first three numbers appearing in exhibit 5D404 MFI as associated with Mr Ali Sabra. The fourth number is described as the 'old number' for the third number. See transcript of 27 September 2017, pp 34-35, 37.

the number 144, which the Prosecution attributes to Mr Ali Sabra in support of its attribution of Purple 018 to Mr Assad Sabra. That the Prosecution was not aware that other numbers were attributed to third-party contacts goes to the issue of diligence of its investigation. It is relevant because it may undermine the attribution of the number relied upon by the Prosecution.¹⁶⁰

129. The document is taken from Ogero's records and, contrary to the Prosecution's objections, is not the Sabra Defence's work product. The chain of custody to the Prosecution is identical to that of exhibit 5D399.¹⁶¹ The Prosecution's objection that the translation is one row off from the telephone number does not appear to be correct. However, if the Trial Chamber deems it necessary, the original document in Arabic may be admitted into evidence pending a new translation request.¹⁶²

130. The Prosecution objects to the admission into evidence of this document for lack of relevance and probative value. None of the four numbers were in contact with Purple 018, 546 or 657 during the time frame they are attributed to Mr Sabra. Further, two of the four numbers were activated in 2009, and the Sabra Defence fails to demonstrate the relevance or probative value of a third-party contact number which was activated after the end of the Purple 018's attribution period.¹⁶³

131. Mr Donaldson was not aware of these numbers and referred to the discrepancies between the numbers and the addresses. The Sabra Defence made no effort to explain how the document is relevant to the analysis of the attribution of numbers 018, 546 and 547 to Mr Sabra.¹⁶⁴

Discussion and decision

132. Ogero provided this document to the Sabra Defence. Despite the reliability issues raised by the Prosecution in relation to the discrepancies between numbers and addresses in

¹⁶⁰ See, for general submissions, transcript of 9 November 2017, p. 91.

¹⁶¹ Exhibit 5D399 is an extract of a document sent by Ogero in response to a request for assistance. It was put to Mr Donaldson on 27 September 2017 and later admitted on 9 November 2017. Upon its admission, the Trial Chamber noted that a potential discrepancy between one landline number associated with a particular address in the document did not preclude its admission and that it would assess the document in light of the Parties' submissions and give it the appropriate weight. See transcript of 27 September 2017, pp 7-15; transcript of 9 November 2017, pp 93-98.

¹⁶² Sabra Defence application, paras 25-28. See transcript of 27 September 2017, pp 34-37; transcript of 29 September 2017, pp 24-25.

¹⁶³ Prosecution response, paras 27-28.

¹⁶⁴ Prosecution response, paras 29-30.

the document, the Trial Chamber finds that, similar to its decision with regard to exhibit 5D399, these potential discrepancies do not preclude admission of the document, but rather go to its weight. The Trial Chamber therefore finds that the document bears sufficient indicia of reliability for admission. However, in light of the issue raised in relation to the English translation of this document,¹⁶⁵ the Trial Chamber instructs the Sabra Defence to obtain a revised translation and disclose it to the Parties and the Trial Chamber.

133. The Trial Chamber understands that the Sabra Defence seeks the admission into evidence of the document to challenge the diligence of the Prosecution's investigations. However, it does not explain how the information on three or four landline numbers associated with Mr Ali Sabra's name could undermine the Prosecution's attribution of a (Alfa) mobile number to him. Although the Defence claims that it does not need to explain how exactly it will rely upon any tendered document in its final submissions,¹⁶⁶ it should clearly explain a document's relevance and probative value for it to be admitted. Nevertheless, the Trial Chamber exercises its discretion to admit this document into evidence for the limited purpose of assessing the diligence of the Prosecution's investigations. It will determine at a later stage the weight, if any, to be given to this evidence.

CONFIDENTIALITY

134. The Trial Chamber reiterates the public nature of the proceedings. The Sabra Defence filed annexes A to H to its application confidentially as they contain communications between the Parties. The Sabra Defence should file public redacted versions of the annexes after having consulted the Prosecution. The Sabra Defence and the Prosecution must also file public redacted versions of their filings F3511, F3422, and related annexes, as well as of filings F3507 and F3532.

135. The Trial Chamber is satisfied, however, that the present classification of annex A to filing F3507—'Examples of Internal Correspondence'—is justified because it contains the name of multiple staff members not previously publicised and several items of internal correspondence.

¹⁶⁵ Transcript of 27 September 2017, pp 35-36; transcript of 29 September 2017, pp 24-25; Sabra Defence application, para. 28; Prosecution response, para. 29.

¹⁶⁶ Sabra Defence reply, paras 2-4, 10.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

INSTRUCTED the Sabra Defence to assign an ERN to the ‘internal memorandum’ supporting the call sequence tables’ *prima facie* reliability, as described in paragraph 36;

INSTRUCTED the Sabra Defence to revise the call sequence table for the number ending in 112, with ERN 1DT5-12001-1DT5-13288, as explained in paragraph 33 and to disclose the revised table to the Trial Chamber and the Parties;

ADMITTED into evidence the thirteen call sequence tables identified in paragraph 40 of the decision—as exhibits 5D352 to 5D354 and exhibits 5D522 to 5D531—and exhibits 5D348 MFI and 5D356 MFI, pending the assignment of an ERN to the ‘internal memorandum’ and—with regard to the call sequence table for number 112—the revision and disclosure of a revised call sequence table by the Sabra Defence;

ADMITTED exhibits 5D404 MFI, 5D417 MFI, 5D420 MFI, 5D423 MFI, 5D424 MFI, 5D426 MFI and 5D355 MFI into evidence; and

ADDITIONALLY,

ORDERS the Sabra Defence to obtain, from the Language Services Section, revised English translations of exhibits 5D404 and 5D417 and disclose them to the Parties and the Trial Chamber;

REJECTS any other application or request;

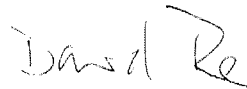
ORDERS the Sabra Defence to file public redacted versions of filing F3511, ‘Response to “Prosecution Notification of its Continued Objection to the Admission of 13 Documents Tendered by the Sabra Defence”’, including its annex, and, after having consulted the Prosecution, of Annexes A to H to filing F3414, ‘Sabra Defence Application for Admission into Evidence of Twenty Two Documents Marked for Identification’; and

ORDERS the Prosecution to file public redacted versions of filings F3422, ‘Prosecution Response to “Sabra Defence Application for Admission into Evidence pursuant to Rule 149 (C) of Twenty Two Documents Marked for Identification”’, including its annex; F3507, ‘Prosecution Notification of its Continued Objection to the Admission of 13 Documents Tendered by the Sabra Defence’; and F3532, ‘Prosecution Second Notification to

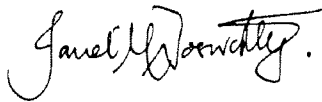
the Trial Chamber of its Continued Objection to the Admission of 13 Documents Tendered by the Sabra Defence’.

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

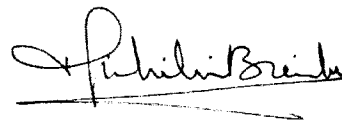
Leidschendam,
The Netherlands
15 February 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

