



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 16 July 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ADMITTING ONE SABRA DEFENCE *AIDE-MEMOIRE* INTO
EVIDENCE AND DECLINING TO ADMIT ANOTHER TWO**

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**Legal Representatives of
Participating Victims:**
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Mr Mohamed Aouini & Mr Jad Youssef Khalil

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yasser
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Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Geoffrey Roberts &
Ms Sarah Bafadhel



PROCEDURAL BACKGROUND AND FACTS

1. On 25 and 26 June 2018, Mr Michael Taylor,¹ the Prosecution's Chief of Investigations from 2010 to 2013, testified as a witness for the Trial Chamber, under Rule 165² of the Special Tribunal's Rules of Procedure and Evidence.³

2. His evidence was relevant to one aspect of the Prosecution's case against the Accused, Mr Assad Hassan Sabra, namely whether he was implicated in the alleged abduction of Mr Ahmed Abu Adass, who was then used to make a false claim of responsibility for the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005. Mr Abu Adass has not been seen since he left his home on 16 January 2005. The Prosecution also pleads that another Accused, Mr Hussein Hassan Oneissi, participated in Mr Abu Adass's disappearance by allegedly using the alias 'Mohammed', and that Mr Abu Adass left home with this 'Mohammed'.⁴

3. The Defence of Mr Sabra challenges this allegation and has put forward a case that the Prosecution had evidence that Mr Abu Adass may have left his home with Mr Khaled Taha and not Mr Oneissi, thus raising a reasonable doubt as to Mr Sabra's pleaded involvement in the crimes charged.

4. Counsel for Mr Sabra extensively cross-examined Mr Taylor on this aspect of their defence, and showed him three *aides-memoire* they had prepared which were relevant to this. They are,

- *Aide-memoire* 1, entitled 'Investigative measures taken by Lebanese authorities and UNIIIC in Khaled Taha investigation', is a 32-page list containing 108 extracts from documents obtained from the Lebanese investigating authorities and the United

¹ Witness CH-001.

² Rule 165 provides that, 'After hearing the Parties, the Trial Chamber may, *proprio motu* or at the request of a Party, order either Party or a victim participating in the proceedings to produce additional evidence. It may, after hearing the Parties, *proprio motu* summon witnesses and order their attendance'.

³ See STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3646, Decision Partly Granting Sabra Defence Application and Ordering the Attendance of a Former Prosecution Investigator to Testify under Rule 165, 13 April 2018 (circulated on 7 May 2018) ('Decision ordering Mr Taylor's attendance').

⁴ F2720, annex A, Amended consolidated indictment, paras 3 (b)-(c), 23, 28; 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 (confidential) 23 August 2013 (a public redacted version of the annex was filed on 31 October 2013), paras 62, 114, 117, 121-122, 148. See also STL-13-04/PT/PTJ, *Prosecutor v. Merhi*, F0052, annex A, Prosecution's Pre-Trial Brief, 8 January 2014 (confidential) (a public redacted version of the annex was filed on 13 January 2014), paras 53, 105, 107, 113.

Nations International Independent Investigation Commission (UNIIC) relating to the investigation from March 2005 onwards into Mr Taha's involvement and role in Mr Hariri's assassination and Mr Abu Adass's disappearance.

The list, divided into 7 columns and 170 rows, describes the investigative action undertaken (and the corresponding date), the relevant extract describing the measure and providing some context to it, the specific investigative body that conducted the investigative action, the evidence record number (ERN) and the document reference where available.

- *Aide-memoire* 2 is entitled 'Interviews conducted by Lebanese/Syrian authorities and UNIIC that are related to Khaled Taha' and is a list of interview records, from March 2005 onwards, obtained from the Lebanese and Syrian authorities, the UNIIC and the Prosecution that contain parts relevant to the investigation of these authorities into Mr Taha's involvement and role in Mr Hariri's assassination and Mr Abu Adass's disappearance.

This 11-page list of interview records is divided into 170 entries describing the date of the interview, the authorities or officials that conducted the interview, the name of the interviewed person, the ERN and the document reference where available.

- *Aide-memoire* 3, entitled 'Information on Khaled Taha as a person of interest in the Ahmad Abu Adass investigation', is a 54-page list that contains 176 entries which consist of extracts from different documents originating from the UNIIC and the Lebanese investigating authorities such as the Lebanese Internal Security Forces (ISF) and Lebanese investigating magistrates.

The extracts relate to the investigation conducted by these authorities into Mr Taha's involvement and role in Mr Hariri's assassination, in general, and into Mr Abu Adass's disappearance, in particular. Some of the quotations in this aide-memoire are from 112 witness statements which mention Mr Taha, whom the Sabra Defence argues may have had a role in Mr Abu Adass's disappearance.

Eleven of the witness statements and documents referred to in this *aide-memoire* are either Prosecution or Defence exhibits.⁵

5. The extracts, interview records and other documents included in the *aides-memoire* come from documents and statements made to the Lebanese judicial investigating authorities, the UNIIC and the Special Tribunal's Office of the Prosecutor, from February and March 2005 onwards. They also include documents obtained from other entities such as a Lebanese military court, the Syrian authorities—judicial, military and intelligence—and Interpol.

6. For example, extract 28 of *aide-memoire* 1 describes a Lebanese judicial magistrate receiving a letter (dated 28 April 2005) from the Lebanese *Sûreté Générale* confirming that no Lebanese border record was identified for Mr Taha; the same extract contains the specific extract from the letter and specifies the date of the letter, the date of its receipt and the ERN of the referenced letter. Extract 35 is from a decision of a Lebanese investigative magistrate to summon Mr Taha's mother for an interview on 12 August 2005; the date of this investigative measure and the ERN of the referenced document from which the extract was taken are also specified.

7. In another example, extract 62 of *aide-memoire* 2 shows the date and the ERN, the reference of an interview record of a named person that was prepared by the ISF Information Branch. Extract 100 of the same *aide-memoire* shows the date, the ERN and the reference number of an interview record of a named person with the UNIIC.

8. Extract 5 of *aide-memoire* 3 is an extract from an analysis document prepared by the ISF stating that 'the investigation confirmed a highly important point regarding the strong ties between Ahmad Abu Adas and Khaled Taha and this was clear in the statements of Khaled's brother' and another person. And that 'it is probable that the religious commitment of Abu Adas and Taha was very similar because they used to pray together which means that they both adopted the same ideology and doctrine'. Extract 10 of the *aide-memoire* is an extract from a UNIIC report, dated 12 December 2005, stating that 'the Commission's investigation into the whereabouts of Ahmad Abu Adass was hindered by the unavailability of two important witnesses', namely Mr Taha and another named person.

⁵ See annotated *aide-memoire* 3 in annex B to Prosecution response. These are: exhibits P2128 and 5D477 (extracts 2 and 7), exhibits 4D545, P2131 and P2132 (extracts 24, 26 and 31), exhibit 5D494 (extract 56), exhibit 5D258 (extract 81), exhibit 5D482 (extract 83), exhibit 5D477 (extract 94), exhibit P2131 (extract 114), exhibit 5D478 (extract 126), exhibit 5D479 (extract 142), exhibit 5D490 (extracts 131 and 162).

9. At the conclusion of Mr Taylor's testimony, counsel for Mr Sabra asked the Trial Chamber to accept the *aides-memoire* into evidence for itself under Rule 165, but using Rule 154 for the admission of documents, and Rule 155 for the admission of extracts of statements.⁶ Counsel stated that they were not being tendered for the truth of what is in the extracts in the *aides-memoire*, but rather as to the fact of what was said and the Prosecution's awareness of this. The Prosecution opposed the application. The Prosecution and Defence then filed written submissions on the admissibility of the three *aides-memoire*,⁷ which is the subject of this decision.

10. In court, however, Defence counsel additionally asked the Trial Chamber to receive into evidence—under Rule 165—the 112 witnesses statements from which portions were extracted.⁸ This too was opposed by the Prosecution and the Trial Chamber, in a short decision announced in court, declined to receive the 112 statements into evidence under Rule 165.⁹ It thereafter provided written reasons for the decision.¹⁰

Sabra Defence cross-examination of Mr Michael Taylor

11. During their cross-examination, counsel for Mr Sabra questioned Mr Taylor about two of the 108 extracts in *aide-memoire* 1. In response to the Sabra Defence's question about extract 1—which contains the name of a person questioned by a Lebanese judicial investigating magistrate and the references of the interview record—Mr Taylor stated 'that's probably right. [...] I don't know'. His response to the question about extract 2—which contains the name of another person questioned by a Lebanese judicial investigating magistrate and the interview references—was not a comment about the information in the extract, but the overall investigation.¹¹

⁶ Transcript of 27 June 2018, pp 67-70.

⁷ F3702, Prosecution Response to Sabra Defence Request for Admission of Three 'Aides-Memoire', 2 July 2018, with confidential annexes A and B ('Prosecution response'); F3703, Reply to Prosecution Response to Sabra Defence Request for Admission of Three 'Aides-Memoire', 3 July 2018, with confidential annex A ('Sabra Defence's reply to Prosecution response'); F3704, Prosecution Sur-Reply Regarding Sabra Defence Request for Admission of Three 'Aides-Memoire', 4 July 2018 ('Prosecution sur-reply'); F3705, Further Reply to Prosecution Sur-Reply Regarding Sabra Defence Request for Admission of Three 'Aides-Memoire', 5 July 2018 ('Sabra Defence's further reply to Prosecution sur-reply').

⁸ Transcript of 26 June 2018, pp 65-71, 135; transcript of 27 June 2018, pp 3-8, 65-67, 78.

⁹ Transcript of 28 June 2018, p. 40.

¹⁰ F3707, Reasons for the Trial Chamber's Decision Dismissing the Sabra Defence Application to Receive 112 Witness Statements into Evidence under Rule 165, 13 July 2018.

¹¹ Transcript of 25 June 2018, pp 105-109.

12. In respect of the second *aide-memoire*, he was asked if Mr Taylor had previously referred to Mr Mohammed Kojja whose name is in it.¹²

13. As for *aide-memoire* 3, Mr Taylor was only asked specifically about four of the 176 extracts. When asked about extract 1—from a witness statement by Mr Hussam Mohsen taken by a Lebanese Judicial Investigating Magistrate on 18 March 2005—Mr Taylor did not remember him. Extract 83 is an extract from a Lebanese court document, dated 3 September 2008, related to an unspecified case in a Lebanese military court, but Mr Taylor had no knowledge of the particular Lebanese case and counsel acknowledged that Mr Taylor could not assist.¹³ Extract 116 consists of extracts from two border entry/exit records for 15 and 16 January 2005 related to Mr Taha and provided by the ISF Directorate General. While counsel initially referred to only the two records, they questioned Mr Taylor on records from February 2004 to 16 January 2005, which in the underlying documents of the extracts in the *aide-memoire*. Mr Taylor was questioned about the document underlying the extract, but not the extract itself.¹⁴

14. In addition, Mr Taylor answered the Sabra Defence's questions about six categories of extracts in *aide-memoire* 3. The first category related to Mr Taha's association with Mr Abu Adass. The second dealt with Mr Taha's 'ideological outlook' and the third and fourth addressed Mr Taha's whereabouts in 2004 and 2005. The sixth category counsel entitled 'Efforts to Conceal Khaled Taha from Investigation'.¹⁵ *Aide-memoire* 3 also contains a fifth category, which relates to Mr Taha's whereabouts in 2006, but counsel did not question the witness about it in court.

SUBMISSIONS

Defence submissions in court

15. Counsel for Mr Sabra submitted in court that, when read in conjunction with Mr Taylor's testimony, the *aides-memoire* provide a fuller, more accurate picture of the investigative interest in Mr Taha and, more specifically, of his potential involvement in Mr Abu Adass's disappearance. This is, in turn, relevant to assess the Prosecution's decision to

¹² Transcript of 26 June 2018, pp 14-18.

¹³ This document was admitted into evidence as exhibit 5D482.

¹⁴ Transcript of 25 June 2018, pp 84-86, 88-91, 93-96.

¹⁵ Transcript of 25 June 2018, p. 83-84 (category 1), 87-88 (category 2), 91-92 (category 3), 92-93 (category 4), 99-100 (category 6).

discontinue the line of inquiry with regard to Mr Taha before being able to conclude or rule him out as someone who may have been involved.¹⁶

Prosecution's written response

16. The Prosecution in its written response submits that the Sabra Defence failed to lay the foundation necessary to tender the *aides-memoire* through Mr Taylor during cross-examination. The *aides-memoire* do not meet the Trial Chamber's principles for a Party to tender evidence through a witness, because Mr Taylor is not their author, cannot speak to their origins or content and has not commented on them.

17. The Sabra Defence questioned Mr Taylor on only the first two of 108 extracts in *aide-memoire* 1. Mr Taylor's answers were neither positive nor meaningful. For *aide-memoire* 2, Mr Taylor was only asked if he had previously referred to someone listed in the document. As to *aide-memoire* 3, Mr Taylor was only asked specifically about four out of the 176 extracts (1, 83, 116 and 159) and he expressed his lack of familiarity with the document and its contents. Mr Taylor answered the Sabra Defence's questions about six categories of extracts that the Defence introduced, but this exchange does not demonstrate his knowledge of the specific extracts within each category.

18. Mr Taylor cannot specifically address investigative measures and interviews that occurred before his employment with the Office of the Prosecutor. The *aides-memoire* primarily reference documents that precede his employment period. The documents in the first and second *aides-memoire* are dated before he worked at the Special Tribunal. In the third *aide-memoire*, only four statements in five of the 176 extracts were taken during Mr Taylor's employment. Mr Taylor therefore cannot speak to or comment on them.

19. The Sabra Defence does not demonstrate that the documents have the requisite relevance and probative value. They are irrelevant because they concern decisions made during the Prosecution's investigation, a topic that falls outside the scope the Trial Chamber set for Mr Taylor's testimony. The Defence claims that investigative deficiencies can help determine whether alternative reasonable inferences may be drawn, but the *aides-memoire* do not demonstrate any deficiencies. And even if there was a deficiency, the Sabra Defence fails

¹⁶ Transcript of 26 June 2018, p. 136.

to explain how it would show that Mr Taha was involved in the crime or that Mr Sabra was not.

20. The Sabra Defence acknowledges the distinction between the *aides-memoire* and Mr Taylor's testimony. However, it fails to establish standing to seek their admission, under Rule 165, through a witness after choosing not to present a case under Rule 128.¹⁷

21. Statements must be tendered into evidence through Rules 155, 156 or 158.¹⁸ The Sabra Defence did not comply with the *lex specialis*¹⁹ provisions of these Rules which must apply to parts of witness statements extracted in the *aides-memoire*. This includes the five witness statements in the UNIIC document listed in extract 76 of *aide-memoire* 1 and the extracts of 112 witness statements in *aide-memoire* 3. The Sabra Defence previously attempted to have the UNIIC document and many of the witness statements in *aide-memoire* 3 admitted into evidence, but failed to comply with the Rules. The fact that the Sabra Defence showed the *aides-memoire* to Mr Taylor during cross-examination does not override its obligation to comply with these Rules.

22. The Sabra Defence claims it does not seek to tender the third *aide-memoire* for the truth of its contents. As the Trial Chamber has previously held, the fact that a witness statement is offered for purposes other than the truth of its contents does not affect the applicability of Rules 155, 156 or 158. However, contrary to its claim, the Sabra Defence has demonstrated its reliance upon *aide-memoire* 3 for the truth of its contents. Analysis of the Sabra Defence's questions and submissions reveal its attempts to draw reasonable inferences that Mr Taha was responsible for the crime. These attempts suggest the Sabra Defence seeks admission of the *aides-memoire* for the truth of their contents.

23. Should the Trial Chamber admit the *aides-memoire*, the Prosecution would seek to cross-examine the witnesses. The Prosecution opts to do this despite the procedural difficulties and unfairness of deciding whether to cross-examine witnesses without having the

¹⁷ Rule 128 provides that, after the close of the Prosecutor's case and upon a Defence election to present its case, the Trial Chamber shall order the Defence to file: (i) a list of witnesses the Defence intends to call; and (ii) a list of exhibits the Defence intends to offer in its case. The Defence shall serve on the Prosecutor copies of the exhibits.

¹⁸ Rule 155 permits a chamber to admit witness statements or transcripts into evidence without requiring the witness to testify if it does not go to the acts and conduct of an Accused person. Under Rule 156 a witness must attend court and attest to the statement's accuracy and be available for cross-examination. Under Rule 158 a statement or transcript may be admitted if a witness is 'unavailable' and the chamber is satisfied of its reliability.

¹⁹ '*Lex specialis*' refers to a law that governs a specific subject matter which, generally, excludes or modifies the application of a general rule on the same matter.

Defence's witness list or knowing where the evidence fits into the Defence case. The Defence also failed to address the reliability of each extract and underlying document for *aides-memoire* 1 and 3.

Sabra Defence reply

24. The Sabra Defence replies that the Prosecution raised no arguments which affect the relevance, reliability or probative value of the *aides-memoire*. The Defence properly laid the foundation for tendering the *aides-memoire* through Mr Taylor when the witness was taken to various sections of the *aides-memoire* and commented on them. Mr Taylor was Chief of Investigations from 2009²⁰ to 2013 and was aware of the investigation into Mr Taha.²¹

25. The Prosecution's objections to the scope of Mr Taylor's evidence have no bearing on the admission of the *aides-memoire*. A similar *aide-memoire* on the attribution of mobile number Purple 018 to Mr Sabra²² (exhibit 5D412) was admitted into evidence through Prosecution analyst Mr Andrew Donaldson notwithstanding that the vast majority of the statements included in it was not admitted into evidence.²³

Prosecution's sur-reply

26. Exhibit 5D412 is distinguishable from *aides-memoire* 1 and 3 as the Defence exhibit is merely a list of 24 witness names meaning that Rules 155, 156 and 158 are inapplicable. As for *aide-memoire* 2, contrary to Mr Donaldson's comments about that exhibit, Mr Taylor did

²⁰ Mr Taylor actually testified, however, that he became Chief of Investigations in April 2010 (transcript 25 June 2018, p. 10).

²¹ Sabra Defence's reply to Prosecution response, paras 3-4, 6.

²² In the amended consolidated indictment, the Prosecution alleges that five interconnected colour-coded mobile telephone groups, operating in four closed networks, and, additionally one group of 'purple' mobiles—were involved in planning, preparing and executing the attack that resulted in Mr Rafik Hariri's death in Beirut on 14 February 2005. The 'purple' phones were used to coordinate a false claim of responsibility for the attack. The Accused, Mr Assad Hassan Sabra was allegedly involved in the preparatory acts, the dissemination of the statements falsely ascribing responsibility for the attack, and was the user of 'Purple 018'. Prosecution analyst Mr Andrew Donaldson (Witness PRH230) provided analytical opinion evidence attributing mobile numbers, including Purple 018, to Mr Sabra. During his cross-examination by counsel for Mr Sabra, the Trial Chamber received into evidence, as an *aide-memoire*, a list prepared by the Sabra Defence of 24 Prosecution witnesses in relation to the use of Purple 018. See F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 3 (c), 14-15, 18, 19 (d); STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Prosecution's Submission of Updated Pre-Trial Brief Pursuant to Rule 91 (G) (i) and the Pre-Trial Judge's Order of 7 August 2013 and Decision of 16 August 2013, 23 August 2013 (public with confidential annexes A-B), annex A, para. 55; STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2125, Public Redacted Version of Prosecution Motion for the Admission of CSTs and SMS CSTs Related to the Accused Assad Hassan Sabra, 7 October 2016, paras 2-3; Exhibit P1953.1, 'Evidence of Telephone Attribution – Assad Hassan Sabra', Version 5, dated 14 December 2017; Transcript of 28 September 2017, p. 30; exhibit 5D412.

²³ Sabra Defence's reply to Prosecution response, paras 7-10, 11-12.

not comment on them. Moreover, the Sabra Defence incorrectly relies upon Rule 150 (I)—which defines the limits of cross-examination²⁴—to seek to expand the defined scope of Mr Taylor’s testimony as ordered by the Trial Chamber under Rule 165. To rely on Rule 150 (I), the Defence would have to first call a case under Rule 128, or else Rule 150 (I) would serve as a way for a Party to avoid its obligations under Rules 112 and 128.²⁵

27. Mr Taylor did not accept, comment or was asked to confirm that the extracts in the *aides-memoire* represent accurate extracts from the underlying materials. Mr Taylor could not have demonstrated the reliability and probative value of each *aide-memoire* or the extracts because the production of most of the material pre-dated his employment.

Defence’s reply to Prosecution’s sur-reply

28. Exhibit 5D412 is not distinguishable from the *aides-memoire* because, although it did not include the extracts of the listed statements, the relevance and purpose of the exhibit was based upon the information contained within the underlying statements. Moreover, the Sabra Defence’s questioning of Mr Taylor and the *aides-memoire* fall within Rule 150 (I) as no positive Defence case needs to be called for this part of Rule 150 (I) to apply.

29. Finally, as for the reliability of the information contained in the extracts, the Defence is not seeking to admit this evidence for the truth of its contents. The reliability of the evidence is whether it accurately reflects the information that was provided to the Lebanese authorities, the UNIIC or Prosecution investigators and whether these documents were in the Prosecution’s possession for use as the basis for further investigations.

DISCUSSION AND DECISION

30. The Sabra Defence could have called a Defence case and moved any relevant and probative document into evidence under Rule 154, and or sought to tender witness statements under Rules 155, 156 or 158, or to call the witnesses to testify. Instead, counsel for Mr Sabra elected not to do this, but rather attempted to tender extracts from potentially relevant documents via the Trial Chamber under Rule 165 as ‘*aides-memoire*’. The Sabra Defence

²⁴ Under Rule 150 (I), cross-examination is confined to the subject-matter of the examination in chief, matters affecting the witness’s credibility and, where the witness can provide the information, evidence relevant to the case of the cross-examining Party.

²⁵ Rule 112 (A) states disclosure obligations for the Defence that arise ‘[a]t the end of the Prosecutor’s case, following a Defence election to present its case’.

asked, on the eve of the close of the evidence, the Trial Chamber to receive the three documents into evidence by using a combination of Rules 154, 155 and 165. Rule 165, however, provides,

After hearing the Parties, the Trial Chamber may, *proprio motu* or at the request of a Party, order either Party or a victim participating in the proceedings to produce additional evidence. It may, after hearing the Parties, *proprio motu* summon witnesses and order their attendance.

31. But a preliminary issue arises here, namely, of whether *aides-memoire* prepared by Defence counsel for use with witnesses called by the Trial Chamber can constitute ‘additional evidence’ within the Rule. Strictly, the answer is ‘no’. The Rule requires the Trial Chamber to positively order a Party to produce ‘additional evidence’, either *proprio motu* (i.e. of its own volition) or on a Party’s application. This is not the case here. The Sabra Defence is itself offering the *aides-memoire* for tender into evidence. Rule 165 is therefore inapplicable.

32. The Trial Chamber will therefore consider whether the documents are admissible—but as Defence exhibits—under Rule 149 (C) which provides that it can only admit evidence which is relevant and has some probative value. And it will do so only on the basis that the documents were shown in part to Mr Taylor.

33. Generally, however, the Sabra Defence’s argument that it properly laid the foundation for tendering the *aides-memoire* through Mr Taylor—by taking him to various sections within the *aides-memoire* and commenting on them—is not particularly persuasive. Mr Taylor provided comments on a very limited number of extracts in *aides-memoire* 1 and 3, while for *aide-memoire* 2, he was only asked if he had previously referred to someone whose name is there. Mr Taylor has no real familiarity with the material he was being asked to comment on. The Trial Chamber will therefore consider whether a proper foundation under the Rules exists to admit the documents into evidence.

Aide-memoire 1

34. The first *aide-memoire* is 108 extracts from 112 witness statements and documents which are mainly witness statements, and also includes information in requests for assistance sent by the UNIIIC to the Lebanese government, Lebanese judicial investigative reports and portions of investigative interviews.

35. Each extract refers to Mr Khaled Taha and demonstrates—if accepted at face value—that the Lebanese investigating authorities, the UNIIIC and, thereafter, the Prosecution were all very much aware of who Mr Taha was and his possible involvement in the crimes charged in the amended consolidated indictment.

36. The Sabra Defence, however, tenders the extracts not for the truth of what is contained in them, but for the fact that whatever they contain was said, and hence the Prosecution was aware that Mr Taha was a possible suspect in both Mr Abu Adass's disappearance and the attack on Mr Hariri. During the Prosecution case, counsel for Mr Sabra formulated its case in several motions,²⁶ and presumably, this information is tendered to allow the Sabra Defence to argue that it helps to create a reasonable doubt as to whether Mr Sabra—and by extension Mr Oneissi—were involved in Mr Abu Adass's disappearance and hence also the conspiracy to murder Mr Hariri.

37. This may make the information in the documents *potentially* relevant but it does not necessarily make it probative. To be probative it must be *prima facie* reliable. Standing alone the extracts do no more than demonstrate—if accepted that whatever is in them is accurately recorded—that Mr Taha was a person of interest, and at some time, a possible suspect in the investigation. Mr Taylor, however, has testified to precisely that—and at some length—over two days.²⁷ This issue is not in dispute between the Prosecution and the Sabra Defence.

38. To accept the extracts into evidence the Trial Chamber must be satisfied that they are *prima facie* reliable. But the documents cannot be probative of a Defence case that Mr Taha *actually* left with Mr Abu Adass on 16 January 2005. For this to hold, the information in the statements must be capable of belief. But the extracts of themselves lack the necessary *prima facie* reliability to make them probative. They are simply extracts, devoid of context. Further, to make them admissible for their truth—and hence probative of a Defence case that Mr Taha was *positively* involved in Mr Abu Adass's disappearance—the makers of any statement may

²⁶ *E.g.* F3529, Motion for the Admission of Documents Relating to the Claim of Responsibility – The Invention of the “Mohammed” story, 22 January 2018 (confidential, with confidential annexes A-F), paras 26, 51-52; F3165, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass – The Successful Recruitment of Ahmed Abu Adass, 31 May 2017 (confidential, with confidential annexes A-B), paras 24, 28; F3024, Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass with updated annexes, 7 March 2017 (public, with confidential annexes A-C and public annex D), paras 47-54.

²⁷ Transcript of 25 June 2018, pp 19-24, 75-77, 99, 103-15, 108; transcript of 26 June 2018, pp 21, 32, 35, 40, 88.

have to be questioned. The Sabra Defence should have made a reasoned application under Rules 155, 156 or 158 to tender the witness statements into evidence.

39. In relation to the extracts of other documents, such as, for example, an extract from a document sent by Interpol in Ankara on 12 April 2005 stating of Mr Taha that ‘we found no information about him on the frontiers’,²⁸ the Sabra Defence has not explained why it has not sought to tender the documents into evidence and how they are relevant and probative to its case. This holds for most of the non-statement documents. Again, the Sabra Defence should have made a reasoned application to tender any documents into evidence under Rule 154 if it sought to reply upon them.

40. The Trial Chamber, for these reasons, is not satisfied of the relevance and probative value of the extracts in the document and will not receive the *aide-memoire* into evidence.

41. But, further, Mr Taylor has already substantively provided the evidence sought by the Sabra Defence in relation to what the Prosecution knew about Mr Taha and what it and the UNIIC did. This provides the necessary basis, in the Trial Chamber’s view, for any closing submissions on this topic.

Aide-memoire 2

42. This *aide-memoire* lists 170 Lebanese investigating and UNIIC documents, including witness statements, which are related to Mr Taha. The Trial Chamber has already admitted into evidence a similar list, exhibit 5D412, which is of 24 witness names.²⁹ The Trial Chamber will similarly receive the list into evidence as a Defence exhibit. It is relevant to the Defence case and its *prima facie* reliability comes from its unchallenged status as a list of witnesses and documents that have referred to Mr Taha in some way. It therefore has some limited probative value to the Defence case.

Aide-memoire 3

43. This document contains 176 extracts from 112 witness statements and documents, of which eleven are already in evidence as Prosecution or Defence exhibits. The Defence argues that the Prosecution chose not to investigate leads as to Mr Taha’s possible involvement into

²⁸ See extract 10 in *aide-memoire* 1.

²⁹ Transcript of 28 September 2017, para. 30.

Mr Abu Adass's disappearance.³⁰ However, as already noted, Mr Taylor has been comprehensively cross-examined on this issue and has provided detailed evidence on this.

44. Further, the eleven statements and documents which are already in evidence, in the Trial Chamber's view, contain a representative sample of the contents of the whole and thus provide the Sabra Defence with the evidence necessary to make its final trial submissions on the relevant points, including those pertaining to Mr Taylor's testimony.

45. Nor is the Trial Chamber entirely persuaded of the Sabra Defence's submission that it does not seek to tender this *aide-memoire* for the truth of its contents. In one example, as observed by the Prosecution,³¹ when asking Mr Taylor about the extract of a statement taken by a Lebanese Judicial Investigating Magistrate from Mr Hussam Mohsen on 18 March 2005, the Sabra Defence refers to the fact that Mr Taha 'is recorded as being the one who influenced' Mr Abu Adass. In another, it relies on an extract from the statement of a close relative of Mr Taha's—but in lieu of an official border entry/exit record—to establish that Mr Taha travelled to Syria in February 2005.³² These submissions are, on their face, incompatible with not tendering the *aide-memoire* for its truth. Whatever the intended submission, the effect of receiving them into evidence, in the light of the questioning, would require evaluating the extracts for their truth.

46. For these reasons, the Trial Chamber is not satisfied of the relevance or probative value of the extracts and will similarly not receive this *aide-memoire* into evidence.

Rule 150 (I) submissions

47. The Trial Chamber, therefore, need not consider the Prosecution's submission that the Sabra Defence's questioning of Mr Taylor and the *aides-memoire* fall within Rule 150 (I) or the effects of the Defence argument—that it does not seek to tender *aides-memoire* 1 and 3 for the truth of its contents—on the admissibility of the *aides-memoire*.

³⁰ F3600, Motion for Reconsideration of Sabra Defence Request Pursuant to Rule 165, 9 March 2018, para. 25; F3591, Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128 Order, 5 March 2018 (confidential, with confidential annexes A-B and public annex C), paras 16-17.

³¹ Prosecution response, para. 23.

³² Extracts 1 and 159 in *aide-memoire* 3; see transcript of 25 June 2018, pp 85, 100.

CONFIDENTIALITY

48. The Sabra Defence filed one annex confidentially without any justification for it. The Prosecution filed two annexes confidentially as they contain confidential information regarding the identity of non-witness third parties and the Sabra Defence has not confirmed that whether it had spoken to the these individuals to inquire whether they required protective measures.³³ Proceedings before the Special Tribunal are public by nature. Confidentiality is the exception, not the rule. The Trial Chamber, therefore, orders the Prosecution and the Sabra Defence, after having consulted each other, to file public redacted versions of the annexes to their filings.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLINES to admit *aides-memoire* 1 and 3 into evidence;

DECIDES to admit *aide-memoire* 2 into evidence and directs the Court Management Services Section to receive it on the court record as exhibit 5D589; and

ORDERS the Prosecution and the Sabra Defence to file public redacted versions of the annexes to their filings.

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

Leidschendam,
The Netherlands
16 July 2018

David Re

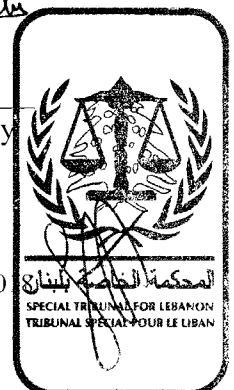
Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



³³ Prosecution response, para. 27.