



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: 26 March 2019

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

PUBLIC REDACTED VERSION OF

**“DECISION PARTLY GRANTING SEVENTH SABRA DEFENCE MOTION FOR
THE ADMISSION OF DOCUMENTS RELATING TO AHMED ABU ADASS –
THE ‘MOHAMMED’ STORY” OF 3 APRIL 2018**

Office of the Prosecutor:
Mr Norman Farrell & Mr Nigel Povoas

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

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

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini & Mr Jad Youssef
Khalil

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yassine
Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:
Mr David Young & Mr Geoffrey Roberts
Ms Sarah Bafadhel



INTRODUCTION

1. The amended consolidated indictment pleads that the former Lebanese Prime Minister, Mr Rafik Hariri, and 21 others were killed on 14 February 2005 when a Mitsubishi Canter containing a large quantity of high explosives was detonated in Beirut alongside Mr Hariri's motorcade. The explosion injured another 226 people.¹

2. It further alleges that the Accused, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra—under Mr Hassan Habib Merhi's supervision—participated in identifying and finding a suitable individual who would falsely claim responsibility for the attack. For this purpose, Mr Oneissi met and introduced himself to Mr Ahmed Abu Adass as 'Mohammed' at the beginning of January 2005 at the Arab University Mosque of Beirut, the Al-Houry Mosque, and asked to teach him how to pray. Subsequently, Mr Abu Adass left his home on the morning of 16 January 2005 with 'Mohammed' (Mr Oneissi) and on the following day his family received two calls: one telling them that Mr Abu Adass was in Tripoli and a second call telling them that Mr Abu Adass was leaving for 'jihad' in Iraq and would not be returning. Mr Abu Adass was not seen again until he appeared in a video broadcast on Al-Jazeera on 14 February 2005 falsely claiming responsibility for the attack on behalf of a previously unknown group called 'Victory and Jihad in Greater Syria'.²

3. Between December 2016 and July 2017, counsel for Mr Sabra filed six separate motions tendering—under Rule 154 of the Special Tribunal's Rules of Procedure and Evidence or, in the alternative, under Rules 92 or 165—165 statements and 95 other documents submitted as relevant to Mr Abu Adass. On 25 September and 30 November 2017, the Trial Chamber issued six decisions denying the admission of all the statements but admitting 72 other documents.³ The Trial Chamber subsequently denied certification to appeal these decisions.⁴

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended consolidated indictment, 12 July 2016 ('Amended consolidated indictment'), paras 4, 13, 40-42.

² Amended consolidated indictment, paras 3 (b)-(d), 5, 23, 28, 44, 48 (c), 64 (f), 66 (f), 68 (h), 70 (h); *see* transcript of 7 March 2018, p. 19.

³ *See* F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 ('First Abu Adass Decision'); F3439, Decision Partly Granting Second Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Selection of Ahmed Abu Adass, 30 November 2017 ('Second Abu Adass Decision'); F3442, Decision Partly Granting Third Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – The Failed Recruitment of Mr Ahmed Abu Adass, 30 November 2017 ('Third Abu Adass Decision'); F3443, Decision Partly Granting Fourth Sabra Defence Motion for the Admission

4. This decision concerns the Sabra Defence's seventh motion related to Mr Abu Adass, filed on 22 January 2018, in which it seeks the admission into evidence, under Rules 149 (C) and 154, of eight previously untendered documents related to the Mohammed story. It also asks the Trial Chamber to partially reconsider its six decisions denying the admission of 12 previously tendered statements and to admit them pursuant to Rule 154.⁵ The Prosecution opposes the motion, the Sabra Defence replied and the Prosecution sur-replied.⁶

5. For the reasons below, the Trial Chamber will not reconsider its six decisions, will admit two relevant and probative documents into evidence, but will not, consistent with the reasons in its prior decisions, receive any witness statements tendered by the Defence during the Prosecution's case which closed on 7 February 2018.

THE EVIDENCE

Sabra Defence motion

6. The tendered evidence is in annexes A and C of the Sabra Defence motion and includes statements and documents—including investigators notes, call sequence tables and reports—which are submitted to be sufficiently reliable, authentic and relevant. Their admission will assist the Trial Chamber in arriving at the truth.⁷

of Documents Relating to Mr Ahmed Abu Adass – The Successful Recruitment of Mr Ahmed Abu Adass, 30 November 2017 ('Fourth Abu Adass Decision'); F3444, Decision Partly Granting Fifth Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – The False Claim of Responsibility, 30 November 2017 ('Fifth Abu Adass Decision'); F3445, Decision Partly Granting Sixth Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Fax, 30 November 2017 ('Sixth Abu Adass Decision'); F3486, Clarifications of and Corrigenda to Decision Partly Granting Sixth Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Fax, 15 December 2017.

⁴ F3423, Decision Denying Certification to Appeal 'Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates', 23 November 2017; F3489, Decision Denying Certification to Appeal Five Decisions Partly Granting Five Sabra Defence Motions to Admit Documents Relating to Mr Ahmed Abu Adass, 18 December 2017 ('Second certification decision').

⁵ 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) ('Sabra motion').

⁶ F3557, Prosecution Response to Sabra Defence "Motion for the Admission of Documents Relating to the Claim of Responsibility – The Invention of the 'Mohammed' story", 6 February 2018 (confidential with confidential annexes A-B) ('Prosecution response'); F3566, Reply to "Prosecution Response to Sabra Defence 'Motion for the Admission of Documents Relating to the Claim of Responsibility – The Invention of the 'Mohammed' story'", 12 February 2018 (confidential) ('Sabra reply'); F3569, Further Reply to "Prosecution Response to Sabra Defence 'Motion for the Admission of Documents Relating to the Claim of Responsibility – The Invention of the 'Mohammed' story'", 13 February 2018 (confidential) ('Sabra further reply'); F3572, Prosecution Sur-Reply to Sabra Defence Reply to Prosecution Response to Sabra Defence "Motion for the Admission of Documents Relating to the Claim of Responsibility – The Invention of the 'Mohammed' story", 15 February 2018 (confidential) ('Prosecution sur-reply').

⁷ Sabra motion, para. 57.

7. Through this evidence,⁸ the Sabra Defence disputes the Prosecution's case concerning the allegation of a meeting held between someone identified as 'Mohammed' and Mr Abu Adass in the Al-Houry Mosque. The evidence it tenders provides context as to the information in the possession of the Lebanese authorities, the United Nations International Independent Investigation Commission (UNIIC) and the Special Tribunal's Prosecution at the time of the investigation. It shows that the Prosecution had evidence contradicting or undermining its case against Mr Oneissi and Mr Sabra regarding Mr Abu Adass' disappearance, and did not take further investigative actions to verify and discount any 'alternative reasonable inference' from the evidence available to Prosecution investigators.⁹

8. The Sabra Defence has repeatedly challenged the Prosecution's case regarding the 'Mohammed' story and Mr Sabra's alleged involvement. According to the Defence, there is evidence showing that members of Mr Abu Adass' family, together with other unnamed persons, adopted a fabricated story that Mr Abu Adass had been lured from his home by this 'Mohammed'. Although a person named 'Mohammed' was known to Mr Abu Adass, their relationship pre-dated the conspiracy period by six months and was entirely unrelated to the plot to kill Mr Hariri. It was later re-engineered by those involved in Mr Abu Adass' 'departure' to make it seem like Mr Abu Adass had been lured by a previously unknown person whom he had only recently met.¹⁰

9. The first report of Mr Abu Adass' disappearance on 19 January 2005, which is tendered by the Sabra Defence, was made by his father—Mr Taysir Abu Adass (Witness PRH636)—to the police and in a complaint filed with the Public Prosecutor's Office at the Court of Appeal in Beirut on the same day. It shows no mention of a call received from 'Mohammed' on the night of Mr Abu Adass' departure or that Mr Abu Adass left his home in the company of 'Mohammed'. Nor does it mention a meeting between Mr Abu Adass and 'Mohammed' or anyone else he supposedly met at the Al-Houry Mosque prior to his disappearance. It is silent about any person who Mr Abu Adass left his house to meet on the morning of his disappearance, or that someone had come to pick him up that day. Similarly, it does not mention any call to the Abu Adass home after Mr Abu Adass' departure concerning being in Tripoli or of Mr Abu Adass carrying out 'jihad' in Iraq on 17 January 2005 or of a

⁸ The Sabra Defence also relies in its motion on four statements and two reports—exhibits P461 (which includes a report and a statement), P1775, P2131, P2132 and 5D490—that have already been admitted into evidence to challenge the Prosecution's case as it relates to the 'Mohammed story': Sabra motion, annex B, items 1-6.

⁹ Sabra motion, paras 1, 4-5.

¹⁰ Sabra motion, paras 19-21.

supposed promise by Mr Abu Adass to return home to clean the carpet. Mr Abu Adass was simply reported to have asked for money to buy bread. According to the Sabra Defence, the information on the ‘Mohammed’ story was only provided by Witness PRH056 after Mr Hariri has been assassinated and Mr Abu Adass had claimed responsibility in the video. That is, once there was a reason to distance Mr Abu Adass from the crime.¹¹

10. The documents already admitted into evidence concerning the information provided by Mr Taysir Abu Adass regarding the disappearance of his son are insufficient to fully assess the credibility and reliability of his account. The investigators note¹² and the landline call sequence table¹³ for the Abu Adass household on 17 January 2005¹⁴ tendered by the Defence are relevant to assess Mr Taysir Abu Adass’ credibility. As Mr Taysir Abu Adass died in March 2005, this evidence could not be put to him in court. Its admission is therefore necessary for the Trial Chamber to have a complete and accurate picture.¹⁵

11. Further, the Sabra Defence provides material supporting the existence of three alternative versions that differ from the Prosecution’s ‘Mohammed’ story. In the first two versions, ‘Mohammed’ refers to two different people unconnected to Mr Abu Adass’ disappearance and with whom he had a relationship which pre-dated the conspiracy period. This is opposed to the Prosecution’s version which alleges that the relationship was contemporaneous with Mr Abu Adass’ disappearance. The material also does not show the existence of someone different than the person alleged to have lured Mr Abu Adass from his home. According to the Sabra Defence, in the third theory, ‘Mohammed’ was the nickname of someone who never went to the Arab University Mosque and there is no evidence of this ‘Mohammed’ ever meeting Mr Abu Adass. The ‘Mohammed’ described by the Abu Adass

¹¹ Sabra motion, paras 25-27, 30.

¹² Sabra motion, annex A, item 1 (explaining that Mr Taysir Abu Adass was accompanied by a woman when he reported his son’s disappearance to the Lebanese police; that Mr Abu Adass had disappeared on 15 January 2005 rather than 16 January 2005; and that Mr Taysir Abu Adass denied that Mr Abu Adass had any disputes, arguments, or differences with anyone; that Mr Abu Adass did not have friends; and that Mr Taysir Abu Adass could not understand why Mr Abu Adass left and had not returned, despite the existence of the alleged phone calls from ‘Mohammed’).

¹³ Call sequence tables (CSTs) render the information contained in call data records legible by presenting ‘chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time’: F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL’s Prosecution, 6 May 2015, para. 2. *See also* F2799, Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks, 31 October 2016, para. 3.

¹⁴ Sabra motion, annex A, item 3 (which fails to record any calls received which match the alleged calls from ‘Mohammed’).

¹⁵ Sabra motion, paras 31-33.

family and relied upon by the Prosecution, therefore appears to be an amalgamation of ‘various other pre-existing stories.’¹⁶

12. The evidence tendered suggests that the ‘Mohammed’, as described by Mr Abu Adass’ family, simply did not exist. This is apparent from Witness 56’s attribution to ‘Mohammed’ of a number of characteristics which in fact belonged to two known associates of Mr Abu Adass. In this respect, the Sabra Defence relies on two calls received on the Abu Adass home telephone line on 16 January 2005 from a public payphone known to be used by Mr Bilal Zaaroura which was later used to implicate ‘Mohammed’.¹⁷ Additionally, ‘Mohammed’’s call habits, as described by Witness 56, were borrowed from what Witness 56 had previously heard about Mr Khaled Taha from Mr Abu Adass.¹⁸

13. The Sabra Defence also tenders witness statements and call sequence tables in relation to how three different groups—Mr Abu Adass’ relatives, people involved in his disappearance and Mr Abu Adass’ religious associates—appear to have contributed, due to various motives, to propagate the fictional ‘Mohammed’ story. First, Mr Abu Adass’ relatives were fearful that revenge would be exacted upon them if he had willingly left with a friend, as this would have supported the theory that Mr Abu Adass was a willing participant in Mr Hariri’s assassination. Second, Mr Abu Adass’ acquaintances who were involved in his disappearance—Mr Ziad Ramadan (Witness PRH103) and Mr Hussam Mohsen in particular—had clear motives to convince Mr Abu Adass’ family about the ‘Mohammed’ story. Mr Ramadan and Mr Mohsen were acquainted with each other, were in contact with Witness 56 after Mr Abu Adass left on 16 January 2005 and thus had the opportunity to convince Witness 56 of the ‘Mohammed’ story. Further, Mr Ramadan either was an accomplice in Mr Abu Adass’ disappearance or wished to hide any association with the man who had left with Mr Abu Adass. Mr Mohsen is closely linked with three people involved in the manipulation and disappearance of Mr Abu Adass: Mr Taha, Mr Ahmad Saneh and Mr Fouad Al-Masri.¹⁹

14. Third, a witness [REDACTED] contacted Mr Ibrahim El-Masri. Mr El-Masri was the Deputy General of Jamaa Al-Islamiya in Lebanon and had ‘personal knowledge’ of Mr Abu Adass. [REDACTED] League of Muslim Students—which may have shared Jamaa Al-

¹⁶ Sabra motion, paras 34-41.

¹⁷ See Sabra motion, annex A, item 3.

¹⁸ Sabra motion, paras 42-45.

¹⁹ Sabra motion, paras 46-53.

Islamiya's ideology—and was in contact with Mr Assad Harmouche, a member of the Lebanese parliament representing the Jamaa Al-Islamiya. Various people connected with Jamaa Al-Islamiya were thus implicated in the attack which killed Mr Hariri and sought to deflect attention from themselves and Mr Abu Adass and thus direct responsibility to 'Mohammed'.²⁰

15. The Sabra Defence submits that the Prosecution, by presenting the 'Mohammed' story as a central part of its case, is inadvertently furthering and endorsing the attempt by the real perpetrators to deflect responsibility for their own involvement in Mr Abu Addas' disappearance.²¹

RECONSIDERATION

16. Under Rule 140, '[a] Chamber may, *proprio motu* or at the request of a Party, reconsider a decision, other than a judgement or sentence, if necessary to avoid injustice.' The Appeals Chamber has emphasised that reconsideration is exceptional and there must be actual injustice.²² This Rule may not be used as an ordinary remedy to redress imperfections in a decision or to circumvent the unfavourable consequences of a ruling. The party seeking reconsideration must show an injustice that involves prejudice and is demonstrated on specific grounds. If prejudice or an injustice is shown, reconsideration may be granted on grounds that include an error of law, abuse of discretion, or the existence of new facts or a material change in circumstances.²³

17. On 25 September and 30 November 2017, as noted above at paragraph 3, the Trial Chamber issued six decisions denying the admission of 165 statements tendered by the Sabra Defence, primarily under Rule 154.²⁴ They were denied admission on the basis that, among other things, Rules 155, 156 and 158²⁵ are *lex specialis*²⁶ provisions governing the admission

²⁰ Sabra motion, paras 54-56.

²¹ Sabra motion, para. 22.

²² STL-11-01/PT/AC/R176bis, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, F0327, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, 18 July 2012 ('Appeals Chamber decision of 18 July 2012'), paras 22-23, 27.

²³ See F3459, Decision Clarifying Decision of 25 September 2017 Admitting Exhibit 5D251 MFI (Relevant to Mr Ahmed Abu Adass) and Denying Prosecution Application for Reconsideration, 6 December 2017, para. 8; F2719, Decision on Ayyash Defence Motion for 'Reissuance' and Oneissi Defence Motion for Reconsideration of the Trial Chamber's Decision of 29 July 2016, 14 September 2016, para. 10; Appeals Chamber decision of 18 July 2012, paras 22-26.

²⁴ Rule 154 provides that the Trial Chamber 'may admit evidence in the form of a document or other record'.

²⁵ Rule 155 allows written statements and transcripts to be admitted in lieu of oral testimony; Rule 156 allows the admission of written statements and transcripts in lieu of examination in chief but the witness must be

of witness statements and that witness statements cannot generally be tendered into evidence under Rule 154 over the opposing Party's objections. It was further held that a variation in the sequence for the presentation of evidence under Rule 146 (B)²⁷ should be sought to tender witness statements during the opposing Party's case where the opposing Party seeks to cross-examine the witnesses. Where a Party tenders witness statements for the truth of their content and in support of its case, the witness more appropriately belongs in that moving Party's case.²⁸

Sabra Defence motion

18. Annex C of the motion lists 12 statements that the Trial Chamber refused to admit into evidence in its six decisions; some statements were tendered by the Sabra Defence and rejected by the Trial Chamber multiple times.²⁹ The Sabra Defence seeks partial reconsideration of these six decisions—under Rule 140—in relation to the 12 statements. It argues that their non-admission into evidence constitutes an injustice causing prejudice because the Defence is prevented from relying on the statements to demonstrate that the Prosecution had access to evidence contradicting or undermining its case. Further, the Prosecution was aware of this evidence and did not take adequate investigative action. Moreover, Mr Sabra's responsibility for Mr Abu Adass' disappearance is not the only reasonable inference that can be drawn from the evidence.³⁰

19. The Sabra Defence submits that the Trial Chamber's decision was based on an error of law. The error is identified in the following passage in the Trial Chamber's decision of

available for cross-examination; and Rule 158 relates to 'unavailable' witnesses and permits the admission of written statements, a transcript of a statement, or any other reliable record of what a witness has said.

²⁶ '*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.

²⁷ Rule 146 (B) provides that, unless directed otherwise by the Trial Chamber in the interests of justice, evidence at trial shall be presented in the following sequence: Prosecution evidence; evidence called by the Trial Chamber at the request of the victims participating in the proceedings; Defence evidence; Prosecution rebuttal evidence; victims rebuttal evidence; and Defence evidence in rejoinder.

²⁸ See below, para. 35.

²⁹ Of the 12 statements, six statements were denied in the First Abu Adass Decision (Sabra motion, annex C, items 2, 3, 8, 10-12); seven statements were denied in the Second Abu Adass Decision (Sabra motion, annex C, items 1, 7-12); one statement was denied in the Third Abu Adass Decision (Sabra motion, annex C, item 10); two statements were denied in the Fourth Abu Adass Decision (Sabra motion, annex C, items 10, 12); three statements were denied in the Fifth Abu Adass Decision (Sabra motion, annex C, items 1, 3, 8,); and six statements were denied in the Sixth Abu Adass Decision (Sabra motion, annex C, items 1, 4-8).

³⁰ Sabra motion, paras 9, 11.

18 December 2017 denying the Sabra Defence's request to certify for interlocutory appeal of five of the six decisions:³¹

[T]he decisions rejecting the admission into evidence of the 98 witness statements were not solely premised on their being tendered for the truth of their content. Rather, consistent with the decision of 25 September 2017, admission was denied because the statements were impermissibly tendered under the wrong rule—Rule 154 rather than Rules 155, 156 or 158—and without seeking a variation of the order for the presentation of evidence under Rule 146 (B).³²

20. Relying on the International Criminal Court (ICC)'s case law, particularly from the *Bemba* contempt case,³³ the Sabra Defence submits that statements not tendered for the truth of their content need not comply with Rules 155, 156 and 158. This recognizes and reflects the false testimony penalties to which a statement maker is subject—pursuant Rule 152 (H)³⁴—when the statement is being submitted for the truth of its content. The fact that Rule 152 (H) refers specifically to Rules 155, 156 and 158, confirms that statements tendered for the truth of their content must be tendered under those Rules.³⁵

21. By contrast, statements tendered for a purpose other than for the truth of their content are not subject to Rule 152 (H) and may be tendered pursuant to Rules 149 (C) or 154 without a request to vary the order of the presentation of evidence. What is relevant is the intention of the tendering party. By finding that Rules 155, 156 or 158 apply to all statements, regardless of the purpose for which they were tendered, the Trial Chamber committed an error. Without this error, the statements could have been tendered under Rule 154 over the Prosecution's objection and with no variation request³⁶

³¹ Sabra motion, paras 12-13 (citing Second certification decision, para. 9).

³² Second certification decision, para. 9 (footnotes omitted).

³³ ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1478-Red-Corr, Corrigendum of Public Redacted Version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015 ('*Bemba* contempt decision'), para. 34. The Sabra Defence also submits that 'this approach' was endorsed in the ICC's *Ongwen* and *Lubanga* cases: ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-985-AnxXVI, Registry's Report on the Evidence Recognised as Formally Submitted to the Chamber, 13 September 2017 ('*Ongwen* Registry report'), Annex XVI, pp. 6-7; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2595-Red-Corr, Corrigendum to Redacted Decision on the Defence Request for the Admission of 422 Documents, 8 March 2011 ('*Lubanga* decision'), para. 50.

³⁴ Rule 152 (H) provides that 'Paragraphs (B) to (G) apply *mutatis mutandis* to a person who knowingly and willingly makes a false statement in a statement taken in accordance with Rules 93, 123, 125, 155, 156, 157 and 158 which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.'

³⁵ Sabra motion, paras 14-17.

³⁶ Sabra motion, paras 17-18.

Prosecution response

22. The Prosecution argues that the Sabra Defence's case is built on contradictions. The Sabra Defence submits that the evidence will assist the Trial Chamber in arriving at the truth, but at the same time submits that the statements are not being tendered for the truth of their content. Further, it seeks to draw an alternative reasonable inference or facts from the tendered statements, namely, that people other than Mr Sabra were responsible for Mr Hariri's assassination. However, such an inference cannot be drawn from material that is not tendered for the truth of its content.³⁷

23. In any event, there is no injustice as the six decisions did not preclude the Sabra Defence from tendering the statements under Rule 155 during the Defence phase of the trial. Similarly, there is no injustice and no prejudice when material is denied admission—and the Defence is precluded from relying upon it—as prescribed by the Rules. Rather, the Trial Chamber is merely upholding the Rules.³⁸

24. Had the Trial Chamber erred in law, the outcome would be the same. The six decisions found that the statements *were* tendered for the truth of their content, a finding which the Sabra Defence did not challenge. In its second certification decision of 18 December 2017, the Trial Chamber further held that the Sabra Defence's submissions suggested reliance on the documents for the truth of their content. Regardless of the alleged error, Rules 155, 156 and 158 apply to the 12 statements and they remain inadmissible at this stage.³⁹

25. Rules 155, 156 and 158 do not distinguish between statements tendered for the truth of their content or not; they include no such requirement. Therefore, a statement not tendered for the truth of its content does not prevent the application of Rules 155, 156 or 158, rules the Trial Chamber has consistently held are *lex specialis* provisions governing the admission of witness statements. Rather than challenging this finding, the Sabra Defence identifies an error in the second certification decision, which is not one of the six decisions subject to the reconsideration application. Similarly, the Sabra Defence ignores the Trial Chamber's consistent decisions not to admit witness statements under Rule 154. Regarding Rule 152 (H), the Prosecution submits that it does not concern admissibility of evidence or govern which

³⁷ Prosecution response, paras 2-3.

³⁸ Prosecution response, paras 6-7.

³⁹ Prosecution response, para. 8.

Rules apply to the admission of evidence. The fact that a statement was tendered and admitted not for the truth of its content may, at best, affect the application of Rule 152 (H).⁴⁰

26. The Sabra Defence failed to justify why ICC decisions should override the Trial Chamber's decisions. While the ICC may have taken a different approach, it does not mean that an error of law was committed. Further, the ICC decisions are distinguishable as they pertain to the ICC's Rule 68⁴¹—which does not include some of the Rules considered by the

⁴⁰ Prosecution response, paras 9-12.

⁴¹ ICC Rule 68 provides:

1. When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.
2. If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:
 - (a) Both the Prosecutor and the defence had the opportunity to examine the witness during the recording.
 - (b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:
 - (i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question:
 - relates to issues that are not materially in dispute;
 - is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
 - relates to background information;
 - is such that the interests of justice are best served by its introduction; and
 - has sufficient indicia of reliability.
 - (ii) Prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief. Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.
 - (iii) Accompanying declarations must be witnessed by a person authorized to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State. The person witnessing the declaration must verify in writing the date and place of the declaration, and that the person making the declaration:
 - is the person identified in the prior recorded testimony;
 - assures that he or she is making the declaration voluntarily and without undue influence;
 - states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and
 - was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.
 - (c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:
 - (i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability

Trial Chamber in its decisions⁴²—and did not deal with objections from the responding party seeking to cross-examine the witnesses who made the statements.⁴³

27. The Sabra Defence has previously sought certification to appeal or reconsider one or more of the six decisions and did not raise the alleged error of law. It did not explain why it is only now being raised.⁴⁴

Sabra Defence reply

28. The Sabra Defence reiterates that it is not tendering the statements for the truth of their content and submits that the Prosecution refers to portions of its motion out of context. It argues that where, in a circumstantial case, an investigative lead clearly points to a non-

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- (ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.
 - (d) The prior recorded testimony comes from a person who has been subjected to interference. In such a case:
 - (i) Prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that:
 - the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony;
 - the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion;
 - reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness;
 - the interests of justice are best served by the prior recorded testimony being introduced; and
 - the prior recorded testimony has sufficient indicia of reliability.
 - (ii) For the purposes of sub-rule (d)(i), an improper interference may relate, *inter alia*, to the physical, psychological, economic or other interests of the person.
 - (iii) When prior recorded testimony submitted under sub-rule (d)(i) relates to completed proceedings for offences defined in article 70, the Chamber may consider adjudicated facts from these proceedings in its assessment.
 - (iv) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.
3. If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

⁴² Specifically, the Prosecution submits that the ICC Rules do not have the equivalent of Rule 149 (F) (which provides that '[a] Chamber may receive the evidence of a witness orally or, pursuant to Rules 93, 123, 125, 155, 156, 157 and 158 in written or other form') or Rule 154 (which provides that '[s]ubject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149 (C) and (D).')

⁴³ Prosecution response, paras 13-15.

⁴⁴ Prosecution response, para. 16. The Prosecution also made submissions in the event that the Trial Chamber opted to reconsider its six decisions: Prosecution response, paras 17-22. It also included its previous reliability analysis of the 12 statements in annex A of the Prosecution response. Since, for the reasons below, the Trial Chamber will not reconsider its six decisions, there is no reason to consider them.

criminal explanation which is left unexplored, then that lead alone can permit reasonable doubt as to the Prosecution's case.⁴⁵

29. While Rules 155, 156 and 158 do not, as submitted by the Prosecution, distinguish between statements tendered for the truth of their content and those that are not, neither does the ICC's Rule 68. Yet, the ICC considered the intention of the tendering party when determining the admissibility of prior recorded testimony so as to create an exception to Rule 68's criteria—reflecting those of the Special Tribunal's Rules 155, 156 and 158—which bolster the reliability of prior recorded testimony, but is unnecessary when the truth of their content is not relied upon.⁴⁶

30. The Sabra Defence rejects the Prosecution's attempts to limit the application of the ICC decisions, noting, among other things, that the statements' admission were contested by the opposing party at the ICC and therefore they remain relevant to the Trial Chamber. By maintaining that the statements should be tendered under Rule 155 to allow for cross-examination, the Prosecution seeks to complete its investigations during the trial when it had ample opportunity to consider and eliminate the factual propositions contained in the statements. Injustice would arise if the Defence would be forced to meet the stringent limitations of Rules 155, 156 and 158 when the statements are not offered for the truth of their content in proceedings held *in absentia*.⁴⁷

Discussion and decision

31. The Sabra Defence asks the Trial Chamber to partly reconsider its six decisions that denied the admission of 12 witness statements. It alleges an error of law, but does not refer to any paragraph in the six decisions where the alleged error was made. Rather, the Defence identifies the supposed legal error by quoting directly from the second certification decision of 18 December 2017. But that decision did not assess the arguments of the Parties, deny the admission into evidence of the 12 statements or fully reason why. Instead, the second certification decision was concerned with an entirely different exercise, namely, whether the two issues identified by the Sabra Defence as relating to their denial met the strict requirements of Rule 126 (C) for interlocutory appeal.⁴⁸ Thus, the Sabra Defence claims that a

⁴⁵ Sabra reply, paras 3-6.

⁴⁶ Sabra reply, para. 7.

⁴⁷ Sabra reply, paras 8, 10-11.

⁴⁸ Rule 126 (C) provides that the Trial Chamber can certify a decision for interlocutory appeal when 'the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or

legal error was committed not in the decisions it seeks the Trial Chamber to reconsider, but in a decision that had nothing to do with the admission of any evidence. On this basis alone, the reconsideration application is dismissed. There is no injustice warranting reconsideration.

32. Additionally, the ICC case law is distinguishable. In addition to the differences between ICC Rule 68 and the Special Tribunal's Rules, the Prosecution has, in this case, consistently objected *and* expressed the preliminary view—in response to the Sabra Defence's six motions tendering the witness statements—that it would seek to cross-examine the witnesses who made the statements. In this respect, as the Trial Chamber has previously held, tendering witness statements during the Prosecution's case presents procedural difficulties because '[i]t may [...] be unfair to the Prosecution to force it to elect now whether to seek to cross-examine a witness without having the Defence's witness list' or without knowing where the evidence fits into the Defence's case. This is why the Trial Chamber has held that, in such cases, the Defence would be required to formally request a variance in the sequence for calling evidence under Rule 146 (B).⁴⁹ Here, the Defence did not do this.

33. Moreover, the ICC Prosecution did not seek to cross-examine the witnesses who made the tendered statements as the Prosecution does here.⁵⁰ As a result, the ICC did not have to consider the procedural difficulties associated with the Prosecution cross-examining a witness during its own case, the need for the Prosecution to be aware of the Defence's case, or to formally vary the presentation of evidence. The ICC's case law is therefore distinguishable both on its facts and in its application of the law.

34. For these reasons, and considering that reconsideration is an exceptional remedy, the Trial Chamber will not reconsider its six decisions and the admission of the 12 witness statements in annex C of the Sabra Defence motion.⁵¹ This part of the Defence motion is denied. This leaves the admissibility of eight previously untendered documents contained in annex A of the Sabra Defence motion.

the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.'

⁴⁹ See First Abu Adass decision, paras 89-90, 100.

⁵⁰ See ICC, *Bemba* contempt decision; ICC, *Ongwen* Registry report, Annex XVI; ICC, *Lubanga* decision.

⁵¹ See Sabra motion, annex C, items 1-12.

ADMISSIBILITY OF EVIDENCE

Legal principles

35. In its six decisions, the Trial Chamber consistently articulated the following principles that are applicable to the admission of the tendered statements and documents:⁵²

- statements taken by investigative authorities and recorded through due procedure in the course of investigations are ‘witness statements’;
- Rules 155, 156 and 158 are *lex specialis* provisions governing the admission of witness statements;
- witness statements cannot generally be tendered into evidence under Rule 154 over the opposing Party’s objections;
- a variation in the sequence for the presentation of evidence under Rule 146 (B) should be sought to tender witness statements during the opposing Party’s case where the opposing Party seeks to cross-examine the witnesses;
- witness statements tendered under Rule 155 must, in most cases, comply with the Rule 155 Practice Direction;⁵³
- the admission of witness statements that do not comply with the Rule 155 Practice Direction and are tendered unopposed under Rule 154 is dependent on the witness being on the tendering Party’s witness list or its seeking to add the witness to its witness list;
- the Trial Chamber may refuse to hear a witness whose name does not appear on the witness list of a Party, and a Party seeking to call live evidence from such a witness would need to provide compelling reasons for the Trial Chamber to permit it;
- the Trial Chamber cannot, on its volition, receive witness statements into evidence under Rule 155 as Rule 155 (C) requires it to hear from the Parties as to whether the witness is required to appear for cross-examination;

⁵² See First Abu Adass Decision, paras 83-84, 87-89, 91-92, 97-100, 102-104, 109; Second Abu Adass Decision, paras 9-13; Third Abu Adass Decision, paras 12-14; Fourth Abu Adass Decision, paras 11-13; Fifth Abu Adass Decision, para. 24; Sixth Abu Adass Decision, para. 13.

⁵³ 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.

- where a Party tenders witness statements for the truth of their content and in support of its case, that witness more appropriately belongs in that moving Party's case; and
- in principle the Trial Chamber, in the exercise of its discretion, may admit into evidence documents other than witness statements during an opposing Party's case—where that Party is sufficiently informed of the tendering Party's case—without a formal variation under Rule 146 (B).

36. Additionally, the Trial Chamber has previously outlined the legal principles for the admission of documents from the 'bar table' under Rule 154. These apply here. The documents must be relevant and probative, and its probative value must not be outweighed by the need to ensure a fair trial.⁵⁴ *Prima facie* reliability is sufficient.⁵⁵ In addition, how and where each document or record fits into the tendering party's case must be clearly explained.⁵⁶ The ultimate weight given to the material by the Trial Chamber is separate and distinct from its probative value.

Classification of the evidence

37. According to the Sabra Defence—and disregarding the 12 witness statements whose reconsideration has been rejected above in paragraphs 31-34—the eight tendered documents consist of:

- Three call sequence tables;⁵⁷
- Three witness statements;⁵⁸
- One police report;⁵⁹ and
- One investigators note.⁶⁰

⁵⁴ See F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution, 6 May 2015 ('CST decision'), paras 66, 111; F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015 ('Mobile documents decision'), para. 33; F1781, Corrected Version of "Decision on Prosecution Motion to Admit into Evidence Geographic Documents" of 8 December 2014, 10 December 2014, para. 4.

⁵⁵ F1308, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014 ('Visuals decision'), para. 8; F1350, Decision on Prosecution's Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014 ('Victims decision'), para. 7; Mobile documents decision, para. 33; CST decision, para. 111.

⁵⁶ CST decision, para. 111; Mobile documents decision, para. 33; Victims decision, para. 7; Visuals decision, para. 6.

⁵⁷ Sabra motion, annex A, items 3-5.

⁵⁸ Sabra motion, annex A, items 6-8.

⁵⁹ Sabra motion, annex A, item 2.

⁶⁰ Sabra motion, annex A, item 1.

38. According to the Prosecution, the documents are:

- Three call sequence tables;⁶¹
- Four witness statements;⁶² and
- One police report.⁶³

39. The Parties therefore disagree on the classification of one document, namely, the investigators note.⁶⁴ The Sabra Defence submits that it is a document that shows that the account of Mr Abu Adass' father—Mr Taysir Abu Adass—regarding his son's disappearance was very different from the information subsequently given by Witness 56. This undermines Witness 56's evidence but the Prosecution did not question Witness 56 about this apparent inconsistency. The document was produced by the UNIIC as part of its investigations and is signed, dated and includes the names of UNIIC officials responsible for it. As advanced by the Prosecution, investigators notes do not constitute a witness statement.⁶⁵

40. The Prosecution submits that the document is a witness statement because of its content, use, function and source. Further, it notes that previously tendered investigators notes have been held to be witness statements and rejects the notion that it has previously submitted that investigators notes cannot constitute witness statements.⁶⁶

41. The Trial Chamber has previously held that 'there is no single definition of a "witness statement". More than one definition exists'.⁶⁷ Thus, whether a document is a witness statement or not is to be determined 'on a case-by-case basis, according to the type of testimony the witness will give, the character of the witness, and the content, use, function and source of the document or material itself'.⁶⁸

42. The document details the first-hand knowledge of a member of the Anti-Terrorism Branch of the Lebanese Internal Security Force (ISF) who completed the missing persons' report in relation to Mr Abu Adass, based on information that his father Mr Taysir Abu Adass directly and personally gave him. This information was passed on to the UNIIC during its investigations and was recorded in the form of an investigators note. Having reviewed the

⁶¹ Prosecution response, para. 29, fn. 69 (referring to Sabra motion, annex A, items 3-5).

⁶² Prosecution response, para. 23, fn. 53 (referring to Sabra motion, annex A, items 1, 6-8).

⁶³ The Prosecution does not challenge the classification of this item or its status as a police report: Prosecution response, para. 27 (referring to Sabra motion, annex A, item 2).

⁶⁴ See Sabra motion, annex A, item 1.

⁶⁵ Sabra motion, para. 59; annex A, item 1.

⁶⁶ Prosecution response, para. 24.

⁶⁷ F3171, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017 ('Witness 230 Decision'), para. 47. See also First Abu Adass Decision, para. 11.

⁶⁸ Witness 230 Decision, para. 48; First Abu Adass Decision, para. 12.

document, the Trial Chamber is satisfied that it has the characteristics of an unsigned witness statement, although not formally classified as such by the Defence. The Trial Chamber therefore disagrees with the Defence's characterization of this document and finds that, for the purposes of this decision, it is a witness statement—rather than an investigators note—on the basis of its content, the relevant witness' character and the source and function of the material.

43. The Sabra Defence has therefore submitted four witness statements⁶⁹ and four other documents⁷⁰ for admission pursuant to Rule 154.

Witness statements

44. The Sabra Defence submits that none of the witness statements—provided to either the UNIIC, Lebanese authorities or the Prosecution—are tendered for the truth of their content and so the Trial Chamber need not assess whether they are true. Relying on the *Al Jadeed and Al Khayat* contempt case,⁷¹ it submits that what is important is whether the statements accurately reflect 'the evidence given'. The statements contain information about the interviewers and interviewees, the dates of the interviews and the process of recording the evidence. They are thus sufficiently reliable for admission for the limited purpose advanced by the Defence.⁷²

45. The Sabra Defence notes the Trial Chamber's liberal and non-technical approach to the admission of evidence and states that the evidence is relevant to the Trial Chamber's responsibility to arrive at the truth and, absent a client, the 'absolute' necessity of enabling the Defence to put forth all relevant information to defend itself. The rejection of the evidence would constitute a major impediment to the ability of the Trial Chamber to arrive at the truth.⁷³

46. The Prosecution responds that the Defence's submissions are contradictory. The Sabra Defence does not seek to rely on the truthfulness of the statements, but submits that their admission will assist the Trial Chamber in arriving at the truth. Further, the Sabra Defence relies on the statements to identify 'alternative reasonable inferences' which the Prosecution

⁶⁹ Sabra motion, annex A, items 1, 6-8

⁷⁰ Sabra motion, annex A, items 2-5.

⁷¹ STL-14-05/A/AP, *In the Case Against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, F0028, Public Redacted Version of Judgment on Appeal, para. 68 (finding that because documents were not tendered for the truth of their content, the reliability of their content was irrelevant).

⁷² Sabra motion, paras 2, 59, 61-62.

⁷³ Sabra motion, para. 63.

was obligated to investigate, but tendered the statements under Rule 154 which precludes cross-examination. By drawing alternative reasonable inferences from the material, the Sabra Defence is relying on the truth of their content, but this is undermined because their truth and accuracy are ambiguous. The Prosecution's 'obligation' to investigate these alternative inferences rests on ambiguous material whose relevance and probative value are conditional on the existence of such an obligation—one that the Sabra Defence has not established.⁷⁴

47. Further, relying on the Trial Chamber's decisions, the Prosecution submits that tendering statements during the Prosecution's case under Rule 154 is improper as Rules 155, 156 and 158 are the *lex specialis* provisions governing their admission and that a variation of the sequence for the presentation of evidence under Rule 146 (B) is required. The Prosecution's preliminary view is that it will seek to cross-examine the witnesses, and annex B of its response analyses the reliability of the statements. The Sabra Defence's reliance on the *Al Jadeed and Al Khayat* case is misplaced as it concerned media articles—rather than witness statements—which were not tendered as truthful.⁷⁵

48. In reply, the Sabra Defence reasserts that it is not relying on any statement for the truth of its content and the Prosecution's submission to the contrary quotes its motion out of context. While proving a counter-narrative is a route for the Defence to establish a reasonable conclusion, it is not the only one. Where a circumstantial case is so weak that a second non-criminal explanation is readily apparent, then there is nothing preventing the Trial Chamber from concluding that the second explanation establishes reasonable doubt from 'logical inference alone'. Similarly, when an investigatory lead which points to a non-criminal explanation is left unexplored, then this lead alone also permits reasonable doubt. Here, the Defence relies on the material tendered to show an unrealized investigative lead and its submissions as to why they justify reasonable doubt will be made at the appropriate point.

49. The Sabra Defence also relies on its submissions citing ICC case law and does not contest that inferences can only be drawn from established facts—which is why it seeks to admit the evidence. It also emphasizes that it would suffer injustice if it were required to meet the stringent requirements of Rules 155, 156 and 158 when it is not offering the material for

⁷⁴ Prosecution response, paras 2-4, 25, 28.

⁷⁵ Prosecution response, paras 23, 26.

its truth and when it is not obliged to prove a counter-narrative or makes submissions on the reasonable conclusions the Trial Chamber can draw from the evidence before it.⁷⁶

50. The Prosecution sur-replies that the Sabra Defence must demonstrate now why the investigative leads it has purportedly identified justify reasonable doubt as this is linked to the evidence's relevance and probative value. It is unduly prejudicial to the Prosecution for the Sabra Defence to tender material where its relevance and probative value are unknown, since the Prosecution cannot determine whether rebuttal evidence is necessary and, if so, which rebuttal evidence is relevant, warranted and sufficient.

51. Reasonable doubt cannot be inferred from purported unrealized investigative leads based on material that is not tendered for the truth of its content or on speculation about that material. As the Sabra Defence conceded, inferences can only be made from established facts and since the statements are not tendered for their truth, they cannot establish any facts except that the Prosecution was aware of their existence. Similarly, characterising the statements as 'unrealised investigative lead[s]' is speculative and incorrect because to characterise them in this way requires an assessment of their content to see whether they could be true, which is impermissible because they are not being tendered for the truth of their content. Further, the Sabra Defence offered no evidence to support its allegation that the Prosecution did not investigate or consider the material it tendered. In any event, reasonable doubt cannot be inferred from the actions or inaction of a Party but on evidence and the Sabra Defence incorrectly claims that the tendered material points to a non-criminal explanation. The Sabra Defence's case keeps shifting, thereby resulting in prejudice to the Prosecution.⁷⁷

Discussion and decision

52. The Trial Chamber is unconvinced by the submission that the Sabra Defence is not relying on the truth of the statements' content. In fact, the Sabra Defence has made submissions that show that it, in fact, relies on the truth of the content of some of the tendered statements.

53. The Sabra Defence submits that there were three potentially different versions of the Mohammed story and, relying on two of the witness statements and other evidence, asserts that in one of them, 'Mohammed' was Mr Ibrahim Sbanekh who attended the Imam Ali

⁷⁶ Sabra reply, paras 3-11.

⁷⁷ Prosecution sur-reply, paras 2-10.

Mosque to learn how to pray and take Islamic lessons.⁷⁸ According to the Sabra Defence, the statements ‘show that an acquaintance of Mr Hussam Mohsen apparently knew someone called “Mohammed” who was Christian who converted to Islam and was looking for religious advice’ and ‘shows the existence of a person called Ibrahim but who was given the surname of Mohammed’.⁷⁹

54. In context, ‘this information can be used to demonstrate that the “Mohammed” account was created as a cover story, which in turn shows that Mr Abu Adass’ departure and its aftermath was facilitated by his close associates with considerable level of preparation.’⁸⁰ If the statements are not being relied upon for the truth of their content, then they merely show that two witnesses *said* they knew of a person they called ‘Mohammed’ who had changed his religion and had sought religious advice. Instead, the Sabra Defence argues that the statements, in context (presumably relying on other evidence), establish specific *factual* assertions concerning Mr Abu Adass’ disappearance, namely, that it was facilitated or prepared by his close associates and that the Mohammed story was a cover story.

55. In another example, the Sabra Defence submitted, based on the tendered statements, that the Abu Adass family ‘had an understandable fear that revenge might be exacted upon them’ if Mr Abu Adass was seen as having willingly taken part in Mr Hariri’s assassination.⁸¹ According to the Sabra Defence, the statement showed that Mr Abu Adass’ father was ‘afraid for his life and that of his wife following the assassination of Mr Hariri.’⁸² These submissions are incompatible with a statement that is not tendered for its truth.

56. The Sabra Defence’s submissions demonstrate that these witness statements are not tendered simply to demonstrate an ‘unrealised’ investigative lead that the Prosecution should have followed. They do much more than that. Despite its denials, the Sabra Defence’s submissions show that it has ascribed at least some truth to the statements. Therefore, it follows that the Sabra Defence has tendered the statements, at least in part, for the truth of their content. The Prosecution objects to this and seeks to cross-examine those who provided the statements. Accordingly, and consistent with all previous decisions on this issue, the Trial Chamber finds that they are witnesses who more appropriately belong in a Defence case. Further, the Sabra Defence has tendered these witness statements under Rule 154, and none

⁷⁸ Sabra motion, para. 37, fn. 28 (relying on Sabra motion, annex A, items 6-7).

⁷⁹ Sabra motion, annex A, items 6-7.

⁸⁰ Sabra motion, annex A, items 6-7.

⁸¹ Sabra motion, para. 47, fn. 37 (relying on Sabra motion, annex A, item 8).

⁸² Sabra motion, annex A, item 8.

appear on a Party's witness list. Further, the Sabra Defence has not made an application to formally vary the presentation of evidence under Rule 146 (B).

57. In these circumstances, and consistent with the principles and previous decisions cited above at paragraph 35, the Trial Chamber denies the admission of the three witness statements,⁸³ pursuant to Rule 154, at this time. Indeed, at this stage of the proceedings, that is, after the close of the Prosecution's case, any witness statements should now be tendered as part of a Defence case.⁸⁴ Here, the Trial Chamber notes that the Sabra Defence officially informed the Trial Chamber on 9 March 2018 that it is not calling a case.⁸⁵

58. Concerning the final tendered statement of an ISF officer,⁸⁶ the Sabra Defence submits that it is relevant to assess the credibility of Mr Abu Adass' father, particularly his account that Mr Abu Adass disappeared on 15 January 2005 rather than on 16 January 2005.⁸⁷ This statement, according the Sabra Defence, 'shows that Abu Adass's father reported that his son disappeared on 15 January 2005.'⁸⁸

59. The statement, however, was not made by Mr Taysir Abu Adass. Instead, the statement shows an ISF officer's account of what Mr Taysir Abu Adass told him as recorded by UNIIC investigators in an investigators note. The Sabra Defence uses it to contest the Prosecution's version of when Mr Abu Adass disappeared (16 January 2005) by using an assertion in the statement—purportedly given to the ISF officer by Mr Taysir Abu Adass—that it occurred on a different day (15 January 2005). The result is the questioning of the credibility of Mr Taysir Abu Adass' account.

60. In the circumstances, the Trial Chamber is not convinced of the statement's *prima facie* reliability for the purpose which the Sabra Defence seeks its admission, namely, to contest the date of Mr Abu Adass' disappearance. The information it contains is too far removed from Mr Taysir Abu Adass, particularly when the Trial Chamber has admitted another witness statement directly from Mr Taysir Abu Adass stating that his son disappeared on 15 January 2005⁸⁹—the very purpose for which the Sabra Defence seeks the present

⁸³ Sabra motion, annex A, items 6-8.

⁸⁴ See Transcript of 8 March 2018, p. 13.

⁸⁵ F3608, Scheduling Order for Hearing the Oneissi Defence Case between 10 and 20 April 2018, 23 March 2018, para. 7, fn. 8.

⁸⁶ The Sabra Defence submitted that this was a document and not a statement, but in light of its content, the relevant witness' character and the source and function of the material, it is a statement: see above paras 39-42.

⁸⁷ Sabra motion, para. 32(ii) (relying on Sabra motion, annex A, item 1).

⁸⁸ Sabra motion, annex A, item 1.

⁸⁹ Exhibit P461.

statement's admission. Where the Trial Chamber already has direct evidence from Mr Taysir Abu Adass giving the two different dates for his son's disappearance, it is unnecessary to receive into evidence another less reliable account providing the same information.

Police report

61. This item is a complaint by Mr Taysir Abu Adass to the Public Prosecutor's Office at the Court of Appeal in Beirut on 19 January 2005. It states Mr Ahmed Abu Adass' age, appearance and that he disappeared on 15 January 2005. It requests an investigation to find him. The Sabra Defence submits that the document is signed and bears the seal of the Head of the Public Prosecutor's Office and the Attorney General at the Court of Appeal in Beirut. The document also shows that it was forwarded by the Attorney General at the Court of Appeal in Beirut to the Lebanese ISF which was ordered to investigate the matter.⁹⁰

62. The document is relevant and probative because it shows that Mr Abu Adass' father reported his son's disappearance without mentioning any information other than his age, appearance and the date of his disappearance. It also reveals a discrepancy between the accounts given by witnesses, particularly with respect to the date of Mr Abu Adass' disappearance and the 'Mohammed' story. It is relevant to show that the Prosecution failed to investigate discrepancies which undermined its case concerning the false claim of responsibility.⁹¹

63. The Prosecution does not take any position regarding the document's *prima facie* reliability. However, it submits that the Sabra Defence failed to demonstrate its relevance and probative value because these requirements are conditional upon the existence of a purported legal obligation on the Prosecution to investigate an alleged 'alternative reasonable inference' and the Sabra Defence has failed to establish such an obligation.⁹²

Discussion and decision

64. The Sabra Defence submits that the report fails to show information that was subsequently relied upon by the Prosecution: namely, (i) the meeting between Mr Abu Adass and 'Mohammed' at the Al-Houry Mosque before Mr Abu Adass' disappearance; (ii) that Mr Abu Adass left his house on the morning of his disappearance or that he had been picked

⁹⁰ Sabra motion, para. 58; annex A, item 2.

⁹¹ Sabra motion, para. 26, annex A, item 2.

⁹² Prosecution response, paras 27-28.

up on that day; (iii) any call to the Abu Adass house concerning events in Tripoli or that Mr Abu Adass was carrying out ‘jihad’ in Iraq; and (iv) a promise by Mr Abu Adass to return home to clean the carpet.⁹³

65. The document supports the Sabra Defence’s position. The Trial Chamber therefore finds that the document is relevant and—as its *prima facie* reliability is unchallenged—possesses some probative value. The document is therefore admissible under Rule 154. It rejects the Prosecution’s position that the document’s relevance and probative value is linked to an obligation to investigate ‘alternative reasonable inferences’. Indeed, whether any inferences can be drawn from the document in respect of the Prosecution’s investigations is a matter of weight which is to be assessed at a later stage in the proceedings.

Three call sequence tables

66. The Sabra Defence tenders three call sequence tables for admission—one for a landline number ending in 017 (showing calls to and from the Abu Adass household between December 2004 and February 2005) and two tables for mobiles ending in 580 (showing calls between September 2004 and March 2005) and 804 (showing calls between August 2004 and February 2005).⁹⁴ It submits that they are based on call data records given by the Lebanese telecommunications providers MTC Touch, Alfa and Ogero (particularly Kalam and Telecarte pre-paid landline cards) to the UNIIC and the Prosecution, and have already been deemed *prima facie* reliable by the Trial Chamber in earlier decisions.⁹⁵

67. The Sabra Defence also tenders three internal memoranda—one for each table⁹⁶—explaining the methodology a member of the Sabra Defence team used to produce them. The Sabra Defence argues that they can be used to demonstrate the general frequency of contacts between Mr Bilal Zaaroura, Mr Hussam Mohsen and Mr Ziad Ramadan and Mr Abu Adass and the Abu Adass household in the period before his disappearance and shortly after. The call sequence tables are material to understanding the circumstances of

⁹³ Sabra motion, para. 26 (i)-(iv).

⁹⁴ Sabra motion, annex A, items 3-5.

⁹⁵ Specifically, in F2797, Decision on Four Prosecution Motions on Call Sequence Tables Related to Salim Jamil Ayyash, Hassan Habib Merhi, Assad Hassan Sabra, Mustafa Amine Badreddine, and Five Witness Statements, 31 October 2016; F2797, Addendum to the ‘Decision on Four Prosecution Motions on Call Sequence Tables Related to Salim Jamil Ayyash, Hassan Habib Merhi, Assad Hassan Sabra, Mustafa Amine Badreddine, and Five Witness Statements’, 31 October 2016, 2 November 2016 and F2894, Decision on the Admission of the Consolidated Ogero Statement, 7 December 2016.

⁹⁶ Sabra motion, annex D for the call sequence table at Sabra motion, annex A, item 3; Sabra motion, annex E for the call sequence table at Sabra motion, annex A, item 4; and Sabra motion, annex F for the call sequence table at Sabra motion, annex A, item 5.

Mr Abu Adass' disappearance and suggest that Mr Zaaroura, Mr Mohsen and Mr Ramadan closely monitored him and were involved in his 'departure'. The tables are also relevant to demonstrate the Prosecution's failure to investigate further or exclude evidence which suggests that Mr Abu Adass left with known associates.⁹⁷

68. The Prosecution responds that the Sabra Defence failed to show the requisite relevance, probative value and reliability of the tables. It argues that no admitted evidence was cited to attribute numbers to Mr Zaaroura, Mr Mohsen and Mr Ramadan during the relevant periods. Concerning the call sequence table for the landline number 017, it purports to attribute a public payphone to Mr Zaaroura when it could have been used by 'untold numbers of people'. There is no evidence that Mr Zaaroura used it to call the Abu Adass household. As for the mobiles 580 and 804, the Sabra Defence failed to show that the number and frequency of calls in the tables amounted to 'close monitoring' of Mr Abu Adass. There is no cited admitted evidence that Mr Mohsen was a close associate or acquaintance of Mr Abu Adass and the Sabra Defence did not demonstrate that the first four calls of the table for the mobile 580 are linked to Mr Abu Adass' disappearance.⁹⁸

69. Additionally, the Prosecution argues that, to assess the *prima facie* reliability and probative value of a tendered call sequence table, a statement from its creator is necessary. The Sabra Defence's 'internal memoranda' do not comply with the Rule 155 Practice Direction⁹⁹ and should be redrafted to comply with it. It is irrelevant that the Trial Chamber has previously admitted non-compliant statements, as in those circumstances it was not feasible to do so and the Trial Chamber has previously directed that non-compliant statements should be rectified before a Party seeks to admit them. In any event, non-compliance is the exception and the Sabra Defence has not shown that compliance is not feasible.¹⁰⁰

70. The Prosecution also wants to cross-examine the call sequence tables' creator to assess and challenge the reliability of the tables before their potential admission. Noting the process for removing duplicate rows, it claims that inconsistencies exist in the methodology used to produce the tendered tables in the three internal memoranda annexed to the Sabra Defence's motion and in two other internal memoranda relating to separate Sabra Defence motions for

⁹⁷ Sabra motion, para. 60; annex A, items 3-5.

⁹⁸ Prosecution response, paras 29-32.

⁹⁹ See STL, 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.

¹⁰⁰ Prosecution response, paras 33-34.

the admission of other tables.¹⁰¹ Lastly, the Prosecution submits that the title of the call sequence table for the landline number 017 lacks clarity because it contains cell identity information and the rationale for including this in a landline call sequence table is not detailed in the internal memorandum. Best practice requires their removal or a clear explanation, and a title on the table to reflect that it is a landline call sequence table.¹⁰²

71. The Sabra Defence replies that the underlying sources of attribution in relation to the three tables have been provided in references included in annexes D-F of its motion. They include Prosecution and Defence exhibits already in evidence¹⁰³ and evidence tendered in another motion.¹⁰⁴ Concerning the table for landline 017, the Sabra Defence argues that it is the attribution of that number (to the Abu Adass household) which is necessary to assess its *prima facie* relevance, including the calls to and from the Abu Adass household and the absence of records which match any of the alleged calls by the ‘so-called’ Mohammed on 17 January 2005 as advanced by the Prosecution.¹⁰⁵

72. Further, the Sabra Defence maintains that the internal memoranda are not being tendered as witness statements under Rule 155 and that their admission into evidence is not sought. This is consistent with prior internal memoranda submitted by the Sabra Defence in support of other tables which have been admitted into evidence and the Trial Chamber’s previous decisions.¹⁰⁶ The three tendered internal memoranda bear the same characteristics as other internal memoranda deemed acceptable by the Trial Chamber and the Prosecution fails to address how the present circumstances are distinguishable. Further, the Prosecution does not assert that it is unable to re-create the methodology used for the tendered tables or that they do not accurately reflect the underlying call data records. Despite the ‘inconsistencies’ alleged by the Prosecution, it points to only one example—concerning the removal of

¹⁰¹ The Prosecution specifically refers to F3551, Provision of Revised 5D171 Marked for Identification, 5 February 2018, annex A; and the internal memorandum dated 8 December 2017 e-mailed to the Trial Chamber relating to the call sequence tables tendered in F3414, Sabra Defence Application for Admission into Evidence of Twenty Two Documents Marked for Identification, 16 November 2017.

¹⁰² Prosecution response, paras 35-36.

¹⁰³ To attribute landline 017 to the Abu Adass household, the Sabra Defence relies on Prosecution exhibits P461, P809 and P2131; Sabra motion, annex D, para. 3, fn. 2; to attribution mobile 804 to Mr Ramadan (Witness PRH103), the Sabra Defence relies on Prosecution exhibits P1174, P1775 and P1776 and Defence exhibit 5D473; Sabra motion, annex F, para. 3, fn. 1.

¹⁰⁴ To attribute mobile 580 to Mr Mohsen, the Sabra Defence relies on a witness statement tendered in F3561, Request for the Admission of Attribution-Related Material, 7 February 2018, annex C, item 37; Sabra motion, annex E, para. 3, fn. 1.

¹⁰⁵ Sabra reply, paras 12-16.

¹⁰⁶ Referring to transcript of 7 February 2018, pp 3-4; 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’).

duplicates—which is factually incorrect and has been addressed in a Sabra Defence response to the Prosecution’s call sequence table objections in another filing.¹⁰⁷ Concerning the table for landline 017 and its inclusion of cell site information, the Prosecution overlooks the explanation provided in the internal memorandum in annex D of the Sabra Defence motion, namely, that it refers to the cell activated by the mobile numbers in contact with landline 017.¹⁰⁸

Discussion and decision

73. The Sabra Defence submits that the call sequence tables for landline 017 (the Abu Adass household) demonstrate contacts between Mr Zaaroura and the Abu Adass house before and immediately after Mr Abu Adass’ disappearance. This in turn, according to the Sabra Defence, suggests that Mr Zaaroura was involved in the disappearance and is further relevant to demonstrate an investigative failure by the Prosecution.¹⁰⁹

74. However, as the Prosecution has pointed out, not only does the Sabra Defence seek to attribute a public payphone to Mr Zaaroura—which, by its nature, can be used by anyone at any time—but does so on the basis of a statement whose admission has already been denied in a previous decision.¹¹⁰ Further, reconsideration of that decision has also been denied in this decision.¹¹¹ Therefore, while the Sabra Defence relies on admitted evidence to attribute landline 017 to the Abu Adass family, the Sabra Defence tenders the call sequence table to show calls made by Mr Zaaroura. In this respect, the Trial Chamber finds that reliance on evidence whose admission has been denied is insufficient to render the call sequence table *prima facie* reliable for the purpose of showing calls made by Mr Zaaroura from a public payphone. The Trial Chamber therefore denies its admission into evidence.

75. The same holds for the table of the mobile 580, which the Sabra Defence tenders to show the general frequency of contacts between Mr Mohsen and Mr Abu Adass before his disappearance and shortly after, which suggests Mr Mohsen’s involvement in the

¹⁰⁷ Specifically, in F3511, Response to “Prosecution Notification to its Continued Objection to the Admission of 13 Documents Tendered by the Sabra Defence”, 11 January 2018.

¹⁰⁸ Sabra further reply, paras 3-7.

¹⁰⁹ Sabra motion, annex A, item 3.

¹¹⁰ See Sabra motion, para. 44, fn. 34 (ERN 10010366). This statement was previously tendered by the Sabra Defence in 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, annex A, item 9, but its admission was denied in the First Abu Adass Decision, para 103, fn. 135.

¹¹¹ See Sabra motion, annex C, item 11; *above* para. 34, fn. 51.

disappearance and constitutes an uninvestigated Prosecution lead.¹¹² To attribute mobile 580 to Mr Mohsen, the Sabra Defence relies on a single witness statement¹¹³ which it tendered in a different motion.¹¹⁴ However, the Trial Chamber dismissed that motion in a decision delivered in court on 8 March 2018.¹¹⁵ The Sabra Defence thus relies on evidence whose admission has been rejected. In these circumstances, the Trial Chamber cannot be satisfied of the table's *prima facie* reliability for the purpose of showing calls made by Mr Mohsen. Its admission into evidence is therefore denied.

76. Concerning the call sequence table for mobile 804, the Sabra Defence tenders it to demonstrate the frequency of contacts between Mr Ramadan and Mr Abu Adass before his disappearance and shortly after, which suggests Mr Ramadan's involvement in the disappearance. Like the other tables, the Sabra Defence argues that it is further relevant to demonstrate the Prosecution's failure to investigate.¹¹⁶

77. Here, the Sabra Defence attributes mobile 804 to Mr Ramadan via admitted evidence¹¹⁷ and the calls it relies upon are from that number to landline 017. The Trial Chamber has also admitted evidence that could prove that this was the number of the Abu Adass household in early 2005.¹¹⁸ The Prosecution's objections concerning whether the identified calls by the Sabra Defence could constitute 'close monitoring' of Mr Abu Adass is something the Trial Chamber will consider at a later stage.

78. The Trial Chamber has previously considered internal memoranda to be sufficient to admit Defence call sequences tables, provided that they contain the information necessary for the Prosecution to verify their accuracy.¹¹⁹ As the Defence has submitted, the Prosecution has not claimed that the internal memoranda are insufficient for this purpose. Neither has the Prosecution claimed that there exist any inaccuracies in the tendered table. It appears to accurately represent the underlying call data records.

79. Concerning the Prosecution's request to cross-examine the call sequence table's creator, the Trial Chamber finds that the Prosecution's argument that there exist

¹¹² See Sabra motion, annex A, item 4.

¹¹³ See Sabra motion, annex E, para. 3, fn. 1.

¹¹⁴ Namely, F3561, Request for the Admission of Attribution-Related Material, 7 February 2018, annex C, item 37.

¹¹⁵ See transcript of 8 March 2018, pp. 9-15.

¹¹⁶ Sabra motion, annex A, item 5.

¹¹⁷ Namely, exhibits 5D473, P1174, P1775 and P1776: see Sabra motion, annex F, para. 3, fn. 1.

¹¹⁸ See exhibits P461, P809 and P2131.

¹¹⁹ See Decision of 7 December 2017, para. 13.

'inconsistencies' in the methodology across various internal memoranda tendered in separate Sabra Defence motions, without further detail, is vague and imprecise. With respect to the sole inconsistency specifically identified (the removal of duplicates)—which the Prosecution submitted appears in some of the internal memoranda but not others—the Trial Chamber finds that only one internal memorandum (for Sabra Defence tables that are already in evidence)¹²⁰ appears to lack this detail.¹²¹ In any event, the Prosecution only claims that its omission 'can' result in human error, not that it has actually resulted in errors or misrepresentation.¹²² This is insufficient to warrant cross-examination.

80. On the whole, the Trial Chamber finds that the call sequence table for the mobile 804¹²³ is relevant and *prima facie* reliable. It therefore possesses some probative value. It will therefore be admitted into evidence.

CONFIDENTIALITY

81. The Sabra Defence submits that its motion was filed confidentially as it refers to the identification of protected witnesses. Limited redactions to the motion are necessary and a public redacted version will be filed in due course. The annexes are confidential because they list the witness statements and telephone numbers attributed to named individuals. They should remain confidential. Concerning its reply and further reply, the Sabra Defence filed them confidentially on account of the confidential status of its motion, but does not object to their public reclassification.¹²⁴

82. The Prosecution's response was filed confidentially for the same reasons as the Sabra motion. For similar reasons, the response and its annexes should remain confidential. While a public redacted version of the response will be filed in due course, it requests that the confidentiality of the annexes remain until the Trial Chamber decides otherwise either upon the Prosecution's motion or after having given the Prosecution the opportunity to be heard on

¹²⁰ Namely, the internal memorandum dated 8 December 2017 e-mailed to the Trial Chamber on the methodology for the production of 13 call sequence tables proposed for admission into evidence in filing F3414, Sabra Defence Application for Admission into Evidence of Twenty Two Documents Marked for Identification, 16 November 2017. The Trial Chamber subsequently ordered the Sabra Defence to assign an evidence record number (ERN) to this document so it could be catalogued and identified in the court record: transcript of 7 February 2018, p. 3; F3571, Written Reasons for Admitting into Evidence Twenty Two Documents upon the Sabra Defence Application, 15 February 2018, para. 36. The document was assigned ERN 1DT5-13480-1DT5-13484: transcript of 7 February 2018, p. 46.

¹²¹ As the Sabra Defence has pointed out, Sabra motion, annex D does appear to address the removal of duplicates: Sabra further reply, para. 6, fn. 11; Sabra motion, annex D, para. 58.

¹²² Prosecution response, para. 35.

¹²³ Sabra motion, annex A, item 5.

¹²⁴ Sabra motion, paras 64-65; Sabra reply, para. 17; Sabra further reply, fn. 1.

the matter. As for the sur-reply, the Prosecution filed it confidentially because the motion and the reply were also classified confidentially. However, it does not object to the sur-reply's reclassification to public.¹²⁵

83. The Trial Chamber agrees with the submissions of both Parties. The Sabra Defence motion and the Prosecution response and their respective annexes should remain confidential, but a public redacted version of the motion and the response should be filed. The Trial Chamber reclassifies the Sabra Defence reply and further reply and the Prosecution's sur-reply from confidential to public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLINES, under Rule 140, to partly reconsider its six decisions denying the admission of 12 witness statements listed in annex C of the Sabra Defence motion;

DECLARES admissible, under Rule 154, the following items from annex A of the Sabra Defence motion which it will formally admit into evidence in the next court hearing:

- **item 2**: a police report regarding a missing person (Mr Abu Adass); and
- **item 5**: a call sequence table for August 2004 to March 2005 for a mobile number ending in 804;

DENIES the Sabra Defence motion in all other respects;

ORDERS that the Sabra Defence motion and the Prosecution response shall remain confidential;

ORDERS the Sabra Defence and the Prosecution to file public redacted versions of its motion and response;

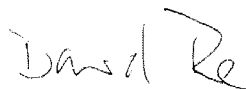
ORDERS that annexes A to F of the Sabra Defence motion and annexes A and B of the Prosecution response shall remain confidential; and

ORDERS the Sabra reply and further reply and the Prosecution sur-reply to be reclassified from confidential to public.

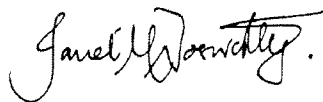
¹²⁵ Prosecution response, para. 37; Prosecution sur-reply, para. 11.

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

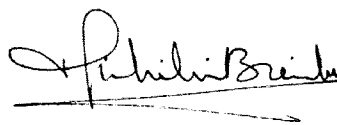
Leidschendam,
The Netherlands
26 March 2019



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

