



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:** 30 November 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

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**DECISION PARTLY GRANTING SIXTH SABRA DEFENCE MOTION  
FOR THE ADMISSION OF DOCUMENTS RELATING TO AHMED ABU ADASS –  
THE FAX**

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**Office of the Prosecutor:**Mr Norman Farrell & Mr Alexander Hugh  
Milne**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, Ms Dorothée Le Fraper  
du Hellen & Mr Jad Youssef Khalil**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yasser  
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Geoffrey Robert  
Ms Sarah Bafadhel

## INTRODUCTION

1. According to the amended consolidated indictment, on 14 February 2005, former Lebanese Prime Minister Mr Rafik Hariri was assassinated in an attack in Beirut that killed 21 others and injured 226 people. Shortly thereafter, Al-Jazeera news network in Beirut received a video featuring Mr Ahmad Abu Adass falsely claiming responsibility for the attack. The Accused, Mr Assad Hassan Sabra and Mr Hussein Hassan Oneissi, participated in identifying and effecting the disappearance of Mr Abu Adass. Mr Oneissi met Mr Abu Adass in January 2005, falsely introducing himself as ‘Mohammed’ and claiming that he had been raised in a Christian orphanage.<sup>1</sup>

2. Counsel for Mr Sabra have 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—documents allegedly relevant to the recruitment of Mr Ahmed Abu Adass and his role in the false claim of responsibility.<sup>2</sup> On 25 September 2017, the Trial Chamber issued its decision with respect to the first of these motions, admitting 49 documents into evidence and denying the admission into evidence of the remaining 79 documents, including all tendered witness statements and call sequence tables.<sup>3</sup> The Trial Chamber subsequently issued decisions with respect to the second through fifth motions.<sup>4</sup>

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential) (‘Amended consolidated indictment’), paras 3 (b), 3 (d), 4-5, 23, 44, 48 (c) (i), 64 (f) (i), 66 (f) (i), 68 (h) (i), 70 (h) (i); F1077/A01, Prosecution’s Updated Pre-Trial Brief, dated 23 August 2013, 23 August 2013 (confidential), para. 122.

<sup>2</sup> 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 public and confidential annexes); F3057, Motion for the Admission of Documents Relating to the Claim of Responsibility - the Selection of Ahmed Abu Adass, 29 March 2017 (confidential); F3109, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass - The Failed Recruitment of Ahmed Abu Adass, 28 April 2017 (confidential); 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); F3205, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass - The Video and the Letter: The False Claim of Responsibility, 30 June 2017 (confidential); F3251, Motion for the Admission of Documents Relating to the Claim of Responsibility - The Fax, 26 July 2017 (confidential) (‘Sabra Defence motion’).

<sup>3</sup> F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 (‘first Sabra bar table decision’). Call data records ‘are so-called metadata [and] provide information about communications, such as the source and destination phone number, the type of communication (phone call or text message), the date and time of phone calls and text messages, the duration of phone calls, the IMEI number of the hand set relevant to the communications, and the cell sectors engaged at the beginning and end of a call’: STL-11-01/T/AC/AR126.9, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0007, Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber’s Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, para. 3 (references omitted). Call sequence tables render the information contained in call data records legible by presenting ‘chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time’: F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL’s

3. This decision addresses the sixth Sabra Defence motion, which tenders 47 documents. The Sabra Defence contests the Prosecution's allegation that Mr Sabra was involved in the identification and recruitment of Mr Abu Adass and does not accept 'the "Mohammed" story'.<sup>5</sup>

4. The tendered documents go to demonstrating that, within hours of Al-Jazeera airing the false claim of responsibility video on 14 February 2005, Mr Ahmad Abdel Aal—the leader of the Al-Ahbash organisation's public relations, military and intelligence services section<sup>6</sup>—prepared and sent a fax to various high-ranking Lebanese state officials.<sup>7</sup> The fax, which contained information pertaining to Mr Abu Adass and 14 of his purported associates, was part of a plot to falsely hold Mr Abu Adass responsible for the attack.<sup>8</sup>

5. In Mr Abdel Aal's version of events—as summarised by the Sabra Defence based on the tendered documents—after the airing of the false claim of responsibility video, he received a call on behalf of Lebanese President Mr Émile Lahoud requesting information on Mr Abu Adass and his associates. Mr Abdel Aal then called Sheikh Samir Tabch, a member of Al-Ahbash, to instruct all Al-Ahbash members to gather information on Mr Abu Adass. Sheikh Tabch subsequently provided Mr Abdel Aal with the requested information, which Mr Abdel Aal then provided to Mr Rustom Ghazaleh—the Chief of the Syrian Military

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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.

<sup>4</sup> F3439, Decision Partly Granting Second Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass - The Selection of Ahmed Abu Adass, 30 November 2017 ('second Sabra bar table 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 Sabra bar table decision'); F3443, Decision Partly Granting Fourth Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass - The Successful Recruitment of Mr Ahmed Abu Adass, 30 November 2017 ('fourth Sabra bar table 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 Sabra bar table decision').

<sup>5</sup> Sabra Defence motion, para. 8, annex A. The Sabra Defence also requested leave to file a 'thematic summary' of the evidence it seeks to tender; *see* F3108, Request for Leave to File Defence Thematic Summary of Information Relevant to the Chamber in Relation to the False Claim of Responsibility, 28 April 2017 (public with confidential annex). The Trial Chamber received the 'thematic summary' as a supplement to the six Sabra Defence evidentiary motions relating to Mr Abu Adass; *see* F3436, Decision Allowing Sabra Defence's Supplement to its Six Evidentiary Motions, 29 November 2017.

<sup>6</sup> A UNHCR report identifies the Al-Ahbash organisation as 'an Islamic group active in the Palestinian camps where Mr Abu Adass had reportedly lived' and as 'a Lebanese group with strong historical ties to the Syrian authorities'. S/2005/662, Letter dated 20 October 2005 from the Secretary-General addressed to the President of the Security Council, transmitting the Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005), pp 35, 60.

<sup>7</sup> The Sabra Defence submits that two separate documents are separate portions of the fax. One of these documents is in evidence as exhibit 5D259, and the Sabra Defence here tenders what it submits is the second section of the fax, as discussed in paragraphs 32-35 below.

<sup>8</sup> Sabra Defence motion, paras 11-12, 22-64.

Intelligence in Lebanon at the time.<sup>9</sup> Mr Ghazaleh told Mr Abdel Aal to disclose the information to the Lebanese authorities, and Mr Abdel Aal then faxed the information to President Lahoud ‘through’ Brigadier General Mustafa Hamdan with copies to other high-ranking members of the Lebanese and Syrian intelligence and security networks.<sup>10</sup>

6. The Sabra Defence also submits that Mr Abdel Aal separately provided information on Mr Abu Adass to Mr Jamea Jamea and Mr Faisal Rasheed, Head of the Syrian Military Intelligence in Beirut and Chief of State Security in Beirut, respectively, at the request of Mr Jamea.<sup>11</sup>

7. According to the Sabra Defence, the tendered documents directly contradict Mr Abdel Aal’s account. Al-Ahbash would not have had time to collect the information in the fax in the hours between the attack and the sending of the fax, and there is no evidence that Al-Ahbash sought to collect this information. It is therefore reasonable to infer that the fax had been prepared before the attack and was ready to be sent immediately after the broadcast of the false claim of responsibility video. Mr Abdel Aal’s false account is relevant, as he had connections to high-ranking members of the Lebanese and Syrian security networks and was considered by the United Nations International Independent Investigation Commission (UNIIC) as a suspect in the assassination of Mr Hariri.<sup>12</sup>

8. The Sabra Defence also contests the Prosecution’s allegations regarding the ‘Mohammed’ story. The tendered documents go to demonstrating that this account is the creation of Mr Abu Adass’s relatives, who ‘recycled’ the story of Mr Ibrahim Sbanekh, a Christian convert called ‘Mohammed’ who met Mr Abu Adass six months prior to the assassination of Mr Hariri. Mr Sbanekh and Mr Abu Adass attended the Imam Ali mosque, which is theologically opposed to Al-Ahbash and which appears to have been under the charge of the Dar al-Fatwa, which was in open conflict with Al-Ahbash. There is evidence that Syrian intelligence services used Al-Ahbash to monitor Sunni mosques and that Al-Ahbash had attempted to take control of the Imam Ali mosque.<sup>13</sup>

9. The Sabra Defence submits that Al-Ahbash were involved in preparing the attack, and that senior officials of Al-Ahbash provided the information in the fax in an effort to steer the

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<sup>9</sup> Mr Ghazaleh’s title is provided in the document the Sabra Defence tenders as item 45.

<sup>10</sup> Sabra Defence motion, paras 13-14, 16, 19-20.

<sup>11</sup> Sabra Defence motion, paras 15, 19, 21.

<sup>12</sup> Sabra Defence motion, paras 17-18, 65.

<sup>13</sup> Sabra Defence motion, paras 8, 73, 76-82, 85-86.

investigation into the assassination of Mr Hariri away from Al-Ahbash and members of ‘the security services’. The fax was intended to make Mr Abu Adass’s claim of responsibility more credible by associating him with violent individuals linked to the Imam Ali mosque. Specifically, the fax associates Mr Abu Adass with ‘enemies’ of Al-Ahbash, including those responsible for the assassination of Al-Ahbash’s former leader, Sheikh Nizar Halabi. Mr Abu Adass did not own or wear the type of headgear associated with the Imam Ali mosque, but he wears such headgear in the false claim of responsibility video.<sup>14</sup>

10. The fax fails to list four of Mr Abu Adass’s closest acquaintances, suggesting they may have been involved in his disappearance. It also fails to list Mr Fouad Al-Masri, a member of Al-Ahbash and alleged member of Al-Qaeda who was initially arrested in connection with the assassination of Mr Hariri, although he was acquainted with two of Mr Abu Adass’s associates named in the fax.<sup>15</sup>

11. Following the 25 September 2017 decision, the Prosecution filed a consolidated response to the five outstanding Sabra Defence motions,<sup>16</sup> the Sabra Defence filed a consolidated reply,<sup>17</sup> and the Prosecution filed a consolidated sur-reply.<sup>18</sup> While these submissions address documents tendered—and legal issues raised—across the five motions, this decision will address only those pertinent to the sixth Sabra Defence motion.

12. For reasons elaborated below, the Trial Chamber declines to revisit the admissibility of 22 documents previously tendered by the Sabra Defence, denies the admission into evidence of 18 documents it finds to be witness statements tendered in a manner inconsistent with the Rules, denies the admission into evidence of two other documents, and exercises its discretion to admit five documents into evidence. For those documents admitted into evidence, the Trial Chamber specifies that it admits the ERN ranges identified in the ‘Full ERN Range EN’ and ‘Full ERN Range AR’ columns of annex A to the Sabra Defence motion.

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<sup>14</sup> Sabra Defence motion, paras 9-10, 66, 68-72, 83-84.

<sup>15</sup> Sabra Defence motion, paras 67, 73-75.

<sup>16</sup> F3356, Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass, 12 October 2017 (confidential) (‘Prosecution consolidated response’).

<sup>17</sup> F3374, Reply to “Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass”, 23 October 2017 (confidential) (‘Sabra Defence consolidated reply’).

<sup>18</sup> F3402, Prosecution Sur-Reply to Sabra Defence Reply to Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass, 3 November 2017 (confidential) (‘Prosecution consolidated sur-reply’).

## THE LEGAL PRINCIPLES

13. In its previous decisions on the Sabra Defence motions, the Trial Chamber decided the legal principles relevant to the Sabra Defence tendering documents during the Prosecution case—namely, the principles governed by Rules 55 (C), 92, 128, 130 (B), 146 (B), 149 (C)-(D) and (F), 150 (H) and (J), 154-156, 158, 165 and 167.<sup>19</sup> Most relevantly, the Trial Chamber noted or decided the following:

- There is no single definition of the term ‘witness statement’ under international criminal law procedural law, but the Trial Chamber has previously adopted the ‘broad definition’ of a witness statement as ‘an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime’;
- When a Party tenders a witness statement for the truth of its content and in support of that Party’s case, that witness more appropriately belongs in that Party’s case;
- The Defence’s tendering of statements during the Prosecution case under Rule 154 is improper, particularly where the Prosecution objects and seeks to cross-examine the witness;
- The potential admission under Rule 154 of unopposed witness statements that do not comply with the Rule 155 Practice Direction<sup>20</sup> is dependent on the witnesses being on a Party’s witness list—or, in the alternative, is dependent on the moving Party seeking to add the witness to its witness list;
- The Defence would be required to request a variance of the Rule 146 (B) sequence for calling evidence to tender witness statements during the Prosecution case, where the Prosecution objects and seeks to cross-examine the witness;
- The Trial Chamber cannot *proprio motu* receive witness statements into evidence under Rule 155 as Rule 155 (C) provides that it first hear from the Parties as to whether to require the witness to appear for cross-examination; and

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<sup>19</sup> First Sabra bar table decision, paras 16-25, 79-117, 123, 131; second Sabra bar table decision 24-29, 34.

<sup>20</sup> STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010.

- The Trial Chamber may admit into evidence other documents tendered by the Defence during the Prosecution case, and the Prosecution is sufficiently informed of the nature of the Sabra Defence case to assess where evidence related to Mr Abu Adass and the false claim of responsibility would fit into the Sabra Defence case.

### **TENDERED DOCUMENTS**

14. The Sabra Defence has previously tendered 23 of the 47 documents in question, and the Trial Chamber has ruled on their admissibility.<sup>21</sup> There has been no change in circumstances that would justify considering them anew, and they should not have been resubmitted in this manner. The Trial Chamber will therefore not revisit the admissibility of these documents, leaving 24 newly tendered documents. Two of these documents are extracts of a report,<sup>22</sup> and the Sabra Defence has also tendered the report in its entirety.<sup>23</sup> The Trial Chamber will assess the entire report and will not separately assess the extracts, leaving 22 newly tendered documents for consideration.

15. The Sabra Defence characterises the 22 newly tendered documents as 17 statements,<sup>24</sup> one UNIIC memorandum,<sup>25</sup> two Lebanese Government responses to UNIIC requests for assistance,<sup>26</sup> one Lebanese Internal Security Forces (ISF) report,<sup>27</sup> and one call sequence table.<sup>28</sup>

16. The Prosecution characterises the 22 newly tendered documents as 21 witness statements within the meaning of the Rules (the 17 documents identified by the Sabra Defence as statements, the UNIIC memorandum, the two Lebanese Government responses to UNIIC requests for assistance, and the ISF report) and one document based upon telecommunications data.<sup>29</sup>

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<sup>21</sup> Sabra Defence motion, annex A, items 1-4, 7, 12-15, 18-25, 28-30, 33, 41, 43. *See* first Sabra bar table decision, addressing items 1-2, 7, 13-14, 18-19, 22, 25, 29-30; second Sabra bar table decision, addressing items 4, 20, 23-24, 33, 41, 43; third Sabra bar table decision, addressing items 12, 21; fourth Sabra bar table decision, addressing item 15; fifth Sabra bar table decision, addressing items 3, 28.

<sup>22</sup> Sabra Defence motion, annex A, items 42, 44.

<sup>23</sup> Sabra Defence motion, annex A, item 40.

<sup>24</sup> Sabra Defence motion, annex A, items 6, 8-11, 16-17, 31-32, 34-39, 46-47.

<sup>25</sup> Sabra Defence motion, annex A, item 5.

<sup>26</sup> Sabra Defence motion, annex A, items 26-27.

<sup>27</sup> Sabra Defence motion, annex A, item 40.

<sup>28</sup> Sabra Defence motion, annex A, item 45. As noted by the Sabra Defence and analysed in paragraph 40 below, the Trial Chamber has marked this document for identification as 5D202 MFI.

<sup>29</sup> Prosecution consolidated response, para. 11, annex F.

## WITNESS STATEMENTS

### *Submissions*

17. As noted above, the Sabra Defence characterises most of the tendered documents as ‘statements’. The Sabra Defence’s arguments are consistent with its previous submissions on this matter.<sup>30</sup> Namely, it maintains that the procedural requirements of Rule 155<sup>31</sup> are inapplicable as the statements are not tendered as ‘witness statements’, the statements are meant only to undermine the Prosecution case, the witnesses are not Sabra Defence witnesses, and the Prosecution’s inability to cross-examine the information providers goes to the weight the Trial Chamber will give to the tendered documents and not to their admissibility. Should the Trial Chamber decline to admit the tendered documents under Rule 154, it should do so under Rule 92 in accordance with Rule 130, which allow the Trial Chamber to gather evidence that the requesting party demonstrates it is not in a position to collect, or under Rule 165, which empowers the Trial Chamber to produce additional evidence.<sup>32</sup>

18. According to the Sabra Defence, the UNIIC memorandum, the two Lebanese Government responses to UNIIC requests for assistance, and the ISF report are not witness statements but rather are responses to official requests for assistance and summaries of information provided in documents created outside the course of the proceedings. The Prosecution disclosed these six documents, and the author of the UNIIC memorandum is a former Prosecution employee.<sup>33</sup>

19. The Prosecution’s arguments likewise mirror its previous related submissions.<sup>34</sup> Namely, it maintains that the documents identified by the Sabra Defence as ‘statements’, as well as the UNIIC memorandum, the two Lebanese Government responses to UNIIC requests for assistance, and the ISF report are all ‘witness statements’ under the Rules and should have been tendered under Rule 155. However, the tendered documents do not comply with Rule 155 and the Rule 155 Practice Direction governing the admission of witness statements. The witnesses are Sabra Defence witnesses because the Sabra Defence has

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<sup>30</sup> See second Sabra bar table decision, paras 20-21.

<sup>31</sup> Rule 155 (B) provides: ‘As a general rule, the statement must have been signed by the person who records and conducts the questioning and by the person who is questioned and his counsel, if present, as well as, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during, the questioning. If, in exceptional circumstances, the person has not signed the record, reasons shall be noted.’

<sup>32</sup> Sabra Defence motion, para. 6; Sabra Defence consolidated reply, paras 14-18.

<sup>33</sup> Sabra Defence motion, para. 6; Sabra Defence consolidated reply, paras 14-18, annex C, pp 10-11.

<sup>34</sup> See second Sabra bar table decision, paras 22-23.



conveyed its clear intention to rely on their statements for the truth of their content. It is irrelevant that the statements were given to agencies other than the Special Tribunal and or created outside the course of the proceedings. The Sabra Defence has not provided any justification to vary the Rule 146 (B) sequence of evidence presentation, as would be required to admit defence witness statements during the Prosecution case. The Prosecution expresses the preliminary view that it would need to cross-examine the witnesses whose statements the Sabra Defence has tendered, and the lack of cross-examination goes to the weight of the evidence only after there have been genuine attempts to afford the responding party an opportunity to conduct such examination. It is irrelevant that the Prosecution disclosed the statements, and Prosecution employees who summarised or included witness statements in reports are not the providers of the information contained in those statements.<sup>35</sup>

### *Discussion and decision*

20. The Parties differ as to whether these documents are witness statements under the Rules and whether the witnesses who gave these tendered statements are Sabra Defence witnesses.<sup>36</sup> While the Sabra Defence maintains that the 17 newly tendered documents it characterises as ‘statements’ are not tendered as witness statements, they are all statements taken by Prosecution investigators, UNIIC investigators or Lebanese Government authorities and recorded through due procedure in the course of investigations.<sup>37</sup> One additional document, the UNIIC memorandum, is a detailed summary of witness interviews conducted by UNIIC investigators. It was recorded through due procedure in the course of an investigation and is therefore a series of witness statements. The Trial Chamber considers that these 18 documents are statements taken and recorded by investigative authorities in the normal course of investigations, and therefore finds that—for the purposes of this decision—they are ‘witness statements’ under the Rules.

21. The Sabra Defence has tendered the 18 witness statements for the truth of their content and in support of its case, and the Trial Chamber therefore finds that the witnesses who provided the information contained in the statements are witnesses who more appropriately belong in a Defence case.

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<sup>35</sup> Prosecution consolidated response, paras 12-19, annex A; Prosecution consolidated sur-reply, paras 3-10, 16.

<sup>36</sup> See paragraph 13 above regarding the legal principles relevant to determining whether a document is a witness statement and whether the witness who gave a statement is a particular Party’s witness.

<sup>37</sup> See Sabra Defence motion, annex A, column titled ‘Indicia of reliability’.

22. The Sabra Defence has improperly tendered these 18 witness statements under Rule 154.<sup>38</sup> The Trial Chamber cannot *proprio motu* receive them into evidence under Rule 155 (see paragraph 13 above). Regardless, it is apparent that most of the tendered statements fail to comply with the Rule 155 Practice Direction<sup>39</sup> and are from people who are not on a Party's witness list.<sup>40</sup>

23. The Sabra Defence has not requested a variation of the Rule 146 (B) sequence for calling evidence, as would be required to permit it to tender contested witness statements during the Prosecution case in circumstances in which it is not putting the content of the statements to a witness who is testifying. Receiving the evidence of the witnesses who made these 18 statements during the Prosecution case would significantly delay the proceedings—in particular, the Prosecution case—and the Trial Chamber will decline to exercise its discretion to vary the Rule 146 (B) sequence. The Prosecution objects to the admission of the witness statements and has expressed the preliminary view that it would seek to cross-examine the witnesses, distinguishing this instance from any circumstance in which statements were admitted into evidence under Rule 154.

24. The Trial Chamber, in these circumstances, is unconvinced that it would be appropriate or in the interests of justice either to gather evidence on its own volition under Rule 92 or to exercise its discretion to order the production of additional evidence under Rule 165. Regarding Rule 92, the Sabra Defence has not presented any argument as to the exceptional nature of the circumstances that merit its application, as would be required by the Rule. Concerning Rule 165, given that the Prosecution has yet to complete its case, and that the Defence may potentially present its own case, the Trial Chamber sees no compelling reason to vary the usual sequence of presentation of evidence under Rule 146 (B).

25. The Trial Chamber will therefore deny the admission into evidence of the 18 newly tendered witness statements. Five documents remain for consideration.

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<sup>38</sup> See paragraph 13 above regarding the legal principles relevant to the admission into evidence of witness statements tendered by the Defence during the Prosecution case.

<sup>39</sup> See Prosecution consolidated response, annex B.

<sup>40</sup> The Sabra Defence tenders a statement of Witness PRH101 taken by UNIIC investigators (Sabra Defence motion, annex A, item 31). This witness was included on the Prosecution witness list (F1444/A03, Consolidated Witness List, 7 March 2014 (confidential)) and testified from 5 to 7 October 2016. Counsel for Mr Sabra and counsel for the Accused, Mr Salim Jamil Ayyash, both questioned him regarding this statement, but did not seek its admission into evidence; see transcript of 7 October 2016, pp 15, 71.

## DOCUMENTS OTHER THAN WITNESS STATEMENTS

### *UNIIC memorandum*

#### *Submissions*

26. The Sabra Defence tenders a UNIIC memorandum concerning Al-Ahbash. The memorandum is probative of and relevant to establishing that the UNIIC considered Mr Abdel Aal a suspect in the assassination of Mr Hariri and that Mr Abdel Aal attempted to steer UNIIC investigators towards Mr Abu Adass. It is reliable as it is a signed and dated UNIIC document disclosed by the Prosecution.<sup>41</sup>

27. The Prosecution objects to the admission of the UNIIC memorandum, submitting that it comprises multiple witness statements, both of its author and of the individuals upon whose statement the memorandum relies. The memorandum is therefore inadmissible for the same reasons provided for witness statements (see paragraph 19 above).<sup>42</sup>

#### *Discussion and decision*

28. The UNIIC memorandum, dated 27 September 2005, analyses information from witness statements, public open-source material, and reports from various Lebanese security agencies. It bears sufficient indicia of reliability as an official United Nations document. It is relevant to assessing the quality of the UNIIC investigation and has some probative value in that regard. The Trial Chamber will therefore exercise its discretion to admit the UNIIC memorandum into evidence for this limited purpose and not for the truth of the content of the underlying materials upon which it relies.

### *Lebanese Government responses to UNIIC requests for assistance*

#### *Submissions*

29. The Sabra Defence tenders two Lebanese Government responses to UNIIC requests for assistance, one from the Army Directorate of Intelligence<sup>43</sup> and one from the ISF General Directorate.<sup>44</sup> The documents are investigative reports concerning Al-Ahbash. They are probative of and relevant to establishing that Dar al-Fatwa was in open conflict with

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<sup>41</sup> Sabra Defence motion, annex A, item 5; Sabra Defence consolidated reply, annex C, p. 10.

<sup>42</sup> Prosecution consolidated response, annex F, pp 1-3.

<sup>43</sup> Sabra Defence motion, annex A, item 26.

<sup>44</sup> Sabra Defence motion, annex A, item 27.

Al-Ahbash and that Al-Ahbash had made attempts to take control of the Imam Ali mosque (see paragraph 8 above), respectively. They are reliable as they are Lebanese Government documents provided to the UNIIC by the Lebanese Public Prosecutor of the Court of Cassation, whose officials signed and stamped them.<sup>45</sup>

30. The Prosecution objects to the admission of both documents, submitting that they comprise multiple anonymous witness statements from Lebanese security personnel providing analysis or opinion evidence. The documents are therefore inadmissible for the same reasons provided for witness statements (see paragraph 19 above).<sup>46</sup>

#### *Discussion and decision*

31. The Lebanese Government responses bear sufficient indicia of reliability as official correspondence between the UNIIC and the Lebanese Government. They are relevant both to providing contextual information regarding the UNIIC investigation and to establishing the Lebanese Government's assessment of Al-Ahbash, and they have some probative value in that regard. The Trial Chamber will therefore exercise its discretion to admit the Lebanese Government responses into evidence for these limited purposes and not for the truth of the content of the reports. The Trial Chamber will bear in mind that the reports are anonymously sourced when determining the weight it will give this evidence.

#### *ISF report*

##### *Submissions*

32. The Sabra Defence tenders a 45-page ISF report concerning statements it took after receiving information pertaining to Mr Abu Adass on the day of Mr Hariri's assassination. The report is probative of and relevant to establishing that the ISF produced a section of the fax in question when interviewing Mr Abdel Aal on 27 October 2005. It is reliable as it is a signed and dated ISF document bearing the official ISF seal, was officially received by the Lebanese Public Prosecutor's Office, and was disclosed by the Prosecution.<sup>47</sup> The report includes what the Sabra Defence submits is a section of the fax in question, which the Sabra Defence also tendered separately as an extract of the report (see paragraph 14 above). The Sabra Defence submits that this section of the fax in particular is probative of and relevant to

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<sup>45</sup> Sabra Defence motion, annex A, items 26-27; Sabra Defence consolidated reply, annex C, p. 10.

<sup>46</sup> Prosecution consolidated response, annex F, pp 7-9.

<sup>47</sup> Sabra Defence motion, annex A, item 40.

establishing what information the fax contained. It is reliable as it is extracted from the ISF report, as Mr Abdel Aal has signed and dated each page, and as it was disclosed by the Prosecution.<sup>48</sup>

33. The Prosecution objects to the admission of the report, submitting that it comprises several witness statements.<sup>49</sup> The Prosecution also objects in particular to the admission of the fax, submitting that it is a witness statement of the person who provided the information in the fax, whether that was Mr Abdel Aal or someone else. The report—and the fax it contains—are therefore inadmissible for the same reasons provided for witness statements (see paragraph 19 above).<sup>50</sup>

#### *Discussion and decision*

34. The ISF report, dated 27 October 2005 and authored by an ISF officer, details the ISF investigation concerning information regarding Mr Abu Adass that ‘a number of people’ provided to the ISF following the assassination of Mr Hariri. It comprises an investigative log; transcriptions of separate interviews of Mr Abdel-Aal, Sheikh Tabch (see paragraph 5 above), and Sheikh Walid El-Halabi, whom the Sabra Defence describes as a prominent member of Al-Ahbash;<sup>51</sup> ‘confirmation of residency’ documents for Sheikh Tabch and Sheikh El-Halabi; and a section of the fax. The Sabra Defence has separately tendered extracts of the report (see paragraph 14 above), but the Trial Chamber will consider the document as a whole.<sup>52</sup>

35. The ISF report is dated and signed. In the absence of any reason to doubt its authenticity or its status as an official Lebanese Government document, the Trial Chamber finds that it bears sufficient indicia of reliability. The transcriptions of witness interviews conducted by ISF investigators and recorded through due procedure in the course of an investigation are witness statements. The Sabra Defence has tendered these witness statements for the truth of their content and in support of its case, and they are therefore—when considered in isolation—inadmissible for the same reasons the Trial Chamber has provided for the witness statements analysed in paragraphs 21 to 24 above. The report,

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<sup>48</sup> Sabra Defence motion, paragraph 12 (footnote 7), annex A, item 44; Sabra Defence consolidated reply, annex C, p. 11.

<sup>49</sup> Prosecution consolidated response, annex F, pp 13-15.

<sup>50</sup> Prosecution consolidated response, annex F, pp 15-16.

<sup>51</sup> Sabra Defence motion, para. 58.

<sup>52</sup> See also second Sabra bar table decision, para. 15 and disposition, deferring consideration of two extracts of the report as it would later consider the report as a whole.

however, has independent value in that it provides some contextual information regarding the ISF investigation. The section of the fax also has independent value in that it goes to demonstrating that a fax identifying Mr Abu Adass and his associates was sent to the Lebanese investigative authorities after the assassination of Mr Hariri. The Trial Chamber will therefore exercise its discretion to admit the ISF report into evidence for these limited purposes and not for the truth of the content of the witness statements or the truth of the content of the fax.

### *Call sequence table*

#### *Submissions*

36. The Sabra Defence tenders one ‘call sequence table’ purporting to show calls between Mr Abdel Aal and members of the Lebanese security apparatus on 14 February 2005. As with the tables it tendered previously, it created this document by extracting call data from the Prosecution’s SQL database,<sup>53</sup> analysing the call data internally, selecting records of interest, identifying fields of relevance, conducting checks, and sorting the call data chronologically. It submits that the table is probative of and relevant to establishing that Mr Abdel Aal called Mr Ghazaleh (see paragraph 5 above) to inform him of the information he had collected about Mr Abu Adass.<sup>54</sup>

37. The Sabra Defence’s arguments regarding the reliability of the table are consistent with its previous submissions on this matter.<sup>55</sup> The table is based on call data records obtained by the Prosecution from Lebanese telecommunications companies Alfa and MTC Touch. The Sabra Defence selected the calls listed in the table to demonstrate contacts between individuals, and whether the selected calls are anomalous to the general pattern of usage has no bearing on the *prima facie* reliability of the table. While the table includes columns titled ‘A\_Number’, ‘B\_Number’, and ‘Call\_Type’ with no explanation, the Trial Chamber heard evidence on the meaning of the relevant terms from Prosecution witnesses in 2015.<sup>56</sup> The

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<sup>53</sup> SQL (Structured Query Language) is a special programming language for databases. The Prosecution’s SQL database enables call data record analysis.

<sup>54</sup> Sabra Defence motion, annex A, item 45; Sabra Defence consolidated reply, annex B, paras 1-16.

<sup>55</sup> See second Sabra bar table decision, paras 31-32.

<sup>56</sup> See transcript of 20 July 2015, p. 40; transcript of 14 September 2015, pp 14-15, 23, 49, 73-74.

Sabra Defence attributed the relevant mobile numbers to specific individuals on the basis of information contained in two of the tendered witness statements.<sup>57</sup>

38. The Prosecution objects to the admission of the table, and its arguments likewise mirror its previous related submissions.<sup>58</sup> It submits that the document is not a comprehensive call sequence table—that is, a table comprising all calls for a particular mobile number over a particular period of time—but rather a table of calls manually selected by the Sabra Defence to advance its case. It includes headers that are not self-explanatory, which could lead to misinterpretation of the data. Prosecution witnesses cannot verify the Sabra Defence’s correct use of terms and headers. Further, the Sabra Defence’s attribution of specific mobile numbers is insufficient as it does not include the specific, relevant time period of attribution or indicate whether the person identified was the primary or sole user of that number. Finally, the Sabra Defence’s explanation of its methodology in creating the table is insufficient. The Trial Chamber cannot properly verify the table’s reliability absent a witness statement from the creator and the possibility of cross-examining the creator.<sup>59</sup>

39. The Prosecution also objects to the admission of the table for lack of relevance and probative value. The Sabra Defence’s only submissions on this front relate to its ‘thematic summary’ (see paragraph 3, footnote 5, above), which even if considered does not explain or substantiate the relevance or probative value of the table.<sup>60</sup>

#### *Discussion and decision*

40. The Sabra Defence first introduced the table in its cross-examination of Mr Saadeddine El-Ajouz (Witness PRH032), and the Trial Chamber marked it for identification as exhibit 5D202 MFI. Counsel for Mr Sabra questioned Mr El-Ajouz on this table in the context of exploring Mr Abdel Aal’s links to figures of interest in the UNIIC investigation into the assassination of Mr Hariri.<sup>61</sup> The Trial Chamber therefore considers this table demonstrative evidence intended to assist its understanding of the Sabra Defence case. It is therefore tantamount to a submission, and the Trial Chamber will exercise its discretion to admit it into evidence for this limited purpose.

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<sup>57</sup> Sabra Defence motion, annex A, item 45; Sabra Defence consolidated reply, paras 6-10, 13, annex A, ‘Sabra Motion Six’ item 45, annex B, paras 1-19, 71-73.

<sup>58</sup> See second Sabra bar table decision, para. 33.

<sup>59</sup> Prosecution consolidated response, para. 11, annex A, ‘Sabra Motion Six’ item 45; Prosecution consolidated sur-reply, paras 19-31, 33-37, annex A, ‘Sabra Motion Six’ item 45.

<sup>60</sup> Prosecution consolidated response, annex A, pp 24-25; Prosecution consolidated sur-reply, annex A, pp 28-29.

<sup>61</sup> Transcript of 1 September 2015, pp 4-21.

**ANNEX B TO THE DEFENCE MOTION***Submissions*

41. The Sabra Defence makes submissions relying on both the documents it tenders and on documents the Trial Chamber has admitted into evidence or found to be admissible. In annex B to its motion, the Sabra Defence lists those documents falling into the latter category.<sup>62</sup> The Prosecution submits that this annex contains erroneous representations and expresses concern that such representations, if permitted to go unchecked, will find their way into the Parties' final trial briefs.<sup>63</sup> Specifically, the Sabra Defence incorrectly relies on: (i) portions of the October 2005 UNIIC report<sup>64</sup> other than those of which the Trial Chamber has taken judicial notice;<sup>65</sup> and (ii) the content of a section of the fax at issue in this decision,<sup>66</sup> although the Trial Chamber did not admit this exhibit into evidence for the truth of its content.<sup>67</sup> The Sabra Defence did not reply to this submission.

*Discussion and decision*

42. The Sabra Defence has relied on material not in evidence and on evidence admitted other than for the truth of its content. The Trial Chamber has already instructed counsel for Mr Sabra not to do this in any future submissions or briefs.<sup>68</sup>

**CONFIDENTIALITY**

43. The Sabra Defence filed its motion confidentially and asked the Trial Chamber to file its decision as public and reclassify its motion as public, subject to any Prosecution redaction applications.<sup>69</sup> The Prosecution submits that, as the Sabra Defence has not informed the Trial Chamber whether any of the witnesses seek protective measures, any public version of the

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<sup>62</sup> Sabra Defence motion, para. 2, annex B.

<sup>63</sup> Prosecution consolidated response, para. 20.

<sup>64</sup> S/2005/662, Letter dated 20 October 2005 from the Secretary-General addressed to the President of the Security Council, transmitting the Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005), para. 209.

<sup>65</sup> Prosecution consolidated response, para. 20, annex G, p. 5. F2665, Decision on Sabra Defence Motion Seeking Judicial Notice of United Nations Fact-Finding Mission and UNIIC Reports, 26 July 2016, taking judicial notice of a number of facts, not including those upon which the Sabra Defence relies.

<sup>66</sup> Exhibit 5D259.

<sup>67</sup> Prosecution consolidated response, para. 20, annex G, pp 5-7. Transcript of 19 July 2016, pp 69-70.

<sup>68</sup> Second Sabra bar table decision, para. 53.

<sup>69</sup> Sabra Defence motion, para. 95; Sabra Defence consolidated reply, paras 21-22. The Trial Chamber has previously addressed the filing status of the Prosecution consolidated response, the Sabra Defence consolidated reply, the Prosecution consolidated sur-reply, and their annexes; *see* second Sabra bar table decision, paras 55-56, disposition.



motion must be redacted to protect the security and privacy of those witnesses and to avoid prejudicing the Prosecution's right of cross-examination by discouraging the witnesses from appearing before the Special Tribunal. Further, the motion identifies people whom the Sabra Defence alleges were involved in criminal conduct. The Trial Chamber should therefore be mindful of the negative impact of making such allegations public, including the potential security risks to the named individuals and their families.<sup>70</sup> The Sabra Defence has not replied regarding protective measures and has rather stated that it does not consider the individuals whose statements it tendered to be Defence witnesses (see paragraph 17 above).

44. The Trial Chamber reiterates the principle of the public nature of proceedings before the Special Tribunal, and that documents should, wherever possible, be filed publicly. The Trial Chamber issues this decision publicly and incorporates information from the Parties' confidential submissions as necessary for the determination of the admissibility of the documents. It orders the Sabra Defence to file a public redacted version of its motion or have it reclassified as public, and urges the Parties to cooperate in this regard.

45. The Sabra Defence has filed the annexes to its motion confidentially because they attribute witness statements and mobile numbers to named individuals.<sup>71</sup> The Trial Chamber finds, in the circumstances, that these annexes should remain confidential.

### **DISPOSITION**

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

**ORDERS** the admission into evidence of exhibit 5D202 MFI;

**DECLARES** admissible, under Rule 154 and in accordance with paragraphs 28, 31 and 35 of this decision, the following items, which it will admit into evidence at a suitable time in the proceedings:

- the UNIIC memorandum dated 27 September 2005;
- the two Lebanese Government responses to UNIIC requests for assistance; and
- the ISF report dated 27 October 2005;

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<sup>70</sup> Prosecution consolidated response, paras 22-25; *see also* Prosecution consolidated sur-reply, para. 38.

<sup>71</sup> Sabra Defence motion, para. 96.

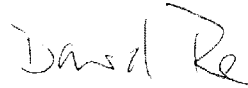
**DENIES** the Sabra Defence motion in all other respects, including the admission of witness statements and the Trial Chamber's exercise of its powers under Rules 92 and 165;

**ORDERS** counsel for Mr Sabra to file a public redacted version of its motion, or have it reclassified as public, and urges the Parties to cooperate in this regard; and

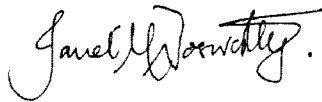
**MAINTAINS** the confidentiality of the annexes to the Sabra Defence motion.

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

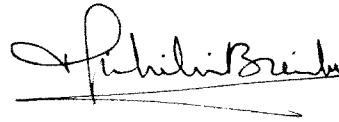
Leidschendam,  
The Netherlands  
30 November 2017



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Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

