



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: 13 July 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**REASONS FOR THE TRIAL CHAMBER'S DECISION DISMISSING THE
SABRA DEFENCE APPLICATION TO ORDER PROSECUTION
DISCLOSURE OF DOCUMENTS RELATED TO MR MICHAEL TAYLOR**

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Ms Sarah Bafadhel



INTRODUCTION

1. Mr Michael Taylor,¹ the Prosecution's Chief of Investigations between 2010 and 2013, testified as a witness for the Trial Chamber, under Rule 165 of the Special Tribunal's Rules of Procedure and Evidence,² on 25 and 26 June 2018. On his first day of testimony, he referred to an investigations plan that he had received and a Prosecution mission to interview a potential witness, referred to in the proceedings as a 'relative of Witness PRH056'.

2. Counsel for the Accused, Mr Assad Hassan Sabra, then asked the Prosecution to immediately disclose to them the investigations plan, two documents relating to the mission—a mission order, seeking its approval, and a mission report, recording what had happened—and other documents, including any standard operating procedures introduced in the Office of the Prosecutor when Mr Taylor was its Chief of Investigations. The Prosecution refused to disclose these documents on the basis that they were exempt from disclosure under Rule 111. This provision protects the internal work product of a Party (Prosecution or Defence) from disclosure.

3. The Sabra Defence then made an oral application in court asking the Trial Chamber to order the Prosecution to disclose the documents. After hearing substantial oral arguments, and viewing *ex parte* the relevant portions of the plan, entitled 'INVESTIGATIONS PLAN _26 OCT 09 – 31 MAR 10', and the mission order and report, the Trial Chamber decided that the documents were all protected from disclosure by Rule 111 and declined their disclosure.³

4. These are the written reasons for that decision.

FACTS UNDERLYING THE APPLICATION FOR DISCLOSURE

5. The amended consolidated indictment alleges that the Accused, Mr Hussein Hassan Oneissi and Mr Sabra, chose a 22-year old Palestinian, Mr Ahmed Abu Adass, to make a false

¹ Witness CH-001.

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

³ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, transcript of 28 June 2018, pp 39-41.

claim of responsibility, on a video, for the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005.⁴

6. Mr Oneissi allegedly introduced himself to Mr Abu Adass as ‘Mohammed’ at the beginning of January 2005 at the Arab University Mosque in Beirut. Mr Oneissi, alias ‘Mohammed’, asked Mr Abu Adass to teach him how to pray, and they met several times. Mr Abu Adass left his home to meet ‘Mohammed’ on the morning of 16 January 2005 and has been missing since.⁵

7. Counsel for Mr Sabra claim that, on 16 January 2005, Mr Abu Adass did not leave with Mr Oneissi, alias ‘Mohammed’, but possibly with Mr Khaled Taha.⁶ They thus contend that the Prosecution failed to investigate a ‘significant lead’ as to Mr Taha’s possible involvement into Mr Abu Adass’s disappearance.⁷ Accordingly, they asked the Trial Chamber to order four former Prosecution investigators, including Mr Taylor, to testify as Chamber witnesses under Rule 165 to aid determining the truth about the circumstances surrounding Mr Abu Adass’s disappearance.⁸

⁴ F2720, Amended Consolidated Indictment, 12 July 2016 (confidential) (‘Amended consolidated indictment’) (a public redacted version was filed on the same day), paras 3 (b)-(d), 23, 64 (f) (i), 66 (f) (i), 68 (h) (i), 70 (h) (i); STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, annex A, Prosecution’s Updated Pre-Trial Brief, dated 23 August 2013 (confidential), 23 August 2013 (‘Prosecution’s pre-trial brief of 23 August 2013’) (a public redacted version was filed on 31 October 2013), paras 62, 114. *See also* STL-13-04/PT/PTJ, *Prosecutor v. Merhi*, F0052, annex A, Prosecution’s Pre-Trial Brief, 8 January 2014 (confidential) (‘Prosecution’s pre-trial brief of 8 January 2014’) (a public redacted version was filed on 13 January 2014), paras 53, 105, 107.

⁵ Amended consolidated indictment, para. 28; Prosecution’s pre-trial brief of 23 August 2013, paras 117, 121-122, 148. *See also* Prosecution’s pre-trial brief of 8 January 2014, paras 53, 105, 113.

⁶ 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), para. 51; F3165, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass – The Successful Recruitment of Ahmed Abu Adass, 31 May 2017 (confidential, with confidential annexes A-B), para. 24; F3024, Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass with updated annexes, 7 March 2017 (public, with confidential annexes A-C and public annex D), para. 47.

⁷ F3600, Motion for Reconsideration of Sabra Defence Request Pursuant to Rule 165, 9 March 2018 (confidential, a public redacted version was filed on 15 March 2018) (‘Sabra Defence motion for reconsideration’), para. 25; F3591, Sabra Defence Request Pursuant to Rule 165 and for Suspensive Effect of Rule 128 Order, 5 March 2018 (‘Sabra Defence request under Rule 165’) (public, with confidential annexes A-B and public annex C), paras 16-17.

⁸ Sabra Defence motion for reconsideration; Sabra Defence request under Rule 165.

8. The Trial Chamber partly granted the application and ordered Mr Taylor to testify⁹ on the grounds that he appeared to be the most relevant of the four as he was the Prosecution's Chief of Investigations between 2010 and 2013. The Trial Chamber held that Mr Taylor's evidence would assist it to determine 'whether there are reasonable inferences available from the evidence which are consistent with the innocence of the Accused'.¹⁰

9. The Sabra Defence's case regarding Mr Taha's potential role in Mr Abu Adass's disappearance is based in part on a piece of what appears to be hearsay in Witness 056's relative's statement which states that Mr Abu Adass left his house with Mr Taha. This contradicts the evidence of other witnesses.

10. Two Prosecution investigators, Mr Quentin Mugg (Witness PRH555) and Mr Christian Carnus (Witness PRH377), interviewed Witness 056's relative in August 2010. The signed witness statement, however, does not specify how the witness obtained the information regarding Mr Abu Adass allegedly leaving with Mr Taha; such as who provided it, when, and in what circumstances. It appears that the investigators neither explored this issue further with the witness nor informed the witness that this information contradicted that of other witnesses. This aspect of the witness statement therefore lacks reliability and hence probative value.

11. Counsel for Mr Sabra extensively cross-examined Mr Mugg on the process of taking the statement, on connected investigative matters and on parts of Witness 056's statements which contradicted this hearsay assertion.¹¹ Mr Sabra's lead counsel also cross-examined Mr Taylor for almost two days on matters that included the content of that same statement. The relevant portions of the statement are now on the court record. Mr Taylor was also questioned directly about the Prosecution's investigations into Mr Taha's possible role in Mr Abu Adass's disappearance.

⁹ F3646, Decision Partly Granting Sabra Defence Application and Ordering the Attendance of a former Prosecution Investigator to Testify under Rule 165, 13 April 2018 (notified to the Parties on 13 April 2018, but circulated on 7 May 2018) ('Decision ordering Mr Taylor's attendance').

¹⁰ Decision ordering Mr Taylor's attendance, para. 22.

¹¹ See transcript of 11 January 2018, pp 20-63. Mr Carnus also testified for the Prosecution (briefly)—see pp 76-82 of the transcript of 22 July 2015, but was not cross-examined by Defence counsel.

THE APPLICATION FOR DISCLOSURE

12. During their cross-examination of Mr Taylor, counsel for Mr Sabra asked Prosecution counsel to disclose ten items, which Mr Taylor had referred to and relied upon in his testimony. The Prosecution refused to disclose four documents that it stated were its internal work product and exempt from disclosure under Rule 111.¹² The remaining documents, they said, either did not exist or had already been disclosed. The Sabra Defence brought this to the Trial Chamber's attention and, on 26 June 2018, made the oral application¹³ that the Trial Chamber order the Prosecution to disclose the following four items,

- an investigations plan of 26 October 2009—referred to by the Sabra Defence as the 'strategy document produced by Mr Taylor in October 2010, in which the investigation of Khaled Taha was specifically required' (item 1);
- a mission report, dated 8 September 2010, concerning the interview of Witness 056's relative (item 4);
- any standard operating procedures introduced during Mr Taylor's tenure as Chief of Investigations (item 5); and
- a mission order of 15 April 2010—referred to by the Sabra Defence as the 'record of approval of the mission to interview' Witness 056's relative (item 10).¹⁴

13. The Trial Chamber requested and the Prosecution provided to it, *ex parte*, the investigations plan, the mission report and the mission order. One of the mission order's objectives was to interview Witness 056's relative. To further assist the Trial Chamber, the Prosecution provided it with another mission report, dated 17 May 2010, related to the

¹² On Rule 111 *see below*, para. 26.

¹³ Transcript of 26 June 2018, pp 81-82, 139-140; transcript of 27 June 2018, p. 18.

¹⁴ The ten items, which the Sabra Defence initially requested to be disclosed, included the investigations plan, the mission report and order, standard operating procedures, minutes of any daily and bi-weekly meetings chaired by Mr Taylor where decisions relating to Mr Khaled Taha were made, the tactical decision by senior trial counsel not to pursue inquiries concerning Mr Taha, a copy of the full set of fingerprints of Mr Taha, including the corresponding request for assistance to the Lebanese authorities, any statement, investigator's notes or requests for assistance, and corresponding response, in relation to the 'house-house inquiries within the vicinity' of Mr Taha's house, the statements and or investigator's notes of the '60 witnesses' whom the Prosecution questioned about Mr Taha, and to which Mr Taylor referred in his testimony—*see* email from counsel for Mr Sabra to the Trial Chamber's senior legal officer, 26 June 2018.

mission order.¹⁵ The documents were redacted so that the Trial Chamber could only see the material relevant to the application.

DOCUMENTS PROVIDED EX PARTE TO THE TRIAL CHAMBER

Investigations plan – October 2009 to March 2010

14. This document is a memorandum on the investigations plan for the period 26 October 2009 to 31 March 2010, prepared by the then Chief of Investigations, Mr Naguib Kaldas. It was sent to Mr Taylor and other senior Prosecution officials, and copied to the then Prosecutor, Mr Daniel Bellemare.

15. The non-redacted portions refer to the Prosecution's investigation of (a) the evidence relating to the evidence that a vehicle containing explosives was detonated by someone in the vehicle, (b) identifying who 'Mohammed' was and (c) obtaining information about Mr Taha in order to establish his potential involvement in Mr Abu Adass's disappearance.

16. Mr Taylor referred to this document and its contents during his testimony and without objection by the Prosecution. Prosecution counsel had shown him a redacted copy of the document before he testified. Mr Taylor explained that Mr Kaldas set this investigative strategy and that it was approved by the then Chief of Prosecutions, Mr Daryl Mundis, and Mr Bellemare. Mr Taylor's responsibility was to identify the objectives and the main lines of inquiry underpinning them, and to establish multidisciplinary teams to work on those objectives. The progress of the various lines of inquiries and objectives, included in the investigations plan, was monitored through biweekly coordination meetings, which Mr Taylor chaired.¹⁶

17. Each team had different projects and at least two lines of inquiries related to Mr Taha, namely, his association with Mr Abu Adass and potential links to Al-Qaeda. The investigation in 2009 and 2010 sought to find Mr Taha to ascertain his relationship with Mr Abu Adass and whether he was involved in the latter's abduction.

18. Mr Taylor established the objectives for the project concerning the false claim of responsibility, which included, in essence, reviewing all material emanating from the inquiry

¹⁵ Disclosure batches 3561, 3562; transcript of 27 June 2018, p. 55; Prosecution's email to the Trial Chamber's senior legal officer, 27 June 2018.

¹⁶ Transcript of 25 June 2018, pp 13-14.

on this matter by the United Nations International Independent Investigations Commission (UNIIC) and by the Lebanese investigating authorities. There was also a re-interview project which involved reviewing all witness materials to decide whether any witnesses could provide further useful information or evidence on this matter.¹⁷

Mission order, dated 15 April 2010

19. The mission order was addressed to the Prosecutor and sent to him through several officials, including Mr Taylor as the new Chief of Investigations. It outlines the mission's objectives, one of which was to interview witnesses in relation to Mr Abu Adass with the purpose of collecting evidence relating to his disappearance and background. One of the witnesses was Witness 056's relative.

20. Mr Taylor was not involved in planning this interview, but approved the mission. He explained how missions are approved: investigators who propose a mission take statements, make a mission proposal and then pass it through a series of line managers. Mr Taylor would approve each proposal before it was sent to the Prosecutor, who, after considering the witnesses' potential probative value, would authorise a Prosecution mission.¹⁸

*Mission report, dated 17 May 2010*¹⁹

21. Mission reports are prepared upon each mission's completion. This mission report corresponds to the mission order of 15 April 2010 and reports that the investigative team unsuccessfully attempted to interview Witness 056's relative, who could not be contacted. The Prosecution showed a redacted copy of this document to Mr Taylor before he testified. Although the Sabra Defence did not request its disclosure, the Prosecution provided it to the Trial Chamber in order to assist its determination of this issue.

*Mission report, dated 8 September 2010*²⁰

22. After Mr Mugg and Mr Carnus interviewed Witness 056's relative in August 2010, a mission report, dated 8 September 2010, was sent to the Prosecutor via Mr Taylor, as Chief of

¹⁷ Transcript of 25 June 2018, pp 15, 17, 20, 74-75.

¹⁸ Transcript of 25 June 2018, pp 121-122; transcript of 26 June 2018, pp 3-4.

¹⁹ This is the typed date on the document. There is a stamp by the Office of the Prosecutor, dated 19 May 2010.

²⁰ This is the typed date on the document. There is a stamp by the Office of the Prosecutor, dated 9 September 2010.

Investigations, and three others, including a team leader and an investigator. Relevantly, it summarises in ten lines the information received from the witness. But this summary merely describes what is in the witness statement, which the Sabra Defence has and on which it cross-examined Mr Taylor.

23. The Prosecution provided Mr Taylor with a redacted copy of this report. Mr Taylor explained the standard procedure in preparing a report: each mission report would go through various chains of command and, ultimately, it would reach him. With respect to this specific report, Mr Taylor was himself on mission when it reached his office. Hence, it was initialled or signed by the acting Chief of Investigations and Mr Taylor did not approve it.²¹

24. This mission report summarised the statements taken from witnesses, including Witness 056's relative. As far as Mr Taylor remembers, this was the first time that this witness was interviewed as a result of the investigation team's efforts to identify other witnesses who could assist in ascertaining Mr Abu Adass's disappearance or abduction and whether Mr Taha was involved in it.²²

LEGAL PRINCIPLES

Rule 110

25. Rule 110 sets out the Prosecution's general disclosure obligations towards the Defence. Under Rule 110 (A) (ii), the Prosecution must disclose to the Defence the statements of all witnesses it intends to call at trial. Rule 110 (B) provides (relevantly) that the Prosecution shall, on request, permit the Defence to inspect items in its custody or control, which are material to the preparation of the defence, or the Prosecution intends to use as evidence at trial.

Rule 111

26. Rule 111 provides for the non-disclosure of reports, memoranda or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case. For the Prosecution, such material includes reports,

²¹ Transcript of 25 June 2018, pp 123-124; transcript of 26 June 2018, pp 5-6.

²² Transcript of 26 June 2018, pp 5-6.

memoranda or other internal documents prepared by the UNIIC or its assistants or representatives in connection with its investigative work.

27. The exceptions to Rule 111 ‘must be narrow in nature and may not serve to undermine the purpose of the Rule, namely, to protect the free exchange of ideas and an open discussion within the Prosecutor’s or Defence counsel’s teams’.²³

28. Documents under Rule 111 ‘contain the *thoughts and original work* of investigators, often in unpolished or incomplete form’. Whether specific material is internal work product depends not on its title but on its content, function, purpose and source. The Prosecution’s internal memoranda containing legal analysis, research or investigatory strategies fall outside its disclosure obligations.²⁴

29. Witness statements are ‘not the Party’s work product; *they are the product of the person interviewed*’.²⁵ Whether a document is a disclosable witness statement requires a case-by-case determination in light of the ‘type of testimony the witness will give, the character of the witness, and the content, use, function and source of the document’.²⁶ The Trial Chamber has held that the term ‘witness statement’ may have different meanings under Rule 110 (A) (ii).²⁷ Additionally, internal work product prepared by someone who later becomes a witness is not subject to disclosure. Consequently, an internal document, created for a Party’s internal use, ‘does not assume a different, non-internal, use merely because its author has become a witness.’²⁸

²³ CH/AC/2013/01, *In the Matter of El Sayed*, Public Redacted Version of Decision on Appeal by the Prosecutor Against Pre-Trial Judge’s Decision of 11 January 2013, Dated 28 March 2013, 28 March 2013 (‘Appeals Chamber’s decision of 28 March 2013’), para. 28.

²⁴ F3690, Decision Dismissing Sabra Defence Application for Disclosure of Material Related to Mr Michael Taylor, para. 11; CH/AC/2011/01, *In the Matter of El Sayed*, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011 (‘Appeals Chamber’s decision of 19 July 2011’), para. 74, fn. 117, referring to relevant case law of the *ad hoc* tribunals, and paras 95-96, 117.

²⁵ STL-11-01/PT/AC/AR126.5, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0003, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judge’s “Decision on Sabra’s Tenth and Eleventh Motions for Disclosure”, 6 November 2013 (‘Appeals Chamber’s decision of 6 November 2013’), para. 26 (emphasis in the original); Appeals Chamber’s decision of 19 July 2011, para. 78 (emphasis in the original).

²⁶ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3171, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017 (‘Decision on Merhi Defence disclosure request’), paras 47-48. The Trial Chamber found that the more extensive definition by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Haradinaj* case (*see below*, fn. 32) is ‘overly broad and all encompassing, running the risk of opening the floodgates to include documents falling’ outside the ambit of Rule 110 (A) (ii), such as a Party’s internal work product under Rule 111.

²⁷ Decision on Merhi Defence disclosure request, para. 47.

²⁸ Appeals Chamber’s decision of 6 November 2013, paras 25, 27.

30. Finally, material which would otherwise be disclosable as material to the preparation of the Defence under Rule 110 (B) is exempt from disclosure if it falls within Rule 111.²⁹

Rule 113

31. Rule 113 (A) governs the disclosure by the Prosecution to the Defence of exculpatory material, that is, ‘any information’ in the Prosecution’s ‘possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility’ of the Prosecution’s evidence. While the ‘major focus of Rule 111 material is on *opinion*’, ‘Rule 113, by contrast, is concerned essentially with *fact*. It is exculpatory fact that forms the essential policy of Rule 113. There is therefore in general a complementari[t]y between the two Rules’.³⁰

32. The Defence must specifically identify the material and *prima facie* demonstrate the probable exculpatory nature of the material and show that it is in the Prosecution’s custody or control.³¹ The Prosecution must disclose exculpatory information even if it is contained in internal work product.³²

33. The Appeals Chamber held, in paragraph 102 of its decision of 19 July 2011 in *El Sayed* on the Prosecution’s disclosure obligation, referring to internal work product,

There is however the possibility that Rule 111 discussion will be expressed (i) in such a categorical manner; (ii) by a decision maker; (iii) in such circumstances as to suggest that what occurs “in-house” is properly to be categorized as admission of *fact*. At that point the Rule 111

²⁹ Appeals Chamber’s decision of 6 November 2013, paras 25, 30.

³⁰ Appeals Chamber’s decision of 19 July 2011, paras 100-101 (emphasis in the original).

³¹ F3320, Decision Denying Merhi Defence Motion Seeking Disclosure of Material Relating to Potential Users of Purple Phone 231, 13 September 2017, para. 34; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1519, Decision on Prosecution Witness Expenses, 9 May 2014, para. 13.

³² F3562, Decision Denying the Sabra Defence Application for Disclosure of a UNIIIC Internal Memorandum on Mr Wissam Al-Hassan (Witness PRH680) under Rules 110 (B) and 113, 7 February 2018 (‘Decision denying disclosure of a UNIIIC memorandum’), para. 12; Appeals Chamber’s decision of 19 July 2011, para. 97 (emphasis in the original), referring to ICTY, *Prosecutor v. Haradinaj*, IT-04-84-PT, Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness, 13 December 2006, p. 4, where the Chamber found that ‘even if the investigator’s memorandum did qualify as internal work product under Rule 70(A), the Prosecution would still be obliged to disclose any portions of the memorandum that suggest the innocence or mitigate the guilt of one or more of the Accused, or affect the credibility of Prosecution evidence’.

shield disappears and is replaced by the Rule 113 obligation (subject of course to its limitations laid down in Rules 116 to 118).³³

34. It continued, in paragraph 105, by summarising this,

if in the course of discourse of persons whose conduct is attributable to a Party in terms of Rule 111 there is (i) unambiguous acceptance; (ii) by a decision maker; (iii) which is fairly to be characterised as a decision as to relevant guilt or innocence, the Rule 111 discussion is lifted into the Rule 113 category and must be disclosed unless any of Rules 116 to 118 applies.³⁴

35. The expression ‘admission of fact’ in paragraph 102, however, is undefined and potentially capable of different interpretations. To further assist the Trial Chamber in its interpretation, the Presiding Judge asked the Parties for their submissions on the meaning of this term and, especially, the word ‘admission’, which may have differing legal and non-legal meanings.³⁵

36. Counsel for Mr Sabra interprets ‘admission of fact’ as meaning a fact concerning whether or not someone was ‘implicated’ in something. Such an ‘admission of fact’ is relevant to a witness’s credibility.³⁶ With respect to the investigation into Mr Taha’s possible involvement in Mr Abu Adass’s disappearance, counsel for Mr Sabra submitted that a decision to cease the investigation into Mr Taha because he is no longer considered to be a person of interest, which results in a decision on innocence, would ‘pierce the Rule 111 shield’ and thus the document would be disclosable.³⁷

³³ Emphasis in the original. *See similarly*, Appeals Chamber’s decision of 28 March 2013, para. 28; Appeals Chamber’s decision of 6 November 2013, paras 18-19.

³⁴ Rule 116 specifies the grounds for non-disclosure of information that would ordinarily be subject to disclosure. The Prosecution may apply for non-disclosure, if the disclosure of such information ‘(i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest or the rights of third parties’.

Under Rule 118, where the Prosecution is in possession of information which was provided on a confidential basis and which affects the security interests of a State or international entity or an agent thereof, it shall not disclose that information or its origin without the consent of the person or entity providing the information.

³⁵ Transcript of 26 June 2018, pp 146-147.

³⁶ Transcript of 26 June 2018, p. 147.

³⁷ Transcript of 27 June 2018, pp 19 (referring to the Appeals Chamber’s decision of 19 July 2011, paras 102, 105), 20-25, 39-40.

37. The Prosecution contends that the wording ‘admission of fact’ signifies a concession against a Party’s interest. Consequently, as regards the Prosecution, this is a concession which tends to exculpate the Accused.³⁸

38. The Trial Chamber concurs that the term ‘admission’ in the context of paragraph 102 should be read to signify a concession against a Party’s interest. However, the summary in paragraph 105 of the decision is clearer and unambiguous and should be preferred over paragraph 102, which requires interpretation. Paragraph 105 specifies that it is the ‘discourse’ of the Party ‘which is fairly to be characterised as a decision as to relevant guilt or innocence’, that can transform internal work product—otherwise protected by Rule 111 from disclosure—into exculpatory material under Rule 113 which must be disclosed. The ‘decision’ by a decision maker in the context of paragraph 105 must be expressed in unequivocal and irrefutable terms. How this may apply to internal Defence communications in circumstances where legal professional privilege—referred to in Rule 163—may not apply is an interesting issue, but not one requiring resolution here.

39. To conclude, an intra-party communication that would normally be considered as protected internal work product may become exculpatory, and hence disclosable, if it is a decision, by a decision maker, as to relevant guilt or innocence.

SUBMISSIONS

Sabra Defence’s submissions

40. The Sabra Defence argues that the documents form an inextricable part of Mr Taylor’s testimony, and seeks disclosure on, it appears, four different bases. First, because Mr Taylor relied on them, the Defence is entitled to see them to verify the witness’s account. Second, even if it is normally exempt from disclosure under Rule 111, the exception, recognised in Appeals Chamber’s decisions, applies here and the documents should be disclosed under Rule 113. Third, by providing the documents to Mr Taylor, the Prosecution waived its privilege against disclosure. Fourth, these documents should be considered as Mr Taylor’s witness statements.

³⁸ Transcript of 27 June 2018, pp 27-28.

41. The Sabra Defence contends that the investigations plan had been transformed into a statement, making it disclosable. Mr Taylor relied repeatedly on it as the basis of his account. Hence, this document represents a ‘witness statement’ within the meaning provided by the Appeals Chamber. In his testimony, Mr Taylor referred many times to the mission order and used it as the basis of his account. Hence, it forms part of Mr Taylor’s testimony and should, therefore, be considered as a ‘witness statement’. Furthermore, by giving this document to Mr Taylor the Prosecution deliberately waived Rule 111.

42. Similarly, there is no discernible justifiable reason why the mission report, upon which Mr Taylor relied during his testimony, should not be disclosed to the Sabra Defence. Just as the investigations plan, the mission report had been transformed into a statement, making it disclosable. As to the standard operating procedures, Defence counsel submit that they fall outside Rule 111 and should be disclosed as material to the preparation of the defence under Rule 110 (B).³⁹

Prosecution’s submissions

43. The Prosecution submits that the documents remain protected under Rule 111. The standard operating procedures are used for internal purposes to guide the Prosecution’s staff members and cover a variety of matters—including investigations. Exceptions to Rule 111 must remain narrow to protect the overall principle guaranteeing free and frank internal discussions of the Parties. Moreover, none of the requested items contain exculpatory material under Rule 113.

44. The Prosecution did not waive Rule 111 by providing Mr Taylor with these documents, and the witness did not waive Rule 111 by referring to and relying upon them. The privilege belongs to the Party not a witness. Further, the Prosecution only gave Mr Taylor redacted versions of the mission reports and the investigations plan.

45. The documents, which the Sabra Defence seeks to access, are not Mr Taylor’s ‘statements’. By referring to them in his testimony, Mr Taylor did not adopt them as part of his evidence. He mentioned the documents in the chronology of the events, of which he was speaking. Furthermore, Mr Taylor has always remained a ‘non-witness’ until he was ordered

³⁹ Transcript of 26 June 2018, pp 81, 84-86, 137, 142-143; transcript of 27 June 2018, pp 20-25, 29-30, 33-34, 39-40.

to appear by the Trial Chamber as its witness. He has never been on any Prosecution or Defence witness list. Anything he may have produced or signed, he did so in his capacity as a representative of the Office of the Prosecutor and not in a witness capacity. Signing a document does not necessarily entail its authorship.⁴⁰

REASONS FOR THE DECISION

Whether the material is internal work product

46. A document's status as internal work product depends not on its title but on its content, function, purpose and source.⁴¹ The Trial Chamber must therefore satisfy itself that the material is properly characterised as internal work product under Rule 111,⁴² and consider whether it is nonetheless disclosable as a statement of the witness, or otherwise exculpatory.

Prosecution's standard operating procedures

47. The Trial Chamber does not understand how the Office of the Prosecutor's standard operating procedures—whether already in place or introduced when Mr Taylor was employed there—could be relevant to assessing either his credibility or the reliability of his evidence, or are material to the preparation of the defence. The Sabra Defence did not explain how it could. Documents of this nature are in essence the internal working product of a Party and thus protected from disclosure by Rule 111. The Trial Chamber cannot see how these documents are relevant to Mr Taylor's testimony or could be disclosable as exculpatory under Rule 113. For these reasons the application was refused.

Whether the investigations plan, mission order and mission reports are 'witness statements' disclosable under Rule 110 (A)

(a) Investigations plan memorandum of 26 October 2009

48. The Trial Chamber has seen portions of the investigations plan, and it reflects the information Mr Taylor provided in his testimony. It is not Mr Taylor's document. As a senior investigator he was an addressee. It is an investigations plan, not a witness statement. It cannot—on any interpretation of the term—be a 'witness statement', either Mr Taylor's or

⁴⁰ Transcript of 26 June 2018, p. 140; transcript of 27 June 2018, pp 15, 42, 44, 46-47, 51.

⁴¹ Appeals Chamber's decision of 19 July 2011, para. 74, fn. 117, referring to relevant case law of the *ad hoc* international criminal tribunals, and para. 117.

⁴² See *similarly*, Decision denying disclosure of a UNIIC memorandum, para. 43.

anybody else's.⁴³ Part of this strategy document concerns the investigation into the alleged false claim of responsibility, setting out the relevant objectives and tasks. The document is not exculpatory and Mr Taylor has substantially put on the court record the part relevant to the Sabra Defence's case, as noted in paragraphs 16 to 18 above. It is an internal strategic document, which constitutes classic (non-exculpatory) Prosecution internal work product.⁴⁴ It will only be disclosable if it is exculpatory under Rule 113.

(b) *Mission order and reports relating to interviewing Witness 056's relative*

49. The mission order of 15 April 2010, the mission report of 8 September 2010, and the mission report of 17 May 2010 concern, among other things, the interview of and the attempt to interview Witness 056's relative. They were communicated to the Prosecutor, either through Mr Taylor as Chief of Investigations or the Acting Chief of Investigations. The report of 8 September 2010 is a joint mission report, encompassing a number of inquiries, one of which relates to Witness 056's relative. The ten lines referring to the interview do no more than summarise the contents of the relative's statement, which the Sabra Defence has, and on which it extensively cross-examined Mr Mugg.

50. The Sabra Defence argues that the mission order and report, which were either authored or approved by Mr Taylor, should be considered as witness statements within the meaning of Rule 110 (A) rather than internal work product. They refer to the Appeals Chamber's finding that Rule 111 'has no application to statements of witnesses, which are not the Party's work product; *they are the product of the person interviewed*'.⁴⁵

51. The mission order, however, is not a witness statement. Mr Taylor is not its author; he was merely an approving officer of a request to the Prosecutor to authorise a mission to, among other things, interview a particular witness. It cannot be considered as a witness statement and therefore is not disclosable as one under Rule 110 (A) (ii), that is, in respect of witnesses the Prosecutor intended to call at trial. If it were a witness statement, the Trial Chamber would have ordered its disclosure for a Rule 165 Chamber witness as a matter of

⁴³ Conceivably, however, there could be circumstances in which the maker of such a document adopts its contents which could transform it into a quasi-witness statement.

⁴⁴ F3690, Decision Dismissing Sabra Defence Application for Disclosure of Material Related to Mr Michael Taylor, 14 June 2018, para. 41.

⁴⁵ Appeals Chamber's decision of 19 July 2011, para. 78 (emphasis in the original).

fairness and in the interests of justice, but as it is not, it does not require disclosure on that basis.

52. Similarly, the mission report of 17 May 2010 that Mr Taylor signed on its way to the Prosecutor's desk is also not Mr Taylor's witness statement and is thus not disclosable under Rule 110 (A). Mr Taylor did not sign the mission report of 8 September 2010 so this is not relevant to this issue.

Waiver of privilege under Rule 111

53. The Sabra Defence claims an implied or express Prosecution waiver of the Rule 111 protection over the three documents. The Prosecution maintains its Rule 111 privilege over disclosing the documents. It argues that this privilege has not been waived either by (a) providing Mr Taylor with the documents, or (b) Mr Taylor partly referring to their contents in his testimony.

54. Waiver is the 'voluntary relinquishment or abandonment – express or implied – of a legal right or advantage'. The Party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.⁴⁶ The same applies to waiving a Party's legal privilege. A legal privilege belongs to a Party or—in the case of a legal professional privilege (or client-lawyer privilege) under Rule 163—to the client.⁴⁷ Only that person or entity may waive it.

55. Rule 111's purpose is 'to protect the free exchange of ideas and an open discussion' in litigation. A witness's reliance on or reference to a specific document, which is a Party's internal work product, does not of itself constitute a waiver of the document's protection from disclosure. Logically, Rule 111 would be made meaningless if the secrecy of communications by a Party's legal counsel depends on external factors, such as a witness's testimony.

⁴⁶ *Black's Law Dictionary*, Bryan A. Garner, Tenth edition (2014), p. 1813.

⁴⁷ See e.g., International Criminal Tribunal for Rwanda, ICTR-99-52-I, *Prosecutor v. Nahimana et al*, Decision on the Defence Motion for Declaratory Relief from Administrative Measures Imposed on Hassan Ngeze at the UNDF, 9 May 2002, p. 4; International Criminal Court (ICC), *The Prosecutor v Bemba et al*, ICC-01/05-01/13-2275-Red 08-03-2018, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, paras 431-435. See also Rule 73 (1) (b) of the ICC's Rules of Procedure and Evidence.

56. However, a Party may implicitly or explicitly waive its privilege under Rule 111 through a witness. Here, the Prosecution apparently fully briefed Mr Taylor on the relevant contents (the unredacted portions) of the documents over which privilege is claimed and allowed him to testify to this without objection.

57. In taking this course, the Prosecution implicitly waived its Rule 111 protection over some of the information in the documents. But at the same time, it has maintained a claim of Rule 111 privilege over the documents themselves. There is a fine line here, and arguably, by implicitly waiving the Rule 111 privilege over the contents of the documents, the documents, in theory, could themselves become disclosable. But this does not always follow—a Party may allow a witness to testify to the content of a document without the document itself becoming disclosable. And here the Prosecution has explicitly not waived its claim of privilege against disclosure of the documents. The Trial Chamber is of the view that the Prosecution’s waiver here—covering some of the information in the documents through Mr Taylor’s testimony—does not automatically extend to the documents themselves in their entirety. But even if it did, the documents will provide no more information than Mr Taylor has already given in court.

Disclosure under Rule 113 of documents otherwise exempt from disclosure under Rule 111

58. The final issue, therefore, is whether the contents of the documents are exculpatory within the meaning in Rule 113 and—notwithstanding their internal work product status and the non-waiver—must be disclosed. Under Rule 113, these documents would be disclosable if they ‘reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor’s evidence’.

59. The mission report of 8 September 2010 is consistent with Mr Taylor’s testimony that nothing *in this document* suggested that the account of Witness 056’s relative was inconsistent with that of other witnesses, meaning that the two investigators failed to note this in the mission report. As Mr Taylor stated, no contradiction between different witness accounts was either flagged up or highlighted.⁴⁸ It thus appears—as Mr Taylor alluded to in his testimony—that the two investigators who interviewed the witness were either unaware of

⁴⁸ See transcript of 26 June 2018, p. 11.

any contradictions, or if they were, did not consider them worthy of mentioning or highlighting.

60. Having examined the (redacted) documents, the Trial Chamber is satisfied that their contents reflect Mr Taylor's evidence. Nothing in them contradicts or undermines his testimony or puts his credibility into question. Similarly, the Trial Chamber could not find anything in the documents that appears to affect the credibility of any other Prosecution evidence. Consequently, the three documents are not disclosable under Rule 113 as documents containing information that may 'affect the credibility of the Prosecutor's evidence'. Here, the Trial Chamber—in the interests of justice and as a matter of fairness—will extend the meaning of 'credibility of the Prosecutor's evidence' to include witnesses called by the Trial Chamber under Rule 165 but for whom the Prosecution has relevant information that could fall within Rule 113 'Disclosure of Exculpatory Material'.

61. Further, the documents contain nothing substantive 'which reasonably suggest[s] the innocence or mitigate[s] the guilt of the accused'. The investigations plan merely proposes reviewing all the evidence regarding Mr Abu Adass's disappearance and whether the explosion was caused by a self-detonating suicide bomber, and identifying gaps in the evidence, including relating to any role Mr Taha may have had. This of itself does not reasonably suggest the innocence of an Accused person or mitigate his guilt; it suggests no more than following existing lines of inquiry and exploring others. And, in any event, no Accused person had at that point been indicted. And even if the documents were authored by a 'decision maker', none contains any conclusion, either preliminary or final, regarding the investigation or Mr Taha's possible involvement in Mr Abu Adass's disappearance—as the Appeals Chamber's test in *El Sayed*, referred to in paragraphs 33 and 34 above, requires.

62. Moreover, whether the differences between witness accounts required further investigatory action is a matter of judgement and Prosecutorial discretion. Mr Taylor, in his evidence, explained all the steps taken to investigate Mr Taha's possible role, including unsuccessfully attempting over several years to find him, concluding by effectively asking 'what more could we have done in the circumstances'.⁴⁹ This, in the Trial Chamber's view, does not make the documents exculpatory under Rule 113. Additionally, counsel for Mr Sabra—using the assistance of the Special Tribunal's Defence Office—could themselves

⁴⁹ Transcript of 25 June 2018, p. 76.

have attempted to interview the witness. For these reasons, none of the identified documents are disclosable under Rule 113.

63. Further, it follows that, as the documents fall within Rule 111, they are not disclosable to the Defence under Rule 110 (B).

64. Finally, even if the Trial Chamber has incorrectly analysed the interplay between Rules 111 and 113, the Defence—through Mr Taylor’s testimony—has now the substance of the relevant information in the documents and the interests of justice do not require their disclosure.

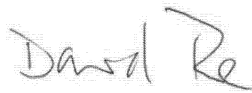
DISPOSITION

FOR THESE REASONS, the Trial Chamber:

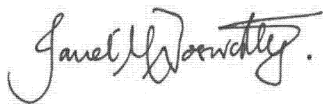
DISMISSED the Sabra Defence motion for disclosure of material.

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

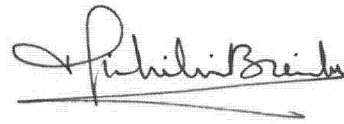
Leidschendam,
The Netherlands
13 July 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

