



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE PRE-TRIAL JUDGE**

Case No.: **STL-11-01/PT/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr. Daryl Mundis**

Date: **14 August 2013**

Original language: **English**

Classification: **Public**

**THE PROSECUTOR**  
v.  
**SALIM JAMIL AYYASH**  
**MUSTAFA AMINE BADREDDINE**  
**HUSSEIN HASSAN ONEISSI**  
**ASSAD HASSAN SABRA**

**DECISION ON SABRA'S TENTH AND ELEVENTH MOTIONS FOR DISCLOSURE**

**Office of the Prosecutor:**  
Mr. Norman Farrell

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**Legal Representative of Victims:**  
Mr. Peter Haynes

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**Counsel for Mr. Hussein Hassan Oneissi:**  
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**Counsel for Mr. Assad Hassan Sabra:**  
Mr. David Young



## **I. INTRODUCTION**

1. The Pre-Trial Judge hereby decides on two motions for disclosure (the “Motions”) filed by Counsel for Mr. Assad Hassan Sabra (the “Sabra Defence”).

## **II. PROCEDURAL BACKGROUND**

2. On 22 and 23 May 2013 respectively, the Sabra Defence filed the Motions (respectively, the “Tenth Motion”<sup>1</sup> and the “Eleventh Motion”<sup>2</sup>).

3. On 6 June 2013, the Prosecution filed a consolidated response to the Motions.<sup>3</sup> The following day, it filed a corrigendum<sup>4</sup> along with a corrected version of its response to the Motions (the “Response”).<sup>5</sup>

4. On 11 June 2013, the Sabra Defence filed a request for leave to reply<sup>6</sup> to any submissions in the Response relating to a decision on disclosure by the Pre-Trial Judge (the “24 May 2013 Decision”)<sup>7</sup> which was rendered after the Motions were filed.

5. On 14 June 2013, the Pre-Trial Judge granted the Sabra Defence leave to reply to that limited extent.<sup>8</sup>

6. On 19 June 2013, the Sabra Defence filed its reply to the Response (the “Reply”).<sup>9</sup>

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<sup>1</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra’s Tenth Motion for an Order for Disclosure – Rule 113 of the Rules of Procedure and Evidence, Confidential, 22 May 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

<sup>2</sup> Sabra’s Eleventh Motion for an Order for Disclosure – Rules 110(A)(ii) and 113 of the Rules of Procedure and Evidence, Confidential, 23 May 2013.

<sup>3</sup> Prosecution’s Consolidated Response to the Sabra Defence’s 10<sup>th</sup> and 11<sup>th</sup> Motions for Orders for Disclosure, Confidential with Confidential Annex A, 6 June 2013.

<sup>4</sup> Corrigendum to the “Prosecution’s Consolidated Response to the Sabra Defence’s 10<sup>th</sup> and 11<sup>th</sup> Motions for Orders for Disclosure”, Confidential, 7 June 2013.

<sup>5</sup> Corrected Prosecution’s Consolidated Response to the Sabra Defence’s 10<sup>th</sup> and 11<sup>th</sup> Motions for Orders for Disclosure, filed 6 June 2013, Confidential, 7 June 2013.

<sup>6</sup> Defence Request for Leave to Reply to the “Prosecution (*sic*) Consolidated Response to the Sabra Defence’s 10<sup>th</sup> and 11<sup>th</sup> Motions for Orders for Disclosure”, Confidential, 11 June 2013, para. 7. The Pre-Trial Judge notes that the Sabra Defence dated the cover page of this request 11 June 2012, but the signature page and the footer are dated 11 June 2013.

<sup>7</sup> Decision on Sabra’s Seventh Motion for Disclosure – Experts, 24 May 2013.

<sup>8</sup> Order Granting the Sabra Defence Request for Leave to Reply to the Prosecution Consolidated Response to the Sabra Defence Motions for Disclosure Orders, 14 June 2013.

<sup>9</sup> Defence Reply to the “Prosecution (*sic*) Consolidated Response to the Sabra Defence’s 10<sup>th</sup> and 11<sup>th</sup> Motions for Orders for Disclosure”, Confidential, 19 June 2013.

### III. SUBMISSIONS

7. In the Motions, the Sabra Defence seeks the disclosure of a total of seven items. This section provides a summary of the submissions made by the Parties for each item, beginning with the five items listed in the Tenth Motion (Items 1 to 5), followed by the two items listed in the Eleventh Motion (Items 6 and 7).

#### A. Items 1 and 2

8. The Sabra Defence seeks, pursuant to Rule 113 of the Rules of Procedure and Evidence (the “Rules”), the disclosure of two documents (“Item 1” and “Item 2”)<sup>10</sup> prepared by the United Nations International Independent Investigation Commission (“UNIIC”). Both Items were referred to in an internal memorandum disclosed by the Prosecution to the Defence pursuant to Rule 113.<sup>11</sup>

9. According to the Sabra Defence, the two documents have been specifically identified, are in the custody of the Prosecution,<sup>12</sup> and are exculpatory in nature.<sup>13</sup> It further argues that “the Prosecution did not exercise its disclosure obligations with the requisite diligence/or that it has interpreted its obligations too narrowly”.<sup>14</sup> The Sabra Defence takes the position that “the exception provided under Rule 111 is not applicable to material falling under Rule 113(A).”<sup>15</sup>

10. In response, the Prosecution submits that Items 1 and 2 are each an “internal draft analytical document prepared by the UNIIC in the course of its investigation” and constitute Rule 111 internal work product.<sup>16</sup> Accordingly, the Prosecution submits that it satisfied its disclosure obligation by disclosing to the Defence all material referred to within Items 1 and 2,<sup>17</sup> if not the Items themselves, since “under the law of this Tribunal, internal work product is not subject to disclosure under Rule 113.”<sup>18</sup>

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<sup>10</sup> Tenth Motion, para. 4(i) (“Item 1”) and 4(ii) (“Item 2”).

<sup>11</sup> *Id.*, para. 5; Response, fn. 28.

<sup>12</sup> Tenth Motion, para. 25.

<sup>13</sup> *Id.*, paras 26-33.

<sup>14</sup> *Id.*, para. 36.

<sup>15</sup> *Id.*, para. 20.

<sup>16</sup> Response, paras 35, 38.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.*, paras 36, 39.

### B. Item 3

11. Also pursuant to Rule 113, the Sabra Defence requests four categories of information in relation to the attribution of a telephone number (collectively, “Item 3”).<sup>19</sup> The Sabra Defence claims the information requested is “specifically identified”<sup>20</sup> and “evidently exculpatory”.<sup>21</sup> It then proceeds to argue that in accordance with Rule 113(A), the Prosecution must provide Item 3 “immediately.”<sup>22</sup>

12. With respect to the four categories of information sought by the Sabra Defence as Item 3, the Prosecution responds that it has already disclosed two of them.<sup>23</sup> The third category relates to information allegedly in relation to other users of the telephone number in question, and the Prosecution claims that “it is not in possession of information suggesting there was another user of [the telephone number in question]”.<sup>24</sup> As for the fourth category, which is information attributing the telephone number to Mr. Sabra, the Prosecution submits that this information is inculpatory and therefore does not fall within the ambit of Rule 113, adding that it has provided the Defence with the evidence it relies upon for the purposes of telephone attribution.<sup>25</sup>

### C. Items 4 and 5

13. The Sabra Defence, pursuant to Rule 113, requests to be provided with any document referred to within a particular UNHCR internal memorandum (“UNHCR Memo”) which was disclosed to the Defence under Rule 113.<sup>26</sup> In particular, the Sabra Defence seeks a document that appears to be an investigator’s note (“Item 4”)<sup>27</sup> and another document described as a “Note to File” (“Item 5”).<sup>28</sup> According to the Sabra Defence, Items 4 and 5 have been

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<sup>19</sup> Tenth Motion, para. 9. *See also* para. 38 which explains that the four categories are the same as those enumerated under paragraph 7(i), (ii), (iv) and (v) of an *inter partes* letter dated 4 April 2013 (Confidential Annex C to the Tenth Motion).

<sup>20</sup> *Id.*, para. 38.

<sup>21</sup> *Id.*, para. 39.

<sup>22</sup> *Id.*, para. 40 (emphasis omitted).

<sup>23</sup> Response, para. 42, referring to the information requested at paragraph 7(i) and (ii) of the *inter partes* letter dated 4 April 2013.

<sup>24</sup> *Id.*, para. 44.

<sup>25</sup> *Id.*, para. 45.

<sup>26</sup> Tenth Motion, para. 11.

<sup>27</sup> *Id.*, paras 12(i) and 48.

<sup>28</sup> *Id.*, para. 12(ii).

specifically identified, are in the custody of the Prosecution, and are exculpatory in nature based on a *prima facie* assessment.<sup>29</sup>

14. The Prosecution responds that the UNIIC Memo was disclosed inadvertently and that Items 4 and 5 are each “an internal document prepared by UNIIC in the course of its investigation” and constitute Rule 111 internal work product.<sup>30</sup> The Prosecution, after having “duly searched and reviewed its holdings”, determined that it had already disclosed all “Rule 113 factual information contained within Item 4” and indicated to the Sabra Defence where this information could be located.<sup>31</sup> The Prosecution adds that the “Rules define the parameters of the information the Defence are entitled to in the course of their investigations. They do not provide for Defence access to the internal work product of the Prosecution”.<sup>32</sup> Similarly, with respect to Item 5, the Prosecution submits that it is exempt from disclosure of this Item under Rule 111 and that it “conducted a search and located no relevant materials subject to disclosure that had not previously been disclosed.”<sup>33</sup>

#### **D. Item 6**

15. In the Eleventh Motion, the Sabra Defence seeks the disclosure of two documents also cited in the UNIIC Memo. The first consists of a report authored by a Prosecution witness and former UNIIC staff member<sup>34</sup> (“Item 6”),<sup>35</sup> which the Sabra Defence argues the Prosecution must disclose pursuant to both Rules 110 and 113.<sup>36</sup>

##### **i. Motion for disclosure pursuant to Rule 110**

16. The Sabra Defence submits that because the author of Item 6 is a Prosecution witness, “any memorandum or report [the witness] prepared needs to be disclosed” pursuant to Rule 110(A)(ii), taking a broad interpretation of “witness statement”.<sup>37</sup> Alternatively, the Sabra Defence submits that Item 6 falls under Rule 110(B) because it is material to the preparation of the defence.<sup>38</sup> The Sabra Defence further argues that by “placing this person

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<sup>29</sup> *Id.*, para. 47.

<sup>30</sup> Response, paras 48, 53.

<sup>31</sup> *Id.*, para. 50.

<sup>32</sup> *Id.*, para. 52.

<sup>33</sup> *Id.*, paras 55-56.

<sup>34</sup> *Id.*, para. 66.

<sup>35</sup> Eleventh Motion, para. 5(i).

<sup>36</sup> *Id.*, para. 18.

<sup>37</sup> *Id.*, paras 19-20.

<sup>38</sup> *Id.*, para. 22.

on its witness list, the Prosecution has effectively waived the possibility of raising any Rule 111 exception to object to its disclosure.”<sup>39</sup>

17. The Prosecution disagrees, stating that placing someone on its witness list “does not automatically convert all internal documents prepared by the witness in his capacity as a UNIIC staff member into witness ‘statements’ to be disclosed under Rule 110(A)(ii).”<sup>40</sup> On this point, the Prosecution refers to the 24 May 2013 Decision, which it interprets as distinguishing between external and internal experts, with the latter’s internal work product not losing its Rule 111 protection merely by including the person on the witness list.<sup>41</sup> As for the Sabra Defence’s Rule 110(B) submissions, the Prosecution responds that it has already provided copies of any non-internal underlying material pursuant to that Rule.<sup>42</sup>

18. In the Reply, the Sabra Defence states that the Prosecution misrepresents the reasoning of the 24 May 2013 Decision upon which it relies by extending its application to non-expert witnesses.<sup>43</sup> The Sabra Defence emphasises that “[d]ifferent Rules apply to expert and non-expert witnesses”<sup>44</sup> and that the former can be cross-examined on matters affecting their credibility and on evidence relevant to the opposing Party’s case. Therefore, the Sabra Defence submits that disclosure obligations in relation to non-expert witnesses must not be limited in the manner set out in the 24 May 2013 Decision, “irrespective of whether or not these witnesses are former or current staff of the UNIIC and/or [the Prosecution]”.<sup>45</sup>

ii. Motion for disclosure pursuant to Rule 113

19. The Sabra Defence submits that Item 6 must be disclosed pursuant to Rule 113(A) because it has been specifically identified and it “is exculpatory in nature and as such [...] the exception of Rule 111 does not apply.”<sup>46</sup>

20. The Prosecution repeats that the UNIIC Memo was inadvertently disclosed and it considers Item 6, as “an internal document prepared by UNIIC in the course of its

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<sup>39</sup> *Id.*, para. 26.

<sup>40</sup> Response, para. 66.

<sup>41</sup> *Id.*, para. 67.

<sup>42</sup> *Id.*, para. 72.

<sup>43</sup> Reply, para. 7.

<sup>44</sup> *Id.*, para. 9.

<sup>45</sup> *Id.*, para. 10.

<sup>46</sup> Eleventh Motion, para. 31.

investigation”, to be internal work product that, pursuant to Rule 111, is not subject to disclosure.<sup>47</sup>

#### **E. Item 7**

21. The second document requested in the Eleventh Motion is a memorandum also cited in a UNIIC Memo (“Item 7”).<sup>48</sup> In seeking its disclosure, the Sabra Defence relies on Rule 113(A) and argues that Item 7 has been specifically identified and is exculpatory in nature.<sup>49</sup>

22. The Prosecution considers that Item 7, as “an internal analytical document prepared by UNIIC in the course of its investigation”, constitutes internal work product that, pursuant to Rule 111, is not subject to disclosure. Accordingly, the Prosecution disclosed the underlying Rule 113 material to the Defence, and indicated the ERN numbers of the Rule 113 information referred to in Item 7 that has already been disclosed.<sup>50</sup>

#### **F. Relief sought**

23. Arguing that the Prosecution has not exercised its disclosure obligations with the requisite diligence and/or has interpreted them too narrowly,<sup>51</sup> the Sabra Defence requests that the Pre-Trial Judge order that Items 1 to 7 be disclosed to the Defence, or in the alternative, it requests that they be disclosed to the Pre-Trial Judge on an *ex parte* basis in order for the latter to assess their exculpatory nature and issue a decision accordingly.<sup>52</sup>

24. The Prosecution submits that the Pre-Trial Judge should dismiss the Motions.<sup>53</sup>

### **IV. APPLICABLE LAW**

#### **A. Rules 111 and 113**

25. Rule 113 requires the Prosecutor to disclose to the Defence material that suggests the innocence or mitigates the guilt of the accused, or affects the credibility of the Prosecution’s

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<sup>47</sup> Response, para. 57.

<sup>48</sup> Eleventh Motion, para. 5(ii).

<sup>49</sup> *Id.*, paras 36-37.

<sup>50</sup> Response, para. 64.

<sup>51</sup> Tenth Motion, para. 2.

<sup>52</sup> *Id.*, paras 59-60; Eleventh Motion, paras 42-43.

<sup>53</sup> Response, para. 73.

evidence.<sup>54</sup> Rule 111 grants an exception to disclosure obligations for internal documents prepared by a Party and, for the purposes of the Prosecution, internal documents include those prepared by the UNIIIC.<sup>55</sup>

26. The complementarity between Rules 111 and 113 has been discussed by the Appeals Chamber in the *El Sayed* matter.<sup>56</sup> It noted that both Rules contain “an expression of important public policy.”<sup>57</sup> Rule 111 serves “predominantly to allow uninhibited discussion among those representing one Party” and its focus is therefore on *opinion*.<sup>58</sup> Meanwhile, Rule 113 “is concerned essentially with [exculpatory] *fact*.”<sup>59</sup>

27. The Appeals Chamber noted that there are exceptions to Rule 111 where its “shield disappears” and material that would otherwise be protected as internal work product must be disclosed pursuant to Rule 113, unless Rules 116, 117 or 118 apply.<sup>60</sup> These exceptions arise only “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”.<sup>61</sup>

28. In a more recent decision in the *El Sayed* matter, the Appeals Chamber emphasised that “not every ‘admission of fact’ will make the shield of Rule 111 disappear” pursuant to Rule 113, since the latter Rule is merely concerned with exculpatory facts.<sup>62</sup> In other words, any 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.”<sup>63</sup>

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<sup>54</sup> Rule 113 STL RPE. *See also* STL, *In the matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011 (“19 July 2011 AC Decision”), para. 97.

<sup>55</sup> Rule 111 STL RPE; 19 July 2011 AC Decision, paras 76-77.

<sup>56</sup> 19 July 2011 AC Decision, para. 101.

<sup>57</sup> *Id.*, para. 99.

<sup>58</sup> *Id.*, para. 100 [emphasis in original].

<sup>59</sup> *Id.*, para. 101 [emphasis in original].

<sup>60</sup> *Id.*, paras 102, 105.

<sup>61</sup> *Id.*, para. 105.

<sup>62</sup> STL, *In the matter of El Sayed*, Case No. CH/AC/2013/01, Decision on Appeal by the Prosecutor Against Pre-Trial Judge’s Decision of 11 January 2013, confidential and *ex parte*, 28 March 2013 (“28 March 2013 AC Decision”), para. 28, with a public redacted version of the same date.

<sup>63</sup> *Ibid.*

29. Finally, a request made pursuant to Rule 113 requires the Defence to discharge its burden of proof, on a *prima facie* basis, that the information sought is within the Prosecutor's possession or actual knowledge and that it is exculpatory in nature.<sup>64</sup>

### **B. Rule 110**

30. Rule 110(A)(ii) requires disclosure of all the statements, regardless of their form and source, of all witnesses who will be called to testify at trial.<sup>65</sup> With respect to investigators' notes, the Pre-Trial Judge recalls that the words of a witness himself contained in a statement must be disclosed, but not necessarily any additional comments or analyses by others contained in the same document, the redaction of which might be appropriate.<sup>66</sup>

31. As for Rule 110(B), its application has been considered in detail in previous decisions by the Pre-Trial Judge.<sup>67</sup> He recalls that the Defence bears the burden of demonstrating that the documents requested pursuant to this Rule are: (a) identified with sufficient specificity; (b) *prima facie* material to the preparation of the defence; and (c) *prima facie* in the Prosecutor's custody or control.<sup>68</sup>

## **V. DISCUSSION**

### **A. Tenth and Eleventh Motions – Application of Rule 113 to Items 1, 2 and 4 to 7**

32. First, the Pre-Trial Judge cannot find that, as submitted by the Sabra Defence, “the exception provided under Rule 111 is not applicable to material falling under Rule 113(A)”.<sup>69</sup> Based on this interpretation, the Sabra Defence argues that the Prosecution did not comply with its disclosure obligations because it “simply asserted” that the Items are not disclosable

<sup>64</sup> Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012 (“8 November 2012 Decision”), para. 28.

<sup>65</sup> Decision on the Prosecution Application for Non-Disclosure of Certain Statements of Witnesses Pursuant to Rule 116, Confidential, 20 December 2012, (“20 December 2012 Decision”), para. 16, citing: SCSL, *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes pursuant to Rules 66 and/or 68, 4 May 2005. A public redacted version of the 20 December 2012 Decision was filed on 28 May 2013.

<sup>66</sup> 19 July 2011 AC Decision, para. 109; 20 December 2012 Decision, para. 12.

<sup>67</sup> Decision on Sabra's Ninth Motion for Disclosure – Request for Assistance, 6 June 2013 (“6 June 2013 Decision”), para. 10, citing: Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012; Decision on the Sabra Defence's Fifth Request of the Fourth Motion for Disclosure, Confidential, 21 December 2012, with a public redacted version filed on 28 May 2013; Decision on Sabra's Seventh Motion for Disclosure, 24 May 2013; Decision on Sabra Defence's Eighth Motion for Disclosure – Documents Signed or Prepared by a Lebanese Law Enforcement Official, Confidential, 11 March 2013.

<sup>68</sup> *Ibid.*

<sup>69</sup> Tenth Motion, para. 20; Eleventh Motion, para. 16.

“since they fall within the ambit of Rule 111, while failing to provide an explanation as to why none of the documents are covered by the Rule 113 exception.”<sup>70</sup> The Pre-Trial Judge considers that this interpretation of the law would effectively reverse the principle established by the Rules and clarified by the Appeals Chamber, namely that “Rule 111 grants an exception from the general disclosure obligation under Rule 113”.<sup>71</sup>

33. Second, the Pre-Trial Judge considers that no distinction ought to be drawn between the Office of the Prosecutor (“OTP”) and the UNIIC for the purposes of the application of Rule 111.<sup>72</sup> The Appeals Chamber has held that, in principle, internal documents – whether they are prepared by the OTP or the UNIIC – are protected by Rule 111 and are exempt from disclosure.<sup>73</sup> As noted earlier, this general protection of internal work product provided by Rule 111 falls away and is replaced by the Rule 113 disclosure obligations if, and only if, the discussion in question is expressed (i) in a categorical manner; (ii) by a decision maker; (iii) suggesting that it should be properly categorised as admission of *fact*.<sup>74</sup>

34. The Motions are therefore based on a false premise by going beyond exculpatory facts alone and arguing that any information that may be exculpatory must be disclosed pursuant to Rule 113, notwithstanding the applicability of Rule 111.<sup>75</sup> The Sabra Defence is effectively seeking access to opinions, analyses and discussions conducted and expressed internally by the OTP and the UNIIC. Although, as a general principle, the Defence is not entitled to this OTP internal work product, the Sabra Defence is requesting that the Prosecution explain its failure to disclose these materials.

35. The Pre-Trial Judge recalls that a “wide margin of discretion is afforded to the Prosecutor in the performance of its important duty to disclose exculpatory information, and the Prosecutor is otherwise presumed to be acting in good faith in complying with this duty.”<sup>76</sup> The Pre-Trial Judge further notes that the Prosecution disclosed the underlying materials related to internal documents sought, and specified that the Sabra Defence has all the Rule 113 factual information that is relevant to Items 1 through 7.<sup>77</sup>

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<sup>70</sup> Tenth Motion, para. 36; Eleventh Motion, para. 39.

<sup>71</sup> 28 March 2013 AC Decision, para. 25, referring to the 19 July 2011 AC Decision.

<sup>72</sup> Tenth Motion, para. 24.

<sup>73</sup> *Id.*, para. 20, referring to the 19 July 2011 AC Decision.

<sup>74</sup> 19 July 2011 AC Decision, para. 102 [emphasis in original].

<sup>75</sup> Tenth Motion, para. 36; Eleventh Motion, paras 38-39.

<sup>76</sup> 8 November 2012 Decision, para. 28.

<sup>77</sup> Response, paras 27, 32.

36. It has been established by international criminal jurisprudence that the burden of proof rests on the Defence to show that the Prosecution has abused its discretionary judgement in violation of its disclosure obligations.<sup>78</sup> In this instance, the presumption that the Prosecution is acting in good faith has not been rebutted and the Pre-Trial Judge is therefore not inclined to intervene in the latter's exercise of its discretion. Thus, the Pre-Trial Judge rejects the Tenth Motion in its entirety and the Eleventh Motion insofar as it requests disclosure pursuant to Rule 113.

37. However, noting that the Response does not mention the following nuance expressed by the Appeals Chamber, the Pre-Trial Judge reminds the Prosecution that internal work product must be disclosed to the Defence if it consists of "(i) unambiguous acceptance; (ii) by a decision maker; (iii) which is fairly to be characterised as a decision as to relevant guilt or innocence"<sup>79</sup>, "unless there is a basis other than Rule 111 to withhold it".<sup>80</sup> In the event that the Prosecution failed to consider this nuance, it must review its holdings – and Items 1 through 7 in particular – and determine whether its Rule 111 material is actually subject to disclosure because it "is properly to be categorized as admission of *fact*."<sup>81</sup>

### **B. Tenth Motion – Application of Rule 113 to Item 3**

38. The Pre-Trial Judge notes that two of the four categories of information sought by the Sabra Defence under Item 3 have already been disclosed and the issue is therefore moot with respect to those two categories.

39. With respect to the third category of information, relating to other users of a telephone number, there is no *prima facie* proof that the Prosecution is in possession of this information and the presumption that the Prosecutor is acting in good faith therefore precludes judicial intervention.

40. For the fourth category of information, relating to the attribution of a telephone number to Mr. Sabra, the Pre-Trial Judge considers that this request does not fall within the

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<sup>78</sup> 8 November 2012 Decision, para. 28, citing: ICTY, *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 31; ICTY, *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, Case No. IT-98-30/1-A, Decision, 22 March 2004, p. 3; ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 39.

<sup>79</sup> 19 July 2011 AC Decision, para. 105.

<sup>80</sup> *Id.* para. 115.

<sup>81</sup> *Id.*, para. 102.

ambit of Rule 113 as there is nothing *prima facie* to suggest that the information sought is exculpatory in nature.

### C. Eleventh Motion – Application of Rule 110 to Item 6

41. Item 6 concerns a report prepared by a Prosecution witness and former UNIIIC staff member, and the Sabra Defence is seeking its disclosure pursuant to Rule 110(A)(ii) or 110(B). The Pre-Trial Judge notes that Rule 110(A)(ii) concerns witness statements, which are different from Rule 111 material such as “legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation.”<sup>82</sup> Indeed, even when the broad definition of “witness statement” adopted by the Appeals Chamber is considered, this only includes the sections within an internal document which consist of “statements from witnesses recorded in direct or indirect speech”, and not any additional comment contained therein.<sup>83</sup>

42. Consequently, the Pre-Trial Judge finds that it would be too liberal an interpretation of Rule 110(A)(ii) to hold that “any memorandum or report [a witness] prepared needs to be disclosed under [this Rule]”.<sup>84</sup> With respect to Item 6, the Sabra Defence gives no indication that it contains personal statements by the witness in question. Although the report could theoretically have been relevant to assess the credibility of the witness, the Pre-Trial Judge notes that the subject-matter of Item 6 is unrelated to his proposed testimony.<sup>85</sup> The Pre-Trial Judge therefore denies the relief requested pursuant to Rule 110(A)(ii).

43. As for the arguments raised by the Sabra Defence in relation to Rule 110(B), the Pre-Trial Judge finds that they fail to meet the required burden of proving that Item 6 is *prima facie* material to the preparation of the defence.<sup>86</sup> Furthermore, he notes that the Prosecution disclosed the non-internal underlying material.<sup>87</sup> In the 24 May 2013 Decision, the Pre-Trial Judge noted that “internal Prosecution work product relating to the final report of internal Prosecution staff [does not lose] the protection conferred by Rule 111 merely by

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<sup>82</sup> *Id.*, para. 82, citing: ICC, *Lubanga Dyilo*, Redacted Decision on the "Prosecution's request for Non-Disclosure of the Identity of Twenty Five Individuals Providing Tu Quoque Information" of 5 December 2008, ICC-01/04-01/06, 2 June 2009, para. 31.

<sup>83</sup> *Id.*, para. 109.

<sup>84</sup> Eleventh Motion, para. 19.

<sup>85</sup> Response, paras 70-71.

<sup>86</sup> Eleventh Motion, para. 22.

<sup>87</sup> Response, para. 72.

the person being included in the Rule 91 witness list.”<sup>88</sup> The Pre-Trial Judge agrees with the Prosecution’s submission that this reasoning extends to “internal chains of custody witnesses”<sup>89</sup> insofar as these witnesses are internal Prosecution or former UNIIC staff. The Pre-Trial Judge therefore denies the relief requested pursuant to Rule 110(B).

## VI. CONFIDENTIALITY

44. The Pre-Trial Judge notes that the Motions were filed confidentially because the Sabra Defence claims they contain “information regarding confidential Defence investigations”.<sup>90</sup> Accordingly, the Response and the Reply were also filed confidentially. In this decision, the Pre-Trial Judge has refrained from providing specific descriptions of the Items or any other details that could consist of information relating to confidential Defence investigations. This decision is therefore rendered publicly.

## VII. DISPOSITION

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**PURSUANT TO** Rules 110, 111, and 113 of the Rules,

**DENIES** the Motions.

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

Leidschendam, 14 August 2013



Daniel Fransen  
Pre-Trial Judge



<sup>88</sup> 24 May 2013 Decision, para. 52.

<sup>89</sup> Response, para. 67.

<sup>90</sup> Tenth Motion, para. 58; Eleventh Motion, para. 41.