

**THE TRIAL CHAMBER**

**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:** 7 July 2015

**Original language:** English

**Classification:** Public

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**DECISION DISMISSING SABRA DEFENCE'S URGENT MOTION FOR DISCLOSURE OF 29 JUNE 2015 (F2031), AND ONEISSI DEFENCE'S SUPPORTING SUBMISSION OF 01 JULY 2015 (F2039)**

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(Extract from Official Public Transcript of Hearing on 7 July 2015, page 3, line 20 to page 11, line 1)

On the 10th of March, 2015, Witness 006 met Prosecution counsel in preparation for her testimony by video-conference link on the 23rd and 24th of June. In cross-examination by Defence counsel she said that during the meeting she was shown a call sequence table, that is, derived from call data records of telephone calls she had made on the 14th of February, 2005, containing SMS records.

Witness 006 stated that a Prosecution employee was present and taking notes. On the 24th of June, 2015, counsel for the accused Mr. Assad Hassan Sabra e-mailed the Prosecution, asking it to disclose "a complete and detailed record of the meeting that was held between PRH006 and the Prosecution."

The Prosecution replied to the e-mail the next day, the 25th of June, 2015, citing to paragraph 18 of a Trial Chamber decision of the 16th of January, 2014, titled: "Directions on the conduct of the proceedings," which is filing F1326, stating that the Prosecution had

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disclosed an appropriate note relating to the meeting containing the only new information and that it was therefore fully compliant with its disclosure obligations.

Paragraph 18 of the decision on the direction and conduct of the proceedings states the following:

"Any new information, material to the proceedings, and any information falling within Rule 113, 'disclosure of exculpatory material, ' obtained by the Prosecution in preparing a witness for testimony must be promptly disclosed to the other parties, the Trial Chamber, and the Legal Representative of the Victims in a suitable form. Disclosure must occur as soon as practicable the day before the witness's expected testimony. The Legal Representative of the Victims has the same disclosure obligation in preparing a witness for testimony."

Counsel for Mr. Sabra, on the 25th of June, in an e-mail replying to the Prosecution, argued that paragraph 18 of the decision relates to the Prosecution's obligations under Rule 113 of exculpatory information and does not supplant its obligations under Rules 110(A) (ii) or 110(B) of the Rules of Procedure and Evidence. This was when they first argued that "notes, records, transcripts, or other records of the proofing meetings" qualified as statements of Prosecution witnesses, therefore requiring disclosure under Rule 110(A) (ii). Similarly, counsel stated that they considered these records as material for their defence preparation for trial.

After receiving what they viewed as an unsatisfactory response, that is, the response I've just referred to, on the 29th of June, 2015, counsel for Mr. Sabra filed a motion, F2031, entitled: Sabra urgent motion for disclosure under Rules 110(A) (ii) and 110(B), seeking the immediate disclosure of "any and all records of meetings held in March 2015 with Prosecution Witnesses PRH006, 430, 020, and 115."

In the motion they submitted that these records constitute the statements of witnesses the Prosecution intends to call at trial, and they are therefore subject to disclosure under Rule 110(A) (ii) or otherwise material to their preparations and therefore subject to disclosure under Rule 110(B).

As these witnesses are scheduled to testify imminently and with Witness 115 today, counsel for Mr. Sabra asked for this to be dealt with on an expedited basis.

And the Prosecution the following day, on the 30th of June, responded in filing F2034, response to Sabra urgent motion for disclosure under Rules 110(A) (ii) and 110(B).

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Counsel for Hussein Hassan Oneissi filed their own submissions supporting the motion in filing F2039 on the 1st of July.

The Prosecution responded to those submissions the following day, on the 2nd of July, 2015, in filing F2041, "Response to ' Oneissi Defence submissions in support of Sabra urgent motion for disclosure under Rules 110(A) (ii) and 110(B). '"

The Trial Chamber observes here that paragraph 18 of the decision on the conduct of proceedings includes the Prosecution's disclosure obligations under both 110 and 113, where it states:

"Any new information, material to the proceedings, and" - "and" is underlined here - "any information falling within Rule 113, 'disclosure of exculpatory material,' obtained by the Prosecution in preparing a witness for testimony must be promptly disclosed to the other parties."

That paragraph was clearly intended to cover material under both Rules 110 and 113, that is, any material disclosable by the Prosecution to the Defence.

The Prosecution replied to correspondence from counsel for Mr. Sabra on the 25th of June, 2015, stating that it had disclosed "all of the disclosable documents" and that there were no further documents in its possession falling under either Rules 110(A) (ii) or 110(B).

The e-mail correspondence between the parties are contained in the annexes A to D of the Sabra Defence motion.

In their motion, counsel for Mr. Sabra submitted that paragraph 18 of the directions of the conduct of the trial is -- that is, the decision on the conduct of the trial, is inapplicable. First, because here the meetings with the witnesses occurred months before the witnesses were scheduled to testify; and second, because the Trial Chamber's decision is "merely part of a series of guide-lines" which cannot supersede the Rules. They also submit that if paragraph 18 is applicable, the Prosecution has breached its disclosure obligations since asking the witness about the SMS messages she sent and received for the first time would qualify as new information under paragraph 18 of that decision.

Therefore, counsel for Mr. Sabra requested the Trial Chamber to find that paragraph 18 of that decision was inapplicable to the present proceedings and to order the Prosecution to fully comply with its disclosure obligations under 110(A) (ii) with respect to the meetings of March 2015.

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Alternatively, counsel for Mr. Sabra requested an order for the disclosure after a finding that Rule 110(A) (ii) "and the jurisprudence developed in this respect" supersedes paragraph 18 of that decision.

As a further alternative, they requested a finding that the Prosecution has breached its disclosure obligations under paragraph 18 and an order to the Prosecution to review its records to ensure full compliance with paragraph 18 of that decision.

The Prosecution opposed the motion, arguing that it does not possess any more records of these meetings that it has already not -- that has already not been disclosed. That is, it has nothing more to disclose. Moreover, counsel, Prosecution says, is improperly attempting to revisit the Trial Chamber's decision on the conduct of the proceedings without following the proper procedure for reconsideration under Rule 140, that is, to seek leave of the Presiding Judge before referring it to the Trial Chamber. The Defence's implicit assumption, the Prosecution says, is that the Prosecution is required to make a formal recording of all contact with its witnesses and this has no basis in the Special Tribunal's Rules or in international criminal procedural case law.

The Prosecution also submitted that it has not breached its obligations under paragraph 18 of the decision on the conduct of the proceedings. The Prosecution counsel say that showing the witness her own SMS messages to have her confirm them is not new evidence. It is the SMS messages which are the evidence and they were previously disclosed to the Defence.

Counsel for Mr. Oneissi supported the motion. In their submissions they argued that the investigator's note produced from the March meeting with Witness 006 is a "manifestly incomplete record." Counsel submitted that Mr. Oneissi's fair trial rights would be violated if the Prosecution could circumvent its Rule 110(A) (ii) disclosure obligations by excluding portions of a witness's interview. They suggested the Trial Chamber order the Prosecution to "keep accurate records of all witness interviews," and they suggested audio recording interviews.

The Prosecution likewise opposed these submissions. It pointed out that these submissions also assume that the Prosecution is required to record all contact with witnesses and to disclose these records to the Defence. This submission, however, according to the Prosecution, is unsupported by any legal authority, including the Special Tribunal's Rules, Statute, case law or that of international case law.

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The Prosecution also submitted that the Defence's request for an order to the Prosecution to record all witness interviews was advanced in their submission, filing F1223, of the 18th of November, 2013, the filing "Defence submissions on the observations of the Legal Representative of the Victims on the modalities of victim participation at trial." The Trial Chamber then rejected this request in its decision on the conduct of proceedings of the 18th of January, 2014. Therefore, counsel for Mr. Oneissi's request is only an improper request for reconsideration, without seeking leave of the Presiding Judge under Rule 114 and identifying any legal basis or injustice that would merit reconsideration of that decision.

The Prosecution lastly submits that the process of cross-examination is a sufficient tool for the Defence to elicit details of meetings that did not result in newly disclosed materials, that is, meetings between the Prosecution and witnesses in preparation for their testimony.

The Trial Chamber has carefully examined the arguments of the Prosecution and counsel for both Mr. Sabra and Mr. Oneissi. The Trial Chamber is unconvinced by the arguments of Defence counsel and dismisses the motion. The wording of paragraph 18 of the decision on the conduct of proceedings is clear. The Prosecution is required to disclose anything under either Rule 110 or Rule 113 that emerges in meetings with The Prosecution has submitted that it has disclosed all such material. Defence counsel have not put forward anything suggesting any reason why the Trial Chamber should disbelieve the Prosecution's submissions that they have disclosed all relevant material.

So therefore, even if the Trial Chamber agreed with counsel for Mr. Sabra, they would receive no additional documents from the Prosecution.

Also, the fact that the meetings between the Prosecution and their intended witnesses occurred months in advance of their testimony does not affect paragraph 18 of the decision on the conduct of the proceedings. The decision is not confined to meetings occurring "immediately before the testimony" or "24 hours in advance," or some other formulation. And in the Trial Chamber's view, meeting witnesses several months in advance of their testimony is good litigation practice.

Further, there is no requirement in either the Special Tribunal's Rules of Procedure and Evidence or in the general principles of international criminal law -- procedural law requiring a party to take a statement from a witness with every contact, or even to make a disclosable record of every contact between a party and a witness.

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The request by the Oneissi Defence for recordings of witness interactions between -- with the Prosecution is an inappropriate request for reconsideration. Defence counsel requested this in their submissions filed on the 18th of November, 2013. The Trial Chamber, however, did not make such an order then in its decision of the 14th of January, 2014, and leave has not been sought to reconsider it now. That motion is likewise -- the motion contained in the response is likewise dismissed.

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