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:	**7 February 2018**
Original language:	**English**
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THE PROSECUTOR
v.
SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

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

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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 Robe[illegible] &
Ms Sarah Bafadhel

INTRODUCTION AND BACKGROUND

1. Mr Wissam Al-Hassan (Witness PRH680) was a former official of the Lebanese Internal Security Forces (ISF) and the head of security for the former Lebanese Prime Minister, Mr Rafik Hariri. Mr Al-Hassan was not working on the day of the attack against Mr Hariri in Beirut on 14 February 2005. The Prosecution attributes responsibility for this attack, which killed Mr Hariri and 21 other persons, and injured 226 others, to the Accused, Mr Salim Jamil Ayyash, Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra.[1]

2. Mr Al-Hassan became the head of the ISF's Information Branch in early 2006. He was also assigned to lead the investigation into Mr Hariri's death. Several years later, on 19 October 2012, Mr Al-Hassan himself died in a car bombing in Beirut.[2]

3. Some months before his death, on 16 and 17 June 2012, the Prosecution interviewed Mr Al-Hassan. He provided information about the background to the investigation into the attack against Mr Hariri, including the cooperation between the ISF and the United Nations International Independent Investigation Commission (UNIIIC), as well as about three networks of mobile telephones that he and his colleagues discovered and investigated, and how these networks operated, related and corresponded with each other in terms of time, location and hierarchy.[3]

4. In a decision of 20 October 2017, the Trial Chamber decided to admit into evidence the audio recordings and transcripts of Mr Al-Hassan's interviews as statements of an unavailable person under Rule 158 of the Special Tribunal's Rules of Procedure and

[1] The Prosecution's case is that five interconnected mobile telephone groups—four of which operated as networks, colour-coded as 'red', 'green', 'blue' and 'yellow', and a group of three 'purple phones'—were involved in the 14 February 2005 attack – *see* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential). *See also* STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1492, Second Decision on Agreed Facts under Rule 122, 11 April 2014, disposition, recording the number of persons who were killed and injured during the attack as facts that the Trial Chamber may accept as being proved at trial. *See also* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3371, Decision Admitting into Evidence the Audio Recordings and Transcripts of the Prosecution Interview of Mr Wissam Al-Hassan (Witness PRH680) under Rule 158 and Three Related Documents under Rule 154, 20 October 2017 ('Decision of 20 October 2017'), paras 1-2.

[2] To date no-one has been charged in connection with his death. *See* Decision of 20 October 2017, para. 2.

[3] Decision of 20 October 2017, paras 7-9.

Evidence.[4] The Trial Chamber found that Mr Al-Hassan's evidence has some, albeit limited, corroborative relevance, in particular, to the allegations concerning the pleaded Green network, its purpose and use, insofar as it concerns the material fact pleaded in paragraph 49 of the amended consolidated indictment that the four Accused are Hezbollah supporters, as was the named co-conspirator, Mr Mustafa Amine Badreddine.[5]

5. On 7 December 2017, counsel for Mr Sabra filed an application under Rules 110 (B) and 113 (A)[6] requesting the disclosure of a report—a UNIIIC internal memorandum on Mr Al-Hassan—to which Witness PRH539 referred during his testimony before the Special Tribunal.[7] The Prosecution responded, opposing the application.[8]

6. On 12 January 2018, on the Trial Chamber's order, the Prosecution provided the internal memorandum, *ex parte*, to the Trial Chamber.[9]

7. The UNIIIC document, entitled 'Internal Memorandum', is dated 21 March 2007.[10] It is a compilation of material relating to, among other things, Mr Al-Hassan's relationship with Mr Hariri and others, his role in the UNIIIC's investigation, and investigative leads he suggested to the UNIIIC's investigators.

8. The internal memorandum analyses Mr Al-Hassan's credibility and assesses the reasons for his absence from work on the day of the attack, and his possible pre-knowledge of, or even involvement in, Mr Hariri's assassination. It extracts information from witness statements, investigators' notes and other sources and makes conclusions. It recommends that the UNIIIC investigate Mr Al-Hassan and formulates a proposed investigatory and evidence collection plan.

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[4] Decision of 20 October 2017, disposition. Rule 158 governs the requirements for admission of the evidence of unavailable persons, that is, persons who have died, who can no longer with reasonable diligence be traced, or who are for good reason otherwise unavailable to testify orally.
[5] Decision of 20 October 2017, para. 55.
[6] On the scope of Rules 110 (A) and 113 (A), *see* paras 9-11 below.
[7] F3461, Request for Disclosure of Document, 7 December 2017 (public with confidential annexes) ('Sabra Defence motion').
[8] F3500, Prosecution Response to Sabra Defence "Request for Disclosure of Document", dated 7 December 2017, 21 December 2017 ('Prosecution response').
[9] Disclosure batch 3486; F3512, Order to the Prosecution to Provide *Ex Parte* to the Trial Chamber a UNIIIC Report on Mr Wissam Al-Hassan (Witness PRH680), 11 January 2018.
[10] ERN D0540184-D0540222.

THE RULES AND THE CASE LAW

9. Rule 110 governs the Prosecution's general disclosure obligations towards the Defence. Under sub-paragraph (B), the Prosecution shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in its custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecution as evidence at trial, or were obtained from or belonged to the accused.

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

11. Rule 113 (A) regulates the disclosure by the Prosecution to the Defence of exculpatory material. The Prosecutor shall, as soon as practicable, disclose to the Defence 'any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence'.

12. Under the general principles of international criminal law and procedure, which the Trial Chamber must apply under Rule 3 in interpreting the Rules, the Prosecution must generally disclose exculpatory material, even if in its internal work product. The Special Tribunal's Appeals Chamber observed,

> That is the effect of the international jurisprudence: there has been general acceptance that, although characterised as internal, a document may nonetheless be subject to disclosure *to an accused* if it suggests the innocence or mitigates the guilt of the accused or if it affects the credibility of the Prosecutor's evidence.[11]

[11] CH/AC/2011/01, *In the Matter of El Sayed*, Decision on Partial Appeal by Mr. El Sayed of the Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 ('Appeals Chamber's decision of 19 July 2011'), para. 97 (emphasis in the original), referring to ICTY, *Prosecutor v. Haradinaj et al.*, 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 Trial 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'.

The Appeals Chamber's interpretation of Rules 111 and 113

13. On appeal from a decision by the Pre-Trial Judge in this case, and in the *El-Sayed* case, the Appeals Chamber has issued three relevant decisions on Rules 111 and 113.[12]

14. Relevant here is the decision of 19 July 2011, in *El-Sayed*, where on internal work product, the Appeals Chamber held that 'internal memoranda of the UNIIIC containing legal analysis, research, or investigatory strategies fall outside the disclosure obligation, pursuant to Rule 111'. Further, the term 'investigators' notes', it understood, referred to 'those documents that contain the *thoughts and original work* of investigators, often in unpolished or incomplete form. They therefore likewise fall within Rule 111'.[13] But most fundamentally, whether a document is internal work product depends not on its title but on its content, function, purpose and source.[14]

15. On the policy reasons for Rule 111, the Appeals Chamber held that, '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'.[15]

16. On the interplay between Rules 111 and 113 it found that the 'major focus of Rule 111 material is on *opinion*', whereas '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'.[16] The Appeals Chamber noted that,

> 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

[12] Appeals Chamber's decision of 19 July 2011; 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'); STL-11-01/PT/AC/AR126.5, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0003-AR126.5, 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').
[13] Appeals Chamber's decision of 19 July 2011, paras 95-96 (emphasis in the original).
[14] 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.
[15] Appeals Chamber's decision of 28 March 2013, para. 28.
[16] Appeals Chamber's decision of 19 July 2011, paras 100-101 (emphasis in the original).

> Rule 111 shield disappears and is replaced by the Rule 113 obligation (subject of course to its limitations laid down in Rules 116 to 118)'.[17]

17. It then concluded that,

> 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.[18]

18. In another decision of 28 March 2013 in *El-Sayed*, the Appeals Chamber emphasised that not every 'admission of fact' will make the shield of Rule 111 disappear but that the Prosecution's disclosure obligation under Rule 113 only arises if exculpatory facts are in play.[19] The Appeals Chamber, however, has not defined what it meant by the expression 'admission of fact'.

19. If the existence of the relevant exculpatory evidence is known and the evidence is accessible to the Defence, the Prosecution *could* be relieved of its obligation to disclose it. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) ruled in *Blaškić* that,

> the Prosecution may still be relieved of the obligation under Rule 68, if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant [*i.e.* the accused], as the appellant would not be prejudiced materially by this violation.[20]

20. The ICTY and the International Criminal Tribunal for Rwanda (ICTR) have consistently reiterated this judicial ruling.[21] The Trial Chamber agrees with it.

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[17] Appeals Chamber's decision of 19 July 2011, para. 102 (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.
[18] Appeals Chamber's decision of 19 July 2011, para. 105.
[19] Appeals Chamber's decision of 28 March 2013, para. 28.
[20] ICTY, *Prosecutor v. Blaškić*, 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. 38.
[21] ICTY, *Prosecutor v. Dario Kordić*, IT-95-14/2-A, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation under Rule 68 of the Rules, 11 February 2004, para. 20. *See similarly*, ICTR, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 15; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Ivan Čermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence, 7 August 2009, para. 8, fn. 33,

21. Finally, on the relationship between Rules 110 and Rule 111, in an appeal by the Sabra Defence from a decision by the Pre-Trial Judge in the *Ayyash* case, the Appeals Chamber held that Rule 111's clear wording 'applies to *all* disclosure that is ordinarily required between the parties, including disclosure under Rule 110 (A) (ii)' and Rule 110 (B).[22]

SUBMISSIONS

Sabra Defence motion

22. The Sabra Defence contends that during his testimony on 7 December 2016, Prosecution investigator, Witness 539, mentioned the existence of a report about Mr Al-Hassan concerning an investigation of rumours related to him. The witness thought that the Defence had access to the report and was able to read it. However, after diligently reviewing the material disclosed by the Prosecution, the Defence asked the Prosecution to disclose the report under Rules 110 (B) and 113. The Prosecution declined arguing that the report was an internal work product and, by virtue of Rule 111, not subject to disclosure.[23]

23. At a hearing on 29 September 2017, the Presiding Judge pointed out with respect to another memorandum on Mr Al-Hassan, about which a Prosecution analyst, Mr Andrew Donaldson (Witness PRH230) was cross-examined, that Mr Al-Hassan was originally on the Prosecution's Witness List and that the Prosecution would have had an obligation to disclose it, despite the Prosecution's contentions that it was internal work product.[24]

24. In a letter of 26 October 2017, the Sabra Defence reminded the Prosecution of this, arguing that its disclosure obligations equally applied to the report on Mr Al-Hassan, which Witness 539 referred to while testifying. However, the Prosecution responded that the Presiding Judge's comments did not apply to this report and maintained, accordingly, its position that the report is not disclosable under Rule 111.[25]

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referring, among others, to ICTR, *Niyitegeka v. Prosecutor*, ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 51.

[22] Appeals Chamber's decision of 6 November 2013, paras 25, 30.

[23] Sabra Defence motion, paras 1-4.

[24] Sabra Defence motion, para. 5, referring to the hearing of 29 September 2017, p. 69.

[25] Sabra Defence motion, paras 6-7.

25. Rule 110 (B) only requires the Defence to demonstrate that one of its three conditions exists. The Prosecution's obligation to disclose potentially exculpatory material under Rule 113, which is fundamental to the fairness of the proceedings, has always been interpreted broadly. Disclosure of exculpatory information is not limited to material which is exculpatory on its face and it need not in fact suggest the innocence of the accused. The broad approach of the *ad hoc* international criminal tribunals on the definition of exculpatory material may also be given a particular significance in the context of *in absentia* proceedings.[26]

26. The exception provided under Rule 111 is not applicable to exculpatory material and must be interpreted restrictively. The case law of the *ad hoc* international criminal tribunals and decisions of the Appeals Chamber of the Special Tribunal, identify circumstances deeming an internal work product disclosable under Rule 113. Furthermore, denying the Defence access to material relevant and necessary to its preparation will evidently cause significant prejudice.[27]

27. The report is disclosable as both material to the preparation of the defence and potentially exculpatory. The material is specifically identified and is in the Prosecution's custody or control. It is material to the preparation of the defence because of Mr Al-Hassan's central role in the security detail of Mr Hariri, as head of the ISF and as the person assigned to lead the investigation into Mr Hariri's death, and, accordingly, his unique position to steer the investigation of the UNIIIC and the prosecution.[28]

28. Mr Al-Hassan provided crucial information relevant to this case, in particular, with regard to the 'discovery' of the 'purple phones', which the Prosecution attributes to Mr Oneissi and Mr Sabra. Since Mr Al-Hassan's evidence was admitted as that of an unavailable person under Rule 158, this increases the Prosecution's obligation to disclose this report as the Defence is prevented from confronting Mr Al-Hassan in court. The disclosure of the report could thus constitute crucial information for the Defence in preparing its case and

[26] Sabra Defence motion, paras 9-13.
[27] Sabra Defence motion, paras 16, 18-22 (referring to the Appeals Chamber's decision of 19 July 2011, para. 97, and to the case law of the ICTR in *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents, 30 September 2009, para. 11, and of the ICTY in *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness, 13 December 2006, p. 4).
[28] Sabra Defence motion, paras 23-31, 34.

would appear relevant to effectively testing the reliability of the information in Mr Al-Hassan's evidence. It could also open doors for possible Defence investigations to be conducted before presenting any potential Defence case.[29]

29. Mr Al-Hassan was seriously suspected of potential involvement in Mr Hariri's assassination. The UNIIIC investigated this 'quietly' in light of the potential impact of such investigation for the future of its own work. Although these suspicions are a live matter in the trial, the Prosecution has opted to withhold this report, while relying on Mr Al-Hassan's evidence. Further, Mr Al-Hassan had a weak alibi for his absence on 14 February 2005 and privileged access to information concerning Mr Hariri's travel and security arrangements, and was uniquely placed to influence the investigation into Mr Hariri's death.[30]

30. The disclosure of this report is of crucial significance to the Trial Chamber's statutory obligation to search for the truth and will enable it to review all material which goes to the credibility of Mr Al-Hassan's evidence and thus to properly assess the weight, if any, to be given to this evidence.[31]

31. The investigation concerning Mr Al-Hassan covers a period of time sufficient to reach a serious and unambiguous conclusion about him by a 'decision maker', namely the UNIIIC or the Prosecution. Further, it appears that the report constitutes a 'decision on the guilt or innocence' of Mr Al-Hassan in the 'cover up' of Mr Hariri's assassination and the subsequent attempts to mislead the investigation, as he would have known the identities of the true perpetrators.[32]

32. Likewise, it would appear that the report would likely have focused on the weaknesses of his alibi. Given the extensive reliance by the Prosecution on Mr Al-Hassan's evidence, it appears that the report found him to be innocent. The Defence is entitled to challenge this assessment of Mr Al-Hassan's credibility and should therefore be granted access to the report, on which the Prosecution relies to advance the witness's status as a witness of truth. The disclosure of the report will affect the reliability of the Prosecution's evidence.[33]

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[29] Sabra Defence motion, paras 32-33, 35-36, 44-45.
[30] Sabra Defence motion, paras 37-42.
[31] Sabra Defence motion, paras 43, 47.
[32] Sabra Defence motion, paras 49-53.
[33] Sabra Defence motion, paras 54-56.

Prosecution response

33. The Prosecution submits that the report is exempt from disclosure under Rule 111 and, furthermore, all relevant evidentiary material, to which it refers—including Mr Al-Hassan's credibility and his role in the UNIIIC's investigation—has already been disclosed to the Defence. The Sabra Defence thus received all potential Rule 113 factual information and may, therefore, put this material before the Trial Chamber for its consideration when deciding the weight it will to give Mr Al-Hassan's evidence. All that remains undisclosed in the report under Rule 111 are the opinions of the investigator, his assessment and recommendations. The report does not refer to any information that may reasonably suggest the innocence or mitigate the Accused's guilt.[34]

34. The content, function, purpose and source of the report show that it is internal work product exempt from disclosure under Rule 111. Its purpose was to consolidate and assess evidence related to Mr Al-Hassan with respect to four topics that the investigator considered to be of interest. The report also contains matters recommended for further investigation based on the investigator's assessment of the evidentiary material. The investigator's gathering and assessment of the underlying evidentiary material and recommendations constitute his 'thoughts and original work' and proposed 'investigatory strategies', which the Appeals Chamber has found to be undisclosable under Rule 111.[35]

35. The Appeals Chamber's decisions, to which the Sabra Defence refers, outlined the Appeals Chamber's understanding of the relevant disclosure provisions of other tribunals. The Prosecution is not obligated to disclose the report on the basis of either Rule 113 or Rule 110 (B). The Sabra Defence's submissions provide no reason for the Trial Chamber to look to authorities other than the Appeals Chamber's case law on the interplay between Rules 110 (B), 111 and 113.[36]

36. Contrary to the Sabra Defence's speculations, the report does not make any decisions or reach any conclusions as to Mr Al-Hassan's possible knowledge of or role in Mr Hariri's assassination. It only contains the investigator's assessment of the evidence and recommendations as to further investigative steps. Further, the mere fact that the UNIIIC

[34] Prosecution response, paras 1, 8-10, 14, 17.
[35] Prosecution response, paras 2-4.
[36] Prosecution response, paras 3-7.

investigated Mr Al-Hassan's possible knowledge of the attack neither potentially suggests the Accused's innocence, nor is it capable of mitigating their guilt. Being aware of the purpose of the UNIIIC's investigation concerning Mr Al-Hassan, the Sabra Defence does not provide any authorities or arguments as to how the mere fact of a prior investigation of another person could suggest the innocence of the Accused.[37]

37. Previously, the Pre-Trial Judge and the Appeals Chamber have rejected the Sabra Defence's attempt to access internal work product in similar circumstances and the Sabra Defence offers no legal basis for the Trial Chamber to reach a different conclusion with respect to the report.[38]

38. The opinions of a single UNIIIC investigator cannot amount to opinions of a 'decision maker' for the purposes of the 'narrow exception' to Rule 111 and thus make the material disclosable. Moreover, the admission of Mr Al-Hassan's evidence under Rule 158 does not alter the Prosecution's disclosure obligations. The Sabra Defence's claim that the Presiding Judge already 'ruled' that the report is subject to disclosure is incorrect, as no Judges of the Trial Chamber have addressed whether the report is subject to disclosure.[39]

39. The Sabra Defence mischaracterises facts related to Mr Al-Hassan and the UNIIIC's investigation, in particular, the opinions and recommendations of a single UNIIIC investigator as the 'position' of the UNIIIC and Witness 539's evidence, claiming that the witness pointed to concerns over Mr Al-Hassan's credibility. Moreover, Mr Al-Hassan did not discover the telephone networks.[40]

DISCUSSION AND DECISION

40. Mr Al-Hassan, a senior ISF official, was also Mr Hariri's chief of protocol and chief of security, yet after the assassination he assumed a leading role in investigating the attack on his former employer, Mr Hariri. This entailed him communicating and coordinating with UNIIIC officials as a senior investigator, but simultaneously also providing witness statements to UNIIIC as a witness to some of the facts in issue in the investigation.

[37] Prosecution response, paras 9, 12.
[38] Prosecution response, para. 11 and fns 17-19.
[39] Prosecution response, paras 11-15.
[40] Prosecution response, para. 16.

41. Objectively, there was an obvious and inherent conflict of interest in Mr Al-Hassan performing these dual roles, and some senior officials within UNIIIC evidently held suspicions—legitimately or otherwise—that Mr Al-Hassan either had pre-knowledge of the attack, or may even have been implicated in it. Yet, at the same time they were supposed to communicate with him as a senior Lebanese investigator *and* take witness statements from him as a witness to matters connected with the attack. This was a very sensitive issue within UNIIIC. That is why the investigator completed his memorandum, which had a 'restricted' classification, on 21 March 2007.

42. The issue for determination is whether this memorandum must be disclosed to the Defence.

Whether the UNIIIC internal memorandum on Mr Al-Hassan is internal work product

43. 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.

44. The document, dated 21 March 2007, and on the letter-head 'Internal Memorandum – Memorandum Interieur' is a 37 page report by a UNIIIC P-2 level investigator, entitled 'Critical Analysis of in-house material relating to Wissam AL-HASSAN'. It is sub-divided into six parts: '1. Introduction', '2. Methodology', '3. Key topics', '4. Preliminary conclusion', '5. Recommended investigative steps', and '6. Evidence collection plan'. Within this is a ten-page annex summarising Mr Al-Hassan's statements to the UNIIIC, of which two and a half pages have been redacted, under Rule 118,[42] from the Trial Chamber's copy.

45. The memorandum summarises and analyses numerous statements and documents—that the Prosecution states have all been disclosed to the Defence—and makes critical observations regarding Mr Al-Hassan's whereabouts on 14 February 2005, his relationship

[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] Rule 118, entitled 'Information never Subject to Disclosure without Consent of Provider', applies where the Prosecution possesses information provided on a confidential basis and which affects the security interests of a State, international entity or an agent of either.

with the former ISF Director-General, General Ali Al-Hajj, and Mr Al-Hassan's involvement in the UNIIIC's investigation.

46. The four-line 'preliminary conclusion' under sub-heading (4), however, goes no further than suggesting that Mr Al-Hassan may have had at least prior knowledge of the attack, concluding that not enough information was available to ascertain whether he had anything to do with Mr Hariri's assassination. The investigator then recommends investigative steps (under sub-heading (5)), accompanied by an evidence collection plan (under sub-heading (6)).

47. After carefully reviewing the material, the Trial Chamber is satisfied that the UNIIIC memorandum—summarising and analysing information in the UNIIIC's possession—is the Prosecution's internal work product as it is 'an in-house product of a Party created for its own internal use.'[43]

Whether the UNIIIC internal memorandum is wholly or partly disclosable under Rule 113

48. The next issue is whether the document contains material disclosable to the Defence under Rule 113. Of Rule 113's three categories of 'exculpatory material', namely, information which (1) may reasonably suggest the innocence or (2) mitigate the guilt of the accused, or (3) affect the credibility of the Prosecution's evidence, only the third could be relevant in potentially affecting Mr Al-Hassan's credibility as a Prosecution witness.

49. The document contains sections headed 'Recommended investigative steps' and 'Evidence collection plan'. These portions clearly fall within Rule 111 and are not disclosable. Consequently, the document, taken as a whole, is not disclosable under Rule 113. But is it partly disclosable?

50. The document contains the work product of an investigator/analyst who analysed material that the Defence now has and made some tentative, or preliminary, conclusions. But can his opinions and analysis rise to what the Appeals Chamber has described as an 'admission of fact'? This test requires the Trial Chamber to assess, first, whether the investigator who wrote the report and made the recommendations had the position and authority of a decision maker and, if so, whether the internal memorandum contains an

[43] Appeals Chamber's decision of 19 July 2011, paras 91, 96.

admission of fact or, in other words, an unambiguous acceptance of Mr Al-Hassan's lack of credibility (*i.e.* information falling within the third category under Rule 113).

51. The memorandum's author was a junior P-2 analyst/investigator then working at the UNIIIC for about a year. His memorandum was sent through an International Team Leader to two senior UNIIIC officials, one of whom was the Acting Chief of Investigations. The Prosecution has informed the Trial Chamber *ex parte* that the investigator was asked by one of those senior officials to prepare the memorandum.[44]

52. It is thus apparent that this junior investigator had neither the position, nor the authority to make final conclusions and or take decisions concerning the investigation or the credibility of material gathered in the course of the investigation—including Mr Al-Hassan's credibility as a potential Prosecution witness. He could do no more than analyse, draw conclusions and make recommendations. Therefore, he was not a 'decision-maker' within the meaning of the Appeals Chamber's decision of 19 July 2011.

53. Moreover, the internal memorandum draws no more than a *preliminary* conclusion on Mr Al-Hassan's absence from work on 14 February 2005 and *suggests* that he *may* have had *at least prior knowledge* of the attack (these italicized words are those used in the preliminary conclusion). But this is simply the investigator's opinion.

54. It is difficult to see how this can rise to the level of an 'admission of fact' requiring disclosure, even if this opinion arguably affects the credibility of the Prosecutor's evidence. So, on one hand, although conceivably the investigator's analysis (and opinion) contains information that may 'affect the credibility of the Prosecutor's evidence', on the other, it is no more than a low-level internal opinion (with due respect to the investigator of course) accompanied by a recommendation and a proposed investigatory plan. It therefore cannot rise to the level of an 'admission of fact' based on the Appeals Chamber's test.

55. Another relevant discretionary consideration is whether the Defence already has the substance of this potentially exculpatory information. The answer is unequivocally 'yes'.

[44] *Ex parte* exchange of emails on 31 January and 5 February 2018 between the Trial Chamber's Senior Legal Officer and the Prosecution concerning the investigator's title, function and grade and how long he had been working in the UNIIIC by March 2007, and the title and function of those the memorandum was sent through and to.

The Trial Chamber has considered that Defence counsel are well aware of the substance of some of the UNIIIC suspicions concerning Mr Al-Hassan.[45]

56. The Trial Chamber admitted into evidence, on the Sabra Defence's application,[46] a leaked unattributed three-page UNIIIC internal memorandum, dated 3 October 2008,[47] sent to senior UNIIIC officials, referring to Mr Al-Hassan as a possible suspect in Mr Hariri's assassination, and recommending that he be 'investigated quietly'.

57. The author of this later 2008 memorandum describes it as a response to a request from the UNIIIC Director of Investigations 'to review the status of a possible suspect in the Hariri killing' with the aim to shed light on Mr Al-Hassan and the plausibility of his 'alibi'. The document refers to 'flaws' in Mr Al-Hassan's 'alibi' based on the analysis of his account of his absence from work and additional information. The Trial Chamber will consider exhibit 5D426 in assessing Mr Al-Hassan's credibility.

58. Consequently, even if the information in the earlier 2007 UNIIIC internal memorandum had risen to the level of an 'admission of fact' under Rule 113, the Prosecution could still be relieved of its obligation to disclose it because 'the existence of the relevant exculpatory evidence is known and the [underlying] evidence is accessible to' the Defence.[48] It follows that the memorandum is neither wholly nor partly disclosable to the Defence under Rule 113.

59. Finally, Mr Al-Hassan's admitted evidence is marginally relevant to only one portion of the Prosecution's case, namely, the pleading in paragraph 49 of the amended consolidated indictment that Mr Badreddine and the four Accused supported Hezbollah. In admitting his statements, the Trial Chamber held that in assessing the weight of Mr Al-Hassan's evidence, it will carefully consider the lack of cross-examination and that Mr Al-Hassan's sources of information were another deceased person (Captain Wissam Eid) and Mr Sayyed Hassan Nasrallah (Hezbollah's Secretary General), who will not be testifying in the trial.[49]

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[45] *See* Sabra Defence motion, paras 37-42.
[46] Decision delivered in open court on 7 February 2018, *see* Real-time transcript, p. 4; F3414, Sabra Defence Application for Admission into Evidence of Twenty Two Documents Marked for Identification, 16 November 2017 (public, with confidential annexes A-H), paras 49-58.
[47] Exhibit 5D426.
[48] *See above,* para. 19 and fn. 20.
[49] Decision of 20 October 2017, para. 86.

60. The Trial Chamber concluded that, taken together, these factors will inevitably decrease the probative value of the interview and hence the weight it can give to it.[50] The Defence has the material necessary to make submissions concerning the weight that can be given to Mr Al-Hassan's evidence. In the totality of these circumstances, no injustice will occur if the Defence does not have the March 2007 UNIIIC internal memorandum.

Whether the UNIIIC internal memorandum is disclosable under Rule 110 (B)

61. The Sabra Defence also requests an order that the internal memorandum be disclosed under Rule 110 (B) as material to Defence preparations. However, as noted above, the Appeals Chamber has held that if 'the sought material constitutes internal work product of a party, it is exempt from disclosure' under Rule 110.[51] The Trial Chamber agrees with this and as the memorandum is internal work product protected by Rule 111, it is not subject to disclosure to the Defence under Rule 110 (B).

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DENIES the Sabra Defence application for disclosure of a UNIIIC Internal Memorandum on Mr Wissam Al-Hassan under Rules 110 (B) and 113.

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

Leidschendam,
The Netherlands
7 February 2018

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy

[50] Decision of 20 October 2017, para. 86.
[51] Appeals Chamber's decision of 6 November 2013, paras 25, 30.