



THE APPEALS CHAMBER

Case No.: CH/AC/2013/01

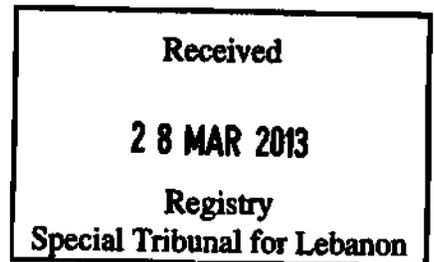
Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko
Judge Ivana Hrdličková

Registrar: Mr Herman von Hebel

Date: 28 March 2013

Original language: English

Classification: Public Redacted



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**

Counsel for Mr El Sayed:
Mr Akram Azoury

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux





INTRODUCTION

1. In the context of proceedings concerning a request by Mr El Sayed for disclosure of documents in the Prosecutor's custody, we are seized of an appeal by the Prosecutor against the Pre-Trial Judge's decision of 11 January 2013.¹ In that decision, the Pre-Trial Judge determined that certain documents were subject to disclosure to Mr El Sayed in line with the Appeals Chamber's case-law.² We find the appeal admissible. The appeal also succeeds on the merits because the three documents in question are not subject to disclosure. We accordingly reverse the Pre-Trial Judge's decision.

BACKGROUND

2. The Prosecutor has in his possession three documents in respect of which he was unsure whether he was obliged to disclose them to Mr. El Sayed. We have previously ruled on the scope of the Prosecutor's disclosure obligations vis-à-vis Mr El Sayed. In particular, we have explained the extent to which internal work product may not be disclosed to Mr El Sayed.³ In the light of that decision, the Prosecutor requested the Pre-Trial Judge to clarify his disclosure obligations with respect to the three documents. Referring to the decision, the Prosecutor generally argued that these documents, correspondence between the United Nations International Independent Investigation Commission ("UNIIC") and the Lebanese authorities, constitute internal work product under Rule 111 of the Rules of Procedure and Evidence ("Rules") and were therefore not subject to disclosure.⁴

3. In the Impugned Decision, while not ordering outright disclosure, the Pre-Trial Judge found that all three documents contained "admissions of fact" which, in terms of the Appeals Chamber's

¹ STL, *In the matter of El Sayed*, OTP/AC/2013/01, Prosecution Appeal of the Pre-Trial Judge's "Décision portant sur la Demande du Procureur de Suspendre la Communication de Certains Documents" of 11 January 2013, Confidential and *Ex Parte*, 7 February 2013 ("Appeal").

² STL, *In the matter of El Sayed*, CH/PTJ/2013/01, Decision on the Prosecution Request to Suspend the Disclosure of Certain Documents, Confidential and *Ex Parte*, 11 January 2013 ("Impugned Decision").

³ STL, *In the matter of El Sayed*, 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 ("Decision of 19 July 2011"); *see also* below paras 25-26.

⁴ STL, OTP/PTJ/2012/10, *In the matter of El Sayed*, Prosecution's Submissions on the Status of Certain Documents, Confidential and *Ex Parte*, 1 November 2012.



decision, should be disclosed.⁵ However, he also stated that this clarification was independent of other conditions that might prevent their disclosure.⁶

4. On appeal, the Prosecution submits that the Pre-Trial Judge erred in interpreting the Appeals Chamber decision too broadly and that he should have found that the documents are protected as internal work product under Rule 111.⁷ Mr El Sayed opposes the Appeal, primarily arguing that it is not admissible.⁸

DISCUSSION

I. The public nature of the proceedings

5. The proceedings before the Pre-Trial Judge in this particular matter were held confidentially and *ex parte*, that is, without the participation of Mr El Sayed. This means that Mr El Sayed was not given the opportunity to respond to the Prosecutor's request before the Pre-Trial Judge. Likewise, the Appeal was initially filed without being provided to Mr El Sayed. However, by way of Interim Order, we provided him with public redacted versions of the Appeal, the Impugned Decision, and the Prosecutor's request before the Pre-Trial Judge, to allow him to participate in this matter as far as possible.⁹ We were guided in our decision by two considerations: the principle that requires a court to hear both parties before it renders any decision and our obligation to hold the Tribunal's proceedings in public.

A. The principle of *audi alteram partem*

6. The Tribunal must comply with the highest standards of international criminal procedure.¹⁰ Indeed, it is "the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made."¹¹ This principle of "hearing the other side" (*audi alteram partem*) is

⁵ Impugned Decision, p. 8; paras 11, 15.

⁶ Impugned Decision, para. 16.

⁷ Appeal, paras 6, 9.

⁸ STL, *In the matter of El Sayed*, CH/AC/2013/02, Observations of General Jamil El Sayed on the Prosecution Appeal of the Pre-Trial Judge's "Décision portant sur la Demande du Procureur de Suspendre la Communication de Certains Documents" in Execution of the Appeals Chamber Decision of 14 March 2013, 18 March 2013 ("El Sayed Response"); see also STL, *In the matter of El Sayed*, OTP/AC/2013/01, Prosecution Reply to the Observations of Jamil El Sayed, 25 March 2013.

⁹ STL, *In the matter of El Sayed*, CH/AC/2013/01, Interim Order on Prosecutor's Appeal, 14 March 2013.

¹⁰ Art. 28(2) STL St.

¹¹ ICTY, *Prosecutor v Jelisić*, IT-95-10-A, Judgement, 5 July 2001, para. 27.



recognized in all legal systems of the world, including in Lebanon.¹² It is underpinned by a number of considerations. One is the potential for judicial error caused by an absence of arguments.¹³ Another is the acceptance of judicial decisions both by the parties involved and the public in general.¹⁴ These reasons have been summarized in the following way:

The task of the courts to render a final judgment with respect to a specific factual situation cannot normally be resolved without hearing those concerned. Hearing them is therefore the precondition for achieving a correct decision. Moreover, a person's dignity requires that his rights are not disposed of summarily by the authorities; an individual should not just be the object of a judicial decision, rather, he should have his say before a decision affecting his rights is rendered so as to bear upon the proceedings and their outcome.¹⁵

7. However, the *audi alteram partem* principle is not without exceptions. Indeed, we have previously decided in this very matter that *ex parte* proceedings are appropriate under certain limited circumstances. We have held that the participation by Mr El Sayed in the assessment of whether disclosing to him information related to certain individuals could put them at risk would have defeated the whole purpose of the risk assessment.¹⁶ More generally, this follows the approach of

¹² See Arts 372, 373 Lebanon, *Code of Civil Procedure*.

¹³ See UK, Chancery Division, *John v Rees*, [1970] Ch 345 (1968), Megarry J, p. 402: "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

¹⁴ *Ibid*: "Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."; see also UK, House of Lords, *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 (2009), Lord Phillips, p. 355: "The point goes further. Resentment will understandably be felt, not merely by the contolee but by his family and friends, if sanctions are imposed on him on grounds that lead to his being suspected of involvement in terrorism without any proper explanation of what those grounds are. Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust."

¹⁵ Germany, Bundesverfassungsgericht [Federal Constitutional Court], BVerfGE 9, 89(95). "*Die Aufgabe der Gerichte, über einen konkreten Lebenssachverhalt ein abschließendes rechtliches Urteil zu fällen, ist in aller Regel ohne Anhörung der Beteiligten nicht zu lösen. Diese Anhörung ist daher zunächst Voraussetzung einer richtigen Entscheidung. Darüber hinaus fordert die Würde der Person, daß über ihr Recht nicht kurzerhand von Obrigkeit wegen verfügt wird; der einzelne soll nicht nur Objekt der richterlichen Entscheidung sein, sondern er soll vor einer Entscheidung, die seine Rechte betrifft, zu Wort kommen, um Einfluß auf das Verfahren und sein Ergebnis nehmen zu können.*"

¹⁶ STL, *In the matter of El Sayed*, CH/AC/2012/02, Decision on Partial Appeal by Mr El Sayed Against Pre-Trial Judge's Decision of 8 October 2012, 23 November 2012 ("Decision of 23 November 2012"), para. 12.



Rules 116, 117 and 118 which explicitly permit *ex parte* proceedings in cases where a party seeks to be relieved of certain disclosure obligations for one of the important reasons set out in these Rules.¹⁷

8. The issue before us is whether the three documents in question are ultimately subject to disclosure to Mr El Sayed. Granting Mr El Sayed access to the documents in order for him to comment on their content would run counter to the object of the litigation and render it meaningless. We thus reject his complaints in this regard.¹⁸ However, in this specific case, there are no exceptional reasons that warrant *full* exclusion of Mr El Sayed from the entire appellate process for any of the reasons provided in Rules 116 to 118. For one, Mr El Sayed knows that there is an ongoing disclosure process and that the Prosecutor might seek to withhold certain material from disclosure. Furthermore, Mr El Sayed could and did raise arguments that are not strictly related to the content of the documents. We note that this was also the position of the Prosecutor.¹⁹

B. The principle of publicity

9. We have explained in previous decisions that our Statute and Rules require all proceedings before the Tribunal to be held in public, unless otherwise determined by a Chamber:

“We are mindful of and emphasize the need for transparency in the proceedings before this Tribunal, especially considering that the accused are entitled to a “fair and *public* hearing” under Articles 16(2) and 20(4) of the Statute. Rules 96 and 136 of the Rules reflect this important principle and permit exceptions only in specific and limited circumstances. Confidential submissions and decisions—although sometimes necessary—by their very nature conflict with this policy of openness. They should be kept to a minimum and can only be justified for exceptional reasons, which may include the protection of victims and witnesses and the safeguarding of a continuing investigation by the Prosecutor.”²⁰

Even though we set out these principles in the framework of the *Ayyash et al* proceedings—a criminal trial—they should also find application in the matter before us, which we have held is “a civil or administrative one.”²¹ Accordingly, while the content of the three documents at issue must be

¹⁷ Rule 116 STL RPE: prejudice to ongoing or future investigations; potential of grave risk to the security of a witness or his family; or any other reasons that may be contrary to the public interest or the rights of third parties; Rule 117: the security interests of a State or international entity; Rule 118: failure to obtain the consent of an information provider to disclose that information.

¹⁸ See El Sayed Response, paras 9-11.

¹⁹ Appeal, para. 30.

²⁰ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, *Corrected Version of Decision on the Pre-Trial Judge’s Request Pursuant to Rule 68(G)*, 29 March 2012, para. 12; see also Decision of 23 November 2012, para. 12.

²¹ Decision of 19 July 2011, para. 28; see also STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision of Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, para. 70: “[Mr El Sayed’s] application



kept confidential, both with respect to Mr El Sayed and with respect to the public, there is no reason to keep the existence of the litigation confidential. In addition to ordering the redactions of the underlying documents, we will therefore also issue a public version of the decision, keeping any redactions to an absolute minimum.

II. Admissibility of the Appeal

A. *Whether the Appeal was filed out of time*

10. The Prosecutor filed his Appeal on 7 February 2013, almost one month after the Impugned Decision. He argues that the Appeals Chamber has set no time limits for the filing of appeals in the *El Sayed* matter. If, however, the Appeal were considered out of time, it could still be accepted under Rule 9 of the Rules because good cause exists to do so.²² Mr El Sayed did not respond on this issue.

11. We have previously clarified that “[a]lthough the current proceedings fall outside the literal scope of the Rules, we wish to maintain focus on the fairness and efficiency of proceedings.”²³ The Prosecutor should have therefore adhered to the time limits that the Rules provide for comparable appeals. We note that under Rule 126(E) of the Rules an appeal must be filed within seven days after certification to appeal is granted. We hold that from now on this time limit should also apply to all appeals in this matter. This includes both appeals where certification is necessary and those where it is not.

12. Even in the absence of specific time limits, we are of the view that the Prosecutor should have acted more expeditiously in filing this appeal. Nevertheless, we condone this otherwise late filing and admit the appeal because this is the first time in this matter that we have clarified the proper time limit for filing an appeal in these proceedings. While the Prosecutor should have been more diligent, we will not permit the lack of clarity until now to disadvantage him.²⁴

must be considered in accordance with the dictates of Rule 3, including international standards of human rights and general principles of international criminal law and procedure, and in light of the spirit of the Statute and the Rules.”

²² Appeal, para. 15.

²³ Decision of 19 July 2011, para. 20.

²⁴ See ICTY, *Prosecutor v Marijačić and Rebić*, IT-95-14-R77.2-A, Judgement, 27 September 2006, para. 14.



B. Whether the Prosecutor could appeal without seeking certification

13. The Prosecutor argues that his appeal is admissible without having obtained certification from the Pre-Trial Judge.²⁵ He submits that even though the Pre-Trial Judge “did not order disclosure in the Impugned Decision, he did deal finally with the Documents, as Rule 111 was the only basis for their non-disclosure on which the Prosecutor sought the guidance of the Pre-Trial Judge.”²⁶

14. We recall that an appeal in this matter can be brought before our Chamber without certification if it “potentially deals finally” with Mr El Sayed’s application for disclosure of documents. Otherwise, certification is required.²⁷ We must therefore determine whether the Impugned Decision can be classified as final or merely interlocutory.

15. On a preliminary note, we dismiss the Prosecutor’s argument that he has a right to appeal the Impugned Decision because of its impact on the application of Rule 111.²⁸ Whether or not “[c]larification by the Appeals Chamber on the proper application of this exception is [...] necessary” is irrelevant for determining whether it is a final decision (permitting immediate access to the Appeals Chamber) or not (requiring certification by the Pre-Trial Judge).

16. However, we agree with the Prosecutor that in any event, the Impugned Decision for all intents and purposes was final.²⁹ We held previously that any decision of the Pre-Trial Judge ordering the disclosure of documents is final because “once the documents are disclosed there is nothing more to decide.”³⁰ While it could be argued that the Pre-Trial Judge has only decided that the documents do not fall under Rule 111 and has not ordered their disclosure, it is clear that, in the absence of other reasons for non-disclosure, the Pre-Trial Judge would make such an order based on his reasoning in the Impugned Decision. It would be overly formalistic and not in the interests of judicial economy to require another decision of the Pre-Trial Judge when it is obvious what such decision would be. The Appeal therefore did not require certification of the Impugned Decision.

²⁵ Appeal, paras 11-14.

²⁶ Appeal, para. 12.

²⁷ STL, *In the matter of El Sayed*, CH/AC/2012/03, Decision on the Prosecutor’s Partial Appeal of the Pre-Trial Judge’s Order of 20 February 2012, 18 April 2012 (“Decision of 18 April 2012”), para. 15 (with further references to our previous decisions); see also Decision of 23 November 2012, para. 5.

²⁸ Appeal, para. 14.

²⁹ Appeal, paras 12-13.

³⁰ STL, *In the matter of El Sayed*, CH/AC/2012/02, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-Trial Judge’s Decision of 2 September 2011 and Ordering the Disclosure of Documents, 7 October 2011, para. 5; see also Decision of 18 April 2012, para. 15.



C. Whether the Prosecutor was otherwise barred from bringing the Appeal

17. Mr El Sayed argues that the Prosecutor is barred from bringing the appeal because the Prosecutor had previously considered that the documents in question did not fall under Rule 111 and had now reconsidered his position. Mr El Sayed specifically relies on the doctrine of estoppel.³¹ The Prosecutor responds that this doctrine does not apply in the present case.³²

18. We first note that the procedural background of this litigation is complicated.³³ Part of the difficulty stems from the fact that the Prosecutor has taken seemingly contradictory positions throughout the proceedings with respect to the three documents. Indeed, when ordered by the Pre-Trial Judge to submit to him “those documents that could be disclosed [to Mr El Sayed]”³⁴ the Prosecutor initially submitted the three documents, arguing that they “contained Rule 111 discussions expressed such that they amount to ‘admissions of fact’ disclosable pursuant to the Appeals Chamber Decision of 19 July 2011.”³⁵ Subsequently, there was extended litigation on certain aspects of the disclosure process, which extended to the filing of appeals before us. However, the three documents were never the subject of these disputes.³⁶ It was only a year after the Prosecutor’s submission that the documents could be disclosed, and after having been ordered to disclose remaining materials in his possession,³⁷ that the Prosecutor changed his opinion and asked the Pre-Trial Judge to now confirm that the documents need not be disclosed.³⁸ He did so without mentioning that he had submitted the very same documents a year before and consequently without

³¹ El Sayed Response, paras 18-21.

³² Prosecutor Reply, paras 2, 5-15.

³³ We refer to the procedural history provided by the Impugned Decision for a detailed overview, Impugned Decision, para. 7.

³⁴ STL, *In the matter of El Sayed*, CH/PTJ/2011/17, Order for Enforcement of the Appeals Chamber Decision of 19 July 2011, 17 October 2011, Disposition.

³⁵ STL, *In the matter of El Sayed*, CH/PTJ/2011/17, Prosecution’s Submissions Following the Pre-Trial Judge’s Order for Enforcement of the Appeals Chamber Decision of 19 July 2011, 15 November 2011, para. 11.

³⁶ See Impugned Decision, para. 7.

³⁷ STL, *In the matter of El Sayed*, CH/PTJ/2012/04, Decision Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge’s Order of 21 May 2011, 8 October 2012, para. 13. The title of the Impugned Decision initially contained an error, which was later on corrected, see STL, *In the matter of El Sayed*, CH/PTJ/2012/05, Corrigendum to the “Decision Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge’s Order of 21 May 2011”, 11 October 2012.

³⁸ STL, *In the matter of El Sayed*, OTP/PTJ/2012/10, Prosecution’s Submission on the Status of Certain Documents, Confidential and *Ex Parte*, 1 November 2012 (“Prosecution Submissions of 1 November 2012”), paras 14-15.



indicating any reason why his views on the status of these documents were now different.³⁹ In this regard, we share the Pre-Trial Judge's surprise at the Prosecutor's request.⁴⁰

19. However, we find that the Prosecutor's change of position with respect to the three documents and his tardiness in informing the Pre-Trial Judge about it did not bar him from making his request. Mr El Sayed's reliance on the doctrine of estoppel is misplaced in this regard. First of all, Mr El Sayed fails to explain on which elements of this doctrine he is relying. Indeed, the doctrine of estoppel is legally complex, viewed differently by different legal systems, and its precise application depends on a number of factors.⁴¹ We find it unnecessary to decide whether it is applicable in proceedings related to the disclosure of documents. That is because there is no evidence that Mr El Sayed acted in some manner on the basis of the Prosecutor's initial position.

20. No principle was cited to us and, with one exception, we are not aware of one, which in the absence of such evidence would prevent the Prosecutor from reviewing his original decision. The exception is the common law principle of estoppel by deed—where a person who has entered into a solemn engagement by deed is not permitted to deny any matter asserted in it and no subsequent conduct or other act of reliance by the party invoking the estoppel is required.⁴² But here there was no such formality; the Prosecutor did no more than file a submission stating that the three documents in question constituted “‘admissions of fact’ disclosable pursuant to the Appeals Chamber Decision of 19 July 2011.”⁴³

21. Estoppel by deed aside, the authorities we have examined require either subsequent conduct or other acts of reliance by the party invoking the estoppel or unconscionability.⁴⁴ For example, if waiver is asserted,⁴⁵ the operative principle entails that if

[...] a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights [of the other party] [...] will not be enforced [and if] [...] it would be

³⁹ Prosecution Submissions of 1 November 2012.

⁴⁰ Impugned Decision, paras 9, 12.

⁴¹ See UK, Queens Bench, *McIlkenny v Chief Constable*, [1980] 1 QB 283, Lord Denning, p. 317 (identifying at least 11 different types of estoppel).

⁴² UK, Chancery Division, *PW & Co v Milton Gate Investments Ltd*, [2004] 1 Ch 142, (30 June 2003) Neuberger J pp 148-9.

⁴³ Prosecution's Submissions of 15 November 2011, para 11.

⁴⁴ UK, Chancery Division, *PW & Co v Milton Gate Investments Ltd*, [2004] 1 Ch 142, (30 June 2003) Neuberger J pp 149-159, 195, 205, 209-211, 221-222, 227.

⁴⁵ See, e.g., UK, Queens Bench, *Brikom Investments Ltd v Carr*, [1979] 1 QB 467, (1979) Roskill L.J., pp 488-9.



inequitable having regard to the dealings which have thus taken place between the parties [the person seeking to enforce those rights will not be allowed to enforce them].⁴⁶

22. The same applies, if Mr El Sayed seeks to rely on estoppel by election, namely, that the Prosecutor had intentionally exercised a choice between two inconsistent alternatives (*i.e.* stating that the documents should be disclosed) that now bars the Prosecutor from benefiting of the alternative not selected (*i.e.* disputing that the documents should be disclosed.)⁴⁷ That is because estoppel by election also presumes that the other party (*i.e.* Mr El Sayed) relied on the choice made and through the changed position would now suffer prejudice.⁴⁸ We note that while claiming that the Prosecutor's change of position was to his detriment,⁴⁹ Mr El Sayed fails to substantiate any harm he suffered as a result of the Prosecutor's actions. Indeed, Mr El Sayed could hardly rely on any position of the Prosecutor in this regard given that Mr El Sayed was unaware of the content of the documents.

23. We therefore find that the Prosecutor was not prevented from retracting his initial characterization of the documents and dismiss Mr El Sayed's arguments in this respect. However, we remain puzzled as to why the Prosecutor's reassessment of the three documents would have taken so long. We note that neither the Pre-Trial Judge nor the Appeals Chamber were given any explanations in this regard. We have stated previously that the Prosecutor should meet his disclosure obligations in this matter swiftly and without further delay.⁵⁰ We remind him again of the importance of finalizing disclosure in this case and urge him to do so expeditiously with respect to any outstanding documents.

III. Merits of the Appeal

24. The question before us is whether the Pre-Trial Judge erred when he found that the three documents in the possession of the Prosecutor were "admissions of fact within the meaning of the [Appeals Chamber's] Decision of 19 July 2011". We conclude that he did and thus reverse the Impugned Decision.

⁴⁶ UK, House of Lords, *Hughes v Metropolitan Railway Co*, (1877) 2 App Cas 439 (5 June 1877), Lord Cairns, p. 448.

⁴⁷ See UK, Privy Council, *Meng Leong Ltd v Jip Hong Ltd*, [1985] 1 AC 511 (1984), p. 521.

⁴⁸ *Ibid.*

⁴⁹ El Sayed Response, para. 21.

⁵⁰ Decision of 18 April 2012, para. 44.



A. The standards set out by the Appeals Chamber

25. In the Decision of 19 July 2011, we recalled that Rule 111 grants an exception from the general disclosure obligation under Rule 113, which requires the Prosecutor to 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.”⁵¹ Rule 111 provides:

Reports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure or notification under the Rules. For purposes of the Prosecutor, this includes reports, memoranda, or other internal documents prepared by the UNIIC or its assistants or representatives in connection with its investigative work.

We concluded that under the terms of the Rule “correspondence exchanged between the UNIIC and the Lebanese Prosecutor-General constitutes such ‘internal’ documents, to the extent the correspondence pertains to the coordination of a unitary criminal investigation.”⁵²

26. However, we also clarified that Rule 111 is not without its limits. We held as follows:

“99. Each of Rules 111 and 113 contains an expression of important public policy.

100. That of Rule 111 is predominantly to allow uninhibited discussion among those representing one Party when considering what decisions to make. The high interest of freedom of expression to be found across the jurisprudence is an expression of this point. Candour is vital to quality. The major focus of Rule 111 material is on *opinion*.

101. 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 complementarity [*sic*] between the two Rules.

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

103. A further point is whether “guilt or innocence” in Rule 113 refers not only to the crime alleged by Mr. El Sayed that others have made false evidence, but also to the original suspicion of Mr. El Sayed’s implication in the assassination (a matter that is not at present germane to the adjudicatory power of this Tribunal, in view of the 2009 statement by the Prosecutor that he was not preferring any charge against Mr. El Sayed for that assassination).

⁵¹ See Decision of 19 July 2011, paras 76-78.

⁵² Decision of 19 July 2011, para. 92.



104. Such distinction is one without difference. These are opposite sides of the same coin. Mr. El Sayed's assertion is of innocence on his part of assassination; that is part of his assertion of criminality on the part of the alleged "false witnesses".

105. In short, 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.⁵³

27. We stress that the issue before us is not one of "clarification" / "interpretation" or even "reconsideration" of our previous decision. Rather, it is one of "application" of our case-law to a set of documents. Hence, we are asked to determine whether the Pre-Trial Judge erred in concluding that the documents were not covered by the disclosure exception of Rule 111. In other words, the Appeals Chamber is not deciding once again on the applicable law, namely, the scope of the exception under Rule 111. Indeed, we have already done so,⁵⁴ having had the assistance of both the Prosecutor and Mr El Sayed who provided us with their views on this precise legal issue.⁵⁵ There is no need to reopen that discussion. What we must do now is review the three documents and decide whether they fall under the exception or not.

B. The application of these standards to the three documents in question

28. Before reviewing each of the three documents individually, we note that the Pre-Trial Judge appears to have based his analysis on an overly broad reading of the Decision of 19 July 2011. We recall 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. Conversely, disclosure obligations under Rule 113 only arise if exculpatory facts are in play. In the context of Rule 111, this means that not every "admission of fact" will make the shield of Rule 111 disappear. As we have explained, 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

⁵³ Decision of 19 July 2011, paras 99-105.

⁵⁴ Decision of 19 July 2011.

⁵⁵ See STL, *In the matter of El Sayed*, CH/PTJ/2010/01, Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011, 20 May 2011; STL, *In the matter of El Sayed*, CH/AC/2011/01, Prosecution's Response to "Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011", 10 June 2011; STL, *In the matter of El Sayed*, CH/AC/2011/01, Reply to the "Prosecution's Response to 'Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011'", 21 June 2011.



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.”⁵⁶

29. In this regard, we reject the Prosecutor’s argument, opposed by Mr El Sayed,⁵⁷ that the Decision of 19 July 2012 is “ambiguously drafted” and that the “Appeals Chamber has articulated two distinct versions of the exception” to Rule 111.⁵⁸ As the Prosecutor elsewhere concedes, the relevant paragraphs of the Decision cannot be read in isolation. In particular, paragraph 105 of that Decision, as set out above, is the summary of the Appeals Chamber’s discussion in the previous paragraphs. As such, the Decision must be read in totality.

[REDACTED]

30. [REDACTED]

31. [REDACTED]

This was an error. [REDACTED]

does not turn them into admissions of fact. We recall that when we referred to Mr El Sayed’s “guilt or innocence” we meant his assertion that he was innocent of the attack of 14 February 2005 which killed former Prime Minister Hariri, and that he was wrongly accused by the alleged “false witnesses” of involvement in the attack.⁶⁰ It would therefore go too far

⁵⁶ Decision of 19 July 2011, para. 105.

⁵⁷ El Sayed Response, para. 14.

⁵⁸ Appeal, paras 17, 18 (referring to paras 102 and 105 of the Decision of 19 July 2011); *see also* paras 3, 4.

⁵⁹ Impugned Decision, para. 15.

⁶⁰ Decision of 19 July 2011, para. 104.



to describe [REDACTED]

We stress once again that any exceptions to Rule 111 must be construed narrowly lest the benefits of the Rule vanish.

[REDACTED]

32. [REDACTED]

33. The Pre-Trial Judge found that this [REDACTED]

was “nevertheless a categorical statement on the subject of innocence or guilt, in particular that of the Applicant, carried out by a decision maker” and was “[i]n this sense [...] an admission of fact.”⁶² Again, this was an error. [REDACTED]

the [REDACTED]

intention was not to express an opinion of guilt or innocence [REDACTED]

⁶¹ [REDACTED]

⁶² Impugned Decision, para. 11.



C. Conclusion

34. The three documents are protected under Rule 111. The Pre-Trial Judge erred when he held that they were not. His decision is accordingly reversed.



DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER unanimously;

FINDS the Appeal admissible;

REVERSES the Impugned Decision;

FINDS that the three documents are protected under Rule 111;

ORDERS the Pre-Trial Judge to file a public redacted version of the Impugned Decision, applying the redactions as undertaken by the Appeals Chamber in the Interim Order, Annex B;

ORDERS the Prosecutor to file public redacted versions of the Prosecution Submissions of 1 November 2012 and the Appeal, applying the redactions as undertaken by the Appeals Chamber in the Interim Order, Annexes A and C.

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

Dated 28 March 2013,

Leidschendam, the Netherlands

Judge David Baragwanath
Presiding

