



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, Acting Registrar  
Date: 24 May 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 SEVENTH MOTION FOR DISCLOSURE – EXPERTS**

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Mr. Peter Haynes

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## **I. INTRODUCTION**

1. In this decision, the Pre-Trial Judge rules on a motion by Defence Counsel for Mr. Assad Hassan Sabra (the “Sabra Defence”) containing five separate requests for the disclosure of various documents, which documents underlie or are related to expert reports to be relied on by the Prosecution in these proceedings (the “Motion”).<sup>1</sup>

## **II. PROCEDURAL BACKGROUND**

2. On 24 January 2013, the Sabra Defence filed the Motion.

3. On 31 January 2013, the Pre-Trial Judge issued a Scheduling Directive (the “Scheduling Directive”) inviting the Prosecution to file any response to the Motion by 6 February 2013, thereby abridging the usual 14 days provided by Rule 8 of the Rules of Procedure and Evidence (the “Rules”).

4. On 1 February 2013, the Prosecution requested an extension of time until 13 February 2013 to file its response to the Motion (the “Leave Request”).<sup>2</sup> On 13 February 2013, the Prosecution filed its response to the Motion (the “Response”).<sup>3</sup>

## **III. APPLICABLE LAW**

5. The principles governing disclosure pursuant to Rule 110(B) have been stated in prior decisions.<sup>4</sup> In general, the onus is on the Defence to demonstrate that any requested documents are specifically identified with precision, are material to the preparation of the defence and in the Prosecution’s custody and control.

6. Additionally, in the special case of expert reports, the fundamental principle guiding the disclosure of documents underlying or related to expert reports, as expressed in international jurisprudence, is that the evidence is to be provided “in full transparency of the established or assumed facts that he or she relies upon, and of the methods used when

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<sup>1</sup> STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Sabra’s Seventh Motion for an Order for Disclosure – Experts, 24 January 2013, including confidential annexes A to H. All further references to filings and decisions relate to this case number unless otherwise stated.

<sup>2</sup> Prosecution Request for an Extension of Time for the Filing of the Prosecution Response to “Sabra’s Seventh Motion for an Order for Disclosure – Experts”, 1 February 2013.

<sup>3</sup> Prosecution Response to “Sabra’s Seventh Motion for an Order for Disclosure – Experts”, 13 February 2013.

<sup>4</sup> Decision on the Sabra Defence’s Fifth Request of the Fourth Motion for Disclosure, confidential, 21 December 2012 (“Decision of 21 December 2012”), paras 9-10 and 12.

applying his or her knowledge, experience, or skills to form his or her expert opinion”.<sup>5</sup> In doing so, “sources and methodology used in support of any proposed expert opinion must be clearly indicated and accessible” in order to allow the parties to test or challenge the probative value of such expert evidence.<sup>6</sup>

#### IV. SUBMISSIONS AND DISCUSSION

##### A. General

###### a. Submissions

7. The Sabra Defence submits that there are good policy reasons why disclosure of documents underlying or associated with expert reports should be ordered at the pre-trial phase, despite the fact that it “may go beyond what has been ordered at other international courts”.<sup>7</sup> Primarily, the Sabra Defence suggests that early disclosure could ultimately lead to more efficient and expeditious proceedings, thus saving time and money. Any areas of relevance could be more properly researched and questions by the Sabra Defence could be tailored more specifically.<sup>8</sup> Furthermore, expert witnesses would be on notice of documents disclosed and would presumably review them with greater attention prior to giving oral testimony at trial, resulting in greater precision and thoroughness in their responses on cross-examination.<sup>9</sup>

8. The Prosecution opposes the Motion in its entirety. In the main, the Prosecution submits that Rule 161(A) only obliges it to disclose final, signed versions of expert reports.<sup>10</sup> Additionally, the Prosecution relies on jurisprudence of other international criminal tribunals which has denied early disclosure of documents underlying or associated with expert reports where the equivalent of Rule 110(B) in those jurisdictions had been invoked by the

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<sup>5</sup> ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Stanišić Request for Order of Disclosure of Materials Related to the Admissibility of the Expert Report of Reynaud Theunens, 11 March 2011 (“*Stanišić Decision of 11 March 2011*”), para. 19. See also, ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution’s Motions for Admission of Expert Statements, 7 November 2003, para. 19; ICTY, *Prosecutor v. Stanišavlje Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Phillips, 3 July 2002, p. 2.

<sup>6</sup> ICTY, *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Decision on Disclosure of Expert Materials, 27 August 2009 (“*Gotovina Decision*”), para. 10.

<sup>7</sup> Motion, para. 24.

<sup>8</sup> *Id.*, para. 20.

<sup>9</sup> *Id.*, para. 20.

<sup>10</sup> Rule 161(A) STL RPE provides: “The full statement of any expert witness to be called by a Party shall be disclosed to the opposing Party and to the victims participating in the proceedings within the time-limit prescribed by the Pre-Trial Judge or Trial Chamber.”

Defence.<sup>11</sup> Contrary to the approach of early disclosure argued by the Sabra Defence, for the Prosecution the view adopted in the jurisprudence was that “j dicial economy could in fact be better served by exploring these matters with the proposed experts during cross-examination, as opposed to receiving a vast amount of documents in advance”.<sup>12</sup> The Prosecution maintains that to the extent disclosure is required at all, delaying and limiting it to cross-examination at trial would result in no prejudice to the Defence.

#### **b. Findings**

9. As a preliminary point, the Pre-Trial Judge observes that while prior *inter partes* correspondence attempting to resolve this dispute indicates that the Sabra Defence invoked both Rules 110(B) and 113 as a basis for disclosure,<sup>13</sup> it is unclear, on the face of the Motion, as to what basis the Sabra Defence relies on in seeking the Pre-Trial Judge’s intervention for the relief requested. The Pre-Trial Judge understands from the Sabra Defence’s submissions that it is relying only on Rule 110(B).<sup>14</sup> Accordingly, the Pre-Trial Judge rules on this limited basis, without prejudice to any extant *inter partes* claims for disclosure on the basis of Rule 113.

10. The Pre-Trial Judge stresses once again that supporting correspondence annexed to motions, particularly when containing numerous claims and disclosure requests over an extended period of time, some of which may be redundant, merely illustrate attempts by the Parties to resolve issues between themselves.<sup>15</sup> This is a precondition for any request for the Pre-Trial Judge’s intervention, which should be exceptional on matters of disclosure and only after all efforts to resolve the dispute in good faith between the parties have been exhausted. As the Pre-Trial Judge has stressed before, statutory provisions relied on by the Parties in seeking judicial relief should be clearly and unambiguously stated in the body of the motion, and it should not be left for the Pre-Trial Judge to infer provisions from arguments in

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<sup>11</sup> Rule 110(B) STL RPE provides: “The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.”

<sup>12</sup> *Gotovina* Decision, para. 11.

<sup>13</sup> Motion, Annexes A to H.

<sup>14</sup> See e.g., para. 44 below.

<sup>15</sup> Decision on the Sabra Defence’s First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012 (“Decision of 8 November 2012”), para. 55.

submissions or annexed correspondence.<sup>16</sup> Failure to do so may in future risk the dismissal of such disclosure motions.

11. By way of context, the Pre-Trial Judge recalls that to date, the Prosecution has foreshadowed its intention to rely in these proceedings on 137 experts<sup>17</sup> and a minimum of 152 expert reports.<sup>18</sup> The efficient management of these proceedings in light of the significant volume of expert witnesses and reports is clearly of importance.

12. The Pre-Trial Judge is not persuaded by the Prosecution's principal contention that Rule 161 is to be read restrictively to limit disclosure only to the final signed version of the expert report. While no other provision in the Rules expressly permits access to documents underlying or associated with expert reports, it does not follow that Rule 161 covers the field or dictates a constrained reading of the Prosecution's more general disclosure obligations under Rule 110(B).

### **B. The Disclosure Requests**

13. The substance of the Sabra Defence's five requests (individually, the "First Request", "Second Request", "Third Request", "Fourth Request" and "Fifth Request") are set out in full in the annex to this decision (the "Annex"). Given the overlap and duplication in the categories of material sought between each of the five requests, the Pre-Trial Judge adopts, for convenience, the Sabra Defence's headings of the six broad categories of disclosure material sought as reflected in each of the five requests. The submissions of the Parties on those broad categories of disclosure and the findings of the Pre-Trial Judge are as follows.

#### **1. Instructions, Prosecution feedback, correspondence and meetings**

##### **a. Submissions**

14. The Sabra Defence requests:

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<sup>16</sup> *Id.*, para. 26.

<sup>17</sup> Update and Further Corrigendum to "Prosecution Updated Notice Pursuant to Rule 161(A)", 1 May 2013; and Final Update and Further Corrigendum to "Prosecution Updated Notice Pursuant to Rule 161(A)", 15 May 2013.

<sup>18</sup> Pre-Trial Chamber Status Conference, 10 April 2013, Transcript, p. 3, line 22.

- a) “the original set of instructions that were provided [by the Prosecution] to each expert/analyst/investigator and any subsequent instructions given to him prior to the completion of the ultimate version of the report”;<sup>19</sup>
- b) “any feedback provided to the experts on their reports by the Prosecution”;<sup>20</sup> and
- c) “records of any other correspondence with the experts and the notes of any meetings that took place between the expert and members of the Prosecution”.<sup>21</sup>

15. These documents, argues the Sabra Defence, are vital in preparing for cross-examination on the credibility of each expert witness. In particular, the Sabra Defence claims it is entitled to early disclosure to ascertain whether instructions were “framed in a neutral manner or whether the expert was requested to demonstrate how the evidence supported the Prosecution case”,<sup>22</sup> that is, whether the instructions were impartial and independent, or whether the selection and use of experts was intended to achieve a certain result.<sup>23</sup> The Sabra Defence submits that the instructions and any subsequent feedback are “part and parcel of the actual evidence that the Prosecution is seeking to lead as evidence in these proceedings”, particularly when they are referenced in the final expert report.<sup>24</sup>

16. The Sabra Defence argues that none of the material sought can be characterised as “internal” to the Prosecution and thereby be protected by Rule 111,<sup>25</sup> since it was shared “externally” and any internal work-product exception available to the Prosecution is waived.<sup>26</sup> Moreover, the Sabra Defence submits that there is no relevant distinction between

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<sup>19</sup> Motion, para. 26. *See*, Annex, para. 2(i) in relation to the First Request; Annex, para. 3(i) in relation to the Second Request; and Annex, para. 6(i) in relation to the Fifth Request.

<sup>20</sup> Motion, para. 26. *See*, Annex, paras 2(iii) and 2(v) in relation to the First Request; Annex, para. 3(iii) in relation to the Second Request; Annex, paras 4(v) and 4(vi) in relation to the Third Request; and Annex, para. 6(iii) in relation to the Fifth Request.

<sup>21</sup> Motion, para. 26. *See*, Annex, para. 2(v) in relation to the First Request; Annex, para. 3(iii) in relation to the Second Request; Annex, para. 4(iv) in relation to the Third Request; and Annex, para. 6(iii) in relation to the Fifth Request.

<sup>22</sup> Motion, para. 27.

<sup>23</sup> *Id.*, para. 28.

<sup>24</sup> *Id.*, para. 18.

<sup>25</sup> Rule 111 STL RPE, 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 UNHCR or its assistants or representatives in connection with its investigative work.”

<sup>26</sup> Motion, para. 19.

internal Prosecution employees presented as “experts” (e.g. two Prosecution investigators subject to Third Request) and other external experts retained by the Prosecution.<sup>27</sup>

17. In response, the Prosecution opposes this category of disclosure on a number of grounds. First, there is no obligation to disclose the requested material under Rules 110(B), 113 or 161. Second, there is no factual basis indicating that undue influence was exerted on any expert witness,<sup>28</sup> or that they are anything other than “disinterested witnesses of truth”.<sup>29</sup> Third, many of the expert statements already incorporate or summarise the terms of reference.<sup>30</sup> To the extent that they do not, this can be raised on cross-examination at trial.<sup>31</sup>

#### **b. Findings**

18. The first issue to be determined with respect to the Prosecution’s original and subsequent instructions to external experts, the Prosecution’s feedback on various versions of reports, and documents evidencing correspondence or meetings between external experts and the Prosecution (collectively, “Prosecution-Expert Communications”) is whether Rule 110(B) imposes any obligation on the Prosecution to disclose them early.

19. The early disclosure of Prosecution-Expert Communications has been a matter of practice and policy in other international criminal tribunals. In the case of *Karadžić* before the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), for instance, the accused had been provided with “correspondence relating to the preparation and history leading up to the various reports” before trial.<sup>32</sup> This was deemed to be the minimal level of access and disclosure necessary to enable the accused to challenge the expert witness’ credibility on cross-examination at trial.<sup>33</sup> The early disclosure of such material is therefore an option that may facilitate the efficient conduct of proceedings.

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<sup>27</sup> *Id.*, para. 30.

<sup>28</sup> Response, para. 25.

<sup>29</sup> Response, para. 28 citing ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on the Admission of the Proposed Expert Report by Reynaud Theunens and the Admission of Theunens Related Documents, 1 April 2011, para. 19: “[t]he fact that a witness has been involved in the investigation and preparation of the Prosecution or Defence case or is employed by one party does not [...] make the expert statement unreliable.”

<sup>30</sup> Response, para. 26.

<sup>31</sup> *Id.*, para. 27.

<sup>32</sup> ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Motion to Compel Inspection of Witness Material (Christian Nielsen) and Prosecution’s Motion to Reclassify Public Motion, 7 July 2011, para. 8.

<sup>33</sup> *Ibid.*

20. As a matter of law, the Pre-Trial Judge considers that requests for early disclosure of Prosecution-Expert Communications is permissible: (a) if they meet the requirements of Rule 110(B) on specificity, materiality and possession; (b) to the extent that the communications reflect or refer to sources and established or assumed facts relied on by the expert in its final report; and (c) to the extent that these Prosecution-Expert Communications were shared with the expert and therefore are not protected under Rule 111.

21. In the circumstances, the Pre-Trial Judge finds that the Prosecution-Expert Communications requested by the Sabra Defence are sufficiently specific by being limited to a group of identified witnesses,<sup>34</sup> and are *prima facie* in the possession of the Prosecution and material to the Defence's preparations on testing the credibility of the expert witness and the probity of their opinions.

22. The Prosecution does not oppose the early disclosure of Prosecution-Expert Communications, subject to the exemption recognised by Rule 111 for internal work products. It could not properly do so in light of the authority by this Tribunal's Appeals Chamber.<sup>35</sup> Indeed, this disclosure is imperative particularly when the experts see fit to make explicit reference in their final report to prior instructions, feedback and other correspondence from the Prosecution as illustrated by the First Request.<sup>36</sup> The Pre-Trial Judge agrees with the Sabra Defence submissions that in these circumstances, such underlying documents are integral to the expert report, and a complete understanding of the opinions reached and the conclusions settled upon cannot be reached without access to the underlying documents indicating the sources and the established or assumed facts.

23. As the Prosecution suggests, in some circumstances, one approach adopted at other international tribunals should be followed, namely, that the Defence may simply cross-examine the expert witness at trial on issues concerning successive instructions and draft versions of a report. However, the few authorities on point, and referred to by the Prosecution, are distinguishable.<sup>37</sup>

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<sup>34</sup> Decision of 21 December 2012, para. 10, citing ICTR, *Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, para. 32.

<sup>35</sup> 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 ("*El Sayed Decision*"), paras 87 and 91.

<sup>36</sup> Motion, para. 3; Annex, para. 2.

<sup>37</sup> The case of *Gotovina*, for instance, involved a Prosecution request for disclosure of material relating to Defence experts. No obligation equivalent to Rule 110(B) rests on the Defence to disclose at the pre-trial stage

24. It may be the case, as the Prosecution asserts, that some of the expert reports already summarise the terms of reference, and to the extent that they fail to do so, the Sabra Defence may cross-examine the witness at trial. However, the Pre-Trial Judge finds that this approach does not serve the interests of justice and the fair and expeditious conduct of proceedings particularly in light of the significant amount of expert evidence relied upon by the Prosecution.

25. The second issue raised by the Sabra Defence is the distinction between external and internal experts. The Pre-Trial Judge agrees only in part with these submissions and finds that the Sabra Defence understates relevant distinctions between the two classes of expert witnesses. As a result, this distinction must still be maintained and the aforementioned conclusions of the Pre-Trial Judge are subject to this caveat. The early disclosure of Prosecution-Expert Communications is limited in its application only to external experts retained by the Prosecution. It would not apply to internal staff employed by the Prosecution who may have particular expertise in an area and, by the Prosecution's own description, are relied on as "summary witnesses" to summarise the Prosecution's own evidence from various sources.<sup>38</sup>

26. With respect to Prosecution employees, no clear line can be drawn between internal work produced in the daily execution of their duties and their final written testimony. This does not preclude the Sabra Defence from cross-examining at trial any Prosecution staff presented as "experts" who may be included on the Rule 161 Expert Witness List. Ultimately, however, the probative value of the evidence of such internal staff is a matter to be assessed by the Trial Chamber. The Pre-Trial Judge stresses that this distinction between internal and external experts is made solely for the purposes of early disclosure pursuant to Rule 110(B) and is without prejudice to any other subsequent determination by the Trial Chamber on issues such as the challenges under Rule 161 or the admissibility of the reports or other testimony of any expert witness.

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in those circumstances: *Gotovina* Decision, para. 9. More relevantly, in *Stanišić and Simatović*, a request was made by the Defence for similar materials under the ICTY's equivalent of Rule 110(B). This request was denied. However, this request was made during trial and *after* the oral testimony had been given by the expert witness. In the circumstances, materiality of the evidence could be assessed with the benefit of that oral evidence and in light of the fact that an opportunity had already been afforded to the Defence to cross-examine the witness. See, *Stanišić* Decision of 11 March 2011, paras 21-23.

<sup>38</sup> Response, para. 41.

27. In summary, Prosecution-Expert Communications between the Prosecution and external experts comprising original and subsequent instructions, correspondence of the Prosecution's feedback or notes of meetings, are disclosable insofar as they reflect or refer to sources, established or assumed facts relied on by the external expert in the final signed report and to the extent that these Prosecution-Expert Communications were shared with the expert and therefore are not protected under Rule 111.

## 2. Prior versions of expert reports

### a. Submissions

28. The Sabra Defence seeks disclosure of "all previous draft versions of all expert reports relied on by the Prosecution".<sup>39</sup> The justification for such disclosure is based on fairness to the accused and their ability to cross-examine experts on issues of credibility of the expert and other witnesses who participated in amendments to their reports. This may include the exploration of issues such as the reasons for any amendments and whether doubt or uncertainty was present on any particular aspect of the expert opinion.<sup>40</sup>

29. The Prosecution notes the absence of authorities which support the Sabra Defence position and avers that only the final, signed version of the expert report, containing the conclusions of the expert, constitutes the evidence that may be challenged at trial.<sup>41</sup>

### b. Findings

30. The Pre-Trial Judge notes ICTY jurisprudence which has concluded that "the Rules do not entail any obligation to disclose [...] documents drafted in preparation of such a report or early drafts thereof".<sup>42</sup> Indeed, in the *Gotovina* case, requests for earlier versions of expert reports were refused on the grounds that reports were constantly changing and therefore no specific document was disclosable under Rule 110(B).<sup>43</sup> As a general principle, the Pre-Trial Judge accepts this proposition.

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<sup>39</sup> Motion, para. 33. See, Annex, paras 2(ii), 2(iv) and 2(vi) in relation to the First Request, Annex, paras 3(ii) and 3(iv) in relation to the Second Request; and Annex, paras 6(ii) and 6(iv) in relation to the Fifth Request.

<sup>40</sup> Motion, para. 34.

<sup>41</sup> Response, para. 30.

<sup>42</sup> Response, para. 29 citing *Stanišić* Decision of 11 March 2011, para. 20. See also, ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion to Compel Disclosure of Notes and Photographs from Examination of Mladić Notebooks, 12 June 2012, para. 8.

<sup>43</sup> *Gotovina* Decision, para. 9.

31. On balance, the Pre-Trial Judge considers that only in exceptional circumstances are prior draft versions of reports disclosable under Rule 110(B). As a general rule, expert opinions are based and dependent on established facts, assumptions and other sources which should be specified and disclosed to the Defence. They are subject to change and will often evolve in the process of arriving at a finalised, signed report. No reliable conclusions can be drawn from such drafts. On the contrary, misleading conclusions may be reached from relying on such drafts. Furthermore, requiring the disclosure of prior draft versions of reports could deprive their authors of a frank and open environment in which to prepare materials on which the proceedings may rely. Lastly, those prior draft versions of expert reports are not “relied on” by the Prosecution, as the Sabra Defence suggests.

32. The Pre-Trial Judge recalls the Appeals Chamber’s finding that Parties are entitled to know how a factual witness’ version of his or her testimony has evolved as reflected in investigators’ notes.<sup>44</sup> This holding is distinguishable in the view of the Pre-Trial Judge as witnesses of fact are in a different category to experts, who are providing their expert opinion based on facts either established or presumed or on the basis of other knowledge in their field of expertise.

33. The one exception to this rule is where an expert report makes reference to the existence of such prior draft versions. The need to make such pointed reference in the final signed report by the expert witness is an indication of the significance of revisions of the report in the view of the expert. This was the case in the First Request, where the expert saw fit to refer to “STL feedback” received by him on two occasions in the course of preparing his report. Reference to any draft versions of the report surrounding the exchanges between the Prosecution and the expert would in such circumstances render them disclosable, as they form an integral source and basis of the expert’s final report.

### **3. Information available to experts in the preparation of their reports**

#### **a. Submissions**

34. The Sabra Defence seeks “a list of any documents, material and information relied upon by the Prosecution experts in preparing their reports” and any documents related thereto

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<sup>44</sup> *El Sayed* Decision, para. 85.

which have not already been disclosed.<sup>45</sup> Similarly, in relation to two Prosecution investigators, the Sabra Defence sought “any document, report or material not specifically identified in the footnotes of their reports”.<sup>46</sup>

35. The Sabra Defence submits that this material is necessary for its preparations for trial for a number of reasons. First, the Sabra Defence contends it is entitled to understand precisely what information the experts’ conclusions are based on, and in particular, whether information provided to the experts was incomplete or selective. This is relevant regardless of whether any omission was inadvertent or deliberate to orientate the expert witness towards a particular position. Second, the Sabra Defence foreshadows a need to test whether the experts have properly evaluated the relevance of particular evidence. Third, the Sabra Defence claims this material is necessary to ensure and verify that each and every item provided to the experts has been disclosed.<sup>47</sup> While evidence of such matters could be obtained at trial, such an approach would be inefficient as the Sabra Defence would be forced to ask many questions which would involve hours of exploratory cross-examination.<sup>48</sup>

36. In response, the Prosecution observes that many expert witnesses already refer to material relied on through explanation in the text or footnotes.<sup>49</sup> The Prosecution rejects as speculative and unsubstantiated the Sabra Defence’s contention that lengthy cross-examinations will result from the absence of the early disclosure sought. In any event, the Prosecution is willing to compromise that if the Sabra Defence is able to identify a specific report, as opposed to a generalised request, that does not refer to material relied on by the expert in any form and demonstrates that such information would be material for the preparation of the Defence, it may seek the Prosecution’s assistance in that regard.<sup>50</sup>

#### **b. Findings**

37. The Pre-Trial Judge presumes that a list of documents, materials and other information relied on by the Prosecution experts for the preparation of their report is contained either in an instruction or some other document. The Prosecution does not dispute their existence except specifically for its internal “experts” such as investigators and

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<sup>45</sup> Motion, para. 37. *See*, Annex, para. 3(vii) in relation to the Second Request.

<sup>46</sup> Motion, para. 37. *See*, Annex, para.4(iii) in relation to the Third Request and para. 6(vii) in relation to the Fifth Request.

<sup>47</sup> Motion, para. 39.

<sup>48</sup> *Id*, para. 40.

<sup>49</sup> Response, para. 33.

<sup>50</sup> *Id*, para. 35.

analysts.<sup>51</sup> To the extent they exist and are in the custody and control of the Prosecution, the Pre-Trial Judge finds that these lists of documents must be disclosed to the Sabra Defence as well as any documents or material referred to on such lists, provided they have not already been disclosed. However, if such lists do not exist, Rule 110(B) does not impose any further obligation on the Prosecution to generate new work product by creating such lists.<sup>52</sup>

38. The Pre-Trial Judge notes the Prosecution's concession that it would be prepared to assist if the Sabra Defence were able to identify any specific report which does not refer to material on which it relies. The Pre-Trial Judge considers that the *ad hoc* approach suggested by the Prosecution would not be sufficient to ensure the interests of justice and an expeditious and fair conduct of these proceedings. Rather, a more systematic disclosure of any relevant documents is preferable.

#### **4. Other persons involved in the production of expert reports**

##### **a. Submissions**

39. Apart from the signatories of the various expert reports, the Sabra Defence also seeks disclosure of information relating to "any other persons involved in the preparation and finalisation of the expert reports and (*sic*) well as information on the specific aspects of the report that these additional persons worked on".<sup>53</sup>

40. The Sabra Defence submits that it is entitled to cross-examine any expert witness, and challenge their qualifications or the relevance of any part of a report.<sup>54</sup> Some of the research and sections of certain reports were apparently drafted by persons other than the expert and their identities should be notified to the Defence so they can determine if these additional persons should be cross-examined. "Otherwise the expert would be effectively providing conclusions for work he cannot be cross-examined on", thereby depriving the accused of the right to examine witnesses against him in accordance with Article 16(4)(e) of the Statute.<sup>55</sup>

41. The Prosecution argues that it has already disclosed a list of witnesses pursuant to Rule 91(G)(ii) and that the contents of each report and its conclusions are those of the author

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<sup>51</sup> Response, para. 41.

<sup>52</sup> Decision of 8 November 2012, para. 31.

<sup>53</sup> Motion, para. 42. See, Annex, paras 3(vii) and 3(viii) in relation to the Second Request; Annex, para. 4(ii) in relation to the Third Request; Annex, paras 6(v) and 6(vi) in relation to the Fifth Request.

<sup>54</sup> Motion, para. 43.

<sup>55</sup> Motion, para. 43.

who has signed it, which must be defended during his testimony. The Sabra Defence will have the opportunity to raise any concerns it has regarding “other persons” involved during cross-examination of the witness.<sup>56</sup>

#### **b. Findings**

42. The Pre-Trial Judge is not persuaded by the Sabra Defence’s arguments for the disclosure of lists of names of other persons involved in the preparation and finalisation of expert reports, and clarification of what portions of the report they may have worked on. The Pre-Trial Judge accepts the Prosecution’s submission that the signatories of expert reports are ultimately accountable for their conclusions regardless of what portions of a report may have been delegated to others to prepare initial drafts. The proper avenues for clarification of this issue are the mechanism provided for under Rule 161 or at trial. In any event, such a bald request for lists most likely involves the generation by the Prosecution of new work product.<sup>57</sup> In its current form, this category of material is an overly broad and imprecise interrogative demand for information, made on a speculative basis rather than being a request for specific pre-existing documents *prima facie* in the custody and control of the Prosecution. In the view of the Pre-Trial Judge, it is an improper request for disclosure under Rule 110(B) and is accordingly denied.

### **5. Credibility of expert witnesses**

#### **a. Submissions**

43. The Sabra Defence seeks “any material, document of information which could affect their credibility as a witness”.<sup>58</sup> Illustrative examples of material in this category include evidence that the proposed expert: (a) played a part in the investigation and/or preparation of the Prosecution case; (b) provided different advice or analysis to the Prosecution in regard of any matter forming part of his report; (c) provided advice or analysis in a different context that would contradict the Prosecution case; (d) is not the sole author of the report; or (e) was unable to provide expert opinion in relation to some of the questions asked of him or her. Additionally, other matters of interest include: evidence of the experts’ remuneration; the

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<sup>56</sup> Response, para. 37.

<sup>57</sup> Decision of 8 November 2012, para. 31.

<sup>58</sup> Motion, para. 44. See, Annex, para. 3(viii) in relation to the Second Request; Annex, para. 5 in relation to the Fourth Request; and Annex, para. 6(viii) in relation to the Fifth Request.

circumstances under which the expert was selected; or the circumstances under which an expert was willing to change or amend his analysis upon a Prosecution request to that effect.

44. The Sabra Defence notes a previous ICTY ruling that material falling under the provision equivalent to Rule 113 will also necessarily be material to the preparation of the defence under Rule 110(B).<sup>59</sup> The Sabra Defence avers that the information sought is a subset of a wider category of material which the Prosecution would have to disclose under Rule 113 in any event. Rather, the more favourable deadline of 15 working days under Rule 110(B) should apply to allow the Defence to properly prepare for trial.<sup>60</sup>

45. The Prosecution responds that this category of disclosure falls uniquely under Rule 113 and would be disclosed in line with the timetable for that particular disclosure regime rather than the Specific Disclosure Regime.<sup>61</sup>

#### **b. Findings**

46. The Pre-Trial Judge considers that this category of requests is insufficiently specific for the purposes of Rule 110(B). The more specific sub-categories of material suggested by the Sabra Defence are also denied on the basis that it has failed to demonstrate *prima facie* that such documents are in the custody or control of the Prosecution. In the circumstances, these requests are speculative and the Pre-Trial Judge considers them to be an impermissible fishing expedition.<sup>62</sup>

47. The Pre-Trial Judge recalls that the practice of requesting categories of disclosure in broad, all encompassing terms, with non-exclusive sub-paragraphs listing more specific illustrative sub-categories is unhelpful and is to be discouraged.

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<sup>59</sup> ICTY, *Prosecutor v. Radovan Karadžić*, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, para. 14.

<sup>60</sup> Motion, para. 47. *See*, the "Specific Disclosure Regime" established in the Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012 ("Working Plan Order of 25 October 2012"), para. 24.

<sup>61</sup> The Pre-Trial Judge has established a regime for the disclosure of Rule 110(B) material by no more than 15 working days: Working Plan Order of 25 October 2012, para. 24. By contrast, Rule 113 disclosures were ordered under the Working Plan, as amended, to be completed by 28 February 2013: Decision on Prosecution's Request to Extend Working Plan Deadlines, confidential, 17 December 2012, Disposition, para. 5. Prior to the deadline of 28 February 2013, the Prosecution filed a Prosecution's Notice Regarding Disclosure, confidential, 15 February 2013, with a public redacted version of the same date. In this filing, the Prosecution sought an extension to 17 June 2013 to complete its Rule 113 disclosures. A decision is pending on this latest extension request.

<sup>62</sup> Decision of 21 December 2012, para. 12 and authorities cited thereto.

## **6. Other work conducted by Prosecution Investigators**

### **a. Submissions**

48. By the Third Request, the Sabra Defence seeks disclosure of material in relation to two Prosecution Investigators including: (a) their involvement in the investigation and preparation of the case, including any memorandum they prepared relevant to Mr. Sabra; (b) any advice they gave in relation to proposed exhibits; (c) any report or analysis whereby an opinion was given to the Office of the Prosecutor regarding their reports; (d) any other report they prepared regarding any communication aspect pertaining to the case; and (e) a list of material they had access to as employees of the Prosecution.<sup>63</sup>

49. The Sabra Defence submits that this material relates directly to the witnesses' credibility and it is required to verify exactly what other investigative activities these persons were involved in.<sup>64</sup> Furthermore, the Sabra Defence contends that this material is needed to determine whether it is able to elicit evidence relevant to aspects of its case through investigators who might possess information relevant thereto.<sup>65</sup> Furthermore, insofar as Rule 111 may be relevant, the Sabra Defence contends that employed members of the Office of the Prosecutor or the United Nations International Independent Investigation Commission ("UNIIC") do not benefit from the protection of Rule 111 once they are placed on the Rule 91 witness list as they must then be treated in the same way as other external experts.<sup>66</sup>

50. The Prosecution objects to the request on a number of grounds. First, the request goes beyond Rule 161(A), which only requires a "full statement" of experts, including experts involved in the Prosecution case.<sup>67</sup> Second, some of the requested information constitutes internal work product protected by Rule 111,<sup>68</sup> and the Sabra Defence has not demonstrated that merely including these Prosecution witnesses on the Rule 91 witness list constitutes a waiver of the Rule 111 protection.<sup>69</sup>

51. Third, the Prosecution also objects to the policy reasons advanced by the Sabra Defence as applying to "non-fact witnesses" such as "Prosecution investigators and analysts

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<sup>63</sup> Motion, para. 48. *See*, Annex, paras 4(i), 4(v), 4(vi), 4(vii) and 4(viii) in relation to the Third Request.

<sup>64</sup> Motion, para. 49.

<sup>65</sup> *Id.*, para. 50.

<sup>66</sup> *Id.*, para. 55.

<sup>67</sup> MotionResponse, para. 39.

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

<sup>69</sup> *Ibid.*

who have produced analytical or expert-like reports”.<sup>70</sup> As explained by the Prosecution, the role of these witnesses, which it calls “summary witnesses”, is to summarise evidence provided from various other sources.<sup>71</sup> The underlying documents have been disclosed and the Defence and the Trial Chamber are able to evaluate the summaries on the basis of the underlying evidence.<sup>72</sup> Unlike external experts, these witnesses are not provided with terms of reference and do not rely solely on materials provided to them.<sup>73</sup>

#### **b. Findings**

52. The Pre-Trial Judge considers that the determinative issue on the disclosability of this category of documents lies in the applicability of Rule 111. The issue of in-house investigators or analysts employed directly by UNIIIC or the OTP is distinguishable from external experts retained by the Prosecution, notwithstanding the fact that these internal “experts” are put forward as experts on the Prosecution’s Rule 161 Notice.<sup>74</sup> These internal staff, presented as having particular expertise and variously described by the Parties as “non-fact witnesses” or “summary witnesses”, simultaneously wear two hats as Prosecution staff and “experts”. However, these roles are not mutually exclusive. The Pre-Trial Judge does not consider that internal Prosecution work product relating to the final report of internal Prosecution staff loses the protection conferred by Rule 111 merely by the person being included in the Rule 91 witness list.

53. The Pre-Trial Judge notes the Sabra Defence concedes that Rule 111 may still apply in relation to communications and internal documents prepared in connection with “other issues” apart from those canvassed in the final report.<sup>75</sup> Practically however, with the exception of the final report, there can be no clear delineation between internal work product of internal employees and notionally disclosable material under Rule 110(B), given the circumstances in which the “summary witnesses” operate. For instance, the category of material evidencing “their involvement in the investigation and preparation of the case, including any memorandum they prepared relevant to Mr. Sabra” is extremely broad in scope and casts a wide net traversing all manner of internal documents. As the Prosecution has

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<sup>70</sup> Motion, para. 6; Response, para. 41.

<sup>71</sup> Response, para. 41.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Final Update and further Corrigendum to “Prosecution updated Notice pursuant to Rule 161(A)”, public with confidential annex, 15 May 2013.

<sup>75</sup> Motion, para. 55.

described the function of these in-house “experts”, their role is to summarise evidence from a wide range of sources, in the absence of terms of reference circumscribing their brief, or prescribing a set list of materials.

54. In light of the explanation and description of the role of the Prosecution’s internal “summary witnesses”, the Pre-Trial Judge considers that they are distinguishable from the situation before the Appeals Chamber in the *El Sayed* matter. In those circumstances, parts of investigators notes reflecting “a witness’s formal statement” were disclosable and were unhampered by the Rule 111 exemption.<sup>76</sup>

55. In the present circumstances, the Pre-Trial Judge considers that the category of work product of the “summary witnesses” falls in the category of internal work product which is not subject to disclosure under Rule 111. For the purposes of early disclosure, the Pre-Trial Judge is not persuaded that the Sabra Defence has put forward a sufficiently compelling submission that the Rule 111 “privilege” is waived over any of the associated or underlying internal work products by the mere fact that employees of the Prosecution are placed on the Rule 161 Notice. Accordingly, the Pre-Trial Judge denies this type of group of requests.

56. However, the denial of disclosure in this instance does not preclude the Sabra Defence from cross-examining these witnesses at trial on the matters raised by this category of documents if it so wishes. Ultimately, expert reports produced by these types of witnesses as Prosecution employees held out to be “experts” in the case is a matter of weight for the Trial Chamber to decide, and this decision is without prejudice to any subsequent assessment by the Trial Chamber.

## **V. LEAVE REQUEST**

57. On 31 January 2013, the Pre-Trial Judge issued the Scheduling Directive inviting the Prosecution to file any response to the Motion by 6 February 2013, thereby abridging the usual 14 days then allowed for responses permitted by Rule 8. Shortly thereafter, the Prosecution filed its Leave Request effectively seeking the full 14 days to respond, citing the wide range of legal issues raised by the Sabra Defence and the Prosecution’s heavy workload as justifying good cause.<sup>77</sup> While these reasons would not normally suffice in themselves to justify good cause as required by Rule 9(A)(i), the Pre-Trial Judge grants the Leave Request

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<sup>76</sup> *El Sayed* Decision, para. 85.

<sup>77</sup> Leave Request, para. 3.

in the present circumstances, given that the extension sought was no greater than the 14-day response period provided by the Rules.

58. The Prosecution made further submissions that Scheduling Directives to reduce the general time for the filing of responses should be “exceptional” rather than issued on a routine basis. Furthermore, they should take into account matters that have to be addressed in the filing and other deadlines set by the Pre-Trial Judge.<sup>78</sup> Additionally, the Prosecution submits that any Scheduling Directive reducing the usual prescribed time periods should be explained.<sup>79</sup>

59. The Pre-Trial Judge notes that the power vested in the judges to reduce the time for Parties to respond to motions pursuant to Rule 8 is discretionary and that the reasons for reducing the time extend beyond consideration of the Prosecution’s commitments and must also take into account the interests of efficient and expeditious proceedings and consideration of other Parties and participants, as well as the management of other filings before the Pre-Trial Judge. Accordingly, the submissions by the Prosecution in this regard are rejected.

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<sup>78</sup> Leave Request, para. 4.

<sup>79</sup> *Ibid.*

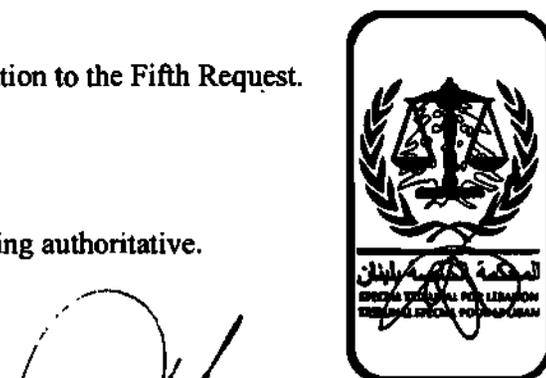
**VI. DISPOSITION****FOR THESE REASONS,****THE PRE-TRIAL JUDGE,****PURSUANT TO Rules 9(A)(i), 110(B) and 111 of the Rules,****GRANTS** the Leave Request;**GRANTS** the Motion in part; and**ORDERS** the Prosecution to disclose to the Sabra Defence by no more than 20 working days, any documents or material meeting the description of:

- a) The First Request in its entirety.
- b) Paragraphs 3(i), 3(iii) and 3(vii) of the Annex in relation to the Second Request insofar as it concerns external expert witnesses retained by the Prosecution only; reflects sources, established and assumed facts relied on by the external expert; and relates to pre-existing documents in the custody and control of the Prosecution which does not require the creation of new work product.
- c) Paragraphs 6(i), 6(iii) and 6(vii) of the Annex in relation to the Fifth Request.

**DENIES** all other requests for relief in the Motion.

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

Leidschendam, 24 May 2013.

Daniel Fransen  
Pre-Trial Judge