



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

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

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

The Registrar: **Mr. Daryl Mundis**

Date: **21 October 2013**

Original language: **English**

Classification: **Public**

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

**PUBLIC REDACTED VERSION OF “DECISION ON SABRA MOTION FOR
EFFECTIVE COMPLIANCE WITH THE PROSECUTION’S DISCLOSURE
OBLIGATIONS AND REQUEST FOR AN EXTENSION OF THE PAGE LIMIT”
DATED 27 SEPTEMBER 2013**

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I. INTRODUCTION

1. In this decision, the Pre-Trial Judge rules on the motion by Counsel for Mr. Assad Hassan Sabra (the “Sabra Defence”) for effective compliance with the Prosecution’s disclosure obligations and request for an extension of the page limit (the “Motion”).¹

II. PROCEDURAL BACKGROUND

2. On 8 November 2012, the Pre-Trial Judge rendered a decision on *inter alia* the Sabra Defence’s “Fourth Motion for an Order for Disclosure – Information Pertaining to [Redacted]”² (the “8 November 2012 Decision” and the “Fourth Motion” respectively)³ in which he ordered the Prosecution to comply with the Specific Disclosure Regime for disclosures made pursuant to Rule 110(B) in connection with the categories of material related to [Redacted].⁴

3. On 19 April 2013, the Sabra Defence filed the Motion.⁵

4. On 2 May 2013, the Sabra Defence filed an addendum to the Motion (the “Addendum”).⁶

5. On 6 May 2013, the Prosecution filed its response to the Motion and the Addendum (the “Response”).⁷

6. On 9 May 2013, the Sabra Defence filed a request for leave to reply to the Response (the “Request”).⁸

¹ STL, *Prosecution v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra Motion For Effective Compliance with the Prosecution’s Disclosure Obligations and Request for an extension of the Page Limit, confidential with confidential Annexes A to Z, 19 April 2013. A public redacted version of the motion was filed on 28 May 2013. All further references to filings and decisions relate to this case number unless otherwise stated.

² Decision on the Sabra Defence’s First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012.

³ Sabra’s Fourth Motion for an Order for Disclosure – Information Pertaining to [Redacted], 19 October 2012.

⁴ 8 November 2012 Decision, para. 49, Disposition (a)(iv) and (b); Fourth Motion, para. 13.

⁵ The Motion refers *inter alia* to evidence contained on [Redacted] and to other hard drives.

⁶ Addendum to Sabra Motion For Effective Compliance with the Prosecution’s Disclosure Obligations and Request for an Extension of the Page Limit, confidential, 2 May 2013.

⁷ Prosecution Response to the “Sabra Motion for Effective Compliance with the Prosecution’s Disclosure Obligations and Request for an Extension of the Page Limit” and “Addendum to Sabra Motion for Effective Compliance with the Prosecution’s Disclosure Obligations and Request for an Extension of the Page Limit”, confidential with confidential Annexes A to E, 6 May 2013. A public redacted version of the Response was filed on 15 August 2013.

⁸ Defence Request for Leave to Reply to the “Prosecution Response to the “Sabra Motion for Effective Compliance with the Prosecution’s Disclosure Obligations and Request for an Extension of the Page Limit and Addendum”, 9 May 2013.

7. On 14 May 2013, the Prosecution filed its response to the Request.⁹
8. On 17 May 2013, the Pre-Trial Judge rendered a decision in which he denied the Request.¹⁰
9. Since the Motion raises several discrete issues, each will be dealt with in turn.

III. PRELIMINARY MATTERS: CONFIDENTIALITY AND EXTENSION OF PAGE LIMIT

A. The Sabra Defence's Submissions

10. With respect to the confidentiality of the proceedings, although the Sabra Defence does not object to the Motion being made public with appropriate redactions, it considers that this would be a difficult task due to the manner in which the Motion is drafted. The Sabra Defence recalls that some of the information contained in the Motion relates to the "Prosecution's evidentiary holdings and to discussions which occurred in confidential working meetings and status conferences".¹¹ Nonetheless, a public redacted version of the Motion was filed, with its 26 annexes remaining confidential.

11. Regarding the extension of the page limit, the Sabra Defence requests an extension of 12 additional pages for the filing of the Motion. The Sabra Defence notes that according to the Pre-Trial Judge's prior ruling that "the practice of seeking disclosure of specific material by way of cross-referencing discussions or correspondence annexed to Motions"¹² conforms neither to the requirement of specificity, nor to the Tribunal's Practice Direction on the filing of documents¹³ (the "Practice Direction"). Therefore, the Sabra Defence recalls that it has

⁹ Prosecution Response to Sabra Defence Request for Leave to Reply to the Prosecution Response to the Sabra Motion for Effective Compliance with the Prosecution's Disclosure Obligations and Request for an Extension of the Page Limit and Addendum, 14 May 2013. A public redacted Version was filed on 15 August 2013 (Redacted Version of the Prosecution Response to the "Sabra Motion for Effective Compliance with the Prosecution's Disclosure Obligations and Request for an Extension of the Page Limit" and [Redacted]," filed 6 May 2013, 15 August 2013).

¹⁰ Decision on Sabra Defence Request for Leave to Reply, 17 May 2013.

¹¹ Motion, para. 93.

¹² *Id.*, para. 94.

¹³ Practice Direction on Filing of Documents Before the Special Tribunal for Lebanon, reference STL/PD/2010/01/Rev.2, 14 June 2013. *See* 8 November 2012 Decision, para. 55. In that decision, the Pre-Trial Judge recalled that article 4(1) of the Practice Direction requires a clear statement of the relief sought. *See* the Practice Direction in force at that time, Practice Direction on Filing of Documents Before the Special Tribunal for Lebanon, reference STL/PD/2010/01/Rev.1, 23 April 2012, art. 4: Contents of Documents (1) Documents submitted for filing before a Judge or Chamber shall contain the following information, where appropriate and unless otherwise directed: (a) An introduction containing the legal basis for the filing and a summary of the relief sought; (b) A summary of the main arguments made; (c) An outline of relevant facts, including a

sought to comply with the Pre-Trial Judge's approach by including "the relevant sections of the voluminous correspondence and the working meetings or status conferences in the body of this motion [which] amount[s] to 11 pages of this motion".¹⁴ Furthermore, the Sabra Defence avers that the Motion refers to numerous hard drives (whose number has continued to increase),¹⁵ the disclosure of which could have been pleaded in separate motions as they require "detailed explanation and discussion", but nevertheless share similar issues "and so should be addressed together".¹⁶

B. The Response

12. The Prosecution did not make any submissions with respect to confidentiality. Its Response was filed confidentially because the Motion itself was filed according to this classification,¹⁷ and a public redacted version was filed subsequently.¹⁸

13. As for the extension of the page limit, the Prosecution observes that the Motion does not follow the proper procedure since the Sabra Defence sought authorisation from the Pre-Trial Judge for an extension of the page limit within the filed Motion. According to the Prosecution, the Sabra Defence presented the Pre-Trial Judge with a *fait accompli* and as such its conduct is inappropriate.¹⁹ The Prosecution notes that once again and despite the Pre-Trial Judge's ruling requiring that "categories of specific disclosure should ideally be drafted with precision in the main body of the Motion", the Motion pleads by cross-reference to previous correspondence.²⁰

C. Discussion

14. With respect to confidentiality, the Pre-Trial Judge takes note that a public redacted version of the Motion was filed by the Sabra Defence on 28 May 2013; annexes A to Z

chronology, where appropriate; (d) A summary of the relevant law; (e) The Participant's arguments; (f) A conclusion with a clear statement of the relief sought; and (g) An appendix containing a list of authorities and copies of those authorities if not widely and publicly available through, for example, the Tribunal's website, government websites, or widely used electronic databases. The Practice Direction was amended on 14 June 2013. However, the current version does not contain any changes to article 4(1).

¹⁴ Motion, para. 94, referring to the 8 November 2012 Decision, para. 55.

¹⁵ Addendum, para. 2.

¹⁶ Motion, para. 94.

¹⁷ Response, para. 62.

¹⁸ See note 9 above.

¹⁹ *Id.*, para. 12.

²⁰ *Id.*, para. 61 citing the 8 November 2012 Decision, para. 55.

attached to the Motion remain confidential as they contain confidential information. The Prosecution filed a public redacted version of the Response on 15 August 2013.

15. The Pre-Trial Judge has consistently stated the importance of maintaining the transparency of these proceedings, save for in those circumstances where a degree of confidentiality is necessary.²¹ In the present circumstances, he has sought to present this decision in a manner consistent with the redactions to the Motion and the Response as far as possible. It is however classified as confidential since it contains terms redacted from those filings but nevertheless necessary to its presentation. The Parties are, accordingly, invited to propose redactions to the instant decision before it is reclassified as public.

16. Regarding the Sabra Defence's request for an extension of the page limit applicable to the Motion, the Pre-Trial Judge recalls that in accordance with articles 5(1)(a) and 5(3) of the Practice Direction:²²

Documents submitted for filing shall not exceed the following word limits: All motions and any responses thereto shall each not exceed 6,000 words [...].

A party must seek authorisation in advance from the relevant Judge or Chamber to exceed the word limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing. If necessary, a Judge or Chamber may vary the word limits *proprio motu*.

17. The Pre-Trial Judge notes the reasons advanced by the Sabra Defence for exceeding the page limit on this occasion. In this particular instance, the Request raises several issues which, while distinct, are inter-related and rely on similar arguments. The filing of separate motions would have resulted in a multiplicity of connected filings, all of which repeat to varying degrees matters raised in each other filing, as well as within correspondence *inter partes*, and which would necessarily have contained many cross-references (itself a practice that has been discouraged).²³ While the Rules of Procedure and Evidence (the "Rules") and the Practice Direction must be respected, for the unusual circumstances described, the Pre-Trial Judge grants the request for an extension of the page limit on an exceptional basis, while reminding the Parties that the relevant statutory requirements are to be respected in order to ensure the efficient conduct of proceedings.

²¹ Decision on the Defence For Hussein Hassan Oneissi's Request for Reconsideration and Certification of "The Decision on Issues Related to The Inspection Room And Call Data Records" Dated 18 June 2013, confidential, 9 August 2013, para. 46.

²² Practice Direction, art. 5(1)(a) and 5(3).

²³ 8 November 2012 Decision, para. 55.

IV. DISCLOSURE OF MATERIALS RELATED TO THE [Redacted] AND OTHER HARD DRIVES

A. The Sabra Defence's Submissions

1. The [Redacted] Hard Drive

18. The Sabra Defence considers that, in the Motion, it raises an issue that falls outside the scope of the Fourth Motion and was accordingly not determined in the 8 November 2012 Decision for at least two reasons. First, it recalls that this issue was discussed during working group meetings and exchanges of correspondence between the Parties. These meetings and exchanges took place after the Fourth Motion was filed and the 8 November 2012 Decision was rendered. Second, the Sabra Defence recalls that it has been informed by the Prosecution on a rolling basis “about the extent of the [Redacted] material, in terms of the exhibits taken [Redacted], [Redacted]”.²⁴ For these reasons, the Sabra Defence avers that the issues raised in the Motion are topical and remain unresolved.

19. By quoting its correspondence with the Prosecution, the Sabra Defence identifies the efforts it has undertaken to obtain the effective disclosure of material on the [Redacted] hard drive that it has sought.²⁵ Despite these efforts, the Sabra Defence notes that even if the Prosecution has reviewed the contents of the [Redacted] hard drive only from 1 January 2002 to 14 February 2005, it has refused to review and analyse the documents outside that date range, especially those created before 1 January 2002. For the Sabra Defence, this distinction is unjustified and is arbitrary.²⁶

20. The Sabra Defence also notes that whereas the index of the [Redacted] hard drive was meant to include an accurate description of the documents, the index provided by the Prosecution is incomplete. For instance, no description has been made of 80% of the documents on the hard drive. On the remaining 20%, 30 files have not been translated and

²⁴ Motion, paras 20-34.

²⁵ For example, the Sabra Defence refers to the spreadsheets listing the material on the [Redacted] hard drive. Quoting a letter of 5 February 2013 sent by the Defence to the Prosecution, the Sabra Defence identifies the following specific issues. In relation to more than 120 item numbers in the [Redacted] spreadsheets, the Defence does not know what the Prosecution's indication of “probably unreadable” refers to. There are also over 95 items for which translation from Arabic language is required. Furthermore, the “C” columns of various items in the index contain what appear to be broken links in Arabic. Finally, there is no indicating ERN to enable the Defence to “determine which material has been disclosed in the Disclosure batches (96, 103,184)”. Thus, according to the Sabra Defence the Prosecution's indications are unclear as are its responses to the Defence's questioning in a letter sent on 12 March 2013, Motion, paras 29-32.

²⁶ Motion, paras 46-47.

123 are described as “probably unreadable”. Such omissions prevent the Defence from both targeting its disclosure request and from assisting the Prosecution in fulfilling its disclosure obligations.²⁷ The Defence makes the same observation of incomplete or unreadable materials regarding the disclosure thereof through the Legal Workflow System (“LWS”).²⁸

21. The Sabra Defence also submits that when disclosing materials under Rule 113, the Prosecution should first clarify whether the document suggests the innocence of the accused, mitigates his guilt and/or affect the Prosecution’s evidentiary materials. Second, the Prosecution should specify the relevance of the documents by linking them to their corresponding theme or subject.²⁹

22. The Sabra Defence notes that the Prosecution seems to favour disclosing materials under Rule 110(B) rather than Rule 113 in order to limit its disclosure obligations.³⁰

2. The Other Hard Drives

23. According to the Sabra Defence, the Prosecution has been in possession of evidence contained in the several other hard drives belonging to “[Redacted]” (the “Other Hard Drives”).³¹ The Defence also claims the Other Hard Drives are associated with members of a group that was perceived as potential perpetrators of the attack which led to Hariri’s death.³² However, the Prosecution has refused to review the material meant to be disclosed under Rule 113 without giving proper justification for such a refusal.³³ Moreover, the Sabra Defence avers that the Prosecution has, on several occasions, clearly affirmed that pursuant Rule 110(B) it has no obligation other than providing for inspection, but recalls the Pre-Trial Judge’s wariness of an excessively literal interpretation of Rule 110(B) which “exaggerates the distinction between disclosure and inspection and unreasonably narrows the scope of inspection” on the basis that Rule 110 is entitled “Disclosure by the Prosecutor”.³⁴

24. Additionally, the Sabra Defence notes that despite the Prosecution’s refusal to conduct the review of the material requested, it has nevertheless and without difficulty

²⁷ *Id.*, paras 66-69.

²⁸ *Id.*, para. 72.

²⁹ *Id.*, para. 73.

³⁰ *Id.*, para. 74.

³¹ *Id.*, paras 2, 11.

³² *Id.*, para. 44.

³³ *Id.*, paras 56-59.

³⁴ *Id.*, para. 6.

searched some items for two out of eight categories of information requested by the Defence. It has furthermore provided the Defence with indexes which are insufficiently useful since the items were not categorised.³⁵ Lastly, the Sabra Defence notes that the Prosecution contradicts itself. On the one hand, the Prosecution considers that the Sabra Defence's request is too general, and on the other hand, the Prosecution claims that the Sabra Defence's narrow request goes beyond the Prosecutions' obligations under Rule 110(B).³⁶ The Prosecution's arguments are therefore inconsistent.

25. For the foregoing reasons, the Sabra Defence considers that the Prosecution has refused fully and effectively to comply with its disclosure obligations under the Statute and the Rules. Therefore, the Sabra Defence resorts to seeking the assistance of the Pre-Trial Judge and requests that he orders the Prosecution to review, analyse and disclose, under Rules 110(B) and 113 of the Rules, the entire contents of the [Redacted] hard drive, as well as the Other Hard Drives, and to provide indexes for all of them.³⁷

B. The Response

1. The [Redacted] Hard Drive

26. First, according to the Prosecution, the Motion mischaracterises the interpretation of the words "permit the Defence to inspect" as stated in Rule 110(B). For the Prosecution, this Rule imposes no obligation to "review, analyse and disclose" Rule 110(B) materials.³⁸ The Prosecution recalls that "Rule 110(B) establishes a regime to permit the Defence to inspect real evidence".³⁹

27. Unlike witness statements, the [Redacted] hard drive falls within the category of real evidence. Since the Prosecution has made it available for inspection to the Defence, the Prosecution submits that it has fulfilled its obligations pursuant to Rule 110(B).⁴⁰ Indeed, the Prosecution has gone beyond its duties by assisting the Defence in various ways; providing spreadsheets, listings, etc., whereas, for its part, the Sabra Defence has allegedly not even tried to accomplish this task.⁴¹ Rather the Defence has refused to undertake the inspection of

³⁵ *Id.*, paras 63 & 70-71.

³⁶ *Id.*, paras 61-62.

³⁷ *Id.*, paras 34 & 95.

³⁸ Response, para. 19.

³⁹ *Id.*, para. 20.

⁴⁰ *Id.*, para. 33.

⁴¹ *Id.*, paras 30-39.

the [Redacted] hard drive without demonstrating it was unable to do so.⁴² Yet, according to the Prosecution “[i]n any event, the voluminous nature of the work of Counsel before [the Special Tribunal for Lebanon] does not result in a different obligation on the Prosecution beyond that under Rule 110(B)”.⁴³ The Prosecution also avers that it has completed the review of the [Redacted] hard drive and, as such, has fulfilled its obligations under Rule 113. Contrary to what the Sabra Defence states, the Prosecution affirms that it has reviewed the entire [Redacted] hard drive and not merely the period of time between 1 January 2002 and 14 February 2005. The Prosecution therefore avers that, to this extent, the Sabra Defence’s assertion is inaccurate.⁴⁴

28. Second, since the Prosecution maintains that it has no obligation other than to allow for inspection of relevant materials, and as the Pre-Trial Judge recalled in his 8 November 2012 Decision, the Prosecution is not required to create indexes, request translations, create relationships in LWS, generate internal work product or create lists, tables or other types of documents which organise or identify specific documents.⁴⁵ As for the indexes, the Prosecution quotes both the 8 November 2012 Decision and the Order on a Working Plan of 25 October 2012 (the “Working Plan Order”)⁴⁶ in which the Pre-Trial Judge found that the Prosecution was not compelled to identify any previously disclosed material, and that such tasks fall under the due diligence of the Defence.⁴⁷ Likewise, contrary to the relief sought by the Defence, the Prosecution avers that Rule 113 does not impose the obligation on the Prosecution to disclose materials by theme or according to criteria predefined by the Defence.⁴⁸ In sum, under Rules 110(B) and 113, the Prosecution is not compelled to sort or identify material disclosed according to the categories specified by the Defence or to generate documents which organise or identify specific documents in the material disclosed.⁴⁹

⁴² *Id.*, paras 37-39.

⁴³ *Id.*, para. 39.

⁴⁴ *Id.*, paras 33-36.

⁴⁵ Response, para. 19.

⁴⁶ Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012.

⁴⁷ Response, paras 31 and 43, referring to the 8 November 2012 Decision, para. 48, and to the Working Plan Order, para. 25.

⁴⁸ Response, paras 48-49.

⁴⁹ Response, para. 17 referring to the 8 November 2012 Decision, paras 30-31.

29. For all these reasons, the Prosecution avers that the Motion which seeks the “effective disclosure” of the [Redacted] hard drive is moot (as to inspection) and without merit (as to disclosure).⁵⁰ Consequently, to this extent, the Motion should be denied.

2. The Other Hard Drives

30. The Prosecution maintains its position with regard to the scope of its obligations under Rule 110(B). Regarding the Other Hard Drives, as well as material contained in the [Redacted] hard drive, the Prosecution underlines the assistance given to the Defence by providing “file listings” for each of the electronic containers made available for inspection. Therefore for both the [Redacted] hard drive and the Other Hard Drives, not only did the Prosecution fulfil its obligations but it also courteously offered assistance to the Sabra Defence beyond the legal requirements of Rule 110(B).⁵¹

31. As for Rule 113, the Prosecution indicates that the Motion is mistaken when it asserts that the Prosecution has refused to review the material concerned. Indeed, the Prosecution recalled that the process of reviewing the material was in progress and would be completed in accordance with the then requested extended deadline of 17 June 2013.⁵²

C. Discussion

32. Rule 110 of the Rules establishes the general disclosure obligations of the Prosecutor and provides in relevant part:

(B) 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.

33. Rule 113 of the Rules regulates the disclosure of exculpatory material and provides in relevant part:

(A) Subject to the provisions of Rules 116, 117 and 118, 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.

⁵⁰ Response, para. 33.

⁵¹ *Id.*, paras 44-45 & 54-56.

⁵² *Id.*, paras 55, 57. The Prosecution subsequently notified the Pre-Trial Judge that it has discharged its disclosure obligations pursuant to Rule 113, Prosecution’s Notice Pursuant to the Working Plan Regarding Disclosure Under Rule 113.

34. The Pre-Trial Judge notes that in the Motion, the Sabra Defence's submissions in connection with the [Redacted] hard drive are not intended merely to reiterate or refine the arguments made in the Fourth Motion. The Motion raises new issues with respect to the inspection of materials. Nonetheless, as the Prosecution points out, the Pre-Trial Judge in the 8 November 2012 Decision developed a principle which is applicable to the Motion. Thus, two important qualifications on the scope of Rules 110(B) and 113 made in the 8 November 2012 Decision merit repeating.

First, the Prosecution is not obliged to sort or identify the material disclosed according to the categories specified by the Defence. The Pre-Trial Judge recalls the duty incumbent on the Defence to exercise due diligence by thoroughly reviewing materials previously disclosed to it, to avoid unnecessary requests and delays.

Second, the Prosecution is not obliged to undertake investigations, perform analyses, or create work products which are not in its custody or control, possession or actually known to it. Put another way, the Prosecution cannot disclose that which it does not have. Neither Rule 110(B) nor Rule 113 extend to permitting the Defence to seek orders compelling the Prosecution to generate new lists, tables, or any other type of document which organises or identifies specific documents in the disclosed material.⁵³

35. While the Pre-Trial Judge has, in the past, required the Prosecution to provide the Defence with an index, that situation was discrete inasmuch as the Prosecution was already in the possession of the index concerned.⁵⁴

36. The Pre-Trial Judge recalls his finding that the Prosecution's literal interpretation of Rule 110(B) "unreasonably narrows the scope of inspection".⁵⁵ He therefore reminds that according to his 8 April 2013 Decision (citing jurisprudence from other *fora*), "although making materials available for inspection under Rule 110(B) does not require disclosing them *per se*, it is clear that one way in which documents can be made available for inspection is via disclosure".⁵⁶

37. Having considered the arguments of both the Sabra Defence and the Prosecution, the Pre-Trial Judge reiterates the position held in the 8 November 2012 Decision. The Pre-Trial

⁵³ 8 November 2012 Decision, paras 30-31, footnotes omitted.

⁵⁴ Order on the Defence Request to Compel Disclosure of the Lebanese Investigative Case Files, 8 February 2013, para. 16 & Disposition ("He adds that the Lebanese Case File included an envelope containing a copy of detailed lists of the content of the 253 files, thereby serving as an index to the entire dossier." para. 16, footnote omitted).

⁵⁵ Decision on the Prosecution Request for Certification for Leave to Appeal the Order to Compel Disclosure of the Lebanese Case Files, 8 April 2013 (the "8 April 2013 Decision"), para. 27.

⁵⁶ *Id.*, para. 28 citing ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Additional Time to Prepare Cross-Examination of Momčilo Mandić, 2 July 2010, para. 7; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings, 10 May 2011, paras 4, 9, 21.

Judge considers that Rules 110(B) and 113 of the Rules impose no general obligation on the Prosecution to review, analyse, index and/or identify material previously disclosed. Whether the request is related to the [Redacted] hard drive or the Other Hard Drives,⁵⁷ such tasks fall within the competence of the Sabra Defence or the Defence generally. The Motion is therefore denied.

38. As for the review of material contained in the Other Hard Drives for the purposes of its Rule 113 obligations, the Pre-Trial Judge notes that the Prosecution completed the process of reviewing such material on 17 June 2013.⁵⁸ To that extent, the Sabra Defence Motion is thus moot.

V. THE VERIFICATION AND NOTIFICATION OF MATERIAL ALREADY DISCLOSED BY EVIDENCE REFERENCE NUMBER

A. The Sabra Defence's Submissions

39. The Sabra Defence recognises that Rule 110(B) of the Rules does not oblige the Prosecution to identify previously disclosed material by evidence reference number ("ERN").⁵⁹ It submits, however, that this finding "must be predicated on the understanding that the Prosecution correctly identifies and categorises its exhibits by ERN and that if a new or different ERN is given to a document, this will be duly notified."⁶⁰ Absent ERNs for the [Redacted] hard drive, the Sabra Defence argues that it is impossible "to identify which documents have already been disclosed and which have not."⁶¹ Moreover, the Defence posits that "it would be odd and an indication of lack of diligence if the Prosecution did not have a record on the same spreadsheet that was disclosed to the Defence of what has already been disclosed under Rule 110(B)."⁶²

40. Following the Prosecution's refusal to "diligently identify which documents had already been disclosed" by ERN, the Sabra Defence is seeking judicial intervention to resolve

⁵⁷ The Pre-Trial Judge notes the reference by the Sabra Defence to the inclusion of 8 USBs and 1MP3 file within these "Other Hard Drives"; Motion, paras. 12 and 95 (iii).

⁵⁸ Prosecution's Notice Pursuant to the Working Plan Regarding Disclosure under Rule 113, 21 June 2013, paras 1-2; confidential Annex A, see e.g. batch no. 516: the material related to the Other Hard Drives was disclosed on 14 June 2013.

⁵⁹ Motion, paras 86-87.

⁶⁰ *Id.*, para. 87.

⁶¹ *Id.*, para. 88.

⁶² *Id.*, para. 91.

the matter in its favour in order to avoid wasting extensive time and resources.⁶³ This amounts to requesting reconsideration of an element of the Working Plan Order — which held that Rule 110(B) of the Rules does not oblige the Prosecution to identify by ERN any previously disclosed material — on the basis that it “prejudices the ability of the Defence to prepare effectively”.⁶⁴

B. The Response

41. In response, the Prosecution submits that “the problem at the core of its request is the Sabra Defence’s assertion that it lacks resources and has ‘no time’ to review of the [Redacted] hard drive”.⁶⁵ Furthermore, the Prosecution denies that the voluminous nature of the [Redacted] hard drive files creates a different obligation or a new duty to provide indexes of ERNs, and that there is no sufficient basis for the Pre-Trial Judge to reconsider the Working Plan Order.⁶⁶

C. Discussion

42. The Pre-Trial Judge recalls his finding, as stated above, that unlike Rules 91 and 110(A), Rule 110(B) of the Rules does not impose on the Prosecution the obligation to provide and/or disclose materials that it does not have, in this case, indexes. The Pre-Trial Judge observes furthermore, that the Sabra Defence requests reconsideration of this element of the 8 November 2012 Decision, alleging that it prejudices the Defence’s ability to prepare effectively for trial.⁶⁷

43. The Pre-Trial Judge notes that – according to the Sabra Defence – reviewing, analysing and creating indexes of all materials contained in the [Redacted] and other hard drives requires time and resources. As the Sabra Defence correctly points out, recognising that the Prosecution is not ordinarily required to generate new work product is predicated on the understandings that the Prosecution correctly identifies its exhibits by ERN, and that when a particular document’s ERN is revised or replaced, this information must be provided to the Defence.

⁶³ *Id.*, paras 89-90.

⁶⁴ *Id.*, para. 92.

⁶⁵ Response, para. 31.

⁶⁶ *Ibid.*

⁶⁷ Motion, para. 92. See 8 November 2012 Decision, para. 48; Working Plan Order, para. 25.

44. In this instance, however, the Sabra Defence has already received this information. The Pre-Trial Judge notes furthermore the Prosecution's punctual disclosure reports, the most recent of which included a "List of All Disclosures", on which the Sabra Defence can perform searches and identify all batches in which material from the [Redacted] hard drive was disclosed.⁶⁸ Indeed the Sabra Defence refers to Prosecution disclosure batches which, at the time of the Motion, contained materials from the [Redacted] hard drive.⁶⁹ Once the number of a batch containing materials from the [Redacted] hard drive has been identified, the LWS can be employed by the Sabra Defence to meet its objective of identifying the ERNs of those materials.

45. Therefore, recalling that the Prosecution is not ordinarily required to generate new work product for the Defence, and noting that the LWS already serves to identify the ERNs sought by the Sabra Defence, the Pre-Trial Judge denies this aspect of the Motion. Where, however, a new or different ERN is given to a document already disclosed, the Prosecution is naturally required to notify the Defence and the Legal Representative of Victims.

46. The Sabra Defence goes further, however, and seeks an order clarifying that the Prosecution must furthermore "categorise" the materials by ERN. In this respect, the Pre-Trial Judge recalls both his decision of 16 April 2013 (the "Decision of 16 April 2013")⁷⁰ and the Disclosure Protocol.⁷¹

[T]he Pre-Trial Judge and Chambers of the Tribunal, as well as the Legal Representative of Victims, will benefit from the provision by the Parties of materials via the LWS in a manner that contains all relevant information and is useful, that is logically structured, and that allows for meaningful searches and analyses.⁷²

47. In a decision of 10 June 2013 – in relation to the question of whether or not the Prosecution must establish links between so-called 'Witness Entities' and materials on its exhibit list – the Pre-Trial Judge made the following determination regarding material falling under Rules 110(B) and 113:

⁶⁸ Prosecution's Disclosure Report, Public with Confidential Annexes A-C, 9 September 2013, Annex B.

⁶⁹ Motion, paras 18, 25, 29(v), 33, 41, 53, 72, referring to batches 90, 103, 184 and 388. The Pre-Trial Judge observes that, subsequent to the filing of the Motion, the Prosecution has also provided disclosure batches 436, 439 and 482 which contain materials from the [Redacted] hard drive.

⁷⁰ Decision on Joint Defence Motion for an Order Regarding Legal Workflow Witness Entities, 16 April 2013.

⁷¹ Disclosure Protocol, version 1.5, 27 February 2012. The Disclosure Protocol was finalised on 27 February 2012, following discussions between the Prosecution and the Defence Office, and consultations with other concerned organs in the Tribunal (the "Disclosure Protocol"). It established *inter alia* that the Prosecution is to disclose information in a methodical way. The Disclosure Protocol is not judicially binding, the Disclosure Protocol is intended to ensure the fair and effective implementation of the disclosure obligations of the Prosecution, the Defence and the Legal Representative of Victims (Decision of 16 April 2013, para. 19).

⁷² Decision of 16 April 2013, para. 20.

the Pre-Trial Judge does not consider that it is the Prosecution's responsibility to create relationships for material that it does not intend to use as evidence in trial. This would burden the Prosecution with this task while the Defence has acknowledged being "fully capable of creating these relationships itself", [...] ⁷³

48. In this instance, the Pre-Trial Judge considers that the same principle applies. On the basis of the Disclosure Report, the Sabra Defence is able to identify those disclosure batches which contain materials from the [Redacted] hard drive. The Defence can thereafter rely upon LWS to identify the corresponding ERNs and categorise the information as it sees fit. The Pre-Trial Judge accordingly denies the Motion to the extent that it requests reconsideration of the 8 November 2012 Decision and seeks an order obliging the Prosecution to categorise materials disclosed pursuant to Rules 110(B) and 113.

49. The Pre-Trial Judge notes, however, that this does not deprive the Prosecution of the obligation to provide materials in a manner that contains all relevant information and is useful, that is logically structured, and that allows for meaningful searches and analyses. With respect to materials disclosed pursuant to Rule 113 in particular, the Pre-Trial Judge recalls that the Disclosure Protocol calls on the Prosecution *inter alia* to indicate whether the information disclosed under Rule 113 may reasonably: (i) suggest the innocence of the accused; (ii) mitigate the guilt of the accused; and/or (iii) affect the credibility of the Prosecutor's evidence. The Disclosure Protocol states furthermore that the Prosecution shall indicate the relevance of the Rule 113 information by listing the theme or subject matter to which the exculpatory information relates or is relevant.

VI. THE TRANSLATION OF MATERIALS MADE AVAILABLE FOR INSPECTION UNDER RULE 110(B)

A. The Sabra Defence's Submissions

50. The Sabra Defence makes submissions in respect of the translation of the disclosed materials. Although the Sabra Defence has taken note of the Pre-Trial Judge's two decisions in point (the decision on languages in the case of *Ayyash et al.* (the "Decision on Languages") ⁷⁴ and the 8 April 2013 Decision), it considers that if such rulings were to apply in the present case, this would severely impair the Defence's ability to prepare effectively. ⁷⁵ Instead, the Sabra Defence requests the Pre-Trial Judge to order the Prosecution to

⁷³ Order on Joint Notice regarding the Legal Workflow System and Witness Entities, 10 June 2013, para. 16.

⁷⁴ Decision on Languages in the Case of *Ayyash et al.*, 16 September 2011.

⁷⁵ Motion, paras 75-80.

systematically submit for translation into English any material disclosed through the LWS under Rule 110(B) as well as Rules 110(A) and 113.⁷⁶

B. The Prosecution's Response

51. With respect to the translation of material disclosed pursuant to Rule 110(B), if the Prosecution has to date provided some assistance to the Defence in the reviewing of some materials, it submits that this does not mean that it is obliged automatically to translate materials made available for inspection. Indeed, the Prosecution recalls that in his 8 April 2013 Decision, the Pre-Trial Judge expressly stated that Rule 110(B) did not impose such an obligation on the Prosecution.⁷⁷

C. Discussion

52. Regarding the translation of material disclosed pursuant to Rule 113, the Pre-Trial Judge recalls that the Prosecution has an obligation to request translation of all material subject to disclosure under Rule 113(A).⁷⁸

53. With respect to the translation of material disclosed pursuant to Rule 110(B), the Pre-Trial Judge recalls his position as elaborated at paragraph 29 of his 8 April 2013 Decision:

[T]he decision on languages rendered on 16 September 2011 makes no reference to Rule 110(B) as the Prosecution is not required to translate the material disclosed pursuant to this rule, unless ordered otherwise by the Pre-Trial Judge or Chamber. [...] Unlike the materials disclosed under Rules 110(A) and 113, those made available for inspection under Rule 110(B) — be it by way of disclosure or other means — shall not be automatically translated. Therefore, the translation issue has no impact on the fairness and expeditiousness of the proceedings.

54. The Decision on Languages was rendered in light of the imperative of determining the language modalities for these proceedings.⁷⁹ Although it was rendered without prejudice to any future order or decision,⁸⁰ its primary purpose was and remains to provide the certainty that the Parties, the Legal Representative of Victims, as well as the Tribunal generally, require in order to prepare for trial effectively. The Pre-Trial Judge will not lightly undermine that certainty.

⁷⁶ *Id.*, para. 81.

⁷⁷ Response, para. 28; 8 April 2013 Decision, para. 29.

⁷⁸ 8 April 2013 Decision, para. 29.; Decision on Languages, para. 56.

⁷⁹ Decision on Languages, paras 8, 13-17.

⁸⁰ *Id.*, para. 8.

55. Rule 110(B) requires the Prosecution to permit the Defence to inspect information *inter alia* that is material to the preparation of the defence, or is intended for use by the Prosecutor as evidence at trial. The rule is silent on whether or not the Prosecution is obliged to provide such information in translated form, and the Pre-Trial Judge has already determined that it shall not be automatically translated. To grant the Sabra Defence's request simply to translate any material disclosed through the LWS under Rule 110(B) would run the risk of overburdening the Tribunal's Language Services Section. In the Pre-Trial Judge's view, it is more appropriate and efficient, notwithstanding the Sabra Defence's concerns,⁸¹ for the Defence itself to identify and prioritise the materials it considers require translation.

56. Consequently, the Pre-Trial Judge denies that aspect of the Motion requesting immediate translation of each document disclosed through the LWS under Rule 110(B).

57. Lastly, with respect to the creation of a relationship in the LWS between the original version of the document and its translation, the Pre-Trial Judge considers that the Sabra Defence's request is redundant. When a search for a document is performed in the LWS using a document's ERN as the basis for the search, the search will reveal the original document and its translations (if any) within the LWS, since original and translated versions bear the same ERN, with the latter modified by a suffix indicating the language of the translation. Subsequent to any unsuccessful search within LWS, the Parties can proceed to request the Registry's Senior Document Management Assistant and Language Services Section for a translation of any particular document that has been disclosed to them. There is therefore no need to grant the Sabra Defence's request for creating a relationship in the LWS between the original version of the document and its translation, even assuming such an order could be implemented in the LWS.

VII. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 110(B) and 113 of the Rules and Article 5(3) of the Practice Direction;

⁸¹ Motion, paras 78-80.

GRANTS the Sabra Defence's request to exceed the permissible page limit and recognises the Motion as validly filed;

DENIES the Motion;

RECALLS that, according to the Disclosure Protocol, the Prosecution shall, when disclosing materials pursuant to Rule 113 to indicate whether the information disclosed may reasonably:

- (i) suggest the innocence of the accused;
- (ii) mitigate the guilt of the accused; and/or
- (iii) affect the credibility of the Prosecutor's evidence; and

to indicate the relevance of the Rule 113 information by listing the theme or subject matter to which the exculpatory information relates or is relevant; and

ORDERS the Parties, should they consider it necessary, to submit any proposed redactions to the instant decision before the Pre-Trial Judge within five working days hereof, failing which it shall be reclassified as public.

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

Leidschendam, 21 October 2013.



Daniel Fransen
Pre-Trial Judge

