

**THE APPEALS CHAMBER**

Case No.: STL-11-01/PT/AC/AR126.5

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

Registrar: Mr Daryl Mundis

Date: 6 November 2013

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ON APPEAL BY COUNSEL FOR MR SABRA AGAINST PRE-TRIAL
JUDGE'S "DECISION ON SABRA'S TENTH AND ELEVENTH MOTIONS FOR
DISCLOSURE"**

Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan
Mr Emile Aoun

Legal Representatives of Victims:
Mr Peter Haynes
Mr Mohammad F. Mattar
Ms Nada Abdelsater-Abusamra

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
Mr John Jones

Head of Defence Office:
Mr François Roux

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse
Mr Yasser Hassan

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaël Mettraux



INTRODUCTION

1. Counsel for Mr Sabra have filed an appeal¹ against a decision of the Pre-Trial Judge denying a request to order the Prosecutor to disclose certain documents.² We find that counsel have not shown error in the Pre-Trial Judge's decision, in particular with regard to the Pre-Trial Judge's interpretation and application of the relevant disclosure rules, and dismiss the Appeal.

BACKGROUND

2. In motions dated 22 May 2013 and 23 May 2013 (the "Motions"), counsel for Mr Sabra requested that the Pre-Trial Judge either order the Prosecutor to disclose six specifically identified documents and certain other material or review such items himself on an *ex parte* basis in order to make a determination as to disclosure.³ Counsel for Mr Sabra sought disclosure of the following items: two internal documents of the United Nations International Independent Investigation Commission ("UNIIC") referenced in a previously disclosed internal UNIIC memorandum ("Item 1" and "Item 2", respectively); various material related to the Prosecutor's attribution of a particular phone number to a non-accused person and subsequently to Mr Sabra ("Item 3"); and, from an undated disclosed internal UNIIC memorandum, an investigator's note ("Item 4"), an internal UNIIC "note to file" ("Item 5"), an internal report by a former UNIIC staff member, currently listed by the Prosecutor as a witness ("Item 6"), and an internal memorandum ("Item 7").⁴ Counsel for Mr Sabra argued that each Item was of an exculpatory nature and thus had to be disclosed pursuant to Rule 113 (A) of the Special Tribunal for Lebanon's ("Tribunal") Rules of Procedure and Evidence ("Rules").⁵ Counsel further asserted that Item 6 was a witness statement and thus subject to disclosure under Rule 110 (A) (ii).⁶

3. In a consolidated response, the Prosecutor submitted that each Item was an "internal document[] [. . .] exempted from the Prosecution's disclosure obligations pursuant to Rule

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.5, Appeal Against the Decision on Sabra's Tenth and Eleventh Motions for Disclosure, with confidential Annex A, 23 September 2013 ("Appeal").

² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Sabra's Tenth and Eleventh Motions for Disclosure, 14 August 2013 ("Impugned Decision").

³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Sabra's Tenth Motion for an Order for Disclosure – *Rule 113 of the Rules of Procedure and Evidence*, Confidential, 22 May 2013 ("Tenth Motion"); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Sabra's Eleventh Motion for an Order for Disclosure – *Rules 110(A)(ii) and 113 of the Rules of Procedure and Evidence*, Confidential, 23 May 2013 ("Eleventh Motion").

⁴ Tenth Motion, paras 3-14, 25-56; Eleventh Motion paras 4-7, 18-40.

⁵ Tenth Motion, paras 25-56; Eleventh Motion, paras 31-37.

⁶ Eleventh Motion, paras 19-30.

111” and, in any event, that the “Sabra Defence [. . .] failed to demonstrate that the items sought fall within the ambit of any of the Rules [on which it relied]”.⁷ The Prosecutor thereby called for the Pre-Trial Judge to deny the disclosure requests.⁸

4. In the Impugned Decision, the Pre-Trial Judge denied the Motions in their entirety.⁹ Consequently, Counsel for Mr Sabra requested certification to appeal the Impugned Decision,¹⁰ which the Prosecutor opposed.¹¹ Subsequently, the Pre-Trial Judge certified the following six potential errors for appeal, articulating certain potential errors differently than had counsel for Mr Sabra in their certification request:¹²

(1) [W]hether the application of Rule 111 requires an initial assessment that the requested material is exculpatory under Rule 113(A); (2) whether the *El Sayed* Jurisprudence is applicable to the present case; (3) if the *El Sayed* Jurisprudence is applicable to the present case, whether the Impugned Decision applied it properly, as explained at paragraph 20 of this decision; (4) whether the Impugned Decision applied the correct interpretation of “statement” pursuant to Rule 110(A)(ii); (5) in determining disclosure obligations pursuant to Rule 110(A)(ii), whether the relevance of a document for the purposes of testing the credibility of a witness is affected by the scope of the witness’ proposed testimony; and (6) whether the reasoning of the Experts Decision specified in paragraph 22 of this decision can be extended to internal chain of custody witnesses, insofar as they are internal Prosecution or former UNIIC staff.¹³

5. Counsel for Mr Sabra then filed the Appeal within the time limit required by the Rules, elaborating six grounds of appeal. These grounds concern the Pre-Trial Judge’s application of Rules 111 and 113 (A), particularly his supposed reliance on certain Appeals Chamber case-law in *El Sayed*, and, with respect to Item 6 only, the Pre-Trial Judge’s

⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Prosecution’s Consolidated Response to the Sabra Defence’s 10th and 11th Motions for Orders for Disclosure, Confidential, 6 June 2013 (“Consolidated Response”), paras 3-4.

⁸ *Id.* at para. 4.

⁹ Impugned Decision, p. 13.

¹⁰ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Request for Certification to Appeal the Decision on Sabra’s Tenth and Eleventh Motions for Disclosure, 21 August 2013 (“Certification Request”).

¹¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Prosecution Response to Sabra Defence Request for Certification to Appeal the Decision on Sabra’s Tenth and Eleventh Motions for Disclosure, 4 September 2013.

¹² See Certification Request, paras 9, 12, 14, 18, 20, 22.

¹³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Sabra Defence Request for Certification to Appeal the Decision on Sabra’s Tenth and Eleventh Motions for Disclosure, 13 September 2013 (“Certification Decision”), para. 23.

interpretation of Rule 110 (A) (ii).¹⁴ The Prosecutor responds that the Appeal should be dismissed.¹⁵

DISCUSSION

I. Scope of the appeal

6. We first observe that an appeal is generally confined to the matters litigated before the first instance Judge or Chamber. The Appeals Chamber will not rule in the abstract on issues that are irrelevant to its decision. Rather, its task is to resolve specific points of contention.¹⁶ We agree with the Prosecutor that some of the issues raised in the Appeal are overly broad and go beyond the scope of the Impugned Decision.¹⁷ To a great extent, this is due to the Pre-Trial Judge's approach in his decision certifying the Impugned Decision for appeal.

7. As we have held in previous decisions, the certification standard of Rule 126 (C) is a strict one and requires 1) a clear and precise identification of the issues in the Impugned Decision that 2) "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings".¹⁸ However, in the Certification Decision, the Pre-Trial Judge appears to have reversed these requirements. He determined first, generally, that

unresolved concerns relating to disclosure would have a significant impact on the conduct of proceedings given that motions for disclosure are recurrent and often voluminous. Matters relating to disclosure impact the Defence's capacity to prepare for trial, especially with respect to the cross-examination of witnesses, thereby affecting the rights of the accused.¹⁹

However, such reasoning could be applied to each and every decision on disclosure. This is not the purpose of certification. Moreover, while the Pre-Trial Judge also held that the "issues specified identified in the [Defence request] affect a broad range and significant number of

¹⁴ Appeal, pp. 2, 4, 6, 8, 10, 12.

¹⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.5, Prosecution Response to Sabra Defence Appeal Against the Decision on Sabra's Tenth and Eleventh Motions for Disclosure, 4 October 2013 ("Response").

¹⁶ Cf. ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10 OA 4, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, para. 49.

¹⁷ See Response, paras 30, 43.

¹⁸ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals Against Trial Chamber's "Decision on Alleged Defects in the Form of the Amended Indictment", 5 August 2013, para. 7 (on the identical requirements of Rule 90 (B) (ii) with reference to the Appeals Chamber's previous decisions).

¹⁹ Certification Decision, para. 17.

documents”, he failed to identify these issues at this stage.²⁰ Only *after* deciding that the issues were significant, and again making a general finding that “these disclosure issues” warrant an immediate resolution by the Appeals Chamber,²¹ did the Pre-Trial Judge precisely state the actual issues that he ultimately certified for appeal.²² As a result, some of these issues are not only overly broad but should not be considered “significant” under the strict standard of Rule 126 (C). For the purposes of this Appeal we will therefore take care to limit our analysis to the questions that in fact arise from the Impugned Decision.

8. We also find that the parts of the Impugned Decision relating to Item 3 are not at issue in this Appeal. We note that Item 3 is among the information for which counsel for Mr Sabra seek an order of the Appeals Chamber.²³ However, this Item was not specifically discussed in either the Certification Request²⁴ or the Certification Decision.²⁵ Nor do counsel argue that any of the alleged errors related to the interaction of Rules 110, 111 and 113 concern Item 3.²⁶ Furthermore, counsel do not challenge the Pre-Trial Judge’s finding that the material sought was already disclosed, was not in the Prosecutor’s possession, or was not exculpatory.²⁷

II. Standard of review on appeal

9. The Prosecutor argues that the “proper standard of review of disclosure decisions is the standard applicable to discretionary decisions.”²⁸ Counsel for Mr Sabra have not made submissions on this issue. We have previously held that decisions on disclosure normally require a broader assessment of the factual circumstances of the case.²⁹ The Pre-Trial Judge’s decision to deny disclosure is therefore a discretionary decision as explained in our case-law.³⁰ We accord deference to this decision if it complies with settled principles.³¹ Such

²⁰ *See ibid.*

²¹ *Id.* at para. 18.

²² *Id.* at paras 19 *et seq.*

²³ *See Appeal*, para. 51; Annex A.

²⁴ *See Certification Request*, para. 3 (making reference to Items 1, 2, 4-7 but not to Item 3).

²⁵ *See Certification Decision*.

²⁶ *See Appeal*, para. 4 (referring to the requested disclosure of seven Items but not specifically elaborating with respect to Item 3).

²⁷ *See Impugned Decision*, paras 38-40.

²⁸ *Response*, para. 4.

²⁹ *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.4, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge’s “Decision on Issues Related to the Inspection Room and Call Data Records”, 2 October 2013 (“CDR Appeal Decision”), para. 6.

³⁰ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.1, *Corrected Version of Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial In Absentia Decision*, 1 November 2013 (“*Trial in Absentia Appeal Decision*”), para. 5 & fn. 17; *see also* ICTY, *Prosecutor v. Šešelj*, IT-03-67-AR73.5, Decision on Vojislav Šešelj’s Interlocutory Appeal Against the Trial Chamber’s Decision on

deference is based on the recognition of the Pre-Trial Judge's organic familiarity with the day-to-day conduct of the proceedings and the practical demands of the case.³² As we have held before, on appellate review, the issue is not whether or not we agree with the Impugned Decision but whether the Pre-Trial Judge is shown to have exercised its discretion incorrectly.³³ Accordingly, we will not interfere with the Impugned Decision unless the Pre-Trial Judge has committed a discernible error. Such error exists where the Pre-Trial Judge i) based his decision on an incorrect interpretation of the governing law; ii) made a patently incorrect finding of fact, or iii) reached a decision so unreasonable as to constitute an abuse of the Pre-Trial Judge's discretion.³⁴

III. Applicable Law

10. At issue here are the interpretation and application of Rules 110, 111, and 113. We reproduce these Rules, in relevant part:

[Rule 110 (A) (ii) states that] the Prosecutor shall make available to the Defence [. . .] (a) the statements of all witnesses whom the Prosecutor intends to call to testify at trial [. . .].

[Rule 110 (B) states that] [t]he 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 [. . .].

[Rule 111 states that] [r]eports, memoranda or other internal documents prepared by a Party [. . .] in connection with the investigation or preparation of a case are not subject

Form of Disclosure, 17 April 2007 (“Šešelj Decision”), para. 14 (“It is well-established in the jurisprudence of the Tribunal that Trial Chambers exercise discretion in many different situations, including ‘when deciding points of practice or procedure.’”)

³¹ Trial *in Absentia* Appeal Decision, para. 5; see also ICTR, *Karemera et al. v. The Prosecutor*, ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, para. 11 (“[D]ecisions on disclosure are discretionary decisions to which the Appeals Chamber must accord deference.”); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.1, Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009, para. 14 (“Decisions by Trial Chambers on disclosure are discretionary decisions to which the Appeals Chamber must accord deference.”); see also ICTR, *Kanyarukiga v. The Prosecutor*, ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010, para. 9; *Šešelj* Decision, para. 14.

³² See, e.g., *Šešelj* Decision, para. 14; ICTR, *Ngirabatware v. The Prosecutor*, ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012, para. 12; cf. ICC, *Prosecutor v. Al Bashir*, ICC-02/05-01/09 OA, Decision on the Applications by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the “Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Al Bashir” and on the Request for an Extension of Time, 23 October 2009, para. 10.

³³ Trial *in Absentia* Appeal Decision, para. 5 (with reference to the case-law of the ICTY, the ICTR and the ICC); see also SCSL, *Prosecutor v. Norman et al.*, SCSL-2004-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, paras 4-7.

³⁴ Trial *in Absentia* Appeal Decision, para. 5.

to disclosure [. . .] under the Rules. For purposes of the Prosecutor, this includes [such documents] prepared by the UNIIC [. . .] in connection with its investigative work.

[Rule 113 (A) states that] 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.

IV. Whether the Pre-Trial Judge erred in denying disclosure

A. Whether the Pre-Trial Judge erred in denying the requests made under Rule 113 (Items 1, 2, 4-7)

11. This appeal primarily concerns the interaction of Rules 111 and 113. The Pre-Trial Judge's denial of the Motions, insomuch as counsel for Mr Sabra sought Items pursuant to Rule 113 (A), was grounded in his interpretation and application of Rules 111 and 113. In the Appeal, counsel for Mr Sabra assert that the Pre-Trial Judge erred in doing so.³⁵ As explained below, we conclude that the Pre-Trial Judge did not err in denying requests made by counsel under Rule 113.

12. In the Impugned Decision, the Pre-Trial Judge held that "Rule 111 grants an exception to disclosure obligations for internal documents prepared by a Party", including those prepared by the UNIIC.³⁶ He rejected counsel for Mr Sabra's contention that Rule 111 did not apply to material falling under Rule 113 (A), finding that such interpretation contradicted the Rules and Appeals Chamber case-law.³⁷ He further recognized that the "general protection of internal work product provided by Rule 111 falls away and is replaced by the Rule 113 disclosure obligations if, and only if, the discussion in question is expressed (i) in a categorical manner; (ii) by a decision maker; (iii) suggesting that it should be properly categorised as admission of *fact*".³⁸ He concluded that, "[t]he Sabra Defence is effectively seeking access to opinions, analyses and discussions conducted and expressed internally by the OTP and the UNIIC. [. . .] [A]s a general principle, the Defence is not entitled to this OTP internal work product [. . .]".³⁹ Consequently, he denied counsel for Mr Sabra's Rule 113 requests.⁴⁰

³⁵ Appeal, pp. 2-8.

³⁶ Impugned Decision, para. 25.

³⁷ *Id.* at para. 32.

³⁸ *Id.* at para. 33 (emphasis in the original).

³⁹ *Id.* at para. 34.

⁴⁰ *Id.* at paras 35-36.

13. In the Appeal, counsel for Mr Sabra allege that the Pre-Trial Judge erred by (1) applying Rule 111 without first assessing whether the requested Items were exculpatory under Rule 113 (A) and (2) wrongly applying Appeals Chamber *El Sayed* case-law.⁴¹ Counsel propose that only upon undertaking this assessment can “the necessary balancing exercise between the object and purposes [of] Rules 113 and 111” be conducted.⁴²

14. Additionally, counsel for Mr Sabra submit that the Pre-Trial Judge erred in applying Appeals Chamber *El Sayed* case-law. They assert that the very different factual circumstances in *El Sayed*, most notably the absence of a criminally accused, render interpretation of Rules 111 and 113 in that context inappropriate here.⁴³ In particular, counsel contend that the “*El Sayed* criteria” restated by the Pre-Trial Judge were “justified solely and exclusively by the fact that the request for access to that information did not come from a defendant before the tribunal”.⁴⁴ Further, counsel argue that even if the Pre-Trial Judge “was correct to apply the *El Sayed* criteria [. . .] as the sole exception to Rule 111 for disclosure requests under Rule 113”, such application required *in camera* assessment by the Pre-Trial Judge.⁴⁵

15. The Prosecutor responds that the Pre-Trial Judge committed no error. He submits that the Pre-Trial Judge was not obligated to conduct a Rule 113 assessment⁴⁶ and that the Impugned Decision was entirely consistent with the Appeals Chamber’s interpretation of Rules 111 and 113 in its *El Sayed* case-law.⁴⁷ He argues that “[t]he Sabra Defence has failed to establish that its own unsubstantiated interpretation of the Rules—whereby Rule 113 essentially trumps Rule 111—should be adopted by the Appeals Chamber”.⁴⁸ Moreover, he claims that “the Sabra Defence misrepresents the nature of the Pre-Trial Judge’s decision.”⁴⁹

16. We first consider whether, when discussing the scope of Rules 111 and 113, the Pre-Trial Judge erred by applying Appeals Chamber *El Sayed* case-law. Contrary to counsel for Mr Sabra’s submission, our interpretation of these Rules was not determined by the “peculiar circumstances of the *El Sayed* case”.⁵⁰ Indeed, in our *El Sayed* decisions we first construed

⁴¹ Appeal, paras 5-27.

⁴² *Id.* at para. 10.

⁴³ *Id.* at paras 14-21.

⁴⁴ *Id.* at para 17.

⁴⁵ *Id.* at paras 22-27.

⁴⁶ Response, paras 10, 15.

⁴⁷ *Id.* at para. 17.

⁴⁸ *Id.* at para. 25.

⁴⁹ *Id.* at para. 26.

⁵⁰ *See* Appeal, para. 19.

Rules 111 and 113, and their relationship to one another, independent of the specific factual situation in those proceedings. We then applied them by analogy to the unique circumstances arising in *El Sayed*. In particular, in our Decision of 19 July 2011, which is referred to by counsel for Mr Sabra, we recognized that

the current proceedings are almost entirely outside the literal scope of our Rules, which are directed to criminal trials. But just as our jurisdiction over the present application is to be inferred from our Statute, so its procedures are guided by analogy from the Rules. [. . .] [T]he Rules give effect to the object and purpose of our Statute and are thus still germane to the exercise of the Tribunal's inherent jurisdiction. We therefore look to the Rules for guidance on how to apply the relevant principles in the matter before us. Indeed, insofar as the Rules protect information against disclosure in criminal proceedings, despite the criminal penalties at stake for the defendant, they *a fortiori* protect that information in civil proceedings where the stakes are almost inevitably lower.⁵¹

In so reasoning, we did not conclude that the “inevitably lower” stakes of civil proceedings called for a “very narrow approach to the relationship between Rules 113(A) and 111”, as counsel for Mr Sabra argue.⁵² Rather, after deciding that the Rules provided “guidance” in *El Sayed*, we determined that, because the stakes were “inevitably lower”, surely our Rules regarding protection of certain material against disclosure to a criminally accused also protected information against disclosure to a civil litigant.⁵³ We then interpreted Rules 111 and 113. Counsel for Mr Sabra appear to confuse interpretation and application, which are dealt with separately in our Decision of 19 July 2011 and in subsequent decisions.⁵⁴ It is evident that our interpretation of the Rules has not been impacted by the civil/administrative nature⁵⁵ of the *El Sayed* proceedings. We thus find that it was perfectly right for the Pre-Trial Judge, in considering Rules 111 and 113, to apply relevant Appeals Chamber *El Sayed* case-law. We now address whether the Pre-Trial Judge correctly applied the law.

17. Rule 113 (A) requires the Prosecutor to disclose to the Defence “any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate

⁵¹ STL, *In the matter of El Sayed*, CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 (“*El Sayed* Decision of 19 July 2011”), paras 19, 30; *see also* STL, *In the matter of El Sayed*, CH/AC/2012/02, Decision on Partial Appeal by Mr El Sayed Against Pre-Trial Judges's Decision of 8 October 2012, 23 November 2012, para. 8 (“We also clarified [in the *El Sayed* Decision of 19 July 2011] that although not directly applicable to Mr El Sayed's case, we are guided in this regard by our Rules of Procedure and Evidence, including the provisions on disclosure.”).

⁵² *See* Appeal, para. 17.

⁵³ *See El Sayed* Decision of 19 July 2011, para. 30.

⁵⁴ *See, e.g.*, STL, *In the matter of El Sayed*, CH/AC/2013/01, Public Redacted Version of Decision on Appeal by the Prosecutor against Pre-Trial Judge's Decision of 11 January 2013, 28 March 2013 (“*El Sayed* Decision of 28 March 2013”).

⁵⁵ *See El Sayed* Decision of 19 July 2011, para. 28.

the guilt of the accused or affect the credibility of the Prosecutor's evidence". We recall, however, that "Rule 111 grants an exception from the general disclosure obligation under Rule 113".⁵⁶ Rule 111 exempts from disclosure "two categories of documents: (i) internal documents prepared by a Party, its assistants or representatives, including reports and memoranda, and (ii) internal documents of the UNIIC, its assistants or representatives including reports and memoranda as well".⁵⁷ We have held that "[t]he major focus of Rule 111 material is on *opinion*. Rule 113, by contrast, is concerned essentially with *fact*. It is exculpatory fact that forms the essential policy of Rule 113. There is therefore in general a complementari[t]y between the two Rules".⁵⁸

18. We have also affirmed a narrow exception to Rule 111—described by counsel for Mr Sabra as the "*El Sayed* criteria".⁵⁹ Material protected by Rule 111 is "lifted into the Rule 113 category and must be disclosed unless any of Rules 116 to 118 applies" if:

in the course of discourse of persons whose conduct is attributable to a Party in terms of Rule 111 there is (i) unambiguous acceptance; (ii) by a decision maker; (iii) which is fairly to be characterised as a decision as to relevant guilt or innocence.⁶⁰

19. In the Impugned Decision, the Pre-Trial Judge did not first consider whether the requested Items fell under Rule 113 (A). Counsel for Mr Sabra argue that this was an error. However, we stress once again that Rule 111 is a general exception to Rule 113.⁶¹ Determining whether or not material is protected by Rule 111 generally does not require consideration of Rule 113. In particular, we agree with the Pre-Trial Judge's reasoning that counsel for Mr Sabra's "interpretation of the law would effectively reverse the principle established by the Rules and clarified by the Appeals Chamber, namely that 'Rule 111 grants an exception from the general disclosure obligation under Rule 113'".⁶² The Pre-Trial Judge also correctly noted that Rule 111's protection only "falls away and is replaced by the Rule 113 disclosure obligations if, and only if" the narrow exception recognized by the Appeals Chamber is demonstrated.⁶³

20. We note that counsel for Mr Sabra did not assert before the Pre-Trial Judge that any of the sought Items was not an internal document under Rule 111. Rather, they submitted that

⁵⁶ *El Sayed* Decision of 28 March 2013, para. 25.

⁵⁷ *El Sayed* Decision of 19 July 2011, para. 77.

⁵⁸ *Id.* at paras 100-101.

⁵⁹ Appeal, para. 17.

⁶⁰ *El Sayed* Decision of 19 July 2011, para. 105.

⁶¹ See *El Sayed* Decision of 28 March 2013, para. 25; see also *El Sayed* Decision of 19 July 2011, paras 99-105.

⁶² See Impugned Decision, para. 32.

⁶³ See *id.* at para. 33.

“the exception provided under Rule 111 is not applicable to material falling under Rule 113(A)” and therefore would be an improper basis for refusing disclosure.⁶⁴ Nor do they argue against the internal status of the documents on appeal. Counsel instead submit that the Pre-Trial Judge had to conduct a “balancing exercise” between Rules 111 and 113.⁶⁵ In essence, counsel argue for the Appeals Chamber to reverse our interpretation of Rules 111 and 113 provided in *El Sayed*. However, they have not presented cogent reasons why we should depart from our holding in that matter.⁶⁶

21. Furthermore, counsel have not argued that any of the requested Items contains information falling under the narrow exception to Rule 111. There is also no other indication that this is the case. As the exception to Rule 111 was not argued, the Pre-Trial Judge was entitled to deny disclosure based solely on Rule 111. We therefore find that the Pre-Trial Judge did not err in rejecting the Motions insofar as they sought disclosure pursuant to Rule 113.

B. Whether the Pre-Trial Judge erred in denying the Rule 110 requests (Item 6)

22. Counsel for Mr Sabra submit three related grounds of appeal arising from the Pre-Trial Judge’s denial of their request for Item 6 pursuant to Rules 110 (A) (ii) and (B).⁶⁷ It is not disputed that Item 6 is an internal report authored by a UNHCR staff member who is now listed as one of the witnesses the Prosecutor intends to call for trial.⁶⁸ Essentially, at issue here is whether Item 6 must be disclosed as a “witness statement” under Rule 110 (A) (ii) because its author is on the Prosecutor’s list of witnesses or under Rule 110 (B) as being “material to the preparation of the defence”, or, alternatively, whether it is a document protected against disclosure under Rule 111. As explained below, we conclude that the Pre-Trial Judge did not err in finding that Item 6 fell under Rule 111 and denying counsel’s request under Rules 110 (A) (ii) and (B).

1. Rule 110 (A) (ii)

23. In the Impugned Decision, the Pre-Trial Judge noted that, “Rule 110(A)(ii) concerns witness statements, which are different from Rule 111 material”.⁶⁹ He concluded that “it

⁶⁴ Tenth Motion, para. 20; Eleventh Motion, para. 16.

⁶⁵ Appeal, para. 10.

⁶⁶ *Cf. El Sayed* Decision of 28 March 2013, para. 27.

⁶⁷ Appeal, paras 28-49.

⁶⁸ Eleventh Motion, paras 5-6, 19-30; Consolidated Response, paras 57-61, 66.

⁶⁹ Impugned Decision, para. 41.

would be too liberal an interpretation of Rule 110(A)(ii) to hold that ‘any memorandum or report [a witness] prepared needs to be disclosed under [this Rule]’.”⁷⁰ He further reasoned that, “even when the broad definition of ‘witness statement’ adopted by the Appeals Chamber is considered, this only includes the sections within an internal document which consist of ‘statements from witnesses recorded in direct or indirect speech’, and not any additional comment contained therein”.⁷¹ He then observed that “[w]ith respect to Item 6, the Sabra Defence gives no indication that it contains personal statements by the witness in question”.⁷² On this basis, he denied counsel for Mr Sabra’s request for disclosure of Item 6 under Rule 110 (A) (ii).

24. In the Appeal, counsel for Mr Sabra contend that the Pre-Trial Judge erred in reasoning that Item 6 did not fall within the definition of “statement” under Rule 110 (A) (ii), and by not reviewing Item 6 *in camera* to verify its status.⁷³ Counsel submit two definitions of “witness statement” and argue that Item 6 is a witness statement by either definition.⁷⁴ Counsel assert that the Pre-Trial Judge failed to apply either definition to Item 6, instead focusing wrongly on “elements of a witness statement contained within an internal document”.⁷⁵ The Prosecutor responds that Item 6 is an “internal work product under Rule 111” and submits that the Pre-Trial Judge rightly determined that Item 6 did not lose Rule 111 protection just “because the Prosecution includes the author [. . .] on the witness list”.⁷⁶ The Prosecutor states plainly, “Rule 111 is not subject to Rule 110(A)(ii).”⁷⁷

25. To determine whether the Pre-Trial Judge erred in denying disclosure of Item 6, we must consider the relationship between Rules 110 (A) (ii) and 111. Rule 110 (A) (ii), in relevant part, requires the Prosecutor to provide the Defence with “the statements of all witnesses whom the Prosecutor intends to call to testify at trial”. Rule 111, on the other hand, exempts from disclosure all “reports, memoranda or other internal documents” prepared by the UNIIC in connection with its investigative work. Given its clear wording, the exemption of Rule 111 applies to *all* disclosure that is ordinarily required between the parties, including disclosure under Rule 110 (A) (ii). Therefore, as a matter of principle, an internal document

⁷⁰ *Id.* at para. 42.

⁷¹ *Id.* at para. 41 (citing the *El Sayed* Decision of 19 July 2011).

⁷² *Id.* at para. 42.

⁷³ Appeal, paras 28-34.

⁷⁴ *Id.* at para 30.

⁷⁵ *Id.* at para. 33.

⁷⁶ Response, paras 34, 36-37.

⁷⁷ *Id.* at para. 38.

falling under Rule 111, and which was prepared by an individual who later becomes a Prosecution witness, is not subject to disclosure.

26. In this regard, we recall our previous holding that merely labelling a document as “internal” is not sufficient for it to fall under Rule 111.⁷⁸ For example, an investigator’s note containing the record of an interview with a third person may not be internal after all: “[T]he words of a witness are not the Party’s work product; *they are the product of the witness.*”⁷⁹

27. However, in their Appeal, counsel for Mr Sabra have not disputed that Item 6 is a document internal to the UNIIC. Instead, counsel assert that because Item 6 was prepared by a UNIIC staff member who is now listed as a Prosecution witness, it has become a witness statement pursuant to Rule 110 (A) (ii) and must, on that basis, be disclosed.⁸⁰ We disagree. An internal document, created for a party’s internal use, does not assume a different, non-internal, use merely because its author has become a witness. No argument was made before the Pre-Trial Judge that Item 6, when created, was not an internal document created for the internal use of the UNIIC. Nor was it argued that Item 6 contained material outside the scope of Rule 111. We therefore find that the Pre-Trial Judge did not err in relying on Rule 111 to deny counsel for Mr Sabra’s request for Item 6 under Rule 110 (A) (ii).

2. Rule 110 (B)

28. The Pre-Trial Judge also rejected the request to disclose Item 6 under Rule 110 (B).⁸¹ He found that counsel had not shown that the Item 6 was *prima facie* material to the preparation of the defence. He added that his reasoning in a previous decision concerning experts—that ““internal Prosecution work product relating to the final report of internal Prosecution staff [does not lose] the protection conferred by Rule 111 merely by the person being included in the [. . .] witness list””—extended to the witness in question here.⁸²

29. On appeal, counsel challenge this finding and its rationale. They mainly argue that the Pre-Trial Judge erroneously provided for a blanket exemption of internal documents created by the internal Prosecution witnesses.⁸³ The Prosecutor contends that the Pre-Trial Judge’s

⁷⁸ See *El Sayed* Decision of 19 July 2011, para. 73.

⁷⁹ *Id.* at para. 109 (emphasis in the original).

⁸⁰ Appeal, paras. 28-34.

⁸¹ Impugned Decision, para. 43.

⁸² *Ibid.* (citing to STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Sabra’s Seventh Motion for Disclosure – Experts, 24 May 2013).

⁸³ Appeal, paras 45-49.

reasoning in his decision relating to experts was not based on anything particular to experts but on “the internal work product nature” of the material and therefore the Pre-Trial Judge was correct to apply it to Item 6.⁸⁴

30. We recall that when requesting disclosure under Rule 110 (B), the Defence must show that what is requested is “material” to the preparation of the defence in the sense that it is “*relevant* to the preparation of the defence case”.⁸⁵ However, just like Rule 110 (A) (ii), Rule 110 (B) is subject to the exception of Rule 111.⁸⁶ If the sought material constitutes internal work product of a party, it is exempt from disclosure. Determinative in this appeal is the fact that Item 6 is an internal document.

31. Consequently, we agree with the Prosecutor that the precise status of the *witness* whose work is requested is irrelevant to the determination here of whether material should be disclosed under Rule 110 (B) or not. Indeed, the Pre-Trial Judge drew no such distinction. Rather, he correctly relied on the status of the *document* as an internal work product of the UNIHC when denying disclosure.

⁸⁴ Response, paras 47-49.

⁸⁵ CDR Appeal Decision, para. 21.

⁸⁶ *See above*, para 25.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

DISMISSES the Appeal.

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

Filed 6 November 2013

Leidschendam, the Netherlands



Judge David Baragwanath

Presiding

