

**THE TRIAL CHAMBER**

Case No.: STL-11-01/PT/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge

Registrar: Mr. Daryl Mundis

Date: 9 December 2013

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON SABRA MOTION TO LIFT REDACTIONS AND
DISCLOSURE OF UNITED NATIONS FACT-FINDING MISSION
DOCUMENTS**

Office of the Prosecutor:
Mr. Norman Farrell

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

Victims' Legal Representative:
Mr. Peter Haynes

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

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. This decision concerns the obligations of a Party to disclose information to an opposing Party and the role of the Trial Chamber in this process.
2. Counsel for the Accused Mr. Assad Hassan Sabra sought one of two alternative orders from the Pre-Trial Judge.¹ First, they asked him to order the Prosecution to lift redactions that it had made to three witness statements that had been disclosed to the Defence and then to re-disclose them without the redactions. They also sought to compel the Prosecution to disclose four documents from United Nations Secretary-General's Fact-Finding Mission to Lebanon, established on 25 February 2005 on the request of the Security Council, to inquire into the assassination of the former Lebanese Prime Minister, Rafik Hariri.²
3. As an alternative to the first order, they asked the Pre-Trial Judge to compel the Prosecution to provide the legal and factual basis for the redactions and the non-disclosure of the fact-finding mission documents, and asked him to review all of these documents to ensure that the Prosecution's actions were legally and factually justified, and to determine whether any counter-balancing measures should be ordered.
4. The Prosecution opposed the motion and a request for leave to reply and a response were also filed.³ On 25 October 2013, the Pre-Trial Judge submitted his report under Rule 95 of the Rules of Procedure and Evidence seizing the Trial Chamber with the case file, including this motion.⁴

SUBMISSIONS

5. Counsel for Mr. Sabra complain that they do not know why three documents were redacted and submit that the Prosecution is obliged to inform them of the legal basis for not disclosing documents. Anything less, they argue, would prejudice their ability to prepare for trial and allow the Prosecution to hide the existence of relevant documents. The Pre-Trial Judge (and now, the

¹ STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, Case No. STL-11-01/PT/PTJ, Request to Lift Redactions and for Disclosure of Fact-Finding Mission Materials, Confidential, 11 October 2013.

² See, S/2005/203, Letter dated 24 March 2005 from the Secretary-General to the President of the Security Council, 25 March 2005, which includes the 'Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri'. Its report preceded the UN International Independent Investigation Commission, established in April 2005.

³ STL-11-01/PT/TC, Prosecution Response to the Sabra Defence Motion to Lift Redactions and for Disclosure of Fact-Finding Mission Material, Confidential, 28 October 2013. STL-11-01/PT/TC, Sabra Defence Request for Leave to Reply to "Prosecution Response to the Sabra Defence Motion to Lift Redactions and for Disclosure of Fact-Finding Mission Material", Confidential, 31 October 2013; Prosecution Response to the Sabra Defence Request for Leave to Reply to the Prosecution Response to the Sabra Defence Disclosure Motion of 11 October 2013, Confidential, 5 November 2013.

⁴ STL-11-01/PT/PTJ, Rapport du Juge de la mise en état établi conformément à l'article 95, paragraphe A) du Règlement de procédure et de preuve, confidentiel, 25 octobre 2013.

Trial Chamber) must police the Prosecution's compliance with its disclosure obligations. The three documents and any other document created by the fact-finding mission as yet undisclosed to the Defence, are relevant and necessary to the Defence, thus the burden should shift to the Prosecution to justify their non-disclosure.⁵

6. Procedurally, the Prosecution submitted that the motion should be summarily dismissed for failing to state the legal basis for the relief sought. Substantively, it stated that the material sought is not subject to disclosure, and it has no obligation to explain why. The Prosecution further referred to the presumption that it is acting in good faith in fulfilling its disclosure obligations, and that the Rules do not require policing of disclosure.⁶

DISCUSSION

7. The primary issue for decision is whether the Trial Chamber should review material ordinarily not subject to disclosure by a Party because it falls under Rule 111 of the Tribunal's Rules of Procedure and Evidence. Section 7 of part 5 of the Rules regulates the obligations of the Parties to disclose information and the role of the Chambers in this process. Rule 110 regulates certain disclosure by the Prosecution, including providing information 'material to the preparation of the defence'. Rule 112 regulates Defence disclosure. Rule 113 compels the Prosecution to disclose exculpatory material 'which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence'.
8. Conversely, the Rules provide for situations where a Party either does not have to disclose information or where it may seek a judicial order relieving it of its normal disclosure obligations. Under Rules 116 and 117, in circumstances where the Prosecution ordinarily must disclose information under Rules 110 or 113, it *may* apply *ex parte* to a Chamber sitting in camera, asking to be relieved of this obligation in specified situations.⁷ The Prosecution must provide the Chambers with the information that it seeks to withhold from the Defence and any 'counterbalancing measures' it proposes. The Rules thus provide that a Chamber judicially determines whether a document may be disclosed with the redactions proposed by the

⁵ Sabra Motion, paras 9-11, 16, 19, 23, 29, 31-32.

⁶ Prosecution Response, paras 1-4, 8-11, 18-19, 21, 23, 28.

⁷ Under Rule 116 these are; potential prejudice to ongoing or future investigations, a potential grave risk to the security of a witness or his or her family, or where it may be contrary to the public interest or the rights of third parties. Under Rule 117 it is in circumstances that may affect the security interests of a State or international entity.

Prosecution pursuant to Rules 116 or 117.⁸ The Pre-Trial Judge has authorised some Prosecution applications made under these Rules.

9. But the Rules do not expressly provide for or require judicial intervention in relation to redactions or non-disclosure pursuant to Rule 111 which regulates the non-disclosure of a Party's internal work product. Entitled, 'Disclosure of reports, memoranda or other internal documents', the Rule provides,

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

10. The Rules do not oblige a Party to inform the other Parties that it is not disclosing a document, or information in a document, that falls under Rule 111 – nor even that the information actually exists. Despite the Rules not expressly giving a Chamber a statutory role in overseeing – that is, effectively policing – the disclosure or otherwise of a Party's internal work product, counsel for Mr. Sabra ask the Trial Chamber to review material potentially falling within that Rule which is either in the Prosecution's possession, or has been redacted from information disclosed to them.
11. In *El Sayed*, in 2011, the Special Tribunal's Appeals Chamber extensively examined the scope and meaning of Rule 111 in the context of UNIIC documents and investigator's notes, including those that may be contained in witness statements.⁹
12. The Appeals Chamber noted that the Prosecutor bears the primary responsibility for properly categorising documents, but emphasised that ensuring compliance with the Rules – including categorising and disclosing documents – is a judicial function. Here, that is the Trial Chamber's. Rule 111, it noted, employed what it termed 'general and undetermined concepts' such as 'reports, memoranda or other internal documents prepared by a Party' and that in these circumstances the judges must themselves establish the criteria for their definition and make an

⁸ As under Rule 118, relating to information provided to the Prosecution on a confidential basis, and which affects the security interests of a State or international entity or an agent thereof, cannot be disclosed without the consent of the information provider. This too is subject to Rule 113.

⁹In *the Matter of El Sayed*, STL-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.

evaluation. In so doing, it held, ‘The content of the documents in question, their function and purpose, as well as their source of author are all relevant to the evaluation’.¹⁰

13. Moreover, it is not enough to accept that a document is an investigator’s note simply because its title says so. Whether it is in fact internal work product – and thus subject to Rule 111 – ‘hinges on an assessment not just of the document’s title, but also of its actual content, function, purpose and source’. This does not require a Chamber to review each document that a Party has withheld under the Rule. Depending on the circumstances, as an ‘alternative to unacceptable rubber-stamping’ the Chamber should establish a suitable sampling process, to examine, at least specimens of the materials.¹¹
14. The Appeals Chamber highlighted that Rule 111 ‘has no application to statements of witnesses, which are not the Party’s work product; *they are the product of the person interviewed*’.¹² An ‘internal document’ is ‘an in-house product of a Party created for its own internal use’.¹³ Moreover, ‘statements from witnesses recorded in direct or indirect speech, including identification of relevant persons, contained within documents labelled “internal memoranda” and “investigator’s notes” do not constitute “internal documents”’. The words of the witness are not the Party’s work product but are the product of the witness – nonetheless it may be appropriate to redact additional comment by investigators, or other work product, contained in the same document.¹⁴ Additionally, notes of meetings could be subject to disclosure.¹⁵
15. Two factual issues confront the Trial Chamber here. First, a Prosecution witness statement disclosed, but with portions redacted – ostensibly under Rule 111. Second, undisclosed UN fact-finding mission documents held by the Prosecution, also said to be within that Rule. The Trial Chamber has not seen the redacted material because the Prosecution did not provide it.
16. Taking guidance from the *El Sayed* decision, the Trial Chamber holds that it *may* review *ex parte* and in camera the content of documents that a Party categorises as falling under Rule 111 and hence being immune from disclosure. As the Appeals Chamber noted, the judges have a duty to ensure compliance with the Rules – including those relating to disclosure. The Trial Chamber may therefore satisfy itself that anything contained in documents subject to disclosure, such as

¹⁰ *El Sayed* decision, paras 71-72.

¹¹ *El Sayed* decision, paras 73-74.

¹² *El Sayed* decision, para. 78 (Appeals Chamber’s italics).

¹³ *El Sayed* decision, para. 91.

¹⁴ *El Sayed* decision, para. 109.

¹⁵ *El Sayed* decision, para. 86.

witness statements – but categorised by the Party as falling under Rule 111 – is truly internal work product. In other words, if a Party attempts to disclose material in a redacted form – such as with passages, or even pages blacked out – the Trial Chamber *may* order that Party to show it the unredacted document. This applies to any Party to the proceedings.

First witness statement – a meeting between Prosecution and Lebanese officials

17. The first witness statement is in the form of a Prosecution memorandum regarding a meeting between Prosecution officials and Lebanese military investigators. Before disclosing it to the Defence the Prosecution redacted some information from it – including apparently some opinions expressed by the witness and the names of other meeting participants. The Prosecution confirmed in an *ex parte* and confidential annex to its response to this motion that the undisclosed material falls under Rule 111 – but without revealing to the Trial Chamber what it is. The Trial Chamber sees no reason why this particular piece of information must remain confidential to the public and *ex parte* to the Defence.
18. Although the Prosecution has no legal obligation to do so and the Trial Chamber will therefore not make the order sought by Defence counsel, the Trial Chamber encourages the Prosecution to inform the Defence of the legal basis for any redaction to disclosed documents (namely, the Rule) and where possible – and if only in a general sense – why. That is, the factual basis for doing so.
19. The Trial Chamber, in applying the principles identified in the *El Sayed* decision believes that the interests of justice require that it satisfy itself of the nature of the material redacted from this document. In the Appeals Chamber's words, whether the redacted material is in fact internal work product – and thus subject to Rule 111 – 'hinges on an assessment not just of the document's title, but also of its actual content, function, purpose and source'. The Trial Chamber will therefore order the Prosecution to provide it with an unredacted copy of the document.

Second witness statement

20. The second witness statement is that of a proposed Prosecution witness. The Pre-Trial Judge, on 25 July 2013, authorised the Prosecution to redact portions of the statement before disclosing it to

the Defence.¹⁶ The Trial Chamber has now (but *proprio motu*) examined the original statement, as the Pre-Trial Judge did before permitting the redaction.

21. The authorised redactions – although not specified as such in the Pre-Trial Judge’s decision – would fall within (ii) in Rule 116 (A), namely ‘may cause a grave risk to the security of a witness of a witness or his family’. The redacted information contains personal information relating to the witness and his perceptions of events. The only redactions to the statement are those authorised by the Pre-Trial Judge. No evidence connected with the amended indictment has been redacted from the statement. The Trial Chamber will not order, as counsel for Mr. Sabra request, the Prosecution to disclose to the Defence the unredacted version of a statement disclosed after a previous judicial order for redaction.
22. Lastly, counsel for Mr. Sabra submit that they were unaware of these facts and complain that the Prosecution ‘refused to simply inform’ them that the redactions were those authorised by the Pre-Trial Judge. The Trial Chamber is of the view that, regardless of whether the Prosecution has a clear-cut legal obligation under the Rules to provide this precise information, doing so would certainly assist the fair and expeditious conduct of the proceedings.¹⁷ The Prosecution is therefore asked to cooperate in this respect.

Third statement – compilation of photo-boards – exhibit 55

23. The third witness statement was the subject of the Trial Chamber’s decision of 19 November 2013,¹⁸ where it was called ‘exhibit 55’. That statement – of a Prosecution official – described how two photo-boards, used with witnesses for identification purposes during the investigation, were compiled. Exhibit 55 – as disclosed to the Defence – contains redactions authorised by the Trial Chamber pursuant to Rule 116, and additional redactions that the Prosecution has made pursuant to Rule 111.
24. The Prosecution had proposed under Rule 116 – and the Trial Chamber authorised – redacting the names of those whose faces appeared on the photo-boards. The photo-boards shown to witnesses contained numbers rather than names. Those were the only redactions authorised by the Trial Chamber to that statement. The statement, however, also contains blacked out

¹⁶ STL-11-01/PT/PTJ, Decision on Prosecution’s Applications to Authorise Necessary Redactions Dated 8 And 18 March 2013, 25 July 2013.

¹⁷ For example, the Trial Chamber would not be devoting time to deciding motions such as this.

¹⁸ STL-11-01/PT/TC, Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, 19 November 2013.

information on seven of its twelve pages, four in which all of the information has been blacked out. The Trial Chamber did not see this information but the Prosecution submits that it fell under Rule 111; in other words it must be some form of ‘internal work product’.

25. A witness statement should contain the words of the witness, not the internal work product of the Party preparing the statement. Therefore, the Trial Chamber – consistent with the Appeals Chamber’s interpretation of a Chamber’s obligation to satisfy itself of the nature of redacted material described as ‘internal work product’ which is contained in a disclosed witness statement, and having been asked by the opposing Party to satisfy itself of the nature of the material that was redacted – will order the Prosecution to provide it with an unredacted copy of the document. This will enable the Trial Chamber to determine whether anything more of the document should be disclosed to the Defence.

Internal work product in witness statements

26. The Trial Chamber reiterates that it does not understand why a Party would put internal work product into a witness statement that could be tendered into evidence in court proceedings. Invariably that work product will be redacted, causing unnecessary speculation as to why. Witness statements, as a matter of good litigation practice, should be taken in a manner facilitating their reception into evidence at a later point. The Trial Chamber repeats its previous statements that this practice of including internal work product in witness statements is to be discouraged.¹⁹

Undisclosed material from the 2005 fact-finding mission

27. Defence counsel discovered that the Prosecution did not provide them with four documents produced by the UN fact-finding mission, and want to know why. Since the Defence counsel filed the motion, the Prosecution has provided two of the documents to them, but maintains that the other two fall under Rule 111.
28. The Trial Chamber has neither seen these documents nor knows what they are. The Prosecution stated in an *ex parte* and confidential annex to its response to this motion that the undisclosed material falls under Rule 111, but did not contain any exculpatory material under Rule 113. As with the first witness statement, the Trial Chamber sees no reason why this particular piece of

¹⁹ STL-11-01/PT/TC, Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, 19 November 2013, para. 9; Transcript of Pre-Trial Conference, 2 December 2013, pp. 27-28.

information – namely, that the material falls within Rule 111 – must remain confidential to the public and *ex parte* to the Defence.

29. The Trial Chamber does not propose to direct any general order to the Prosecution to provide it with documents withheld from disclosure under Rule 111 for *general* inspection. Making such an order would be unjustified and its outcome unworkable. But here, the Prosecution initially decided not to disclose the documents. It was only after the Defence discerned their existence, unsuccessfully sought their disclosure and then filed this motion, that the Prosecution re-reviewed them and, on 28 October 2013, decided to disclose two of the four documents that it had previously decided not to disclose. The Trial Chamber believes this gives it a suitable basis to review such documents for itself. It will thus follow the guidance of the *El Sayed* decision that, depending on the circumstances, and as an ‘alternative to unacceptable rubber-stamping’ the Chamber should establish a suitable sampling process, to examine, at least specimens of the materials.
30. The Trial Chamber will therefore order the Prosecution to provide it with one of the contested identified documents to satisfy itself that the documents are properly categorised as internal work product. This does not mean the Trial Chamber is adopting a policy of scrutinising fifty per cent of documents generally contested by any Party under Rule 111, but simply that in the circumstances this would represent a reasonable sample.

Legal basis for non-disclosure being communicated to the Defence

31. The Prosecution has no obligation under the Rules to inform Defence counsel of the legal basis for redactions included in documents that are subject to disclosure. The Trial Chamber, however, strongly encourages the Prosecution to inform the Defence of the legal basis for any redaction (namely, the Rule) and where possible – and if only in a general sense – why. In other words, if it can, the factual basis for so doing. Such a cooperative approach would assist the fair and expeditious conduct of the proceedings.

REQUEST FOR LEAVE TO REPLY

32. A reply must generally be limited to circumstances where new issues arise out of a response.²⁰ Counsel for Mr. Sabra submitted that three discrete issues were raised by the Prosecution

²⁰ STL-11-01/PT/AC/AR126.1, Order on Defence Request for Leave to File a Reply, 8 October 2012, para. 3.

response meriting leave to reply.²¹ The Prosecution opposed this, stating that none of the three identified issues were new.²² The Trial Chamber considers that the three issues were sufficiently articulated in the motion and the response and, consequently, that a reply is unnecessary.

CONCLUSION

33. The Trial Chamber will partially grant the relief sought by counsel for Mr. Sabra as it will order the Prosecution to provide it with the unredacted versions of the first and third witness statements, and will then review these documents to decide whether to order the Prosecution to disclose them in another form. This could include, for example, disclosure with fewer redactions. The basis for ordering disclosure of this additional information to the Defence would be strictly pursuant to Rules 110 or 113.
34. The Trial Chamber will not grant the second and alternative form of relief sought, namely, to order the Prosecution to provide the precise legal and factual basis for any redactions. However, a cooperative effort by the Prosecution to inform the Defence of the legal basis for redactions would contribute to the fair and expeditious conduct of the proceedings. Accordingly, the Trial Chamber encourages the Prosecution to do this.
35. The Trial Chamber will not revisit the redactions authorised by the Pre-Trial Judge on 25 July 2013 to the second witness statement, and therefore dismisses that ground for relief.
36. Finally, the Trial Chamber will partially grant the relief sought in relation to the two UN fact-finding mission documents by ordering the Prosecution to provide the Trial Chamber with a sample for review. A suitable sample in the circumstances is one of the documents.

CONFIDENTIALITY

37. The filings in this matter are so far confidential. The Parties are ordered to file public redacted versions as soon as practicable.

²¹ Sabra Request for Leave to Reply, para. 2. The three issues are: i. whether there was an allegation of bad faith, and whether this amounts to the appropriate test; ii. whether the motion is moot in respect of the third document; and, iii. the extent to which the Defence seeks disclosure of Fact-Finding Mission material.

²² Prosecution Response to Leave Request, para. 1.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

ORDERS the Prosecution to provide the following documents to the Trial Chamber to allow it to determine whether the redacted material is properly categorised as internal work product under Rule 111 and is not subject to disclosure;

- (1) the unredacted first and third witness statements; and
- (2) one of the non-disclosed documents of the UN fact-finding documents;

DISMISSES the motion in regard to the second witness statement, and

ORDERS the Parties to file public redacted versions of their filings as soon as practicable.

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

9 December 2013

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

