



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: **25 February 2014**

Original language: **English**

Classification: **Public**

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

**PUBLIC REDACTED VERSION OF “CORRECTED VERSION -
DECISION ON THE SABRA DEFENCE’S TWELFTH MOTION FOR AN ORDER
FOR DISCLOSURE OF INFORMATION RELATING TO [REDACTED]” DATED
25 OCTOBER 2013**

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I. INTRODUCTION

1. In this decision, the Pre-Trial Judge grants in part the motion by Counsel for Mr. Assad Hassan Sabra (the “Sabra Defence”) seeking disclosure of information relating to [REDACTED].

II. PROCEDURAL BACKGROUND

2. On 28 August 2013, the Sabra Defence filed its twelfth motion for an order for Disclosure, seeking information relating to [REDACTED] (the “Motion”).¹

3. On 11 September 2013, the Prosecution filed its response to the Motion (the “Response”).²

III. SUBMISSIONS

The Motion

4. Pursuant to Rule 110(B) and Rule 113 of the Rules of Procedure and Evidence (the “Rules”), the Sabra Defence seeks disclosure of evidence that the phone number attributed to Mr. Sabra in the Third Amended Indictment of 21 June 2013,³ 3419018, was actually attributed to [REDACTED].⁴ The Sabra Defence’s Requests at paragraph 40 identifies four different categories of disclosure: (i) information relied upon by the [REDACTED] that lead to its eventual attribution of phone number 3419018 to Mr. Sabra; (ii) information relating to the [REDACTED]; (iii) in relation to the attribution of the number to [REDACTED], generally any and all information/material collected, produced, obtained, or identified by [REDACTED]; and (iv) where any of the requested information is not in possession of the Prosecution, information on whether, in the knowledge or belief of the Prosecution, it is in the possession of a third party.⁵

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-PT-PTJ, Sabra’s Twelfth Motion for an Order for Disclosure - Information Relating to [REDACTED], 28 August 2013, Confidential, With Confidential Annexes A-H (“Motion”). All further references to filings and decisions relate to this case number unless otherwise stated.

² Prosecution Response to the Sabra Defence’s Twelfth Motion for an Order for Disclosure- Information Purportedly Relating to [REDACTED], 11 September 2013, Confidential (“Response”).

³ Prosecution Further Request for Leave to Amend the Indictment, Confidential, Annex A, Amended Indictment, 21 June 2013.

⁴ Motion, paras 2, 40.

⁵ *Id.* at para. 40.

5. First, the Sabra Defence argues that the requested information is all potentially exculpatory evidence, as it may undermine the reliability of the Prosecution's evidence, on the basis of which it alleges that the phone number is attributable to Mr. Sabra.⁶ It submits that, as a result of the [REDACTED], it was put on notice that, [REDACTED], the attribution of 3419018 was revised from [REDACTED] to Assad Hassan Sabra at a certain time.⁷ Furthermore, this evidence may affect the credibility of the Prosecution's evidence, as the number was initially attributed to [REDACTED] and then later reattributed to Mr. Sabra by the Prosecution.⁸

6. The Sabra Defence also argues that, if the evidence is not disclosable under Rule 113(A), it is still material to the preparation of the Defence and thus disclosable under 110(B). It is material as it "would allow the Defence to better understand and analyse the process of attribution of phone numbers conducted [REDACTED] on which the entire Prosecution case stands".⁹

7. Regarding the request for information on the [REDACTED],¹⁰ the Sabra Defence submits that the notes of [REDACTED] was "relatively convinced" that the number was attributable to [REDACTED],¹¹ and that these investigative conclusions [REDACTED] "strike at the very heart of the Prosecution case against Mr. Sabra".¹² It argues that, in order to properly investigate and make use of the information, it requires further information such as [REDACTED] and received the information.¹³ This information would allow the Sabra Defence to conduct further investigations or make requests for disclosure and/or cooperation.¹⁴ Furthermore, the Sabra Defence submits that it is highly likely that further undisclosed information in relation to the [REDACTED] is in the Prosecution's possession.¹⁵

8. Finally, the Sabra Defence argues that the Prosecution has a responsibility to provide information on whether or not a third party is in possession of exculpatory material. Under Rule 113(A), the Prosecution has a duty to disclose exculpatory material that is within its

⁶ *Id.* at paras 20, 23.

⁷ *Id.* at paras 3, 19.

⁸ *Id.* at para. 21.

⁹ *Id.* at para. 23.

¹⁰ *Id.* at paras 24-32, 40(ii).

¹¹ *Id.* at para. 28.

¹² *Id.* at para. 30.

¹³ *Id.* at para. 25.

¹⁴ *Ibid.*

¹⁵ *Id.* at para 31.

“actual knowledge”.¹⁶ This includes whether or not the exculpatory material is in the possession of a third party. As such, the failure to request such information from third parties is a violation of Rule 113(A).¹⁷

The Response

9. The Prosecution responds that the Pre-Trial Judge should reject the Motion as it contains 11 categories of materials that are either “previously litigated, previously disclosed, not subject to disclosure, or not in the possession of the Prosecutor”.¹⁸

10. The Prosecution avers that certain categories of material requested in the Motion have already been litigated, determined and rejected by the Pre-Trial Judge in his 14 August 2013 Decision.¹⁹ As such, the Sabra Defence is seeking to re-litigate these issues.

11. The Prosecution also submits that it has reviewed the material in its possession, and all material subject to disclosure in this matter was disclosed to the Defence on 25 March 2013, and on 3 and 11 June 2013.²⁰ It submits that any requests in the Motion that go beyond what was already disclosed are actually internal work product not subject to disclosure under Rule 111.²¹ Furthermore, the Sabra Defence fails to show that further material exists in the Prosecution’s possession.²²

12. The Prosecution argues that there is no positive obligation for it to investigate or gather materials for the Defence under the Rules; therefore, the Sara Defence may not seek further material and information “not in the possession of the Prosecution” under Rule 113.²³

13. Finally, the Prosecution argues that the Motion seeks to litigate before the Pre-Trial Judge matters that were on-going *inter partes*,²⁴ and that the Rules do not require the Prosecution to explain why materials are not subject to disclosure.²⁵

¹⁶ *Id.* at para. 33.

¹⁷ *Id.* at para. 35.

¹⁸ Prosecution Response, para. 1.

¹⁹ *Id.* at paras 5-12, *citing* Decision on Sabra’s Tenth and Eleventh Motions for Disclosure, 14 August 2013 (“14 August 2013 Decision”).

²⁰ Prosecution Response, paras 2, 11, 19, 21-25, *citing* Disclosure Batch 387, 495 and 505.

²¹ Prosecution Response, para. 12.

²² *Id.* at paras 26-27.

²³ *Id.* at paras 3, 18, 33-38, *citing* Motion, para. 40(iv).

²⁴ *Id.* at paras 28-29.

²⁵ *Id.* at paras 30-32.

IV. DISCUSSION

A. Rule 113

14. The Pre-Trial Judge recalls that Rule 113 requires the Prosecutor to disclose material 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 Prosecution's evidence, subject to the provisions of Rules 116, 117 and 118.²⁶ In its requests for disclosure, the Defence bears the burden to prove, *prima facie*, that the information "is within the Prosecutor's possession or actual knowledge, beyond mere speculation, and that it is exculpatory in nature".²⁷

15. The Pre-Trial Judge first considers the Prosecution's allegation that certain categories of materials requested by the Sabra Defence have already been litigated. The Prosecution avers that the Sabra Defence's disclosure requests in paragraphs 40(i) and 40(iii) (d) of its Motion are identical to its previous disclosure requests that were determined by the Pre Trial Judge in the 14 August 2013 Decision.²⁸

16. The Pre-Trial Judge acknowledges that the same request was made under Rule 113(A) by the Sabra Defence and subsequently adjudicated on in the 14 August 2013 Decision. In that decision, he found that the Defence had not shown *prima facie* that requested material — now before him in paragraph 40 (i) of the Motion — was in the Prosecution's possession, and that the requested material — now before him in paragraph 40(iii)(d) of the Motion — was considered moot as the materials had already been disclosed.²⁹

17. Nevertheless, the prior adjudication of a disclosure request cannot later be used as a shield for the Prosecution in respect to its disclosure obligations under Rule 113. This is because Rule 113 entails an on-going obligation, and the protection of the interests that the Rule safeguards is imperative to the fundamental rights of the accused to a fair trial. Therefore, a request based on the same category of information previously requested, yet with new elements, details or clarifications should be treated as a *de novo* request, and the

²⁶ Rule 113 STL RPE. *See also* STL, *In the matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 ("19 July 2011 AC Decision"), para. 97.

²⁷ Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012 ("8 November 2012 Decision"), para. 28.

²⁸ Prosecution Response, paras 5-12. *See* Motion, para. 40.

²⁹ 14 August 2013 Decision, paras 38-40. Section 40(i) corresponds to Sabra Request adjudicated on in para. 40; Section 40(iii)d refers to the Sabra Request adjudicated on in para. 38.

materials should be diligently disclosed if the materials are in the Prosecution's possession or in its actual knowledge.³⁰ Naturally, the Parties must be reasonable and prudent in not submitting each other to repeated requests for the same information. Yet, should a Defence team provide additional information and therefore discharge its burden of showing *prima facie* that the requested materials are in the Prosecution's possession or actual knowledge, the Prosecution would then have a duty to produce those materials.

1. Paragraph 40 (i), (ii) and (iii) of the Motion

18. With respect to material, *inter alia* collected or produced by UNIIC in relation to the attribution of the phone number to [REDACTED]³¹ and for information pertaining to the [REDACTED],³² the Pre-Trial judge recalls that the Prosecution has argued that the Sabra Defence request has not met its burden of proof of showing that it is *prima facie* within its possession.³³

19. However, the Pre-Trial Judge considers that the Defence has indeed met the requirement of showing *prima facie* that the information is within the Prosecution's possession or actual knowledge, beyond mere speculation, by providing evidence of other disclosures, together with material tending to show that the Prosecution has information relating to [REDACTED] regarding the attribution of the phone number. Furthermore, the requested materials are *prima facie* exculpatory in nature, as the evidence relating to the attribution of the phone number 3419018 to [REDACTED] does indeed relate to the case against Mr. Sabra in a manner that thus could be considered exculpatory.³⁴ In this case, the Pre-Trial Judge considers that the Motion is based on more than simply mere speculation.

20. However, the Pre-Trial Judge notes that the Prosecution also submits that if the material does exist, it would be covered by the Rule 111 exception to disclosure obligations and, in any event, any disclosable Rule 113 information would already have been disclosed.³⁵ The Prosecution further avers that Rule 111 protections extend to "materials related to the unitary investigation conducted by the UNIIC and the ISF".³⁶

³⁰ Rule 113 STL RPE.

³¹ Motion, para. 40 (ii).

³² *Id.* at paras 24-32, 40.

³³ Prosecution Response, paras 21, 26.

³⁴ *E.g.*, Motion, para. 18.

³⁵ Prosecution Response, paras 19, 23-27.

³⁶ *Id.* at para. 26.

21. Rule 111 provides an exception to disclosure obligations for reports, memoranda or other internal documents prepared by a Party and, for the Prosecution, internal documents prepared *inter alia* by the [REDACTED] in connection with its investigative work.³⁷

22. The Appeals Chamber has clarified that Rule 111 grants an exception from the general disclosure obligation under Rule 113.³⁸ The Appeals Chamber concluded that “under the terms of [Rule 111] ‘correspondence exchanged between the UNIIC and the Lebanese Prosecutor-General constitutes such “internal” documents, to the extent the correspondence pertains to the coordination of a unitary criminal investigation.’”³⁹ However, the Appeals Chamber’s has also confirmed that Rule 111 is “not without its limits”,⁴⁰ and that the “Rule 111 shield disappears and is replaced by the Rule 113 obligation” when specific requirements are met.⁴¹ Those requirements are that the material sought (1) must be expressed in such a categorical manner; (2) by a decision maker; (3) in such circumstances as to suggest that what occurs “in-house” is properly to be categorised as admission of exculpatory fact.⁴² The Appeals Chamber further clarified that “not every ‘admission of fact’ will make the shield of Rule 111 disappear” pursuant to Rule 113, since Rule 113 is concerned with exculpatory *facts*, and exceptions to Rule 111 “must be narrow in nature”.⁴³

23. The Pre-Trial Judge considers that to the extent that the Prosecution has indicated that it does not possess some of the relevant materials, it therefore appears as though the Prosecution has already responded to the previous Sabra Defence disclosure requests. However, where the Prosecution suggests that it may indeed have in its possession material sought by the Defence, but is excused from its obligations to disclose them pursuant to Rule 111, the position needs to be clarified.

³⁷ Decision on the Defence Motion for an Order to Compel Disclosure of an Unredacted Document, 17 October 2013, para. 13; *citing* Rule 111 STL RPE; *See also* 19 July 2011 AC Decision, paras 76-77.

³⁸ STL, *In the matter of El Sayed*, CH/AC/2013/01, Decision on Appeal by the Prosecutor Against Pre-Trial Judge’s Decision of 11 January 2013, Confidential and *ex parte*, 28 March 2013, with a public redacted version of the same date (“28 March 2013 AC Decision”), para. 25. *See also* 14 August 2013 Decision, paras 26-27. The 14 August 2013 Decision is currently on appeal with respect to a number of matters for determination that could impact on the instant decision, namely: (1) whether the application of Rule 111 requires an initial assessment that the requested material is exculpatory under Rule 113(A); and (2) whether the jurisprudence in the *El Sayed* matter is applicable to the present case; *see* Decision on Sabra Defence Request for Certification to Appeal the Decision on Sabra’s Tenth and Eleventh Disclosure Motions, 13 September 2013, para. 23.

³⁹ 28 March 2013 AC Decision, para. 25 *citing* 19 July 2011 AC Decision, para. 92.

⁴⁰ 28 March 2013 AC Decision, para. 26.

⁴¹ *Ibid.*, *citing* 19 July 2011 AC Decision, para. 102.

⁴² 19 July 2011 AC Decision, paras 101-102.

⁴³ 28 March 2013 AC Decision, para. 28.

24. As the Pre-Trial Judge has held in another decision, “should the Prosecution conclude that the three requirements for lifting Rule 111 exception are met in respect of the materials sought, it is bound to recognise the resulting inapplicability of Rule 111, and to disclose such material accordingly pursuant to Rule 113”.⁴⁴ Therefore, it is for the Prosecution to make the relevant inquiry under the Appeals Chamber jurisprudence of the exception to Rule 111. To the extent that the Prosecution has failed to substantiate this inquiry in response to the Sabra Defence Request, it must do so. Conversely, where it has conducted this inquiry and established the applicability of Rule 111, such requests for disclosure may not be met.

2. Paragraph 40 (iv) of the Motion

25. The Sabra Defence requests the disclosure of information regarding whether the Prosecution has actual knowledge that exculpatory materials are in the possession of a third party.⁴⁵ The Prosecution argues that this category of requested materials is not in its possession, and further, that Rule 113 does not impose a duty on the Prosecution to undertake investigations and gather materials for the Defence.⁴⁶

26. The Pre-Trial Judge recalls that it has already been established that, where materials sought by the Defence are not in the Prosecution’s possession (or control⁴⁷ or actual knowledge⁴⁸), the Prosecution cannot be compelled to provide them.⁴⁹ He has previously held that “the Prosecution cannot disclose that which it does not have”.⁵⁰ The Pre-Trial Judge has also acknowledged that “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”.⁵¹

⁴⁴ Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer, confidential, 25 October 2013 (the “25 October 2013 Decision”), para. 35.

⁴⁵ Motion, paras 33-35, 40(iv).

⁴⁶ Prosecution Response, paras 33-38.

⁴⁷ Rule 110(B), STL RPE.

⁴⁸ Rule 113, STL RPE.

⁴⁹ 25 October 2013 Decision, para. 26.

⁵⁰ 8 November 2012 Decision, para. 31, citing ITCR, *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA, 8 June 2000, para. 8; ITCR, *Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-T, Decision on Kajelijeli’s Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001, para. 14.

⁵¹ 8 November 2012 Decision, para. 31, citing ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on the Accused’s Motion for Order to Obtain Witness Statements and Testimony from National Courts, 12 January 2011, para. 11; ICTY, *Prosecutor v. Jovica Stanišić, Franko Simatović*, IT-03-69-PT, Decision on Defence Motion to Receive Hard Copies of Rule 66 Material, 11 March 2005. The terms “custody or control”,

27. However, the Prosecution is “an organ of international criminal justice charged with the duty to assist in discovering the truth”⁵² and in doing so must “respect the fundamental rights of suspects and the accused”.⁵³ To this end, the Prosecution is bound to “exercise his or her duties to disclose both inculpatory and, in particular, exculpatory evidence in good faith”.⁵⁴

28. The Pre-Trial Judge considers that, while the Rules and jurisprudence of the Tribunal do not require the Prosecution to undertake investigations on behalf of the Defence, the Prosecution is nevertheless bound by its “unique statutory role”⁵⁵ to exercise diligence in providing all possible information that may be exculpatory to the Accused. It is insufficient for the Prosecution to respond to this request by saying that it does not possess the information requested. This ignores whether the Prosecution knows that a third party has such information. The Prosecution is also required to provide exculpatory information within its actual knowledge as part of its obligations under Rule 113. The relevant inquiry thus becomes whether or not the Prosecution has knowledge of this information being in the hands of third parties, not whether the Prosecution itself is in possession of the information.

29. It should be further noted that the Sabra Defence is not requesting the Prosecution to undertake investigations on its behalf; rather it is requesting the identity of the putative third parties, and information as to the communications between the third parties and the Prosecution regarding the transfer of the materials requested in paragraph 40 (ii) and (iii) of its Motion.⁵⁶ However, to the extent that the Sabra Defence asserts that it is a violation of Rule 113(A) for the Prosecution to fail to request exculpatory information from third parties,⁵⁷ it is applying an incorrect interpretation of the Rule. It is only if the Prosecution has actual knowledge of the existence of exculpatory materials in the possession a third party that it must then disclose that knowledge to the Defence.

30. The Prosecution has argued that it has conducted searches and disclosed all information *in its possession* subject to disclosure obligations, including Rule 113

“possession” and “known” are interpreted as synonymous: ICTY, *Prosecutor v. Thomas Blaškić*, IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, paras 47 and 50.

⁵² 8 November 2012 Decision, para. 32.

⁵³ *Id.* at para. 32, citing Rule 55(C) STL RPE.

⁵⁴ 8 November 2012 Decision, para. 32.

⁵⁵ *Id.* at para. 32.

⁵⁶ Motion, para. 40.

⁵⁷ *Id.* at paras 17, 35.

disclosures.⁵⁸ However it appears that the Prosecution has misapplied Rule 113 by not considering the second part of the Rule, “or actual knowledge”. The Prosecution is therefore ordered to re-examine its evidentiary holdings, taking into consideration the request of the Sabra Defence in paragraph 40(iv) as well as paragraph 40 (i)-(iii).

B. Rule 110(B)

31. Finally, the Sabra Defence submits that the documents requested are also disclosable under Rule 110(B).⁵⁹ Rule 110(B) has been considered by the Pre-Trial Judge in previous decisions in detail.⁶⁰ Regarding Rule 110(B) requests, the Defence must demonstrate that the documents are: (a) identified with sufficient specificity; (b) *prima facie* material to the preparation of the defence; and (c) *prima facie* in the Prosecutor’s custody or control.⁶¹

32. The Pre-Trial Judge considers that the category of documents described under paragraph 40 (i) and (iv) of the Motion are potentially material to the preparation of the defence, but that they are not identified with sufficient specificity. Requests for “underlying material”⁶² and “any information as to other persons”⁶³ are too broad to be qualified as specific.

33. Regarding the requests of paragraph 40 (ii) and (iii), the Pre-Trial Judge considers that they are *prima facie* material to the preparation of the defence and identified with sufficient specificity. However, he is not convinced that the Defence has met its burden regarding establishing that the documents are *prima facie* in the Prosecutor’s custody or control. Indeed the Prosecution continually submits that they are not in its possession.⁶⁴

34. For these reasons, the Pre-Trial Judge dismisses the Motion with respect to its request for relief under Rule 110(B).

⁵⁸ *E.g.*, Prosecution Response, paras 2, 21-27, 33-38.

⁵⁹ Motion, paras 2, 23.

⁶⁰ 14 August 2013 Decision, para. 31; Decision on Sabra’s Ninth Motion for Disclosure – Request for Assistance, 6 June 2013, para. 10, *citing*: 8 November 2012 Decision; Decision on the Sabra Defence’s Fifth Request of the Fourth Motion for Disclosure, Confidential, 21 December 2012, with a public redacted version filed on 28 May 2013; Decision on Sabra’s Seventh Motion for Disclosure, 24 May 2013; [REDACTED].

⁶¹ *Ibid.*

⁶² Motion, para. 40(i).

⁶³ Motion, para. 40(iv).

⁶⁴ *See supra* footnotes 19, 59.

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rule 110(B), Rule 111 and Rule 113 of the Rules,

GRANTS in part the Motion,

ORDERS the Prosecution to revisit the Sabra Defence request in paragraph 40 (i), (ii), (iii) and (iv) and disclose any Rule 113 materials in its possession or actual knowledge, unless covered by an exception to the Rule, and

DENIES the Motion's request for disclosure under Rule 110(B).

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

Leidschendam, 25 February 2014.



Daniel Fransen
Pre-Trial Judge

