SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

BEFORE THE APPEALS CHAMBER

Case No.:	**CH/AC/2011/01**
Before:	**Judge Antonio Cassese, Presiding** **Judge Ralph Riachy** **Judge Sir David Baragwanath, Judge Rapporteur** **Judge Afif Chamsedinne** **Judge Kjell Erik Björnberg**
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DECISION ON PARTIAL APPEAL BY MR. EL SAYED OF PRE-TRIAL JUDGE'S DECISION OF 12 MAY 2011

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المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

HEADNOTE[1]

The Appellant was detained by the Lebanese authorities for more than three and a half years as part of the investigation into the 2005 assassination of former Prime Minister Rafiq Hariri. Following the establishment of the Special Tribunal for Lebanon, and on the application of the Tribunal's Prosecutor, the Appellant was released without charge by order of the Pre-Trial Judge. He applied to the Tribunal for disclosure of documents in its possession to enable him to bring proceedings before national courts against persons allegedly responsible for false allegations against him. The Appeals Chamber previously upheld a decision of the Pre-Trial Judge that the Appellant has standing to make the application and that the Tribunal has jurisdiction to entertain it. It confirmed the existence of a generally expressed right to such disclosure and remanded the case for further consideration by the Pre-Trial Judge. The Appellant now challenges on appeal the decision of the Pre-Trial Judge that three categories of documents were exempt from disclosure, namely (1) correspondence between the Lebanese authorities and the United Nations International Independent Investigation Commission ("UNIIIC" or "Commission"); (2) internal memoranda of the UNIIIC; and (3) the notes of investigators.

The issues on appeal are:

> *(1) What is the nature of the right of access claimed by Mr. El Sayed to some or all of the investigatory materials in the three categories?*
>
> *(2) Did the Pre-Trial Judge err in categorically excluding these three sets of documents from disclosure to Mr. El Sayed?*
>
> *(3) What relief if any should be ordered?*

(1) The Appeals Chamber holds that, under international law, the Applicant's claim to the documents is supported by (i) the right of access to justice coupled with (ii) a right of access to information held by a governing authority. However, the streams of authority tending to support a claim to disclosure do not without more give rise to an actionable right to information. The claim must first be evaluated against competing interests.

In this case such competing interests include the principle of good administration of justice, in particular the need to safeguard the secrecy of an investigation that is still continuing. These competing interests may also include the right to privacy and confidentiality and the need for husbanding finite resources in circumstances where no more is known of the facts than has been disclosed by the Prosecutor. The application should be granted only if necessary to avoid a real risk that, if it is declined, the Applicant will suffer an injustice that clearly outweighs the opposing interests.

The fact of long detention, together with the acknowledgement made by the Prosecutor at the end of the period, demonstrate a real possibility that access to information is required in the present case to

[1] This Headnote does not constitute part of the decision of the Appeals Chamber. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.

avoid an injustice, and that the interests in allowing the claim outweigh the costs of that course. But it is permitted only to the extent required to enable the Appellant to pursue remedies before other courts, as he asserted he intended to do in his application to the Tribunal.

(2) Although the present application falls outside the literal scope of the Tribunal's Rules of Procedure and Evidence, those Rules are still relevant and guide the Chamber's analysis. Under those Rules, limitations on the right of disclosure include Rule 111, which grants exception from disclosure for:

> *[r]eports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case [...]. For purposes of the Prosecutor, this includes reports, memoranda, or other internal documents prepared by the UNIIIC or its assistants or representatives in connection with its investigative work.*

The Rule is confined to what has been created by the Party, its agents and the UNIIIC and its agents acting as such. It has no application to statements of witnesses, which are not the Party's work product, but the product of the person interviewed.

The Appeals Chamber agrees with the Pre-Trial Judge that categories (1), (2) and (3) generally fall within the scope of Rule 111. But the proper employment of those exclusions depends on the correct classification of individual documents. Proper categorisation depends not on a document's title, but on its content, function, purpose and source.

(3) Having sampled in camera *examples of the challenged documents, the Appeals Chamber notes possible errors in categorisation. It therefore refers the documents classified under categories 1, 2 and 3 back to the Pre-Trial Judge with directions to ensure their appropriate and expeditious categorisation in the light of its decision.*

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LIST OF ABBREVIATIONS

ECHR	European Court of Human Rights
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UNIIIC	United Nations International Independent Investigation Commission

INTRODUCTION

1. The ultimate issue on appeal is whether, in considering the appellant's application for information, the Pre-Trial Judge should have considered individual documents rather than simply endorsing three challenged categories employed by the Prosecutor. We conclude that the approach taken so far is inadequate in the circumstances and therefore allow the appeal. An essential preliminary issue is whether the Special Tribunal for Lebanon ("STL" or "Tribunal") should grant an application for access to documents in its possession, so they may be used by the applicant for the purpose of intended proceedings. If so, on what basis and to what extent? Our answer is "yes", within the constraints outlined in this decision.

2. On 30 August 2005, Jamil El Sayed ("Mr. El Sayed" or "Appellant") was detained in connection with the attack of 14 February 2004 that killed Prime Minister Rafiq Hariri and twenty-two others (the "Hariri case").[2] On 3 September 2005, a Lebanese Investigating Judge issued an arrest warrant for Mr. El Sayed, continuing his detention.[3] That detention did not end until 29 April 2009, nineteen days after the STL assumed authority over him and three others held by the Lebanese authorities in connection with the Hariri case.[4] He was never charged with a crime.

3. On 17 March 2010, Mr. El Sayed applied to the STL for access to investigative materials related to his detention and release. He asserts he will use this material to pursue remedies in national courts.[5] This Chamber on 10 November 2010 confirmed the preliminary decision of the Pre-Trial Judge that the STL has jurisdiction to consider Mr. El Sayed's application and that Mr. El Sayed has

[2] *In re: Application of El Sayed*, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010 ("El Sayed Decision of 10 November 2010"), para. 4.

[3] *In re. Application of El Sayed*, Submissions on the Jurisdiction of the Pre-Trial Judge to Rule on the Application Dated 17 March 2010 and Whether General Jamil El Sayed Has Standing Before the Special Tribunal for Lebanon, CH/PTJ/2010/01, 12 May 2010 ("Applicant's Submission of 12 May 2010"), paras 10-11.

[4] El Sayed Decision of 10 November 2010, *supra* note 2, at paras 5, 7.

[5] *Id.* at para. 8. The application is "to obtain the release to General Jamil El Sayed personally and directly of all the evidence related to the crimes committed against him and held exclusively by the Special Tribunal for Lebanon (STL) in order that he shall have an effective and efficacious remedy, by becoming a civil party [*partie civile*] against the perpetrators before the various national courts that are competent in the matter." *In re: Application of El Sayed*, Public redacted version of Memo number 112 Application: Request for release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention, 17 March 2010 ("Application of El Sayed"), at 1 (unofficial translation). The term "*partie civile*" is not confined to civil litigation, but refers to a particular procedure in civil law countries (including under Lebanese law) where a private person is involved in a criminal trial in order to obtain reparations for a crime committed against him.

standing to bring his application before this Tribunal. It remanded the matter to the Pre-Trial Judge to consider Mr. El Sayed's request on the merits.[6]

4. The Pre-Trial Judge ordered the Prosecutor to disclose to Mr. El Sayed some hundreds of documents.[7] But he determined that under Rule 111 of the STL's Rules of Procedure and Evidence ("Rules" or "RPE") three categories of documents were exempt from disclosure: correspondence between the Lebanese authorities and the United Nations International Independent Investigation Commission ("UNIIIC" or "Commission"); internal memoranda of the UNIIIC; and the notes of investigators.[8] That Rule is part of a group of rules concerning disclosure. It is reproduced at paragraph 76 below.

5. Mr. El Sayed appealed against these three categorical exclusions.[9] He asks this Chamber to declare that he has a right to documents within these three categories. Although he does not challenge the Pre-Trial Judge's determination that his right to documents is not absolute, he urges that any restrictions must be applied on a document-by-document basis.[10]

6. The Prosecutor did not cross-appeal against the order for partial disclosure. But in order to determine the appeal we must first identify the nature of the right claimed by the Appellant.

7. The issues on appeal are thus:

(1) What is the nature of the right of access claimed by Mr. El Sayed to some or all of the investigatory materials in the three categories?

(2) Did the Pre-Trial Judge err in categorically excluding these three sets of documents from disclosure to Mr. El Sayed?

(3) What relief if any should be ordered?

[6] El Sayed Decision of 10 November 2010, *supra* note 2, at disposition.

[7] *In re: Application of El Sayed*, Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, CH/PTJ/2011/08, 12 May 2011 ("El Sayed Decision of 12 May 2011"), disposition.

[8] *Id.* at paras 33, 36.

[9] *In re: Application of El Sayed*, Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011, CH/PTJ/2010/01, 20 May 2011 ("Partial Appeal of El Sayed").

[10] *Id.* at 8; see also *id.* at paras 9, 16.

PROCEDURAL HISTORY

I. The Detention, Release, and Subsequent Application of Mr. El Sayed

8. According to Mr. El Sayed, his detention on 29 August 2005 was at the request of the UNIIIC.[11] That Commission had been established by the Security Council to assist the Lebanese authorities in their investigation of the Hariri assassination.[12] After four days, on 3 September 2005, Mr. El Sayed was brought before a Lebanese Investigating Judge, who issued an arrest warrant against him.[13] Mr. El Sayed claims, however, that the Investigating Judge did not undertake his own investigation but continued the detention on the basis of the UNIIIC's request.[14] Meanwhile, the UNIIIC allegedly informed Mr. El Sayed on 21 September 2005 that it had concluded its investigation involving him.[15] Mr. El Sayed submitted multiple requests for release to the Lebanese authorities, the UNIIIC, and the UN Security Council over the ensuing months, but his detention continued for more than three and a half years.[16]

9. The STL commenced its operations on 1 March 2009. On 27 March 2009, by order of the Pre-Trial Judge, the STL requested Lebanon to defer to it within fourteen days the investigation of the Hariri case.[17] From 10 April 2009 the STL had legal authority over those detained in Lebanon in connection with the Hariri case, including Mr. El Sayed.[18]

10. On 27 April 2009, the Prosecutor informed the Pre-Trial Judge that he had reviewed all material then available to him and had concluded there was insufficient evidence to support an indictment of Mr. El Sayed and the three other detainees. He requested that the Pre-Trial Judge order their immediate release. On the order of the Pre-Trial Judge, the Lebanese authorities released Mr. El Sayed on 29 April 2009.[19]

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[11] Applicant's Submission of 12 May 2010, *supra* note 3, at para. 9.
[12] S/RES/1595 (2005), at para. 1.
[13] Applicant's Submission of 12 May 2010, *supra* note 3, at paras 10-11.
[14] *Id.* at paras 12-13.
[15] *Id.* at para. 14.
[16] *Id.* at para. 16.
[17] *In re: Application of El Sayed*, Order on Conditions of Detention, CH/PRES/2009/01/rev, 21 April 2009, at para. 3.
[18] El Sayed Decision of 10 November 2010, *supra* note 2, at para. 5.
[19] *Id.* at paras 6-7.

11. Mr. El Sayed applied to the President of the STL for access to investigative materials related to his detention and release.[20] The President assigned the matter to the Pre-Trial Judge.[21] The Pre-Trial Judge received written and oral submissions from Mr. El Sayed and from the Prosecutor, who opposed the disclosure of investigatory materials.[22]

12. On 17 September 2010, the Pre-Trial Judge ruled that the STL had jurisdiction to consider the application and that Mr. El Sayed had standing to bring the application before the Tribunal.[23] The Pre-Trial Judge also held there to be a right of an accused to access documents in his criminal file, and he concluded this right applied to Mr. El Sayed, despite his release from detention and the absence of any formal charge against him, because the allegations of criminal conduct, even though never formalised, had significant repercussions upon him.[24] The Pre-Trial Judge noted, however, that such right of access to one's criminal file is not absolute and could be limited by well-founded concerns that disclosure could compromise continuing investigations, the safety of third parties (particularly witnesses), and national and international security.[25]

II. The Appeal on Jurisdiction and Standing

13. The Prosecutor appealed against the Pre-Trial Judge's preliminary decision.[26] After considering written submissions from the Prosecutor and Mr. El Sayed, this Chamber held that the STL does have jurisdiction over Mr. El Sayed's request and that Mr. El Sayed has standing to bring his application before the Tribunal.[27] We accepted that in general terms there is a right of access to one's criminal file, which in a particular case may be to all, part, or none of it.[28] But we did not decide specifically what the nature and extent of such right might be in respect of information held

[20] See Application of El Sayed, *supra* note 5.

[21] See *In re: Application of El Sayed*, Order Assigning Matter to Pre-Trial Judge, CH/PRES/2010/01, 15 April 2010.

[22] El Sayed Decision of 10 November 2010, *supra* note 2, at paras 8-13.

[23] *In re. Application of El Sayed*, Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr El Sayed Has Standing Before the Tribunal, CH/PTJ/2010/005, 17 September 2010 ("El Sayed Decision of 17 September 2010"), paras 36, 42.

[24] *Id.* at paras 43-52.

[25] *Id.* at paras 53-54.

[26] See *In re. Application of El Sayed*, Appeal of the "Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr El Sayed Has Standing Before the Tribunal" and Urgent Request for Suspensive Effect, OTP/AC/2010/01, 28 September 2010.

[27] El Sayed Decision of 10 November 2010, *supra* note 2, at paras 19-33, 57, & 65.

[28] *Id.* at para. 64.

by the STL's Prosecutor. We remanded the matter to the Pre-Trial Judge to consider the application on its merits.[29]

14. The Pre-Trial Judge received submissions from Mr. El Sayed and the Prosecutor, and he held a public hearing at which Mr. El Sayed, the Prosecutor, and the Head of the Defence Office were heard.[30] The Pre-Trial Judge also received *ex parte* from the Prosecutor all the materials identified by the Prosecutor as related to the detention of Mr. El Sayed in connection with the Hariri case. In addition, the Prosecutor submitted *ex parte* an inventory of that material, identifying which materials he believed could be fully disclosed to Mr. El Sayed and, for the rest, his grounds for withholding all or part of each document from Mr. El Sayed.[31] The Pre-Trial Judge also held a closed and *ex parte* hearing with the Prosecutor to seek clarifications regarding some of these documents.[32]

III. The Pre-Trial Judge's Decision of 12 May 2011

15. On 12 May 2011, the Pre-Trial Judge issued a decision ordering the Prosecutor to disclose some but not all the documents originally identified by the Prosecutor as related to the investigation and detention of Mr. El Sayed.[33] The Judge accepted the Prosecutor's classification of these documents into seven categories: (1) correspondence between the UNIIIC and the Lebanese authorities; (2) internal memoranda; (3) investigators' notes; (4) witness statements and transcripts of witness and suspect interviews; (5) documents originating from Mr. El Sayed or his counsel; (6) Mr. El Sayed's own statements and transcripts; and (7) other documents.[34]

16. The Judge held that documents within categories (4), (5), and (6) should generally be disclosed to Mr. El Sayed.[35] He also held that some documents in category (7) should be disclosed.[36] As for categories (1), (2), and (3), the Judge concluded that those documents were inherently confidential, were exempt from disclosure under Rule 111, and also did not form part of Mr. El Sayed's criminal file. He therefore held that the Prosecutor was not obligated to disclose the

[29] *Id.* at disposition.
[30] El Sayed Decision of 12 May 2011, *supra* note 7, at para. 6.
[31] *Id.* at paras 7-12.
[32] See STL Media Advisory, 19 April 2011, http://www.stl-tsl.org/sid/261.
[33] See El Sayed Decision of 12 May 2011, *supra* note 7, at disposition.
[34] *Id.* at para. 29.
[35] *Id.* at paras 40, 47.
[36] *Id.* at para. 54.

documents in categories (1), (2), and (3). The Pre-Trial Judge noted, however, that the Prosecutor was willing to disclose voluntarily a few documents within these categories.[37]

17. Although the Prosecutor has made further submissions to the Pre-Trial Judge regarding documents within categories (4), (5), (6) and (7), and although the Pre-Trial Judge continues to oversee the disclosure of documents in those categories, it is unnecessary for us to relate the details of those continuing proceedings as they do not fall within the scope of the present and narrowly framed "Partial appeal" against the Pre-Trial Judge's decision of 12 May 2011. Mr. El Sayed asks this Chamber to reverse that decision only to the extent it held categories (1), (2), and (3) generally exempt from disclosure. He seeks a ruling that he has a right of access to documents within these three categories, subject to the other limits (confidentiality of investigations, safety of witnesses, and national or international security) identified by the Pre-Trial Judge.[38] We have noted that the Prosecutor did not cross-appeal against the decision.

PRELIMINARY CONSIDERATIONS

I. Admissibility of the Appeal

18. In our decision of 10 November 2010 we recorded that our jurisdiction to consider that appeal inhered in the nature of our obligation to deal with a situation, not foreseen by the Rules, in which it is alleged that a jurisdictional error has been committed and injustice might result if there were such error and it were left uncorrected.[39] The Tribunal has sole access to the relevant documents and it alone can resolve issues of access to them.

19. In the present circumstances, we are asked to consider a narrow question of law: whether and on what basis Mr. El Sayed is entitled to access certain categories of documents. For reasons later developed the current proceedings are almost entirely outside the literal scope of our Rules, which are directed to criminal trials.[40] 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. Rule 126 requires

[37] *Id.* at paras 33-38.
[38] Partial Appeal of El Sayed, *supra* note 9, at 8.
[39] El Sayed Decision of 10 November 2010, *supra* note 2, at para. 54.
[40] See below paras 27-30.

most interlocutory appeals (meaning any appeal before full and final judgment) to first be certified by the Pre-Trial Judge or Trial Chamber. This is not in fact an interlocutory appeal because it potentially deals finally with certain parts of the application. And so the Pre-Trial Judge has not certified the present appeal as "involv[ing] an issue that 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."[41]

20. But because the appeal does not deal with the whole of Mr. El Sayed's application, we would normally exercise discretion, by analogy with Rule 126, to defer consideration of the appeal until all aspects of disclosure have been determined by the Pre-Trial Judge. Nevertheless we have decided to deal with it now. Although the current proceedings fall outside the literal scope of the Rules, we wish to maintain focus on the fairness and efficiency of proceedings. In addition, the present appeal would satisfy the certification standard if certification had been sought. The categorical exclusion of three sets of documents at this stage might wrongly remove certain documents from the subsequent levels of review currently being conducted by the Pre-Trial Judge. Further, it may take months for the Pre-Trial Judge to conclude those additional levels of review and for the disclosure process to fully conclude. After all that time has passed, if this Chamber then found that certain categories of documents were wrongly withheld at the first stage of review, much of the process would have to be repeated, causing additional delay. Given that far more than a year has already passed since Mr. El Sayed first submitted his request for documents to this Tribunal, further delay is unjustified, particularly as this narrow legal issue can be resolved discretely without distracting the Pre-Trial Judge from his task of completing the disclosure process. We are satisfied that these reasons render the present circumstances exceptional. To ensure a fair and expeditious resolution of the dispute requires us to deal with the merits of the appeal at this stage.

21. However we emphasise that, because we are not seized of any factual appeal, we make no factual findings in this judgment. In particular we make no comment on whether or not Mr. El Sayed's contemplated claim could have merit. Our present task is simply to review the legality of the approach taken by the Pre-Trial Judge to the three disputed categories of documents. We have the file of the Pre-Trial Judge and have examined certain of the documents for which the Prosecutor has claimed confidentiality. Our comments upon those documents are not to be read as entailing any

[41] Rule 126(C) STL RPE.

adjudication upon their status but as provisional observations, made to assist the parties and the Pre-Trial Judge to understand our reasons for referring the present issues back to him for reconsideration and to make necessary determinations.

II. Standard of Review

22. The Appeals Chamber will only reverse a decision if the Pre-Trial Judge or Trial Chamber committed a specific error of law or fact invalidating the decision,[42] or weighed relevant considerations or irrelevant considerations in an unreasonable manner. These criteria are the same used and well-established by the Appeals Chambers of both the International Criminal Tribunal for the former Yugoslavia ("ICTY")[43] and the International Criminal Tribunal for Rwanda ("ICTR").[44]

III. Submissions on Appeal

23. In his Notice of Partial Appeal[45] the Appellant contended that the decision of 12 May 2011:

(1) wrongly limited the right of access recognised in the prior decisions of the Pre-Trial Judge and of this Chamber;[46]

(2) misapplied Rule 111 of the RPE;[47]

(3) wrongly failed to address each document individually.[48]

24. The Prosecutor submitted that the decision:

(1) properly applied the established jurisprudence as to disclosure;[49]

[42] See Article 26 STLSt; Rule 176 STL RPE.

[43] See, e.g., ICTY, *Stakić*, Appeal Judgment, IT-97-24-A, 22 March 2006, para. 7; *Kvočka et al.*, Appeal Judgment, IT-98-30/1-A, 28 February 2005, para. 14; *Vasiljević*, Appeal Judgment, IT-98-32-A, 25 February 2004, paras 4-12; *Kunarac et al.*, Appeal Judgment, IT-96-23&IT-96-23/1-A, 12 June 2002, paras 35-48; *Kupreškić et al*, Appeal Judgment, IT-95-16-A, 23 October 2001, para. 29; *Mucić et al.*, Appeal Judgment, IT-96-21-A, 20 February 2001, paras 434-435; *Furundžija*, Appeal Judgment, IT-95-17/1-A, 21 July 2000, paras 34-40; *Tadić*, Appeal Judgment, IT-94-1-A, 15 July 1999, para. 64; Article 25 ICTYSt.

[44] See ICTR, *Kajelijeli*, Appeal Judgment, ICTR-98-44A-A, 23 May 2005, para. 5; *Semanza*, Appeal Judgment, ICTR-97-20-A, 20 May 2005, paras 7-8; *Musema*, Appeal Judgment, ICTR-96-13-A, 16 November 2001, para. 15; *Akayesu*, Appeal Judgment, ICTR-96-4-A, 1 June 2001, para. 178; *Kayishema*, Appeal Judgment, ICTR-95-1-A, 1 June 2001, para. 177; *Ruzindana*, Appeal Judgment, ICTR-95-1-A, 1 June 2001, para. 320; Article 24 ICTRSt.

[45] See Partial Appeal of El Sayed, *supra* note 9.

[46] *Id.* at para. 9.

[47] *Id.* at paras 12-14.

[48] *Id.* at paras 16-18.

(2) correctly applied Rule 111;[50]

(3) was not required to adopt a document-by-document approach but was right to deal with the documents by categories;[51]

(4) characterised correctly the relationship between the UNIIIC and the Lebanese authorities.[52]

25. He further submitted that the Appellant was engaged in a fishing expedition.[53]

26. The Appellant submitted in reply[54] that the Prosecutor's submissions:

(1) distorted the effect of the decision of 17 December 2010 by wrongly treating it as limited to the rights of an accused person rather than as extensive;[55]

(2) erred in suggesting that the Pre-Trial Judge has separately examined the challenged documents;[56]

(3) wrongly suggested that the Appellant was engaged in a fishing expedition and in that misplaced the burden of proof;[57]

(4) erred in contending for confidentiality in respect of the correspondence between the UNIIIC and the Lebanese authorities.[58]

IV. Nature of the Application

27. In our decision of 10 November 2010, we identified as the Tribunal's primary jurisdiction the prosecution of the perpetrators of the attack on the former Prime Minister Rafiq Hariri.[59] But we

[49] Prosecution's Response to "Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011", OTP/AC/2011/01, 10 June 2011, at para. 17.
[50] *Id.* at paras 8-24
[51] *Id.* at paras 25-26.
[52] *Id.* at n.32
[53] *Id.* at para. 23.
[54] Réplique à "Prosecution's Response to 'Partial Appeal of the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011'", OTP/AC/2011/01, 24 June 2011.
[55] *Id.* at paras 15-19.
[56] *Id.* at paras 20-25.
[57] *Id.* at paras 27-33.
[58] *Id.* at paras 34-48.

concluded it also possesses an ancillary inherent jurisdiction to entertain the present application.[60] As this is not a criminal matter falling under our primary mandate, we pause to explain the framework under which we analyse this application.

28. Mr. El Sayed's application arises from arrest and lengthy detention, related to suspicion of his involvement in a crime, and which resulted in substantial consequences for Mr. El Sayed. We accept, however, the Prosecutor's submission that the present application is not a criminal proceeding, but a civil or administrative one to secure discovery for the purpose of other judicial proceedings.[61] In sum, we are considering a civil or administrative application that arises from and could possibly bear further on a continuing criminal process.

29. Regardless of the characterisation of the application, what is required of judges in exercising criminal jurisdiction must apply equally in other forms of adjudication they undertake, *mutatis mutandis*.

30. Thus we are guided in procedural matters, among other things, by the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious outcome. This direction is stated in Article 28 of our Statute[62] and is repeated at Rule 3(A) of our Rules of Procedure and Evidence.[63] The Prosecutor submits that, because there is currently no live criminal proceeding against Mr. El Sayed, the Tribunal's disclosure rules are of no relevance to this case. We agree that the Rules focus on the Tribunal's express criminal jurisdiction rather than on its inherent jurisdiction to deal with the present application and appeal. But the Rules give effect to the object and purpose of our Statute and are thus still germane to the exercise of the Tribunal's inherent

[59] El Sayed Decision of 10 November 2010, *supra* note 2, at para. 51.

[60] *Id.* at paras 53-54.

[61] We endorse the New Zealand Supreme Court's classification as civil of a similar application made by a television company, to search the criminal record of the trial of French accused who had been convicted of bombing the *Rainbow Warrior* in Auckland Harbour. See *Mafart and Prieur v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18, paras 28-40.

[62] Article 28(2) of the STL Statute states that, when adopting Rules of Procedure and Evidence, the judges "shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial."

[63] Rule 3(A) STL RPE provides:

> The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights[,] (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

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 must *a fortiori* protect that information in civil proceedings where the stakes are almost inevitably lower.

31. Finally, in our decision of 16 February 2011, we held that an accused is entitled to the application of whichever of the law of Lebanon or international criminal law accords him better protection.[64] We adopt that principle by analogy in the present case.

32. We turn to apply these considerations to the three questions raised by Mr. El Sayed's appeal, mentioned at paragraph 7.

DISCUSSION

I. Is Mr. El-Sayed entitled to documents in the possession of the Tribunal?

33. In our decision of 10 November 2010, we recognized the existence of a general right to access one's criminal file, which it was then unnecessary to define.[65] The Prosecutor has not cross-appealed from the decision of the Pre-Trial Judge of 12 May 2011 as to the nature of that right. There being no pleaded issue on the point, and since we agree with the general approach of the Pre-Trial Judge, we have not called for further submissions or directed oral argument to assist our elaboration upon the principles that in this instance give rise to a right to information. In his 17 September 2010 decision, the Pre-Trial Judge compared Mr. El-Sayed's request to that of a criminal defendant seeking access to his criminal file. We rely on broader principles of international law to reach the same result.

34. We consider Mr. El Sayed's request for information under both international and Lebanese law. We determine that, taking into account Mr. El Sayed's legitimate interest in accessing these documents, namely their use in a court of law to bring claims against those allegedly responsible for his unlawful detention, Mr. El Sayed has a valid claim for documents. We separately consider

[64] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I, 16 February 2011 ("Interlocutory Decision on the Applicable Law"), para. 211.
[65] El Sayed Decision of 10 November 2010, *supra* note 2, at para. 64.

whether, and how, that claim should be vindicated under the circumstances of this case. Upon a balancing of factors, we conclude that with certain exceptions Mr. El Sayed has a right to documents held by the Tribunal. But for the reasons later given we find it necessary to refer the file back to the Pre-Trial Judge for further consideration.

A. International Law

35. Overarching the work of this Tribunal is the principle of the rule of law.[66] At base the rule of law entails the recognition of essential human rights and just procedures for their enforcement. Other critical elements include fair trial guarantees and the dignity of the individual vis-à-vis the state.

36. Thus our Statute states that "[t]he accused shall be entitled to a fair and public hearing,"[67] and it expressly obligates the Tribunal to safeguard specific rights for both accused individuals[68] and suspects questioned by the Prosecutor.[69] Our Statute further requires that the judges be independent in the performance of their functions and of high moral character, impartiality and integrity, with extensive judicial experience.[70]

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[66] See P. Sales, "Three Challenges to the Rule of Law in the Modern English Legal System", in R. Ekins (ed.), *Modern Challenges to the Rule of Law* (Wellington: LexisNexis, 2011), at 190; see also, e.g., P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467; M.H. Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007), at 101-186; T. Bingham, *The Rule of Law* (London: Allen Lane, 2010); P. Sales, "The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights", in M. Andenas & D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (Oxford: Oxford University Press, 2009), at 163-167; L. Fuller, *The Morality of Law· Revised Edition* (New Haven: Yale University Press, 1969); J. Raz, "The Rule of Law and Its Virtue", 93 *Law Quarterly Review* (1977) 195.

[67] Article 16(2) STLSt.

[68] Article 16(4) STLSt:

> In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
>
> (b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing;
>
> (c) To be tried without undue delay; ...
>
> (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; [and]
>
> (f) To examine all evidence to be used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Tribunal[.]

[69] Suspects questioned by the Prosecutor have the right not to incriminate themselves; to be informed that there are grounds to believe they committed a crime within the jurisdiction of the Tribunal; to remain silent; to have legal assistance, paid for by the Tribunal if necessary; to have an interpreter; and to be questioned in the presence of an attorney. Article 15 STLSt.

[70] Article 9 STLSt.

37. The rule of law also imports the legal equality of all individuals,[71] which in turn limits the authority of the State to what is necessary for the protection of the people. In the past the citizen was treated as subordinate to the sovereign, as was expressed in the old notion "the king can do no wrong".[72] That proposition is progressively being reversed as the true significance of the 1948 Universal Declaration of Human Rights and the two UN Covenants of 1966 on human rights as well as all the other post-War conventions and their call to uphold inherent human dignity is increasingly appreciated. Certain state privileges may remain justifiable as needed to perform legitimate functions in the public interest, subject however to full compliance with the legal imperatives on human rights laid down in customary international law and all the relevant treaties. There is increasing recognition that citizens are not to be treated as inferior to the state but must be fully respected in their right to human dignity and equality. The rise of democracy, with the ascendancy of the citizen, has converted state agencies, including politicians and judges, into servants rather than masters of the people.[73] Their powers, including the authorisation of use of force to detain, are nowadays conferred in order to be performed *on behalf of* the citizenry and not as its master.[74]

38. When considering what information should be the subject of a court order for disclosure, "*The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.*"[75] It is the court's task to devise procedures that will achieve that

[71] In Italy the Constitutional Court has applied the principle of equality in order to reject Prime Minister Berlusconi's claim to be the only citizen exempt from the criminal law: Italy, Constitutional Court, *Constitutionality of "Lodo Alfano"*, Judgment n. 262, 19 October 2009.

[72] Albeit limited by the King's obligation to protect his subjects, reciprocal to their duty of fealty to the Crown: U.K., *Calvin's Case* (1608) 7 Coke's Reports 1a, 77 ER 377.

[73] Among other developments, this is demonstrated by the higher standards of conduct expected of public sector parties in litigation. See, e.g., U.K., *R (Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 [50], [2002] All ER (D) 450 (Laws LJ): "[T]here is – of course – a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide."

[74] See generally J. Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?", 22(2) *European Journal of International Law* (2011) 315, 316-317. Waldron considers that the Rule of Law comprises, among other things, "a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology; [... and] a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law."

[75] U.K., *Tweed v. Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 [3] (Lord Bingham) (emphasis added).

result by properly balancing the competing claims of a litigant to full disclosure and of the state to public interest immunity.[76]

39. In the context of the overarching principle of the rule of law, we note two streams of international jurisprudence that would support Mr. El Sayed's present claim for access to documents: the right of access to justice, and what has been called the "right" to information held by a public authority.

1. Access to Justice

40. That the claim pursued by the present application is related to the right of access to justice was emphasised by the President in the reasons for his Order of 15 April 2010 assigning Mr. El Sayed's application to the Pre-Trial Judge. As he observed:

> The right of access to justice is regarded by the whole international community as essential and indeed crucial to any democratic society. It is therefore warranted to hold that the customary rule prescribing it has acquired the status of a peremptory norm (*jus cogens*). Such status denotes that an international norm has achieved such prominence in the international community that States and other international legal subjects may not derogate from it either in their international dealings or in their own national legislation – unless such derogations are strictly allowed by the norm itself.[77]

41. In support of this observation, the President referenced the major international human rights instruments as well as jurisprudence from regional human rights courts.[78]

42. The right of access to justice, to be meaningful, must extend to the means to secure a proper remedy. Here, to withhold information from Mr. El Sayed could block his effective access to justice before domestic courts.

43. So the courts will strive to ensure that the right to justice receives practical effect. An example of their approach is the form of legal claim, recognised in the common law of England and now evolving widely, of the equitable bill of discovery. When a person has been harmed by an unidentified wrongdoer, the bill of discovery allows that person to seek identifying information about

[76] See New Zealand, *CREEDNZ Inc. v Governor-General* [1981] 1 NZLR 172, 182 (CA); U.K., *R (Al-Sweady) v. Secretary of State for Defence (No 2)* [2009] EWHC 2387 (Admin).

[77] Order Assigning Matter to Pre-Trial Judge, *supra* note 21, at para. 29.

[78] *Id.* at paras 29-33.

the wrongdoer from third parties who are implicated, however innocently, in the harmful conduct.[79] It has been applied in recent times in *R (on the application of Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*.[80]

44. Whether recognised by international human rights case law or that of domestic courts,[81] the effective right of access to justice is fundamental. As we must uphold the highest international standards of justice, this right of access must inform our consideration of Mr. El Sayed's claim. The right of access does not however justify discovery of documents for purposes other than those asserted by Mr. El Sayed, namely the pursuit of legal claims against the individuals allegedly responsible for his detention.

2. Freedom of Information

45. The principle of entitlement to access information held by a public authority is now well-advanced internationally.[82] In strict legal terms it is a "claim", to be evaluated against competing claims, rather than an actionable "legal right"; it becomes a legal right only when the court accepts that the claim is legally enforceable. But, since in ordinary parlance it is normally if more loosely called a "right", we use the term "right" to describe such claim. So does Article 19 of the Universal Declaration of Human Rights ("UDHR"), which provides: "Everyone has the right to freedom of opinion and expression", which includes "freedom [...] to seek, receive and impart information and

[79] U.K., *Norwich Pharmacal v. Customs & Excise Commissioners* [1974] 1 AC 133; U.K., *R (on the application of Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579 and 2653, on appeal [2010] EWCA Civ 65 & 158, [2010] 3 WLR 554; Canada, *Glaxo Wellcome PLC v. The Minister of National Revenue* [1998] 4 FC 439; R.F. Barron, "Existence and Nature of Cause of Action for Equitable Bill of Discovery", 37 ALR 5th 645 (1996); U.S., *Pressed Steel Car Co. v. Union Pacific Railroad Co.*, 240 F. 135 (S.D.N.Y. 1917) (per Learned Hand, J); U.S., *Sinclair Refining Co v. Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933).

[80] U.K., *R (on the application of Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579 and 2653, on appeal [2010] EWCA Civ 65 & 158, [2010] 3 WLR 554. There, the applicant faced capital charges in the United States and sought information from the U.K. government to assist in his defence. The English Divisional Court applied the bill of discovery procedure to require the U.K. government to disclose to assist his defence confidential information concerning its implication in torture employed upon him by U.S. personnel seeking admissions of involvement in terrorism.

[81] In addition to the common law bill of discovery, see the domestic case law cited in the President's Order Assigning Matter to Pre-Trial Judge, *supra* note 21, at para. 27.

[82] "FOI is now becoming widely recognized in international law. Numerous treaties, agreements and statements by international and regional bodies oblige or encourage governments to adopt laws. Cases are starting to emerge in international forums. Nearly 70 countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. [...] About half of the countries that have a constitutional right have adopted a national FOI law." D. Banisar, "Freedom of Information Around the World 2006" (2008), at 6, 17, *available at* http://www.freedominfo.org/documents/global_survey2006.pdf. See also surveys collected below at note 88 and T. Mendel, *Freedom of Information. A Comparative Legal Survey*, 2nd edn. (Paris: United Nations Educational Scientific and Cultural Organization, 2008), at 3.

ideas [...]." Article 19(2) of the 1966 United Nations International Covenant on Civil and Political Rights ("ICCPR") provides that freedom of expression "shall include freedom to *seek, receive and impart information* and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, or through any other media of his choice." Likewise, the Arab Charter of Human Rights (2004), which came into effect in 2008, states in Article 32:

> 1 The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
>
> 2 Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.[83]

46. The Commission established under the African Charter on Human and People's Rights adopted in 2002 the Declaration of Principles of Freedom of Expression in Africa which provides for both freedom of expression[84] and freedom of information.[85] Article 10(1) of the 1950 European Convention on Human Rights provides that the right to freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." And Article 13 of the Organisation of American States' American Convention on Human Rights has been held by the Inter-American Court of Human Rights to establish a broad freedom of information right, subject to appropriate restrictions.[86]

47. Sweden was the first state to enact freedom of information legislation in 1766; that right to information is currently enshrined in "Regeringsformen", the Swedish Instrument of Government,

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[83] It has been signed by Lebanon, Algeria, Bahrain, Egypt, Libya, Jordan, Kuwait, Morocco, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen. It has been ratified by Algeria, Bahrain, Libya, Jordan, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen.

[84] Article I of the Declaration provides:

> 1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
>
> 2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

[85] Article IV of the Declaration provides:

> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
>
> 2. The right to information shall be guaranteed by law in accordance with the following principles:
>
> - everyone has the right to access information held by public bodies[...]

[86] See IACHR, *Claude-Reyes v. Chile*, Series C, No. 151 (19 September 2006), para. 77.

which is part of the Swedish Constitution.[87] Today 115 states have adopted some form of freedom of information principle by either constitutional provisions, statute or regulations.[88] These states are representative, among others, of civil and common law and Islamic traditions.[89] Additional states have draft legislation on freedom of information which is currently within the legislative process.

48. However, the right to information may need to be reconciled with other interests, such as the principle of good administration of justice, in particular the need to safeguard the secrecy of an

[87] Article 1 of "Regeringsformen" ("Instrument of Government"), creates the starting point not only for freedom of information in general terms, but also for the basic right for all citizens of access to all material kept by all public organs. Basically, all such material must be made available and disclosed when asked for. However, this right is not without exceptions. Under certain general conditions set out in the Constitution, this right might be restricted by legislation taken by the parliament. The basic law on those restrictions is "Offentlighets- och sekretesslagen", the Act on Publicity and Secrecy, of 2009.

The restrictions on disclosure in Offentlighets- och sekretesslagen are based on the different kinds of interest that might be harmed or damaged in case of disclosure. This may include the risk of endangering investigation of crimes and the protection of personal information on individuals.

A party, not only in court cases but also in other kinds of cases before public organs, is basically entitled to have access to all material in the case, although in very special circumstances there may be certain restrictions (see Chapter 18 Article 1). If the criminal investigation is closed without a trial, a former suspect may be regarded as a party and as entitled to take part of information in the investigation (Regeringsrätten – The Swedish Supreme Administrative Court decision 2001-06-07 in case 2808-00, published in RÅ 2001 ref. 27). In short, the case was as follows. On basis of an allegation the police started a preliminary investigation on economic crime against a person, T.K. However, the prosecutor decided not to conduct a formal criminal investigation against T.K. The allegation of the crime originated from an ongoing civil case in which T.K was involved. T.K. claimed that he needed to have access to the material the police had gathered in order to be able to guard his rights in ongoing and forthcoming civil processes. The Supreme Administrative Court noted that the material dealt with by the police and the prosecutor constituted a case in the meaning of the law and that T.K. should be regarded as a party in this case. Thus he had the qualified right under the law to get access to the material in question. Referring to the connection between the closed criminal investigation and the ongoing civil process and from the resulting need to get access to the material, the Court found that he had motive strong enough to support his claim for access to the material.

[88] A collection of sources suggest there are up to 115 countries with national laws, decrees, or constitutional provisions recognizing freedom of information, while another twenty-two have draft laws in progress. See Banisar, "Freedom of Information Around the World", *supra* note 82; Open Society Justice Initiative, "Transparency & Silence: a Survey of Access to Information Laws and Practices in Fourteen Countries" (2006), *available at* http://www.soros.org/initiatives/justice/focus/foi/articles_publications/publications/transparency_20060928; D. Banisar, "Legal Protections and Barriers on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States" (May 2007), *available at* https://www.privacyinternational.org/foi/OSCE-access-analysis.pdf (study commissioned by the Representative of the Freedom of the Media for the Organization for Security and Cooperation in Europe); R. Vleugels, "Overview of all FOI Laws" (2010), http://right2info.org/resources/publications/Fringe%20Special%20-%20Overview%20FOIA%20-%20sep%2020%202010.pdf; Right2Info, Constitutional Provisions, Laws and Regulations Relevant to the Right of Information, http://right2info.org/laws (last visited July 14, 2011). In addition to the national laws, decrees and constitutional provisions collected by these sources, see Cameroon, Const. art. 9 sec. 1 & art. 19; Cape Verde, Const. arts. 20 & 43; Dem. Rep. Congo, Const. art. 24; Congo, Const. art. 19; El Salvador, Ley de Acceso a la Informaciôn Pública, Decreto N. 534 (Dec. 2010); Eritrea, Const. art. 19 sec. 3; Ghana, Const. art 21 sec. 1(f); Guinea-Bissau, Const. art. 43; Kazakhstan, Const. art. 18 sec. 3 & art. 20 sec. 2; Kenya, Const. ch. 5 para. 79; Madagascar, Const. art. 11; Malta, Freedom of Information Act, Ch. 496 (Act XVI 2008); Mongolia, Const. art. 16 sec. 17; Nepal, Const. art. 27; Nicaragua, Const. arts. 66 & 67; Rwanda, Const. art. 34; St. Vincent and the Grenadines, Freedom of Information Act (Act No. 27 of 2003); Seychelles, Const. art. 28; Venezuela, Const. art. 28.

[89] See the broad geographic range of countries surveyed in sources cited in notes 82 and 88 above.

investigation. These other interests may also include the right to confidentiality and to privacy, also laid down in the ICCPR at Article 17 (1), which provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Whenever there may arise a conflict among these interests, it falls to courts to strike a balance between them, in light of the general principles of international law on human rights.

49. The international sea-change is of such dimensions as to demand recognition that freedom of information has become a general principle of law. Its justification is summarised in the Swedish Instrument of Government and was spelt out by the New Zealand Committee on Official Information, which concluded that "*It rests on the democratic principles of encouraging participation* in public affairs and *ensuring the accountability of those in office; it also derives from concern for the interests of individuals.*"[90] Thus the evolution and application of freedom of information as a general principle of international law should occur on the basis that:

> [...] the ***presumption of non-disclosure is no longer helpful, or indeed valid*** [...] ***the presumption henceforth should be that information is to be made available unless there is good reason to withhold it.***[91]

3. Competing Interests

50. Under neither rubric (access to justice or freedom of information) is the right to obtain information from public authorities absolute. Limiting the rights to information under both of these streams is the public interest in confidentiality of certain classes of information.[92] For the principle of freedom of information in particular, there is a need to balance the legitimate and well-founded interests of the state as a whole; of individuals and organisations (including those of privacy); and of effective government and administration. That is why:

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[90] New Zealand, Committee on Official Information, *Towards Open Government 1: General Report* (Wellington: 1980) ("*Towards Open Government*"), para. 20 (emphasis added).

[91] *Id.* at paras 54-55 (emphasis in original).

[92] See above paragraph 48. But an accused individual's right of fair trial trumps all other rights and if, despite whatever safeguards may be available, the withholding of information would render a trial unfair, the accused must be discharged. Rule 116(C) STL RPE; U.K., *R v. A (No. 2)* [2001] UKHL 25, [2002] 1 AC 45 [38] (Steyn, LJ); S. Stapleton, "Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation", 31 *N.Y.U. Journal of International Law & Policy* (1999) 535, at 568; cf. ECHR, *Chahal v. United Kingdom*, 15 November 1996, paras 31-32, Reports of Judgments and Decisions, 1996-V.

> [i]n no country where access to official information has become an issue has the case been made for complete openness. Few dispute that there are good reasons for withholding some information and for protecting it.[93]

In both contexts, in order to do justice both to the individual and to the wider community, the law must devise procedures that will protect certain classes of information for legitimate public interest reasons.[94]

51. Similarly, any claim Mr. El Sayed has to information held by this Tribunal must be properly weighed against well-founded contrary interests that may be asserted by the Prosecution on behalf of the larger community. It must also be subject to the condition that the use of information obtained on disclosure be limited to the asserted purposes of Mr. El Sayed's claim, which establish a legitimate interest in the documents.

B. The Law of Lebanon

52. We have noted that the Pre-Trial Judge relied upon an accused person's entitlement to access his criminal file or *dossier* to conduct his defence. He reasoned that Mr. El Sayed should have had access to the file (minus materials which should remain confidential); and that such entitlement survived his release from detention. An opposing argument is that, under the law of Lebanon, he never acquired such right of access, which is triggered only on indictment or discharge.

53. The Lebanese courts have to date construed the Lebanese Code of criminal procedure as heavily restricting a suspect's access to the criminal file during investigation, and allowing full access at the trial stage to an accused. A general principle has been applied to the investigation phase: that of confidentiality or secrecy,[95] which entails exempting from disclosure all investigative

[93] *Towards Open Government, supra* note 90, at para. 33.

[94] See generally D. Feldman, "Disclosure of Information, Torture and the 'Special Relationship'", 69(3) *Cambridge Law Journal* (2010) 430.

[95] Article 53 of the Lebanese Code of criminal procedure provides: "The investigation shall remain confidential until such time as the case is referred to the trial court, except for matters pertaining to the indictment [sic] decision. Anyone who breaches the confidentiality of the investigation shall be liable to prosecution before the Single Judge in whose area of jurisdiction the act complained of occurred; he shall be punishable by imprisonment of between one month and one year and by a fine of between one hundred thousand and one million Lebanese pounds or by either of these two penalties." An English version of the Lebanese Code of criminal procedure can be found on the Tribunal's website (see http://www.stl-tsl.org/sid/49).

material. In general, access to the file has been given only once the suspect is discharged (at the end of the investigation)[96] or at the trial stage and not before.

54. Provisions describing the access to the criminal file are found throughout the Lebanese Code of criminal procedure. At the investigation phase, Article 76 of the Code requires that the defendant be informed of the charges against him, meaning that the Investigating Judge must summarise the facts and inform the defendant of the evidence in his possession or of the suspicions against him.[97] If the defendant requests counsel, Article 78 of the Code requires that, before the defendant is questioned by the Investigating Judge, his counsel be "informed" of the investigative measures taken by that Judge.[98] Such information does not, however, extend to giving him access to witness statements. Therefore, a Judge may construe these provisions as heavily restricting access to one's criminal file.

55. When the indictment is issued by the Indictment Chamber, the whole file is transferred to the criminal court and made public.[99] Under Lebanese law, at the trial phase, there are no defined exceptions to the disclosure of the criminal file. The accused is entitled to access all the elements contained in it. We do not need to consider whether they include information on witnesses, or even information excluded from disclosure under international tribunals' rules of procedure and jurisprudence.

[96] Article 122 of the Code of criminal procedure provides that: "If the Investigating Judge decides to stay the prosecution of the defendant, he shall base his decision on either a legal or factual ground. [...]" The word "stay" in this context refers to a discharge of the accused by the investigating judge and not to a temporary stay of proceedings. The procedure under Lebanese law corresponds to a "non-lieu". A "non-lieu" is translated as a discharge (the Council of Europe French-English Legal dictionary).

[97] Article 76 provides:

> When the defendant appears before him for the first time, the Investigating Judge shall inform him of the charges against him, summarizing the facts and informing him of the evidence in his possession or of the suspicions against him so that he can refute them and mount a defence. The Investigating Judge is not required to provide him with a legal characterization of the facts. The Investigating Judge shall inform him of his rights, particularly the right to the assistance of an advocate during the questioning.
>
> If the Investigating Judge fails to inform the defendant of the charges against him, as set out above, or to inform him of his right to the assistance of an advocate, the results of the questioning shall be inadmissible as evidence.

[98] Article 78 of the Code of criminal procedure provides: "[...] If the defendant chooses an advocate to defend him, the Investigating Judge may not question him or proceed with the investigative measures unless the advocate is present and is informed of all the investigative acts except for the witnesses' statements, on pain of nullity of the questioning and of the subsequent measures. [...]"

[99] Article 239 of the Lebanese Code of criminal procedure can be found in Section III titled "The trial". It provides that: "All parties are entitled to examine the case file and to have a copy thereof."

56. In sum, prior to any charges being brought against an accused, the confidentiality surrounding an investigation has been treated as absolute. A defendant at that stage is merely a suspect, and has few rights regarding information or access to a file. As soon as a defendant becomes an accused, in order to ensure that all his defence rights as well as the principle of equality of arms are preserved, he is provided with essentially all the information gathered by the judges or the judiciary police and supporting the charges brought against him. Likewise, if he is discharged, he is entitled to a copy of the whole file.

57. We have recorded that, at the time of his transfer to this Tribunal, Mr. El Sayed was detained and an arrest warrant had been issued by the Lebanese Investigating Judge who was still conducting the investigation against him. He was neither indicted nor discharged. It is therefore arguable that, at the time of his release by this Tribunal, Mr. El Sayed would not have been entitled to have access to the whole of his criminal file in Lebanon.[100]

58. Nonetheless, Lebanese law might allow such a request on a different basis, such as the right to access information provided for by reference in the Lebanese Constitution independently of, although not necessarily unrelated to, the rights of a criminal suspect or accused.

59. In the decision of 16 February 2010 we held that:

> From the case law of the Lebanese Constitutional Council, it appears that the Preamble is considered an integral part of the Constitution and therefore holds the same legal status as other constitutional provisions.
>
> It follows that the Preamble and all the texts to which it refers [...] have constitutional status. All these principles become therefore constitutional principles on the basis of the Lebanese Constitution itself.[101]

60. The Preamble refers expressly to two human rights instruments: the UDHR and the ICCPR.[102] Both instruments guarantee, as a component of the right to free expression, the right to "seek, receive and impart information."[103]

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[100] See Lebanese Code of criminal procedure, Arts. 76 & 78.

[101] See Interlocutory Decision on the Applicable Law, *supra* note 64, at footnote 232.

[102] The Preamble of the Lebanese Constitution provides that: «Le Liban est arabe dans son identité et son appartenance. Il est membre fondateur et actif de la Ligue des Etats Arabes et engagé par ses pactes; de même qu'il est membre fondateur et actif de l'Organisation des Nations-Unies, engagé par ses pactes et par la Déclaration Universelle des Droits de l'Homme. L'Etat concrétise ces principes dans tous les champs et domaines sans exception». The Lebanese Constitutional Council has held that "[i]t is established that these international conventions which are expressly

61. On such approach, it is warranted to regard freedom of information, as provided for in the UDHR and the ICCPR, as a constitutional value under Lebanese law. However, the scope of any resulting legal right, and any restrictions that may apply to it, have not yet been clearly defined either by Lebanese legislation or by case law. The enshrining of freedom of information in the Lebanese Constitution gives added weight to the international law to which we now turn.

C. Application to the Present Case

62. Under international law, both the concept of effective access to justice and the general principle of freedom of information point to a potentially valid claim on the part of Mr. El Sayed to access documents held by this Tribunal. It is a separate question, however, whether that is a claim we should recognize and vindicate in this instance. There are multiple considerations.

63. First, the weight of the applicant's entitlement to information falls along a continuum: the greater the personal stake, the stronger the claim, albeit still to be weighed against other concerns for confidentiality. In cases like *R (on the application of Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*,[104] *Commissioner of Police v. Ombudsman*,[105] and *United States v. Moussaoui*,[106] the applicant seeking information from a public authority was facing criminal charges and required access to information in order to prepare his defence. Here by contrast Mr. El Sayed is no longer in detention and has never been charged.

64. Next is the fact, peculiar to *ad hoc* tribunals, of limited resources. In *Rwamakuba v. Prosecutor*[107] the Rwanda tribunal struggled with the need to fund, for the violation of an accused's right to legal assistance, minor compensation which is greatly exceeded by the resources required to deal with the present claim. The case indicates the need for a sense of reality. The task of wrestling with issues removed from the Tribunal's statutory functions must not be permitted too readily to divert its finite resources. Yet an absolute barrier to such process would be unjust to a claimant with a legitimate grievance.

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mentioned in the Preamble of the Constitution form an integral part along with said Preamble and Constitution, and enjoy constitutional authority". Constitutional Council, decision no. 2/2001, 10 May 2001, published in Al-majless al-doustouri (2001-2005) [Constitutional Council review (2001-2005)], at 150.

[103] UDHR art. 19; see also ICCPR art. 19(2). These provisions are reproduced in paragraph 45 above.

[104] See footnote 80 above.

[105] [1988] 1 NZLR 385.

[106] 382 F.3d 453 (4th Cir. 2004).

[107] Decision on Appeal Against Decision of Appropriate Remedy, ICTR-98-44C-A, 13 September 2007.

65. Then there is the question of the legitimacy of the asserted legal interest. A bare assertion of a person released from detention that his arrest and custody were wrongful may not be sufficient to justify extraordinary measures. For example, an acquittal following a trial may be for reasons unrelated to an accused person's actual innocence. This is why in some national jurisdictions the state will not reimburse an acquitted defendant's legal costs unless it can also be shown that the prosecution was unreasonable.[108] Likewise, the fact of Mr. El Sayed's eventual release does not of itself mean his original detention was unreasonable or that he is therefore entitled to a remedy before a domestic court, even though it could be an element of a claim for such remedy.

66. The only material before us in this regard is the concession made by the Prosecutor that:

> "information gathered to date in relation to the possible involvement of the four detained persons in the attack against Rafiq Hariri has not proved sufficiently credible to warrant the filing of an indictment against any of them". [...] "[t]he assessment that has been made is based on several considerations, including inconsistencies in potentially key witnesses' statements, and a lack of corroborative evidence to support these statements. Some witnesses also modified their statements and one potentially key witness expressly retracted his original incriminating statement." The Prosecutor, without mentioning any specific name, added that the investigation was ongoing and that the Submission should not be understood as prejudging any future action.[109]

This is not an admission of innocence, but neither is it an assertion of guilt; rather it provides the reasons why, at the time of the release, charges were not pursued.

67. In considering whether Mr. El Sayed's claim for documents should be granted, we must achieve a rational and proportionate resolution of these competing factors.[110] In particular, we must balance that claim for information against the principle of secrecy of an investigation that is still continuing and the need for husbanding of resources in circumstances where we know no more of the facts than has been disclosed by the Prosecutor. We have emphasised that the streams of authority tending to support a claim to disclosure do not without more give rise to an actionable right to

[108] The New Zealand Law Commission, for instance, has argued that acquittal does not of itself require the State to compensate the accused for the costs of his or her defence: a judgment of acquittal may be for reasons unrelated to an accused's actual innocence, much less to the reasonableness of the prosecutor's decision to bring the charges in the first place. New Zealand, Law Commission, *Report 60: Costs in Criminal Cases* (Wellington: May 2000) at para. 10, *available at* http://www.lawcom.govt.nz/sites/default/files/publications/2000/05/Publication_68_290_R60.pdf. Different approaches have been adopted in other jurisdictions.

[109] Order Assigning Matter to Pre-Trial Judge, *supra* note 21, at para. 5 (quoting Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence, CH/PTJ/2009/004, 27 April 2009, para. 29).

[110] Cf. U.K., *R (on the application of Cart) v. The Upper Tribunal* [2011] UKSC 29.

information: countervailing considerations of confidentiality, both for investigation purposes as well as other reasons, must be overcome. Mere acquittal or withdrawal of charges does not as such give rise to such a right. And the test to be formulated must not allow over-ready distraction from the primary mandate of the Tribunal. We have therefore determined that the application should not be granted as of right. Rather *it should be granted only if necessary to avoid a real risk that, if it is declined, the applicant will suffer an injustice that clearly outweighs the opposing interests. Nor should it be granted beyond the extent required for that purpose.*

68. We conclude that the fact of detention for nearly four years, together with the acknowledgement made by the Prosecutor at the end of the period, demonstrate a real possibility that access to information is required to avoid an injustice, and that the interests in allowing the claim outweigh the costs of that course. But it should be permitted only to the extent required to enable Mr. El Sayed to make the claim he states in his application to the President, subject to appropriate conditions set by the Pre-Trial Judge.[111] Use for any other purpose would not be justified and would be improper.[112]

69. Within this context, we turn to consider the specific challenges made by the Appellant to the decision of the Pre-Trial Judge: was he right to determine that all documents in three categories defined by the Prosecutor should be withheld from disclosure?

II. Did the Pre-Trial Judge err in categorically excluding these three sets of documents from disclosure to Mr. El Sayed?

70. We have noted at paragraph 16 that the Pre-Trial Judge concluded that the documents in categories (1), (2), and (3) were inherently confidential, were exempt from disclosure under Rule 111, and also did not form part of Mr. El Sayed's criminal file. He therefore held that the Prosecutor was not obligated to disclose the documents in categories (1), (2), and (3).

A. The Appeals Chamber's Approach

71. The primary responsibility for correct classification of documents falls on the Prosecutor. The Prosecutor's submission that the Appellant's challenge to the classification of the documents is a "fishing expedition" misapprehends that fact. When there are grounds for belief that the Prosecutor

[111] See above note 5.

[112] See the rationale for such a finding in U.K., *Riddick v. Thames Board Mills Ltd.* [1977] 1 QB 881.

has misapprehended that responsibility it is the right of the Appellant to advance that challenge before this Tribunal.[113] The ultimate responsibility for ensuring compliance with the law is that of the judiciary. Public interest privilege "does not represent a surrender of judicial control over access to the courts [...] it is essential that the courts continue critically to examine instances of its invocation."[114]

72. The legal characterisation of a document for the purpose of judicial proceedings involves its assessment against the applicable legal provisions. This process can be relatively simple when the document's characterisation is addressed explicitly in those legal provisions. The process is more complicated when the legal provisions do not clearly define the contours of the concept and its legal consequences. Such is the case for documents covered by Rule 111, which employs general and undetermined concepts such as "[r]eports, memoranda, or other internal documents prepared by a Party [...]."[115] Where concepts are left undefined by legal texts, it is the task of the judges to establish criteria for their definition and to make an evaluation.[116] The content of the documents in question, their function and purpose, as well as their source or author are all relevant to the evaluation.

73. For example, it is not enough to accept that a document is an investigator's note simply because the title of this document says so. The classification of a record as "internal document", because it is the work product of a Party and thus subject to the protection of Rule 111, hinges on an assessment not just of the document's title, but also of its actual content, function, purpose and source.

74. This does not mean that judges must always review material withheld from disclosure on a document-by-document basis. There have been competing arguments on whether the court may accept the categorical approach asserted by the Prosecutor or whether it should examine the material

[113] See sources cited below at note 117.

[114] See U.S., *Mohamed v. Jeppesen Dataplan Inc* , 614 F.3d 1070, 1082 (9th Cir. 2010).

[115] See below paragraph 76.

[116] As Donald Harris distilled from the reasoning of Jeremy Bentham, "it is impossible to *define* a legal concept, and [...] the task of legal writers should be rather to *describe* the use of a word [stating a concept] in the particular legal rules in which it occurs." D. Harris, "The Concept of Possession in English Law", in A.G. Guest (eds), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) at 69-70 (emphasis in original) (citing H.L.A. Hart, "Definition and Theory in Jurisprudence", 70 *Law Quarterly Review* (1954) 37, at 41 (citing in turn chapter 5 of J. Bentham, *A Fragment on Government* (Cambridge: Cambridge University Press, 1988))).

document by document.[117] What is always essential is that the judge be satisfied that – whatever the exact method used – the material in question is properly categorised. Much will depend on the actual circumstances of the case. Where there is a large amount of material for consideration, the alternative to unacceptable rubber-stamping is for the judge to establish a suitable sampling process and to examine at least specimens of the materials. If such sampling indicated the methodology employed by the disclosing party was reliable, depending on all the circumstances of the case it could be appropriate to decide not to proceed further. If, however, an initial examination revealed errors, further review by the judge would be required.

75. In the present case, after a cursory review by this Chamber of the material said to fall within categories (1), (2) and (3), it appears that misclassification of certain documents may have occurred. For that reason and because we are uncertain of the Pre-Trial Judge's approach to reviewing the documents classified in these categories by the Prosecutor, we remand this application to the Pre-Trial Judge for a more thorough review of the classification. We first expand on our analysis.

B. Rule 111

1. The Provisions of the Rule

76. Rule 111 is situated in the disclosure section. It grants an exception from the disclosure obligation. It 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

[117] The ICTY relies on the Prosecutor to determine whether evidence is relevant or exculpatory: "Rule 66(B) imposes on the Prosecutor the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor." J. Jones & S. Powles, *International Criminal Practice*, 3rd edn. (Oxford: Oxford University Press, 2003) at 653. However, if there are errors in the Prosecutor's judgement, the ICTY allows the court to intervene: "The Chamber does not interevene in the exercise of this discretion by the Prosecution, unless it is shown that the Prosecution abused its discretion. [...] The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution." V. Tochilovsky, *Charges, Evidence, and Legal Assistance in International Jurisdictions* (Nijmegen: Wolf Legal Publishers, 2005) at 64 (citing ICTY, *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, IT-99-36-A, 7 December 2004, para. 264). Similar approaches to the disclosure of documents appear in national courts as well. See U.S., *Bevis v. Dept. of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986). Applying the Freedom of Information Act, the court ruled that the FBI had to perform an internal document-by-document review in order for the court to properly exempt the documents based on category: "Although the [agency] need not justify its withholding on a document-by-document basis in court, the [agency] must itself review each document to determine the category in which it properly belongs."

reports, memoranda, or other internal documents prepared by the UNIIIC or its assistants or representatives in connection with its investigative work.

Similar rules have been adopted by the ICTY,[118] ICTR,[119] International Criminal Court ("ICC")[120] and Special Court for Sierra Leone ("SCSL").[121]

77. This Rule excludes from the disclosure obligation 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 UNIIIC, its assistants or representatives including reports and memoranda as well.

78. While the language of the Rule is expressed generally, it is confined to what has been created by the Party, its agents and the UNIIIC and its agents acting as such. As will appear, it has no application to statements of witnesses, which are not the Party's work product; *they are the product of the person interviewed.* The distinction has been overlooked in some of the jurisprudence of other courts to which we now turn.

2. International and Domestic Case Law

79. A review of the jurisprudence of other international courts and tribunals shows that internal documents, otherwise known as internal work product, are generally exempted from the disclosure obligation, subject to certain conditions.

80. An early discussion of its purpose is that of the Supreme Court of the United States in *Hickman v. Taylor*, in which it considered that work product is "written statements, private

[118] Rule 70(A) of the ICTY RPE provides: "Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules."

[119] Rule 70(A) of the ICTR RPE provides: "Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions."

[120] Rule 81(I) of the ICC RPE provides: "Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure."

[121] Rule 70(A) of the SCSL RPE provides: "Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions."

memoranda, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties."[122]

81. Turning to international courts,[123] the Trial Chamber of the ICTY in the *Blagojević* case observed that the rule:

> [...] aims to protect work product from disclosure, as it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party.[124]

The Chamber concluded that notes taken by the Prosecution in preparation of a potential plea with another accused who might testify in the case against Mr. Blagojević were exempt from disclosure "as they are internal documents made by the Prosecution in connection with the preparation of the case."[125]

82. More recently in the *Lubanga* case,[126] the ICC helpfully explained that the material covered by its equivalent rule "includes, inter alia, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation."

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[122] 329 U.S. 495, 510 (1947). The policy rationale for this work product exception was stated as follows:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

[123] For an overview of the notion of work product, see ICTR, *Nahimana et al.*, Public Redacted Version of the Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, ICTR-99-52-A, 27 November 2006, paras 11-12, 14.

[124] ICTY, *Blagojević et al.*, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose Its Notes from Plea Discussions with the Accused Nikolić and Request for an Expedited Open Session Hearing, IT-02-60-T, 13 June 2003, at p. 6.

[125] *Ibid.*

[126] ICC, *Lubanga Dyilo*, Redacted Decision on the "Prosecution's request for Non-Disclosure of the Identity of Twenty-Five Individuals Providing Tu Quoque Information" of 5 December 2008, ICC-01/04-01/06, 2 June 2009 ("*Lubanga*, Decision on non-Disclosure"), para. 31.

83. However, beyond such general explanation international courts have rightly avoided trying to define the concept and instead have offered examples of its operation. But problems have arisen. In a later phase of the *Lubanga* case, the ICC Trial Chamber earlier this year listed as examples of internal documents or "internal work product":

- *all preliminary examination reports*;
- information related to the preparation of a case, such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies;
- information related to the prosecution's objectives and techniques of investigation;
- analyses and conclusions derived from evidence collected by the OTP;
- *investigator's interview notes* that are reflected in the witness statements or audio-video recording of the statement;
- investigator's subjective opinions or conclusions that are recorded in the investigator's interview notes; and
- internal correspondence.[127]

But "preliminary examination reports" and "investigator's interview notes" may well contain information from interviewees. That information is *the product of the person interviewed*, not work product of the interviewer, and does not in our opinion fall within Rule 111.

84. A similar case is that of "screening notes". The ICC defined screening notes as "the result of preliminary procedure, conducted prior to taking a statement, during which the individual is assessed so that a decision can be made as to whether or not a statement is to be taken." These pre-interview assessments are, according to that Court, a stage precedent to an interview ending with a formal statement. Accordingly, it accepted the ICC Prosecutor's argument that only that final statement is subject to disclosure.[128]

85. However, we prefer the conclusion that it does not matter if the prosecution intended to convert the original record of a witness interview into a more formal document to be signed by the

[127] See ICC, *Lubanga Dyilo*, Redacted Decision on the Prosecution's Disclosure Obligations Arising Out of an Issue Concerning Witness DRC-OTP-WWWW-0031, ICC-01/04-01/06, 20 January 2011 ("*Lubanga*, Decision on Disclosure Obligations"), paras 19, 31-32 (emphasis added).

[128] ICC, *Bemba Gombo*, Public Redacted Version of Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure (ICC-01/05-01/08-750-Conf), ICC-01/05-01/08, 9 April 2010 ("*Bemba*, Disclosure Decision"), paras 19, 31-32.

witness. The experience of the courts has been that all stages of the preparation of a witness's formal statement can be important, whether to exhibit consistency or the reverse. The prosecution may not, by labelling the record of an interview "investigators' notes" or "internal memorandum", exempt witness statements from disclosure under Rule 111. It may indeed bear on credibility and thus be doubly in contention for disclosure, under Rule 113 as well.[129]

86. Additionally, international tribunals have considered that internal assessment on various individuals and work processes,[130] "conclusions and recommendations made by the investigators of the Office of the Prosecutor at the end of the interviews with the relevant witnesses,"[131] and internal memoranda, correspondence, handwritten questionnaires and notes of meetings[132] are not subject to disclosure. For the reasons just discussed, this general formulation is in our opinion insufficiently rigorous.

87. We do not agree with the conclusions of the Trial Chamber of the ICC that "investigator's interview notes that are reflected in the witness statements"[133] and "screening notes...[or] pre-interview assessments [that] are a stage precedent to an interview when a formal statement is taken"[134] constitute internal work product that need not be disclosed by the Prosecutor unless it includes exculpatory evidence not otherwise contained in material provided to the defence.[135] This runs the risk that an investigator may sanitize the original account of the witness. That kind of conduct can be a major reason for miscarriage of justice. Both the Trial Chamber and the opposing party are entitled to know how the *witness's* version has evolved.

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[129] See paragraph 97 below.

[130] ICC, *Katanga et al*, Public Redacted Version of the "Eighth Decision on Redactions", ICC-01/04-01/07-568, 9 June 2008, paras 31-37.

[131] ICC, *Katanga et al*, Public Redacted Version of the Corrigendum to the Third Decision on the Prosecution Request for Authorisation to Redact Materials Related to the Statements of Witnesses 7, 8, 9, 12 and 14, ICC-01/04-01/07-249, 5 March 2008, para. 48; see also ICC, *Katanga et al.*, Public Redacted Version of the Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witness 166 and 233, ICC-01/04-01/07-361, 3 April 2008, paras 50-53.

[132] ICTR, *Nahimana*, Decision on the Prosecutor's Ex Parte Application to Exclude Certain Documents from Defence Inspection of Microfiche Material, ICTR-99-52-T, 25 October 2002, at p. 3.

[133] *Lubanga*, Decision on Disclosure Obligations, *supra* note 127, at para. 17.

[134] *Bemba*, Disclosure Decision, *supra* note 128, at para. 31.

[135] We also do not agree with the Special Court for Sierra Leone's acquiescence to the prosecution's destruction of "rough notes containing both disclosable and non-disclosable material" after the notes were formalized into written witness statements. SCSL, *Brima*, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators Notes Pursuant to Rules 66 and/or 68, SCSL-04-16-T, 4 May 2005 ("*Brima*, Disclosure Decision"), paras 17-18.

88. We therefore disagree with the ICC Trial Chamber's conclusion in *Lubanga* that "all preliminary examination reports," "investigator's interview notes that are reflected in the witness statements or audio-video recording of the statement," and "investigator's subjective opinions or conclusions that are recorded in the investigator's notes" may be exempted from disclosure.[136]

89. In *Prosecutor v. Norman*, the SCSL examined the meaning of a witness statement. While that term was defined in a rule of the SCSL Rules of Procedure and Evidence, for which the STL has no equivalent rule, the following statement by that court is directly pertinent:

> The Defence has strenuously argued that a statement made or recorded in the third person rather than in the first person cannot properly be classified as a witness statement, and further, that interview notes do not amount to statements within the meaning of Rule 66 of the Rules.
>
> In this regard, the Chamber would like to refer to the definition of a statement in Black's Law Dictionary, which defines a statement as:
>
> > 1. Evidence. A verbal assertion or non-verbal conduct intended as an assertion. 2. A formal and exact presentation of facts. 3. *Criminal Procedure*. An account of a person's (usu. a suspect's) knowledge of a crime, taken by the police pursuant to their investigation of the offence.
>
> Indeed, the Chamber observes that nowhere in the rules is a witness statement defined. It is worth noting that the Appeals Chamber of [the] ICTY has considered that the usual meaning to be ascribed to a witness statement is 'an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.' (emphasis added) The Tribunals have also considered that transcribed trial testimony, radio interviews, unsigned witness declarations and records of questions put to witnesses and answers given, constitute witness statements.[137]

We agree with that broader appraisal.

90. Furthermore, it may be that the documents in question are copies of original statements contained in other documents. If so, the duplicate documents could perhaps be classified as irrelevant, provided the originals are treated correctly. But while "irrelevance" may be another ground for withholding disclosure – a question not currently before us – that does not change the document's proper classification as internal work product or not.

[136] *Lubanga*, Decision on Disclosure Obligations, *supra* note 127, at paras 16-17.

[137] SCSL, *Hinga Norman*, Decision on Disclosure of Witness Statements and Cross-Examination, SCSL-04-14-PT, 16 July 2004, paras 8-10.

91. We will return to this topic in the analysis below. It is sufficient for present purposes to say that an "internal document" is an in-house product of a Party created for its own internal use. We emphasise that the language of Rule 111 makes clear that the Rule's protection is confined to the internal product *of the Party* or those whose conduct is fairly attributable to the Party or analogous to that of the Party.

C. Application of Rule 111 to the Present Case

1. Category 1: Correspondence between the UNIIIC and the Lebanese Authorities

92. Rule 111 by its terms covers the internal documents "prepared by the UNIIIC or its assistants or representatives in connection with its investigative work." We readily conclude that correspondence exchanged between the UNIIIC and the Lebanese Prosecutor-General constitutes such "internal" documents, to the extent the correspondence pertains to the coordination of a unitary criminal investigation.

93. The UN Security Council created the UNIIIC to assist the Lebanese authorities.[138] In creating the UNIIIC, the Security Council called for the "full cooperation of the Lebanese authorities" in the UNIIIC's investigation.[139] Subsequently, in Resolution 1636, the UN Security Council referenced a *unitary* investigation into the 14 February 2005 attack,[140] while acknowledging the investigatory work of both the UNIIIC and the Lebanese authorities on this matter. In sum, the UNIIIC was established to conduct a single investigation in mutual cooperation with the Lebanese authorities. As such, correspondence between the two bodies related to this unitary investigation should be presumptively considered internal documents prepared in connection with the investigation of a case and thus exempt from disclosure under Rule 111.[141]

[138] See S/RES/1595 (2005), at para. 1; S/RES/1636 (2005), at para. 5.

[139] See S/RES/1595 (2005), at para. 3; S/RES/1636 (2005), at para. 7; *Memorandum of Understanding Between the Government of Lebanon and the UN Regarding the Modalities of Cooperation with the United Nations International Independent Investigation Commission*, S/2005/393 (2005), Annex, at para. 2.

[140] S/RES/1636 (2005), at para. 4.

[141] See U.S., *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007) The court in *Fort* ruled that correspondence between state investigators and federal investigators counted as internal correspondence, as all were "government agents" working on a case involving the same defendant and the same crime. See also U.S., *United States v. Cherry*, 876 F. Supp. 547 (S.D.N.Y. 1995) (ruling that documents transferred by state investigators to federal investigators were protected internal correspondence if the federal investigation was an "outgrowth" of the state investigation); U.S., *United States v Green*, 144 F.R.D. 631 (W.D.N.Y. 1992) (holding that documents from local investigators that are in federal possession are non-

94. The conclusion would be different for documents emanating directly from the UNIIIC whose purpose was not to pursue investigation or in-house discussion but that were operative documents, having effect outside the context of the UNIIIC, that is, outside the internal management of the unitary investigation. Examples would be search warrants or other similar documents issued by the UNIIIC to affect persons beyond its own ranks.

2. Categories 2 and 3: Internal Memoranda of the UNIIIC and Investigators' Notes

95. We understand the second category described by the Prosecutor and employed by the Pre-Trial Judge, that of internal memoranda of the UNIIIC, to encompass documents such as research material and internal analysis of strategies or investigation methods. These coincide with the core concept of traditional "work product" as described above in Part II(B) of the Discussion. Therefore, internal memoranda of the UNIIIC containing legal analysis, research, or investigatory strategies fall outside the disclosure obligation, pursuant to Rule 111.

96. With regard to category 3, we understand "investigators' notes" to refer to those documents that contain the *thoughts and original work* of investigators, often in unpolished or incomplete form. They therefore likewise fall within Rule 111.

3. The Relevance of Rule 113

97. Rule 113 requires the Prosecutor to disclose to the Defence:

> [...] any information in his possession or actual knowledge, which may reasonably suggest the innocence or guilt of the accused or affect the credibility of the Prosecutor's evidence.

That is the effect of the international jurisprudence: there has been general acceptance that, although characterised as internal, a document may nonetheless be subject to disclosure *to an accused* if it suggests the innocence or mitigates the guilt of the accused or if it affects the credibility of the Prosecutor's evidence.[142] Similarly, a screening note, or a pre-interview assessment, not otherwise included in witness statements or other evidence already subject to disclosure,[143] is itself subject to

disclosable internal memoranda, if they are part of a joint investigation). We look to the United States in this instance, as the U.S. federal system often results in multi-sovereign criminal investigations.

[142] ICTY, *Haradinaj et al.*, Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness, IT-04-84-PT, 13 December 2006, at p. 4. This is similarly provided for under Rule 113 of the STL Rules of Procedure and Evidence.

[143] See examples mentioned above, listed in the *Lubanga* case at paragraph 83.

disclosure if it contains exculpatory evidence or information that is material to the preparation of the defence case.[144]

98. Because the submissions do not extend to the confidential materials we have seen, the following opinion expressed in this context, like that of our decision of 16 February 2011, may require revisiting in the light of a particular ruling on specific facts. If the Pre-Trial Judge is in doubt as to the proper characterisation of a disputed document, the appropriate course may be for him, under the inherent power to do justice, to issue on the point a "closed decision" – one setting out confidential reasons not provided to the party seeking disclosure. Any ultimate decision by the Appeals Chamber would, however, be an open decision.[145]

99. Each of Rules 111 and 113 contains an expression of important public policy.

100. That of Rule 111 is predominantly to allow uninhibited discussion among those representing one Party when considering what decisions to make. The high interest of freedom of expression to be found across the jurisprudence is an expression of this point. Candour is vital to quality. The major focus of Rule 111 material is on *opinion*.

101. 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 complementarily between the two Rules.

102. There is however the possibility that Rule 111 discussion will be expressed (i) in such a categorical manner; (ii) by a decision maker; (iii) in such circumstances as to suggest that what occurs "in-house" is properly to be categorized as admission of *fact*. At that point the Rule 111 shield disappears and is replaced by the Rule 113 obligation (subject of course to its limitations laid down in Rules 116 to 118).

[144] See *Bemba*, Disclosure Decision, *supra* note 128, para. 33. See also *Brima*, Disclosure Decision, *supra* note 135, para. 16, where the Court considered that investigators' notes of an internal nature not containing a statement made by a witness are not subject to disclosure.

[145] The issue in the present litigation is what information may be disclosed. Procedures en route to that decision may properly employ the closed decision procedure and the use of special counsel. But once the disclosure decision is made, use of such procedure in substantive proceedings is impermissible. Nor would the STL facilitate the use of such procedures either in its own proceedings or in criminal proceedings employing materials which it has disclosed, save in accordance with the policies of its own Rules. These include Rule 116(C), requiring protection of the accused's right to a fair trial or withdrawal of charges. See U.K., *Al Rawi v. The Security Service* [2011] UKSC 34; compare *Home Office v. Tariq* [2011] UKSC 35.

103. A further point is whether "guilt or innocence" in Rule 113 refers not only to the crime alleged by Mr. El Sayed that others have made false evidence, but also to the original suspicion of Mr. El Sayed's implication in the assassination (a matter that is not at present germane to the adjudicatory power of this Tribunal, in view of the 2009 statement by the Prosecutor that he was not preferring any charge against Mr. El Sayed for that assassination).

104. Such distinction is one without difference. These are opposite sides of the same coin. Mr. El Sayed's assertion is of innocence on his part of assassination; that is part of his assertion of criminality on the part of the alleged "false witnesses".

105. In short, 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, the Rule 111 discussion is lifted into the Rule 113 category and must be disclosed unless any of Rules 116 to 118 applies.

4. Proper Categorisation of Documents

106. Although we agree with the Pre-Trial Judge that categories (1), (2) and (3) generally fall under the scope of Rule 111, the proper employment of those exclusions depends on the proper classification of individual documents.

107. We have noted that a cursory screening of some of the documents classified by the Prosecutor as falling within these three categories suggested that the categories may not always have been employed properly by the Prosecutor. We thus return all the documents in these three categories to the Pre-Trial Judge to re-assess, pursuant to our comments above at paragraph 74, and to require further review and correction by the Prosecutor if necessary.

108. We have emphasised that documents that are not purely *internal* may not be classified as "internal documents". They would include any correspondence that was also sent to counsel for Mr. El Sayed. Similarly, operative documents that are addressed to external actors, such as search warrants or arrest warrants, do not constitute "internal documents".

109. Furthermore, statements from witnesses recorded in direct or indirect speech, including identification of relevant persons, contained within documents labelled "internal memoranda" and "investigators notes", are not covered by Rule 111. The task of securing statements no doubt

involves preparation and effort by the investigator. But we repeat that the resulting statement is, to the extent of the statement component, that *of the interviewee* and does not fall within Rule 111. That is, the words of a witness are not the Party's work product; *they are the product of the witness.* Of course, this does not apply, for instance, to any additional comment by the investigators contained in the same document – in such a case, redaction might be appropriate.

110. As a last note, the discussion above of course does not prevent the Prosecutor from pleading, and the Pre-Trial Judge from accepting, reasons for non-disclosure of particular documents other than the protection for confidentiality enshrined in Rule 111. The Appeals Chamber was not seized of these additional grounds for non-disclosure.

III. What relief if any should be ordered?

111. In summary, the Appeals Chamber considers it must apply the following principles:

112. The principle of freedom of information, while applicable to the present case, must be evaluated against the other important principles of proper administration of justice including the need to safeguard the secrecy of an investigation that is still continuing, the right to privacy and confidentiality and the need to husband finite resources in circumstances where no more is known of the facts than has been disclosed by the Prosecutor.

113. In addition, Mr. El Sayed's claim touches on the right of access to justice. He may need documents solely within the custody of the Tribunal in order to pursue domestic remedies and thus to render his right of access to domestic courts effective.

114. Rule 111 is of direct application in this case, as granting Mr. El Sayed access to information may have a direct effect on the criminal investigation of which this Tribunal is seized. Therefore, subject to the potentially overriding operation of Rule 113, we apply Rule 111 directly.

115. To the extent that any information held by the Prosecutor and falling within Rule 111 "may reasonably suggest the innocence or guilt of [Mr. El Sayed] or affect the credibility of [any of] the Prosecutor's evidence [which might tend to suggest that he was implicated in the conspiracy to kill Rafiq Hariri]" it should be disclosed to Mr. El Sayed unless there is a basis other than Rule 111 to withhold it.

116. The three categories identified by the Pre-Trial Judge are, in theory, covered by the non-disclosure exception of Rule 111, in particular the correspondence between the UNIIIC and the Lebanese authorities. It is for the Prosecutor to properly categorise documents in the first instance. However, the Pre-Trial Judge must be satisfied that the documents in question are properly categorised.

117. Proper categorisation depends not on a document's title, but on its content, function, purpose and source. We have noted possible errors in categorisation. It is therefore for the Pre-Trial Judge to determine the most appropriate process for ensuring the accuracy of the Prosecutor's categorisation.[146]

118. Finally, we note that the proper application of Rule 111 is only the first step in the review being undertaken by the Pre-Trial Judge. Even if a document did not fall under Rule 111, there may be other grounds justifying its non-disclosure, such as those mentioned in the Pre-Trial Judge's decisions of both 17 September 2010 and 12 May 2011.

119. The application of both freedom of information and the right of access to justice is dependent on Mr. El Sayed's claim stated in his application to the President, namely his intention to use these documents to pursue remedies in other courts. This is the reason we have concluded he should be granted access to these documents, and it is the only appropriate use to which these documents may be put.

120. With these clarifications, we refer the documents classified under Categories 1, 2 and 3 back to the Pre-Trial Judge with directions to ensure their appropriate and expeditious categorisation in the light of this decision.

[146] See paragraph 74.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

DECLARES the appeal admissible;

RULES that the appeal be allowed; and

REFERS the case back to the Pre-Trial Judge with directions to ensure that the classifications of documents under Categories 1, 2 and 3 are made appropriately and expeditiously in the light of this decision.

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

Filed this 19th day of July 2011,
Leidschendam, The Netherlands

Judge Antonio Cassese
President