



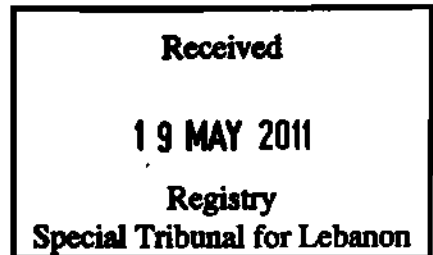
**The Pre-Trial Judge**

**Le Juge de la mise en état**

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

**THE PRE-TRIAL JUDGE**

**Case No.:** CH/PTJ/2011/08  
**The Pre-Trial Judge:** Mr Daniel Fransen  
**The Registrar:** Mr Herman von Hebel  
**Date:** 12 May 2011  
**Original:** French  
**Type of document:** Public



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**DECISION ON THE DISCLOSURE OF MATERIALS FROM THE  
CRIMINAL FILE OF MR EL SAYED**

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**Counsel:**  
Mr Akram Azoury

**Office of the Prosecutor:**  
Mr Daniel Bellemare, QC

**Defence Office:**  
Mr François Roux

*STL Official Translation*



**I. Procedural background:**

1. On 17 March 2010, Mr Jamil El Sayed (the “Applicant” or “Mr El Sayed”), represented by his counsel, attorney Akram Azoury, filed an application with the Special Tribunal for Lebanon (the “Tribunal”), the subject of which was the “request for release of evidentiary materials related to the crimes of libellous denunciations and arbitrary detention” (“the Application”).<sup>1</sup>
2. On 17 September 2010, the Pre-Trial Judge of the Tribunal (the “Pre-Trial Judge”) issued an order pronouncing that the Tribunal had jurisdiction to rule on the Application of 17 March 2010 and recognising the right of the Applicant to have, in principle, access to the materials relating to him in his criminal file, as well recognising his standing to bring proceedings before the Tribunal in order to exercise this right, whilst pointing out that this right was not absolute and that restrictions and limitations might be applied (“Order of 17 September 2010”).<sup>2</sup> Consequently, the Pre-Trial Judge also invited the Prosecutor of the Tribunal (the “Prosecutor”) and the Applicant to put forward their observations and submissions with regard to the possible application of restrictions and limitations in exercising this right at this stage of the investigation.<sup>3</sup>
3. On 28 September 2010, the Prosecutor lodged an appeal of the Order of 17 September 2010.
4. On 10 November 2010, the Appeals Chamber of the Tribunal dismissed the Prosecutor’s appeal.<sup>4</sup> It likewise confirmed the jurisdiction of the Tribunal to rule on the Application of 17 March 2010 as well as on the standing of the Applicant to

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<sup>1</sup> Public redacted version of Memo No. 112. The Application: Request for Release of Evidentiary Materials Related to the Crimes of Libellous Denunciations and Arbitrary Detention, CH/PTJ/2010/01, 17 March 2010.

<sup>2</sup> 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, paras 36, 42 and 53.

<sup>3</sup> *Ibid.*, para. 57

<sup>4</sup> Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, paras 57 and 65.

request the materials relating to him contained in his criminal file. It did not, however, rule on the issue of the right of the Applicant to obtain these materials.<sup>5</sup>

5. On 7 January 2011, the Pre-Trial Judge issued an order convening a public hearing on 14 January 2011 and inviting the Applicant and the Prosecutor to reply to a number of questions relating in particular to the limitations and restrictions that might be applied to the disclosure of materials from the file at this stage of the proceedings.<sup>6</sup> The Pre-Trial Judge also invited the Applicant and the Prosecutor to submit their views with regard to the holding of an *ex parte* hearing in closed session during the course of which the Prosecutor would be asked to provide grounds that would justify non-disclosure of one or other of the documents.
6. On 14 January 2011, the Applicant and the Prosecutor presented their respective submissions at a public hearing during which the Head of Defence Office was also heard.
7. Further to this hearing, the Pre-Trial Judge ordered the Prosecutor to submit to him a confidential and *ex parte* written application before 11 March 2011:
  - i) comprising the materials in his possession, together with an inventory thereof, including materials on electronic files, relating to the detention of the Applicant in connection with the Hariri case;
  - ii) indicating the specific grounds for each of the materials or category of similar materials, that would justify non-disclosure to the Applicant at this stage of the proceedings, or disclosure in redacted form; and

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<sup>5</sup> The Appeals Chamber noted in this respect that it was for the Pre-Trial Judge “to consider and decide on the merits of the Application, namely the existence and scope of the Applicant’s right of access to documents from his criminal file that are in the possession of the Prosecutor. It is for the Pre-Trial Judge to consider this question in the first instance” (*ibid.*, para. 66).

<sup>6</sup> Order on Mr El Sayed’s Requests for Authorisation to File a Rejoinder to the Prosecution’s Reply and for the Convening of a Hearing, CH/PTJ/2011/01, 7 January 2011, pp. 5-6.

- iii) specifying in relation to all the materials to which, in his opinion, these restrictions would not apply, whether he maintains that a copy could be given to the Applicant or otherwise solely consulted by him or his counsel.<sup>7</sup>
8. On 10 March 2011, the Prosecutor filed an application relating to the non-disclosure of materials in his possession concerning the detention of Mr El Sayed (the “Prosecutor’s Application”).<sup>8</sup> However, due to an imprecision involving the English translation of part of the disposition of the Order of 7 February 2011, the Prosecutor did not file the materials relating to the detention of the Applicant, but solely an inventory of those materials in the form of a spreadsheet.<sup>9</sup>
9. On 14 March 2011, an amended version of the English translation of the Order of 7 February 2011 was filed clarifying that the Prosecutor was required to file the materials in his possession, together with an inventory.
10. On 17 March 2011, the Prosecutor filed 459 documents together with a request to set a new deadline for the filing of suggested redactions relating to 186 of those documents.<sup>10</sup> The same day, the Prosecutor filed an Annex containing the summaries in English of 125 documents in Arabic and of one 991-page document in Arabic.<sup>11</sup>
11. Further to the Prosecutor’s Request relating to the extension of the deadline for the filing, the Pre-Trial Judge invited the Prosecutor to file the materials from the

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<sup>7</sup> Order Inviting the Prosecutor to File an Application Containing Grounds Relating to the Non-disclosure of Materials in his Possession Concerning the Detention of Mr El Sayed, CH/PTJ/2011/03, 7 February 2011, pp. 6 to 7 (“Order of 7 February 2011”).

<sup>8</sup> Prosecutor’s Application on the Grounds Relating to the Non-disclosure of Materials in his Possession Concerning the Detention of Mr El Sayed, CH/PTJ/2011/03, 10 March 2011, para. 37.

<sup>9</sup> The official translation provided by the Language Section filed on 10 February 2011 contained the expression “an inventory of the materials” whereas the original version in French specified that the Prosecutor should file the “inventoried materials”. An amended version of the Order in English was filed on 14 March 2011 by the Language Section of the Registry and was notified to the parties on 16 March 2011.

<sup>10</sup> Prosecutor’s Materials Concerning the Detention of Mr El Sayed and Request to Set a 1 April 2011 Deadline for the Filing of the Materials with Suggested Redactions, CH/PTJ/2011/03, 17 March 2011, para. 8 (“Prosecutor’s Submissions of 17 March 2011”).

<sup>11</sup> *Ibid.*, para. 12 and Annexes B and C.

Applicant's criminal file that were in his possession and which the Prosecutor considered could only be disclosed to the Applicant in redacted form, by 1 April 2011 at the latest.<sup>12</sup>

12. On 1 April 2011, the Prosecutor filed the documents with the suggested redactions as well as a spreadsheet containing the inventory of these materials.<sup>13</sup>
13. On 12 April 2011, the Pre-Trial Judge decided that an *ex parte* hearing in closed session should be held in order to clarify and examine in detail some of the documents presented by the Prosecutor in his applications of 10 and 17 March as well as that of 1 April 2011.<sup>14</sup>
14. This *ex parte* and confidential hearing was held at the Tribunal on 19 April 2011.
15. On 21 April 2011, the Prosecutor provided clarification relating to some of the inventoried documents that were discussed during the hearing of 19 April 2011.
16. On 26 April 2011, counsel for the Applicant filed an Addendum to his Non-exhaustive Inventory of 3 December 2010 in order to add two documents which apparently came to his attention on or about 17 January 2011.<sup>15</sup>
17. On 28 April 2011, the Prosecutor filed additional documents that he had identified shortly before the hearing of 19 April 2011 and clarified his position with regard to other documents contained in the spreadsheet of 1 April 2011.<sup>16</sup>
18. On 5 May 2011, the Prosecutor filed a new series of additional documents as well as a spreadsheet summarising all of the documents under review.<sup>17</sup> The same day, he submitted that the Addendum filed by the Applicant on 26 April 2011 should be

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<sup>12</sup> Scheduling Order for the Prosecutor to File Redacted Materials, CH/PTJ/2011/06, 21 March 2011.

<sup>13</sup> Prosecutor's Submission of Documents that can only be Disclosed to the Applicant in Redacted or Summarised Form, CH/PTJ/2011/06, 1 April 2011 ("Prosecutor's Submissions of 1 April 2011").

<sup>14</sup> Scheduling Order for a Confidential and *Ex Parte* Hearing in Connection with the Request for Release of Evidentiary Materials Related to the Crimes of Libellous Denunciations and Arbitrary Detention Filed by Mr El Sayed on 17 March 2010, CH/PTJ/2011/07, 12 April 2011.

<sup>15</sup> Addendum to the Non-exhaustive Inventory of the Documents and Materials General El Sayed Requests from the Prosecutor, CH/PTJ/2010/01, 26 April 2011.

<sup>16</sup> Prosecutor's Submissions Concerning Additional Documents for Disclosure or Inspection by the Applicant, CH/PTJ/2011/07, 28 April 2011.

<sup>17</sup> Prosecution's Further Submissions Concerning Additional Documents for Disclosure or Inspection by the Applicant, CH/PTJ/2011/07, 5 May 2011.

rejected by the Pre-Trial Judge as it is irrelevant and does not comply with Rule 8 of the Rules of Procedure and Evidence of the Tribunal (the “Rules”) with regard to time limits for filing responses to motions.

19. On 10 May 2011, counsel for the Applicant filed a Reply to the Prosecution’s response in connection to the Addendum to the inventory.<sup>18</sup>

## **II. The Applicant’s request:**

20. In the initial Application,<sup>19</sup> the Applicant requested that he obtain the following documents:

- a certified copy of the original records of the complaints of the Applicant that were transferred to the Tribunal by the Lebanese authorities on 1 March 2009;
- a certified copy of the original records of the statements of witnesses who implicated him, either directly or indirectly, in the assassination of Rafiq Hariri ;
- the reports provided to the Lebanese Prosecutor regarding the assessment of the above-mentioned statements and in particular the report by Mr Brammertz provided on 8 December 2006;
- the views of Mr Bellemare in regard to the detention of the Applicant and the other detained persons which were forwarded to the Lebanese Prosecutor General; and
- any other evidence that is in the possession of the President which is “necessary for the prosecution of the offences”.

21. Further to the Scheduling Order of 16 November 2010, the Applicant set out in an inventory, which was filed on 3 December 2010, the documents that he was requesting from the Prosecutor, specifying in particular that he wished to obtain the official records of the statements made before the International Independent

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<sup>18</sup> *Réplique à [REPLY TO]* “Prosecution’s response to the applicant’s 26 avril [sic] 2011, motion”, 10 May 2011.

<sup>19</sup> Application, 17 March 2010, pp. 7 and 8.

Investigation Commission (the "Investigation Commission") and the assessment reports of the witnesses heard before the Investigation Commission.<sup>20</sup>

### **III. The Prosecutor's Submissions:**

22. On 10 March 2011, the Prosecutor identified 885 documents of which, in his opinion, 459 were relevant to the Applicant's request and of which 426 were not relevant.<sup>21</sup> During the hearing of 19 April 2011, the Prosecutor explained that 885 documents had been identified on the basis of pages 7 and 8 of the Application of 17 March 2010 and the Non-exhaustive Inventory of 3 December 2010 of the Applicant. The Prosecutor conducted an electronic review of his database which contains documents originating from the Investigation Commission, the Lebanese authorities and his own investigations. The review encompassed all the documents which might have referred to the Applicant or to the witnesses he mentioned. Among the documents that he considered to be relevant, the Prosecutor stated that 273 documents could be disclosed to the Applicant, 67 documents could be inspected by counsel for the Applicant and 119 documents could not be disclosed to the Applicant.<sup>22</sup> The Prosecutor further stated that the inspection could take place at the headquarters of the Tribunal or at its Beirut Office.<sup>23</sup>
23. On 1 April 2011, following a more detailed assessment of the documents under review, the Prosecutor stated that 64 documents that he deemed relevant on 10 March 2011 were in fact irrelevant in that they did not, directly or indirectly, involve Mr El Sayed, nor did they provide for an assessment of the credibility of the witnesses who had implicated the Applicant in the assassination of Mr Hariri.<sup>24</sup>

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<sup>20</sup> Non-exhaustive Inventory of the Documents and Materials General El Sayed Requests from the Prosecutor, CH/PTJ/2010/01, 3 December 2010.

<sup>21</sup> The Prosecutor's Application, paras 11 and 34.

<sup>22</sup> *Ibid.*, para. 37.

<sup>23</sup> *Ibid.*, para. 36.

<sup>24</sup> Prosecutor's Submissions of 1 April 2011, para. 4.

24. With regard to most of the documents in Arabic, the Prosecutor pointed out that, at this stage, only a summary had been prepared and that he would only be able to determine whether they should be disclosed to the Applicant or whether they should be inspected by his counsel once he was in possession of a full translation, should the Judge decide it necessary.<sup>25</sup>

**IV. Statement of reasons:**

25. Firstly, the Pre-Trial Judge considers that there is no reason that would justify the late filing of the Addendum by the Applicant on 26 April 2011 and which, consequently, is out of time. Furthermore, he notes that in accordance with Rule 8 of the Rules, a reply, if any, to a response can only be filed after obtaining leave of the Pre-Trial Judge. That being the case, the reply filed by the Applicant on 10 May 2011 is inadmissible. The Pre-Trial Judge wishes to note, however, that if the documents mentioned in the Addendum are included in part of the Applicant's criminal file which is in possession of the Prosecutor, they must have been reviewed in order to determine whether or not they can be disclosed to the Applicant and to his counsel.
26. The Pre-Trial Judge notes that the jurisdiction of the Tribunal and the standing of the Applicant to exercise his right to access materials which justified his detention were recognised in the Order of 17 September 2010.<sup>26</sup> In particular, the Order stated that the Applicant "must be entitled to the basic rights of defence similar to those conferred on an indictee, such as the right to have access to his criminal file".<sup>27</sup>
27. Given that this right is not absolute, however, the Pre-Trial Judge mentions in the same Order that it follows from legislation and case law, both national and

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<sup>25</sup> Prosecutor's Application, para. 16.

<sup>26</sup> Order of 17 September 2010; Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010.

<sup>27</sup> *Ibid.*, para. 52.



international, that some restrictions on the disclosure of materials from the criminal file may be applied, in particular, to avoid compromising an ongoing or future investigation or undermining fundamental interests, such as the physical well-being of persons concerned by these documents, or affecting national or international security. The Pre-Trial Judge likewise noted in this Order that, in some circumstances, the right of access to the file may be limited to counsel for the Applicant.<sup>28</sup>

28. In the case at hand, it is appropriate first of all to recall that the Prosecutor, as the person responsible for the investigations and prosecutions,<sup>29</sup> is the only one who has in-depth knowledge of the file relating to Mr El Sayed, which allows him to assess, with full knowledge of the facts, from amongst all the materials in his possession, those which have a bearing on the proceedings against the Applicant and which must be disclosed to him. For his part, the Pre-Trial Judge has the role of ensuring that the Prosecutor conducts a most rigorous assessment, consistent with the spirit of the texts of the Statute and the Rules, which render the Prosecutor not only a party to the proceedings but also an organ of Justice, and guarantor of the public interest that he represents.<sup>30</sup> In this respect, the Pre-Trial Judge notes that, in view of the various submissions that he has filed and the explanations he has provided, the Prosecutor has effectively and faithfully fulfilled this task whilst respecting the above-mentioned principles.
29. Taking into consideration these requirements, the Prosecutor classified the materials under review into seven categories: (1) correspondence between the Investigation Commission and the Lebanese authorities, (2) internal memoranda, (3) investigators' notes, (4) witness statements and transcripts of witness and suspect interviews, (5) documents originating from the Applicant or his counsel, (6) the Applicant's own statements and transcripts, and (7) other documents. Among the reasons put forward in order to refuse to disclose to the Applicant, all or in part,

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<sup>28</sup> *Ibid.*, para. 53.

<sup>29</sup> Article 11 of the Statute.

<sup>30</sup> Rule 55 of the Rules.

some of the materials, the Prosecutor mentions the need to safeguard the ongoing investigation, the safety of witnesses and the interests of national and international security. Furthermore, he added that some of the documents were internal documents from his Office and thus covered by Rule 111 of the Rules, whereas others were not relevant in relation to Mr El Sayed's request.

30. On the basis of the criteria mentioned in the Order of 17 September 2010 and noted in paragraphs 25 to 28 above, the Pre-Trial Judge has made an assessment of the documents released to him by the Prosecutor, in accordance with the categories he established, in order to determine, at the current stage of the proceedings, whether the reasons put forward would justify the non-disclosure of some of the documents or the measures limiting access to them.
31. The Pre-Trial Judge notes that the Prosecutor considers that for reasons of security in particular, some documents may not be disclosed or even consulted in their entirety by the Applicant and his counsel. According to the Prosecutor, these documents may only be inspected by the Applicant's counsel after some information has been redacted since the Code of Professional Conduct requires that counsel shall not disclose any confidential information, on pain of penalty. However, the Pre-Trial Judge finds that this dual precaution is not justified. In point of fact, where suggested redactions are, in particular, aimed at protecting witnesses and third persons, once redacted a document must, in principle, be disclosed to the Applicant and to his counsel. On the other hand, when the Prosecutor states that a document cannot be disclosed but simply consulted, it must be in its entirety, whether it is consulted by the Applicant and his counsel or by his counsel alone.
32. Furthermore, the Pre-Trial Judge underlines that the documents which will be disclosed by the Prosecutor to the Applicant and to his counsel, and the documents submitted for inspection, may only be used for legitimate grounds and provided that the presumption of innocence, the rights of the defence and the privacy of third persons are respected.

i) Categories 1 and 2: Correspondence between the Investigation Commission and the Lebanese Authorities and Internal Memoranda

33. In the opinion of the Prosecutor, correspondence between the Commission and the Lebanese authorities, and internal memoranda from the Commission, are protected under Rule 111 of the Rules and exempt from disclosure at the risk of jeopardising the ongoing investigation.<sup>31</sup> The Pre-Trial Judge considers that the Prosecutor claims with good reason that, by their very nature, these documents are confidential. In addition, they do not strictly speaking form part of the Applicant's criminal file. Consequently, they cannot be made the subject of an obligation to disclose.

34. However, the Pre-Trial Judge notes that the Prosecutor has suggested that some materials from the Investigation Commission mentioned in the spreadsheet of 5 May 2011 could be disclosed to the Applicant and to his counsel. The materials referred to here are documents 59, 61, 65 (redacted version) and 66.

35. In so far as the Prosecutor is prepared to disclose these documents, which appear to be judicial documents, the Pre-Trial Judge considers that there is nothing preventing them being released to the Applicant and to his counsel.

ii) Category 3: Investigators' Notes

36. According to the Prosecutor, notes made by the investigators are in principle not disclosable as some are covered by Rule 111 of the Rules, while others might jeopardise the ongoing investigation.<sup>32</sup> The Pre-Trial Judge deems these notes to be confidential by definition and that they are not part of the Applicant's criminal file. They cannot be made the subject of an obligation to disclose.

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<sup>31</sup> Prosecutor's Application, paras 25 to 29.

<sup>32</sup> Prosecutor's Application, paras 30 and 36.

37. Nevertheless, the Pre-Trial Judge notes that the Prosecutor considers that documents 151 and 173 from the Investigation Commission mentioned in the spreadsheet of 5 May 2011 could be disclosed to the Applicant and to his counsel, and that documents 145 and 159 from the Investigation Commission mentioned in the same spreadsheet could be inspected by his counsel after they have been redacted.

38. In so far as the Prosecutor is prepared to make available the documents mentioned above, and given that after they have been redacted the documents must in principle be disclosed, there is nothing to prevent documents 145 and 159 being released to the Applicant and to his counsel.

iii) Category 4: Witness Statements and Transcripts of Witness and Suspect Interviews

39. According to the position taken on principle by the Prosecutor, to disclose witness statements and transcripts of witness and suspect interviews to the Applicant could compromise the safety of these witnesses or of third parties. However, the Prosecutor suggests that some statements made by witnesses known to Mr El Sayed can be inspected by his counsel.<sup>33</sup>

40. At the present stage of the case, the Pre-Trial Judge considers that, as suggested by the Prosecutor, the statements of the witnesses or suspects identified by numbers 18 and 23 in the spreadsheet of 5 May 2011 can be disclosed to the Applicant and to his counsel. With regard to documents 37 and 48, the Pre-Trial Judge notes that on 1 April 2011 the Prosecutor deemed that these documents could be disclosed or inspected, while on 28 April 2011 he affirmed that these documents were no longer relevant and for that reason could not be disclosed or inspected. In so far as the Pre-Trial Judge considers that these documents might be relevant, the Prosecutor should examine whether they might be prevented from being disclosed for reasons other than that they are not relevant.

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<sup>33</sup> Prosecutor's Application, para. 31.

41. The Pre-Trial Judge recalls that the issue of applying a relevance criterion was debated during the hearing of 19 April 2011. In order to ensure that the Applicant's right to have access to his criminal file is respected, as recognised in the Order of 17 September 2010, the Pre-Trial Judge considers, based on the examples put forward during that hearing, that according to that criterion, the Applicant should, in principle, have access to all the witness statements which were produced in the context of the examination of his file and on which his detention was based. Consequently, among the witness statements the Prosecutor has in his possession, the documents relating to Mr El Sayed's request cannot be limited to the statements made by witnesses or suspects which it would appear directly implicate him in the Hariri case. The result is therefore, first and foremost, that the statements from all the witnesses or suspects which were taken in the context of the examination of Mr El Sayed's file might be relevant and, therefore, could be disclosed to him, subject to the exceptions and conditions set out in paragraph 27 above.
42. As regards the suggested redaction of information contained in the witness statements mentioned in the spreadsheets filed by the Prosecutor, the Pre-Trial Judge wishes to recall that, as for any other restriction of access to the file, it must be reasoned, in particular by the need to safeguard the ongoing investigation, the safety of the witnesses and the interests of national and international security. Consequently, the Pre-Trial Judge invites the Prosecutor to indicate clearly in his suggested redactions the reasons behind them, except for that of their alleged relevance.
43. The Pre-Trial Judge notes that the Prosecutor proposes to disclose document 38 in its entirety; to allow inspection of documents 20, 40 and 53 in their entirety; to allow inspection of the following documents after they have been redacted: 1, 7, 10, 11, 16, 17, 19, 29, 36, 39, 41, 42, 49, 50, 52, 55; and to allow inspection of the following documents after they have been translated and, where necessary, redacted: 4, 5, 6, 8, 9, 12, 13, 21, 22, 24, 26, 27, 28, 30, 31, 34, 35, 43, 44, 45, 56

and 57. According to the principle whereby the redacted documents must be able to be disclosed to the Applicant and to his counsel, the Pre-Trial Judge considers that all the documents mentioned above must be disclosed to the Applicant and to his counsel after they have been redacted, with the exception of documents 20, 40 and 53 which can be consulted in their entirety by counsel for the Applicant.

44. Moreover, the Pre-Trial Judge invites the Prosecutor to re-examine the list of witness statements relating to the Applicant among the 885 documents that he originally identified on 10 March 2011, or other materials and documents that might have come to his attention since then, as well as the relevant suggested redactions in light of, in particular, the criteria for the safeguarding of the ongoing investigation, the safety of the witnesses and the interests of national and international security mentioned in the Order of 17 September 2010.
45. Finally, the Pre-Trial Judge also invites the Prosecutor to examine in the future whether some documents which cannot be disclosed at present might be at a later date, once the reasons for their non-disclosure no longer exist. The same applies in respect of documents which might come to his attention later.

iv) Categories 5 and 6: The Applicant's Own Statements and Documents Originating from the Applicant or his Counsel

46. The Prosecutor indicates that the documents originating from the Applicant or his counsel as well as his own statements should be disclosed to him,<sup>34</sup> with the exception of some documents which can only be inspected by his counsel after they have been redacted, as they also relate to other persons.

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<sup>34</sup> Prosecutor's Application, paras 32, 33 and 35.

47. The Pre-Trial Judge deems that all the Applicant's own statements and the documents that he or his counsel have filed should be disclosed to him. Consequently, the following documents, contained in the spreadsheet of 5 May 2011, should be disclosed to the Applicant and to his counsel: 174 to 177 inclusive, 179 to 182 inclusive, 184 to 205 inclusive and 207.
48. With regard to documents 178 and 183 which fall in this category and which the Prosecutor considers should be redacted before being disclosed, the Pre-Trial Judge notes that during the hearing of 19 April 2011 and in his Submissions of 21 April 2011, the Prosecutor explained that these documents contained not only the Applicant's own statements, but also those of other persons, or information which was not relevant and which should therefore be redacted.
49. With regard to document 206 from this category which only exists in Arabic, the Pre-Trial Judge notes that the Prosecutor envisages that it can only be inspected by the Applicant's counsel as it would appear to contain information which does not concern Mr El Sayed and which should therefore be redacted. In this regard, the Pre-Trial Judge notes that the Prosecutor cannot redact this document until it has been translated and deems that after it has been translated and redacted, as appropriate, the document should be disclosed to the Applicant and to his counsel.
50. The Pre-Trial Judge also considers that all the documents originating from the Applicant or his counsel, i.e. documents 208 to 263 inclusive and 265 to 436 inclusive, must be disclosed.
51. He notes moreover that, according to the explanations provided by the Prosecutor on 19 April 2011, document 264 is an investigator's note and not a document originating from the Applicant or his counsel, as indicated initially. Consequently, this document falls into category 3 (Investigators' Notes) and should not be disclosed.

v) Other Documents

52. To the aforementioned categories explained in his Application of 10 March 2011, the Prosecutor added, in his spreadsheet of 1 April 2011, a new category entitled “other documents”, which should now be examined.
53. With regard to document 437,<sup>35</sup> the Pre-Trial Judge has considered the explanation provided by the Prosecutor on 19 April 2011 according to which this document was placed by error in the category of documents originating from the Applicant. From the summary of this document which exists only in Arabic, the Pre-Trial Judge deems, at first sight, that it is relevant and therefore that it should be translated before the Prosecutor is able to say whether it should be disclosed, if necessary, after being redacted.
54. According to the information provided by the Prosecutor, documents 438 to 442 inclusive, 454 and 457 to 459 inclusive can be disclosed to the Applicant and to his counsel. However, documents 451 and 456 can only be inspected by the Applicant’s counsel after they have been translated. As regards documents 443 and 444, after they have been translated, and documents 447, 449 and 450, they can likewise only be inspected, but only after some information has been redacted. In the opinion of the Pre-Trial Judge, documents 438 to 442 inclusive, 454 and 457 to 459 inclusive can be disclosed to the Applicant and to his counsel, while documents 451 and 456 should be translated before any decision is made regarding access to them by the Applicant or his counsel. Finally, there is nothing that would justify non-disclosure of the following documents to the Applicant after sensitive information has been redacted from them: 443 and 444 after they have been translated, 447, 449 and 450.
55. According to the Prosecutor’s Submissions of 28 April and of 5 May 2011, the following additional documents can be inspected by the Applicant’s counsel after they have been redacted: 460, 461, 462, 463, 464, 465, 467, 468, 471 and 472. He

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<sup>35</sup> Annex C to the Prosecutor’s Submissions of 17 March 2011.



further considers that document 469 can be disclosed to the Applicant and to his counsel.

56. In accordance with the principles set out in paragraph 31, the Pre-Trial Judge considers that, in addition to document 469 which can be disclosed directly, documents 460, 461, 462, 463, 464, 465, 467, 468, 471 and 472 should be disclosed to the Applicant after sensitive information has been redacted from them.

**V. Final Remarks:**

57. The Pre-Trial Judge wishes to make the following three final remarks.

58. First, he notes that the Prosecutor consulted the United Nations with regard to the disclosure or inspection of the aforementioned documents and that that Organisation is not against such disclosure or inspection.

59. Second, he recalls that Mr El Sayed requested certified copies of the inventoried documents. He deems this request to be justified.

60. Third, the Pre-Trial Judge considers that there is no justification to issue this present decision as confidential, with the exception of the Annex containing the list of documents to be disclosed to the Applicant, to be inspected by his counsel or to be translated, as well as the list of documents for which the Prosecutor proposes redactions, drawn up based on the numbering of the documents contained in the spreadsheet filed on 5 May 2011 by the Prosecutor (“the Confidential Annex”).

**III. Disposition:**

**FOR THESE REASONS,**

**THE PRE-TRIAL JUDGE,**

**REJECTS** the Addendum to the inventory of 17 April 2011 and the Reply of 10 May 2011 filed by the Applicant;

**ORDERS** the Prosecutor to disclose to the Applicant on 20 May 2011 at the latest, through the Registry of the Tribunal, a certified copy of the following documents listed in the Confidential Annex: 18, 23, 38, 59, 61, 66, 151, 173 to 177 inclusive, 179 to 182 inclusive, 184 to 205 inclusive, 207, 208 to 263 inclusive, 265 to 436 inclusive, 438 to 442 inclusive, 454, 457 to 459 inclusive, 469;

**ORDERS** the Prosecutor to arrange for 27 May 2011 at the latest the inspection by the Applicant's counsel of the following documents listed in the Confidential Annex: 20, 40 and 53;

**ORDERS** the Prosecutor to submit to the Pre-Trial Judge on 27 May 2011 at the latest the following documents listed in the Confidential Annex: 1, 7, 10, 11, 16, 17, 19, 29, 36, 39, 41, 42, 49, 50, 52, 55, 65, 145, 159, 178, 183, 447, 449, 450, 460 to 465 inclusive, 467, 468, 471, 472 containing the suggested redactions based on the criteria for the safeguarding of the investigation, the witnesses or third parties, or national or international security, with a view to their being disclosed to the Applicant and to his counsel;

**ORDERS** the translation by the offices of the Registry of the following documents listed in the Confidential Annex: 4, 5, 6, 8, 9, 12, 13, 21, 22, 24, 26 to 28 inclusive, 30, 31, 34, 35, 43 to 45 inclusive, 56, 57, 206, 437, 443, 444, 451 and 456, and orders the Prosecutor,

within 15 days of their being translated, to disclose them in their current state to the Applicant and to his counsel, or if appropriate, to seize the Pre-Trial Judge with any reasoned proposal for them to be inspected in their entirety or to be redacted with a view to their being disclosed to the Applicant and to his counsel;

**ORDERS** the Prosecutor to re-examine, in the light of the criteria for the safeguarding of the interests of the investigation, the witnesses and third parties, and national and international security, the witness statements among the 885 documents that he had identified initially, or other documents that he might have identified since then, including the handwritten documents in Arabic that are in his possession and to submit on 3 June 2011 at the latest a revised spreadsheet of these documents containing the relevant suggested redactions, as appropriate;

**ORDERS** the Prosecutor to examine, on the basis of the principles and criteria set out in the Order of 17 September 2010 and in the present decision, any document from the criminal file relating to the Applicant that may come to his attention later and to disclose those which he considers can be disclosed in their current state and, if necessary, to submit to the Pre-Trial Judge any document the access to which he wishes to restrict, accompanied by his reasons for doing so and suggestions regarding such restriction;

**ORDERS** the Prosecutor to draw up a report for the attention of the Pre-Trial Judge relating to the fulfilment of his obligations by 13 June 2011 at the latest;

**REMINDS** the Applicant and his counsel that the documents disclosed or submitted for inspection can only be used for legitimate grounds, provided that the presumption of innocence, the rights of the defence and the privacy of third parties are respected.

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

Leidschendam, 12 May 2011.

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**Daniel Fransen**  
Pre-Trial Judge

