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/2011/14**
The Pre-Trial Judge:	**Mr Daniel Fransen**
The Registrar:	**Mr Herman von Hebel**
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DECISION ON MR EL SAYED'S REQUEST OF 1 AUGUST 2011 FOR CERTIFICATION OF THE APPEAL OF THE PRE-TRIAL JUDGE'S DECISION OF 21 JULY 2011

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NOTING the Request of 1 August 2011 for Certification of the Appeal of the Pre-Trial Judge's Decision of 21 July 2011,[1] "Relating to the Prosecution's Urgent Application of 14 July 2011 for Suspension of the Decision of 6 July 2011 and to the Prosecution's Further Submissions of 15 and 21 July 2011"[2] (respectively the "Request for Certification" and the "Decision of 21 July 2011");

NOTING the Prosecution's response of 4 August 2011 to the Request for Certification ("the Response");[3]

NOTING Mr El Sayed's reply to the Response of 5 August 2011[4] ("the Reply");

CONSIDERING that, in the Decision of 21 July 2011, the Pre-Trial Judge specifically: (i) ordered the Prosecutor to apply, by 19 August 2011 at the latest, if he deems he should do so, and if need be in consultation with the Victims and Witnesses Unit, for the protective measures necessary so as to ensure the protection of certain witnesses and to specify what he deems should happen to the documents mentioned in the Decision of 6 July 2011;[5] and (ii) suspended the Decision of 6 July 2011, (with the exception of those parts relating to document nos 65 and 178), and point 5 of the disposition of the Decision of 12 May 2011[6] until 19 August 2011 or, if appropriate, until such time as the Pre-Trial Judge has ruled on any possible protective measures sought by the Prosecutor;[7]

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[1] Request for Certification of the Pre-Trial Judge's Decision dated 22 July 2011 [sic] "Relating to the Prosecution's Urgent Application of 14 July 2011 for Suspension of the Decision of 6 July 2011 and to the Prosecution's Further Submissions of 15 and 21 July 2011", CH/PTJ/2011/13, 1 August 2011.

[2] Decision Relating to the Prosecution's Urgent Application of 14 July 2011 for Suspension of the Decision of 6 July 2011 and to the Prosecution's Further Submissions of 15 and 21 July 2011, CH/PTJ/2011/13, 21 July 2011.

[3] Prosecution's Response to Jamil El Sayed's *Demande de certification de l'appel de la décision du Juge de la mise en état datée du 22 juillet 2011 'relative à la requête urgente du 14 juillet 2011 du Procureur aux fins de suspension des effets de la décision du 6 juillet 2011 et aux requêtes complémentaires des 15 et 21 juillet 2011 du Procureur'*, CH/PTJ/2011/13, 4 August 2010..

[4] Reply to "Prosecution's Response" of 4 August 2011 to the Request for Certification to Appeal the Pre-Trial Judge's Decision dated 22 July 2011, CH/PTJ/2011/13, 5 August 2011.

[5] Decision on the Proposed Redactions to the Documents in the Criminal File of Mr El Sayed Submitted by the Prosecutor, CH/PTJ/2011/12, 6 July 2011.

[6] Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, CH/PTJ/2011/08, 12 May 2011.

[7] Decision of 21 July 2011, disposition.

CONSIDERING that Mr El Sayed is seeking to lodge an appeal of the Decision of 21 July 2011, pursuant to Rule 126 paragraph (C) of the Rules of Procedure and Evidence (the "Rules");[8]

CONSIDERING that in its Response, the Prosecution opposes the Request for Certification on the following grounds: (i) Mr El Sayed failed to support his Request for Certification, whereas in accordance with the case law of other international criminal courts applying similar rules to Rule 126 paragraph (C), it is incumbent upon the requesting party to demonstrate that the conditions for a request of this nature have been met;[9] and (ii) as the Decision of 21 July 2011 is only temporary, granting certification would not encourage a swift resolution of the case;[10]

CONSIDERING that, in the Reply, Mr El Sayed states the reasons which, in his opinion, would justify the Request for Certification and, in particular, the fact that in suspending the decisions of 12 May and 6 July 2011, the Decision of 21 July 2011 delays the ongoing proceedings and the opportunity for Mr El Sayed to exercise "his right to seek effective remedy which is a right recognised by the STL [Special Tribunal for Lebanon] itself",[11] and is based "on serious and inaccurate facts which were attributed to the Applicant by those allegedly responsible for the arbitrary detention to the prejudice of the Applicant and firstly does not allow him the possibility to refute them";[12]

CONSIDERING that, according to Rule 126 paragraph (C) of the Rules, "decisions on all motions under this rule are without interlocutory appeal save with certification, if the decision involves 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";

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[8] Request for Certification, p. 1.
[9] Response, paras 5 and 6.
[10] *Ibid.*, paras 7 and 8.
[11] Reply, p. 1.
[12] *Ibid.*, p. 2.

CONSIDERING that, according to the Decision of 19 July 2011, the Appeals Chamber held that the procedure applicable to the El Sayed case, including that governing the certification of appeals, should be guided by that set forth in the Rules, Rule 126 paragraph (C) in this case, and was the responsibility of both the Trial Chamber and the Pre-Trial Judge;[13]

CONSIDERING that, in the same Decision, the Appeals Chamber stated that the procedure for certification to appeal applied to most interlocutory appeals, namely to "any appeal before full and final judgment";[14]

CONSIDERING that the Request for Certification involves the Decision of 21 July 2011 which, by its nature, is not final since it merely suspends various points of the decisions of 12 May and 6 July 2011 relating to the disclosure of documents to allow the Prosecution to request protective measures, if need be, and that, as a result, a request for certification should be filed for an appeal to be lodged;

CONSIDERING that it should be noted that, in accordance with Rule 8 of the Rules, a reply to a response may only be filed once authorised by the Pre-Trial Judge; that since Mr El Sayed has not sought leave in this regard, the Reply is therefore inadmissible;

CONSIDERING that, in accordance with prevailing international case law,[15] the requesting party must, in principle, support the request, even though Rule 126 (C) of the Rules does not explicitly require this;

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[13] Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2001, CH/AC/2011/01, 19 July 2011, para. 19.

[14] *Ibid.*

[15] See, in particular, International Criminal Tribunal for the former Yugoslavia (ICTY): Decision on Defence Request for Certification to Appeal the Trial Chamber's Oral Ruling dated 28 April 2008 in *The Prosecutor v. Stanisić and Simatović*, IT-03-69-PT, 17 July 2008; International Criminal Tribunal for Rwanda, Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France in *The Prosecutor v. Karemera et al.*, ICTR-98-44-PT, 31 March 2005, para. 5.

CONSIDERING that the Pre-Trial Judge notes that Mr El Sayed has failed to support the Request for Certification;

CONSIDERING, however, that it is for the Pre-Trial Judge to assess whether it is appropriate to grant such an application in accordance with the requirements set out in Rule 126 (C) of the Rules; and irrespective of the justification included in the request for certification or even where there is no justification;[16]

CONSIDERING that the Pre-Trial Judge holds that: (i) the Decision of 21 July 2011 does not resolve definitively the issue of the disclosure of the aforementioned documents, but simply suspends certain parts of the decisions of 12 May and 6 July 2011 for the short period of time required to determine whether it is appropriate to adopt protective measures; and (ii) the Decision of 21 July 2011 makes no assumption as to what should happen eventually to these documents since once the stipulated time period has elapsed and any application by the Prosecution for protection has been made, the Pre-Trial Judge must rule on the disclosure of said documents and, if applicable, on the conditions for the disclosure thereof;

CONSIDERING, therefore, that the Decision of 21 July 2011 does not involve "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and that "an immediate resolution by the Appeals Chamber [would not] materially advance the proceedings" as set forth in Rule 126 (C) of the Rules;

FOR THESE REASONS:

Pursuant to Rule 126 (C) of the Rules;

[16] See, in particular, ICTY, Decision on Defence Application for Certification to Appeal the Decision on Scheduling of 18 November 2005, *The Prosecutor v. Krajišnik*, IT-00-39-T, 2 December 2005, p. 2; ICTY, Reasons for Denying Defence Application for Certification to Appeal, *The Prosecutor v. Krajišnik*, IT-00-39-T, 28 August 2006, p. 3.

THE PRE-TRIAL JUDGE,

DECLARES the Reply inadmissible; and

DISMISSES the Request for Certification;

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

Leidschendam, 9 August 2011.

[signature]

Daniel Fransen
Pre-Trial Judge