

**BEFORE THE APPEALS CHAMBER**

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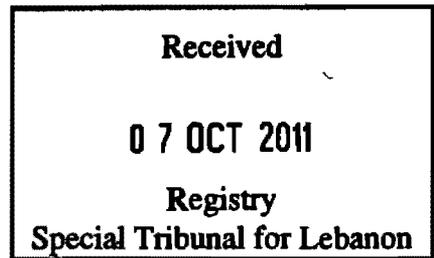
Before: Judge Antonio Cassese, Presiding
Judge Ralph Riachy
Judge Sir David Baragwanath, Judge Rapporteur
Judge Afif Chamsedinne
Judge Kjell Erik Björnberg

Registrar: Mr. Herman von Hebel

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**Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against
the Pre-Trial Judge's Decision of 2 September 2011 and
Ordering the Disclosure of Documents**

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**HEADNOTE¹**

Mr El Sayed 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. In the ensuing litigation between Mr El Sayed and the Prosecutor, who is in possession of the documents in question but has disclosed only a limited portion of them thus far, the Pre-Trial Judge issued a decision on 2 September 2011 requiring the Prosecutor to disclose the statements of certain persons who had been interviewed during the mandate of the United Nations International Independent Investigation Commission ("UNIIC"). The Prosecutor has appealed the decision.

The Appeals Chamber is called upon to decide whether the Pre-Trial Judge erred in ordering disclosure because disclosure would either: (a) put the author of a document or another person at risk; or (b) impede the due conduct of forthcoming litigation.

By way of preliminary ruling, the Appeals Chamber finds that since the Pre-Trial Judge's order on disclosure "potentially deals finally with" Mr El Sayed's application, there is no need for certification by the Pre-Trial Judge and therefore the Appeal is properly before the Appeals Chamber. The Appeals Chamber observes that the definition of "false witnesses" used by Mr El Sayed is improper in relation to persons whose evidence the Tribunal has had no opportunity to appraise. Although they are not witnesses before the Tribunal, it is bound to consider their allegations of legitimate fear insofar as these may have an objective basis. That is because, upon Mr El Sayed's own request, the Tribunal has asserted jurisdiction over these statements.

During an ex parte meeting convened by the Judge Rapporteur, where counsel for the Prosecution and the Head of the Victims and Witnesses Unit ("VWU") were heard, the Prosecution agreed that it is the VWU that can speak authoritatively in relation to any need for protection of persons providing statements. In relation to these persons the proper course is for the Prosecution to seize itself of the question of the risks, consult with the VWU and then present the Pre-Trial Judge with an informed position in relation to each.

The Appeals Chamber finds that the statements of certain interviewees must indeed be provided to Mr El Sayed swiftly, as ordered by the Pre-Trial Judge – a short delay being necessary only to consider whether the redactions proposed by the Prosecutor are not inconsistent or incomplete. As regards the statements of the other interviewees, the determination of whether they should be disclosed and, if so, what redactions would apply must be made by the Pre-Trial Judge after the Prosecutor has liaised with the VWU in order to reconsider the nature of the alleged risk and, if necessary, the methodology previously adopted to assess risk.

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.



Mr El Sayed further (i) contends that the Prosecutor should be deemed no longer eligible to appear before the Tribunal and be replaced by an ad hoc opponent and (ii) claims monetary compensation for alleged abuse of process inflicted upon him by the Prosecutor. In the absence of such contentions at first instance, and there being no basis for asserting delay before the Appeals Chamber, this Chamber is not the proper forum for such a determination at this stage.





INTRODUCTION

1. The Prosecutor has filed an appeal² against the decision of the Pre-Trial Judge of 2 September 2011 which ordered him to disclose to Mr El Sayed and his counsel, on certain terms, some 133 documents.³

DISCUSSION

I. Is Certification of the Appeal Required?

2. The first question is whether the Appeals Chamber should decline to accept the Appeal without a certificate from the Pre-Trial Judge. Rule 126 of the Rules of Procedure and Evidence (“Rules”) deals with motions in criminal appeals that require such certification. While it does not in terms deal with motions in civil appeals, in our judgment of 19 July 2011 on Mr El Sayed’s application for disclosure of documents we held that in civil cases also we would normally require certification for “any appeal before full and final judgment;” but not for an appeal which “potentially deals finally with” the application.⁴
3. Mr El Sayed argues that the Prosecution’s Appeal is interlocutory and that, in the absence of certification to appeal pursuant to Rule 126 (C), the Appeals Chamber is not properly seized of the Appeal.⁵

² *In re. Application of El Sayed*, Urgent Prosecution’s Appeal of the Pre-Trial Judge’s Decision of 2 September 2011 and Request for Suspensive Effect Pending Appeal, Confidential and *ex parte*, OTP/AC/2011/02, 12 September 2011 (“Appeal”).

³ *In re. Application of El Sayed*, Decision relating to the Prosecutor’s second application for suspension of the Decision of 6 July 2011, CH/PTJ/2011/15, 2 September 2011. In his appeal, the Prosecutor asserts that the documents contain witness statements that would place the witnesses at unacceptable risk if disclosed. The Appeals Chamber temporarily suspended the Decision of 2 September 2011 (*In re. Application of El Sayed*, Order on Urgent Prosecution’s Request for Suspensive Effect Pending Appeal, CH/AC/2011/01, 12 September 2011). On 13 September 2011, the Appeals Chamber issued a scheduling order requiring the Prosecution to submit a summary of the risks faced by each witness (*In re. Application of El Sayed*, Scheduling Order, CH/PRES/2011/02, 13 September 2011).

⁴ *In re. Application of El Sayed*, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, CH/AC/2011/01, 19 July 2011, paras 19 and 20.

⁵ *In re. Application of El Sayed*, Réplique à la sixième demande de suspension de Procureur, OTP/AC/2011/01, 9 September 2011, para. 4; Réplique à “Prosecution’s appeal of the Pre-Trial Judge’s Decision of 2 September 2011 and Request for the Suspensive Effect Pending Appeal” en application du “scheduling order” du 13 septembre 2011, OTP/AC/2011/01, 29 September 2011, paras 17 and 18 (“Reply”). Mr El Sayed has requested that the Appeals Chamber accept a rectified version of the title of his Reply (*In re. Application of El Sayed*, Rectification Reply to Prosecution’s Appeal of 12 September 2011 – Request for the Prosecutor to be Withdrawn and an Ad Hoc Opponent to be Appointed –



4. On 15 August 2011 we rejected, for want of a certificate, an appeal by Mr El Sayed against an order of the Pre-Trial Judge of 21 July 2011 suspending the effect of his earlier decision of 6 July 2011 directing disclosure of certain documents. So, it may be asked, why should not the Prosecutor be required to obtain a certificate as a condition of being able to bring his present Appeal?
5. The answer is that the decision of the Pre-Trial Judge of 2 September 2011, ordering disclosure, “potentially deals finally with” Mr El Sayed’s application for disclosure: once the documents are disclosed there is nothing more to decide. His decision of 21 July 2011, by contrast, had no final effect. So a certificate was required to appeal against the latter but is not needed for the present appeal.

II. Mr El Sayed’s Threshold Objection to the Appeal

6. In his reply dated 29 September 2011 Mr El Sayed repeats the contention he has previously made, that the persons whose statements he seeks, and which this Chamber has confirmed are to be provided to him subject to the issue of risk discussed in this decision, are “false witnesses” (“*faux témoins*”) or “authors of defamatory allegations” (“*auteurs des dénonciations calomnieuses*”). He submits that the allegations of such “false witnesses” have wrongly served until now as a pretext for failure to give effect to the Tribunal’s decisions requiring release of the documents he seeks.⁶
7. He contends that the Appeal is fundamentally flawed because, on the true construction of Rule 133, it provides no protection to false witnesses. He further:
 - a) seeks to challenge the decision of the Pre-Trial Judge of 12 May 2011 as wrongly acknowledging an entitlement of the Prosecutor to communicate to “false witnesses” or “authors of defamatory allegations” confidential decisions of the Tribunal;⁷ and

Request for Damages for Abuse of Procedure, OTP/AC/2011/01, 29 September 2011), which we address in paras. 36 to 41 of this decision.

⁶ Reply, para. 11(C)(iii).

⁷ *Id.*, para. 13(A).



- b) contends that the decision has, without justification, recognised an entitlement of “false witnesses” to protection under Rule 133.⁸
8. Mr El Sayed asserts that he has not been responsible for any threat; and that he will comply meticulously with the conditions of disclosure of the various documents referred to by the Pre-Trial Judge in his decision of 12 May 2011.⁹
9. Underlying these arguments is the advice of the Prosecutor to the Pre-Trial Judge that resulted in his decision of 29 April 2009 on the application of the Prosecutor that Mr El Sayed should be released from the detention to which he had been subjected for the previous three and a half years. In that decision the Pre-Trial Judge stated:

D. – Analysis of the merits of the case

33. In support of his Submission, the Prosecutor recalled that in order to apply for the provisional detention of a suspect, he must be in a position to indict within the timeframe set out in the Rules. However, the Prosecutor considered that the information available to him at this point in time did not enable him to indict the persons detained. He thus submitted that the question of whether provisional detention was necessary did not arise.

34. The Prosecutor stated that in arriving at this conclusion, he had:

- i) thoroughly reviewed all relevant material and information available at this point in time, whether gathered by his Office, the Investigation Commission, or received from the Lebanese authorities;
- ii) taken into account and reviewed the statements made by the persons detained and by others that relate to the detained persons and had assessed their credibility;
- iii) reviewed relevant communications data and all other material, including physical evidence collected;
- iv) reviewed the forensic assessments made;
- v) reviewed the filings and decisions made in relation to motions for release filed by the detained persons and their counsel before the Lebanese authorities;
- vi) taken account, in light of a review of all this information, of inconsistencies in the statements of key witnesses and of a lack of corroborative evidence to support these statements; and

⁸ *Id.*, para. 13(B).

⁹ *Id.*, para. 12.



vii) taken account of the fact that some witnesses had modified their statements and one key witness had expressly retracted his original statement incriminating the persons detained.

...

37. In assessing the reasonableness of the Prosecutor's conclusions in line with paragraph 27 of this order, **the Pre-Trial Judge notes the fact that the Prosecutor does not intend to indict the persons detained within the timeframe set out in Rule 63.** He also notes that, in arriving at this conclusion, the Prosecutor has based himself on the information listed above and, in particular, on the fact that he has reviewed the entire file anew, notably in light of the documents provided by the Lebanese authorities, that some witnesses have modified their statements and that a key witness has expressly retracted his original statement, which incriminated the persons detained. Finally, the Pre-Trial Judge notes the context in which the Submission is made, that is to say the detention of these persons in Lebanon since 30 August 2005.

38. Against this background, and given the succinct, but sufficient, information and considerations presented by the Prosecutor, the Pre-Trial Judge considers that the conclusions reached by the Prosecutor are not unreasonable to the point that he might have made a manifest error of judgment in exercising his discretionary power.

39. In conclusion, the Pre-Trial Judge notes that the persons detained cannot, **at this stage in the investigation**, be considered as either suspects or accused persons in the proceedings pending before the Tribunal. As a result, in application of the Rules, they do not meet the conditions *sine qua non* to be placed in provisional detention, or even to be released subject to conditions.¹⁰

(Emphasis added; internal citations omitted.)

10. The position taken by the Prosecutor and the Pre-Trial Judge will have been welcomed by Mr El Sayed. But while it released him from detention, and determined that he and his fellow detainees could not:

[...] at this stage in the investigation, be considered as either suspects or accused persons in the proceedings pending before the Tribunal,¹¹

the decision was not couched either as a declaration of innocence on the part of Mr El Sayed or as one of guilt of "false witness" or "author of defamatory allegations" on the part

¹⁰ STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, CH/PTJ/2009/06, 29 April 2009, paras. 33-34 and 37 to 39.

¹¹ *Id.*, para. 39.



of all or any of the witnesses. There has been no determination beyond the conclusions we have emphasised, including:

[...] the Prosecutor considered that the information available to him at this point in time did not enable him to indict the persons detained.¹²

11. In particular, at no point has there been any official determination as to the reliability of the evidence of the purported “false witnesses” – indeed, Mr El Sayed’s civil claim seeks to secure a judicial determination in this regard. The individuals who were interviewed during the mandate of the United Nations International Independent Investigation Commission (“UNIIC”) are not witnesses before the Tribunal, as their evidence has not been presented to the Trial Chamber.¹³ The Tribunal’s jurisdiction is limited to the prosecution of people accused of the crimes listed in Article 1 of the Statute, and inherent jurisdiction over contempt, obstruction of justice and false testimony before the Tribunal itself. No provision in our Statute allows the Tribunal to assert jurisdiction over criminal offences which might have taken place before the creation of the Tribunal, other than those listed in Article 1 of the Statute.¹⁴ For these reasons, and because we are not seized of the matter of the reliability of this material (and therefore have no access to the totality of the evidence in question), we can offer no comment on whether Mr El Sayed’s contentions are supportable. We are necessarily concerned with the personal safety of individuals who, although not giving testimony before the Tribunal, are closely linked with the material in possession of the Prosecutor and over which we have jurisdiction. Here our assertion of jurisdiction has been made specifically *upon request by Mr El Sayed*. It follows that the Tribunal cannot shy away from taking responsibility for these individuals’ fears insofar as they have an

¹² *Id.*, para. 33.

¹³ Nonetheless, the Appeals Chamber recognises that the term “witness” is used by the parties in this litigation and can at times be used for consistency purposes.

¹⁴ An amendment of the Rules in October 2009 did add the possibility of contempt proceedings for false statements given to a party (i.e., Prosecutor or Defence), but simply could not have provided jurisdiction for statements made *before* the Tribunal itself came into existence. The inherent power of international tribunals to assert jurisdiction on contempt and false testimony occurring (only) in front of these courts has long been recognized by other international criminal tribunals. See, e.g., ICTY, *Prosecutor v. Simić et al.*, Judgment in the Matter of Contempt Allegations against an Accused and his Counsel, IT-95-9-R77, 30 June 2000; *Prosecutor v. Tadić*, Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, IT-94-1-A-AR77, 27 February 2001; *Prosecutor v. Aleksovski*, Judgment on Appeal by Anto Nobile against Finding of Contempt, IT-95-14/1-A, 30 May 2001; ICTR, *Prosecutor v. Ngirabatware*, Decision on Allegations of Contempt, ICTR-99-54-R77.1, 12 March 2010.



objective foundation. Such concerns for their personal safety may not be discarded merely because of untested allegations against the individuals concerned.

12. Furthermore, while Rules 115 and 133 apply mainly to witnesses before the court, protective measures can also be directed towards persons who would be put at risk by publication of the statement of another person, or whose legitimate claim to privacy would be threatened by such publication. This is a principle espoused by other international tribunals, which we confirm and follow.¹⁵

13. It follows that Mr El Sayed's threshold objection to the Appeal is unsustainable. The Appeals Chamber is therefore seized of the Appeal by the Prosecutor against the decision of 2 September 2011 to order disclosure of documents to Mr El Sayed.

14. We turn to consider the merits of the Appeal.

III. The Merits of the Appeal: Procedure

15. On 21 September 2011, the Appeals Chamber received the Prosecutor's written confidential and *ex parte* submissions¹⁶ pursuant to the Scheduling Order of 13 September 2011.¹⁷ The Prosecutor's Submissions listed a number of persons whose statements were included in the disputed documents, and included the Prosecutor's assessment of the risks each person faced upon the disclosure of the documents.

16. To facilitate consideration and determination of the Appeal it was necessary for the Appeals Chamber to explore with the Prosecution on an *ex parte* basis the Prosecutor's grounds for suspending the disclosure of the documents in relation to each of the persons interviewed during the UNIIC's mandate relevant to the present matter. The President accordingly

¹⁵ See ICC Rule 87(3) (stating that measures may be granted to protect "the identity or the location of a victim, a witness or other person at risk"); ICTR, *Prosecutor v. Kamuhanda*, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses, ICTR-99-54-T, 22 March 2001, para. 16; ICTY, *Prosecutor v. Gotovina et al.*, Decision on Defendant Ivan Čermak's Motion for Admission of Evidence of Two Witnesses Pursuant to Rule 92 bis and Decision on Defendant Ivan Čermak's Third Motion for Protective Measures for Witnesses IC-12 and IC-16, IT-06-90-T, 11 November 2009, para. 10.

¹⁶ In re: Application of El Sayed, Prosecution's Confidential and Ex Parte Submissions in Compliance with the President's Scheduling Order of 13 September 2011, OTP/AC/2011/03, 21 September 2011 ("Prosecutor's Submissions").

¹⁷ In re. *Application of El Sayed*, Scheduling Order, 13 September 2011, OTP/AC/2011/03.



appointed Judge Baragwanath as Judge Rapporteur to conduct an *ex parte* meeting with the Prosecution, to consult if necessary with the Victims and Witness Unit (“VWU”) and to report to the members of the Appeals Chamber.

17. An *ex parte* meeting took place on 26 September 2011 in the courtroom of the Tribunal. Mr Daryl A. Mundis and Mr David Kinnecome represented the Prosecution. During that meeting the Judge and counsel spoke by speakerphone to the Head of the VWU. Following the meeting and the subsequent provision by the Prosecution of statements, the Judge posed further questions in writing, to which Prosecution counsel have responded. All these communications were recorded and form part of the record on appeal for future reference. The other Judges of the Appeals Chamber have of course had access to the documents and to the transcript of the meeting.

18. At the meeting on 26 September 2011, the issue was identified as whether the Pre-Trial Judge erred in ordering disclosure because disclosure would either:

- a) put the author of a document or another person at risk; or
- b) impede the due conduct of forthcoming litigation.

19. The Prosecutor’s Submissions contained two lists. One list was prefaced by the statement:

Based on the [Prosecutor’s] threat assessment, and depending on whether the Appeals Chamber seeks the assistance of VWU, redacted statements for the following witnesses can be immediately provided to the Registry for disclosure to Mr El Sayed.¹⁸

The other list was prefaced by the statement:

The Prosecution seeks interim non-disclosure of the statements of the following witnesses until protective measures are in place in connection with the *Ayyash et al.* proceedings.¹⁹

20. The Judge asked counsel whether the submissions should be read as an application for leave to withdraw the Appeal in relation to the persons listed at paragraph 95 of the Prosecutor’s Submissions. Counsel responded that “unless the Appeals Chamber decides to

¹⁸ Prosecutor’s Submissions, para. 95.

¹⁹ Prosecutor’s Submissions, para. 96.



seek the assistance of VWU,” the Prosecution sought such leave.²⁰ Counsel were clearly uncomfortable about making any election and sought to pass the decision to the Appeals Chamber. The Judge pointed out that the Appeals Chamber has no background knowledge of the documents or their context; whereas the Prosecution has been seized of them for some years.

21. The Prosecutor recognised that it is the VWU which can speak authoritatively about risk;²¹ yet the VWU had never been asked to comment save in relation to two persons, one of whom is not relevant to Mr El Sayed’s intimated claim to remedies in national courts.²² The Judge asked:

[...] is it common ground now that ... the right course is for the Prosecution to seize itself of the question [of risks to all interviewees], to consult with VWU, then to go back to the Pre-Trial Judge with an informed position in relation to each?²³

Counsel agreed.²⁴

22. Rule 115 (A) empowers the Prosecutor, in exceptional circumstances, to order non-disclosure of the identity of witnesses and others who may be at risk until appropriate protective measures have been implemented. Rule 115 (B) states that the Pre-Trial Judge or Trial Chamber may consult the VWU. Rule 133 makes further provision for protective measures.
23. Mr El Sayed has contended that the Prosecution has engaged in a systematic process of delay in providing the information which he claims. However, the relatively short time-frame between the filing of the Appeal on 2 September and judgment today, coupled with the Prosecution’s substantial success in this Appeal, mean that there is no basis for

²⁰ *In re. Application of El Sayed*, Transcript of *ex parte* meeting of 26 September 2011 (“Transcript”), at 7.

²¹ *Id.*, at 11:

Clearly within the structure of the Tribunal the primary ...organ responsible for making these types of threat assessments [is] the [VWU]... The [Office of the Prosecution] has a limited capability in order to conduct such threat assessments... [the VWU] we would submit...have superior capabilities and experience in dealing with threat assessments to victims or witnesses.

²² *In re. Application of El Sayed*, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s decision of 12 May 2011, CH/AC/2011/01, 19 July 2011, para. 3 and fn. 5 (citing Mr El Sayed’s initial request for documents).

²³ Transcript, at 17.

²⁴ *Ibid.*



contending that the proceedings before the Appeals Chamber have been delayed. As to the proceedings before the Pre-Trial Judge, it is to be emphasised that the Rules do not detract from the obligation of the Prosecutor, among his many onerous tasks, to make the enquiries needed to determine which witnesses require protection and to place the relevant information before the Pre-Trial Judge. It is not the proper role of the Appeals Chamber to embark on a first instance risk assessment from which no appeal could be brought. A general threat assessment made on 3 May 2011 did not focus on individuals. From the Prosecution's Submissions there may be a question whether the Prosecution provided all relevant information to the Pre-Trial Judge. The Pre-Trial Judge has no other basis to assess the threats over individuals whose identity, status and relevance for the main case was only known to the Prosecution. Although the Prosecution states that it had contacted as many "witnesses" as possible last July, and that all of those successfully contacted had expressed fear at the disclosure of their statements,²⁵ it appears that the Prosecution undertook its first threat assessment specific to each individual only *after* the President required more detailed information in his scheduling order of 13 September 2011. The Prosecution now appears, as a result of this threat assessment, to have reconsidered the need for protective measures for a number of interviewees, as though it had not thoroughly considered the matter before, and it is obliged to acknowledge that some of them in fact do *not* oppose the disclosure of their statements. In addition, the VWU has yet to be consulted regarding any of the additional individuals not considered in the report it has prepared.

24. But this Appeal does not result from any substantive application at first instance for relief on the grounds of such conduct. It is a Prosecutor's appeal from a determination of the Pre-Trial Judge which it contends has been over-generous to Mr El Sayed; not an appeal from any decision dealing on its merits with a substantive claim by Mr El Sayed that he has suffered loss from an unlawful systemic process of delay. It follows from generally recognised principles of law that we can make no present determination of whether the Prosecution duly discharged its duty to provide all relevant and necessary information to

²⁵ Appeal, para. 20.



the Pre-Trial Judge.²⁶ It might be for the Pre-Trial Judge to reach such a determination if called upon to do so.

25. However, we do emphasise that there must be no delay in bringing Mr El Sayed's application to conclusion. It is the duty of any court of law to both make its decision and to do so within a reasonable period.²⁷ That is especially the case where the Tribunal's Statute requires procedures which "reflect ... the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial."²⁸ The policy of expedition which the Statute requires specifically in criminal cases before the Tribunal is also required by analogy in its inherent civil jurisdiction. There is evidence which, if unanswered, might support an argument that the Prosecution has not acted with reasonable promptitude in identifying the nature of the risks to individuals and in putting the relevant material before the Pre-Trial Judge in a timely fashion. Whether that is so, and whether in that event any remedy might be available to Mr El Sayed, are matters of which we are not currently seized. But we, and now the Pre-Trial Judge, are seized of a responsibility to ensure that prompt attention is given to the issues we have referred back to the Pre-Trial Judge.

IV. Statements Where the Appeal is Clearly Not Arguable

26. Among the persons listed in paragraph 95 of the Prosecutor's Submission are three, each of whom has stated he does not object to his statement(s) being disclosed to Mr El Sayed.

²⁶ In *John v. Rees* [1970] Ch. 345 at 402, Sir Robert Megarry warned of the risk of acting on one side's contentions without hearing the other:

It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events. See also *Mahon v. Air New Zealand Ltd* [1984] AC 808 (PC).

²⁷ The courts will impute to decision-makers a duty to act which is not stated in so many words. *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997. There the House of Lords ascribed to a Minister the obligation, albeit unexpressed in the statute, to give due consideration to bona fide complaints about the operation of a scheme for funding the supply of milk which if altered in favour of London suppliers would adversely affect suppliers in Cornwall. He was not permitted to evade or defer the political consequences by avoiding a decision.

²⁸ Statute of the Special Tribunal for Lebanon, Article 28(2).



Having read these statements and the redactions made by the Prosecutor and approved by the Pre-Trial Judge we are not satisfied that the Prosecutor can show any error in the decision of the Pre-Trial Judge as it affects them. That is because:

- a) there is no reason to fear risk to the persons; and
- b) it is not suggested that disclosure of the statements would impede the due conduct of forthcoming litigation.

27. It follows that in relation to their disclosure the Appeal is dismissed. It just remains for the Prosecutor to ensure that redactions of these documents (which he proposed in the first instance) are not inconsistent or incomplete. Our orders made under the final heading “Disposition” refer in relation to these statements to confidential and *ex parte* Annex A.

V. The Other Statements

28. While it is the obligation of any tribunal to perform its task in a timely manner, in doing so it must avoid injustice. As the Prosecutor accepts,²⁹ it is the VWU which can speak authoritatively about risk; yet the VWU has never been asked to comment save in relation to the two persons mentioned in paragraph 21 above, only one of whom (he is listed in paragraph 96 of the Prosecutor’s Submissions, and in confidential and *ex parte* Annex B to this decision) is of relevance.

A. *The individual whose case has been the subject of VWU consultation*

29. In his case the original statements contain reference to names of various persons in respect of whom a second version seeks to redact information tending to identify them. But in several instances the redaction process was incomplete: it was possible to identify the person by reference to indicia other than the name; and indeed in one instance the redaction of the name is followed by disclosure of the name. If on a proper risk evaluation the person’s identity should be suppressed, further redactions would be needed. We note that Mr El Sayed has seen information erroneously released in the Prosecution’s initial notice of appeal. That does not relieve him from complying with the conditions imposed by the Pre-Trial Judge in his order of 2 September 2011 which suppresses that information.

²⁹ Transcript, at 11 (see para. 21 above).



30. Had the matter stopped there we would have allowed the Appeal on the simple ground that the decision was illogical. Either the names as well as other identifiers should be disclosed; or both names and other identifiers should be redacted. Further consideration by the Prosecutor in consultation with the VWU would be required as in the other cases to be mentioned in paragraph 32 of this decision. But as a result of the further enquiry referred to in paragraph 16 above the redaction process can be extended to remove the problem.
31. There is, however, a point that has arisen *after* the decision delivered by the Pre-Trial Judge. We have sighted a report providing fresh material suggestive of risk in relation to this interviewee. It is arguable that, through no fault of the Pre-Trial Judge, his decision in respect of this individual was made on a materially flawed factual basis. It follows that in relation to this person the Appeal must be allowed and the case be sent back to the Pre-Trial Judge for further consideration in the light of this new point. Our orders made under the final heading “Disposition” refer in relation to this statement to confidential and *ex parte* Annex B.

B. The remaining individuals

32. In all other cases we have also concluded, with reluctance, that we must send this matter back to the Pre-Trial Judge for further consideration. It is the obligation of any court of law to take account of all factors potentially significant to the decision; the more so when personal safety is at stake. Our orders made under the final heading “Disposition” refer in relation to these statements to confidential and *ex parte* Annex C.
33. Given the concession by the Prosecution recorded at paragraph 21 above it is unnecessary for us to analyse the reason for intervention. It might be expressed as error on the part of the Prosecution in failing, when preparing its list of witnesses whose redacted statements “can be immediately provided [...] to Mr El Sayed,”³⁰ to give careful consideration to what contribution the VWU might be able to make to the process of risk evaluation and to ensure that the Pre-Trial Judge was in a position to evaluate the relevant risks. As a result the decision of the Pre-Trial Judge erred in law by failing to take account of all factors

³⁰ Prosecutor’s Submissions, para. 95.



potentially significant to the decision, and that error affects the classifications in both paragraphs 95 and 96 of the Prosecutor's Submissions (other than those listed in confidential and *ex parte* Annexes A and B, namely those listed in confidential and *ex parte* Annex C), going to whether either disclosure or non-disclosure in each instance is appropriate. (The name in confidential and *ex parte* Annex B must be kept confidential for the different reason stated at paragraph 31 above.) It is enough that the Prosecution agree that the case must be referred back to the Pre-Trial Judge for further consideration of the other cases.

34. It may be that on such reconsideration the Prosecutor will be able to demonstrate that the VWU is happy with the methodology adopted in making the risk assessment; or that in any event the VWU agrees with the Prosecutor's assessment. In either case the error of law would be corrected. Our obligation is to ensure due process: both disclosure to Mr El Sayed of his entitlement and protection of individuals where that is justified.

35. The need to identify with precision whether there is relevant risk to any witness or other person may have been apparent since, at latest, the decision of the Pre-Trial Judge of 12 May 2011 ordering disclosure. It would be a matter of concern if a failure by the Prosecutor to follow due process added to the delays to date in resolving Mr El Sayed's claim to information.

VI. Mr El Sayed's Claims as to Application of Rules 60 and 60 *bis* and Indemnity in Respect of Abusive Procedure

36. Mr El Sayed concludes his reply with contentions:

- a) the Prosecutor's conduct of the proceeding has constituted contempt of due process and obstruction of justice in various respects which should lead this Chamber to initiate investigation under Rule 60 *bis* (E);³¹ in particular:
- b) as chief investigator for UNIIC the Prosecutor delayed revealing a lack of credible evidence to keep Mr El Sayed in detention, thus prolonging his detention;³²

³¹ Reply, paras 50-51.

³² *Id.*, para. 39.



- c) the Prosecutor has unnecessarily delayed these proceedings, thus infringing principles of fairness and due process and the duty to act in good faith;³³
- d) he is in a conflict of interest because he wishes to avoid releasing information that would shed light on his conduct of the UNIIIC investigations and is partial to the witnesses whose statements are in issue, and is no longer eligible to appear before the Tribunal (Rule 60 (A) (iii));³⁴ and
- e) he should be required to indemnify Mr El Sayed by payment of two hundred thousand Euros.³⁵

37. Such substantive contentions are not so directly related to Mr El Sayed's Reply to the Appeal that to entertain them in that context would "reflect the highest standards of...procedure, with a view to ensuring a fair and expeditious hearing" required by Article 28 of the Tribunal's Statute, either of the Appeal or of the contentions. Mr El Sayed proposes that so much of the case as deals with such contentions should be argued not by the Prosecutor but by a separate *ad hoc* contradictor.³⁶ Such course would lead to confusion both of roles and of issues. For that reason we decline to permit the addition to the submission in reply of the paragraphs seeking to raise the contempt and indemnity issues, save insofar as may bear upon costs of the Appeal.

38. In classifying Mr El Sayed's document as a reply we rely both on his original description of it as "Réplique à 'Prosecution's Appeal of the Pre-Trials Judge's Decision of 2 September 2011 and Request for the Suspensive Effect Pending Appeal' en application du 'scheduling order' du 13 September 2011" and on the amendment of the description on 29 September 2011 to read "Reply to Prosecution's Appeal of 12 September 2011 – Request for the Prosecutor to be withdrawn and an *ad hoc* opponent to be appointed – Request for damages for abuse of procedure." The latter confirms that the document is to be treated as a reply.

³³ *Id.*, paras 41 to 46.

³⁴ *Id.*, para. 53.

³⁵ *Id.*, para. 58.

³⁶ *Id.*, para. 55.



39. At paragraphs 15 and 16 of the Reply Mr El Sayed has advanced a submission of lack of jurisdiction of the STL, further suggesting that the “false witnesses” should not be deemed witnesses for the purpose of Rule 133.
40. We have dealt at paragraph 11 with the contention of “false witnesses.” If the contention contains an assertion of lack of jurisdiction of the Tribunal (we are not entirely clear whether it does), it is not open to a litigant who has himself elected to make an application to this very Tribunal. Neither issue is properly open to Mr El Sayed on this Appeal.
41. It follows that Mr El Sayed’s procedural submission in reply – that the Prosecutor should be withdrawn and an *ad hoc* opponent to his claim should be appointed – cannot be advanced on this appeal since there is no substantive issue before us to which it could attach. Any such submission should be made to a Chamber of first instance – Pre-Trial Judge or Trial Chamber – before which any contentions of the kind referred to in paragraph 36 were advanced. We make no comment on the validity of such contentions or any others, whether under Rules 60 *bis*, 4³⁷ or otherwise.
42. We add that the scheme of the Tribunal’s Statute is for a decision at first instance, either by the Pre-Trial Judge or by the Trial Chamber, followed by an appeal to this Chamber. While the literal language of the first sentence of Rule 60 *bis* (C) appears to allow a party to bring an allegation of contempt to the attention of any Chamber, Rule 60 *bis* (D), (E), (F) and (L) contemplate that the contempt enquiry is conducted by the Pre-Trial Judge or the Trial Chamber, whose decision is explicitly subject to appeal. Although the point has not been argued, and we do not determine it, it may prove that save in such exceptional cases as contempt in the face of the Appeals Chamber, such allegations should be made to the Chamber of first instance.
43. If giving alleged false statements to the UNIIIC is a crime under Lebanese law – something upon which the Appeals Chamber offers no present comment – such offence might be prosecuted under domestic law.

³⁷ We note that Rule 4 allows parties to raise objections about non-compliance of the Rules by a party. There has as yet been no assertion that any specific Rule was breached in the instant proceedings.



44. We mention in conclusion that Mr El Sayed has also asserted that there can be no partial redaction of the challenged statements because that is inconsistent with his right to information about his accusers.³⁸

45. The submission is unsustainable. The task of any court dealing with the complex and varying values which must be considered on such a claim is to evaluate them and make a principled judgment which gives each its due weight. The answer to this contention is to be found in our judgment of 19 July 2011. At paragraph 63 of that judgment we stated:

[...] the weight of the applicant's entitlement to information falls along a continuum: the greater the personal stake, the stronger the personal claim, albeit still to be weighed against other concerns for confidentiality.³⁹

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER

ACCEPTS the Appeal as properly filed;

DISMISSES the Appeal in relation to the statements of the persons listed in confidential and *ex parte* Annex A;

DIRECTS that the Prosecutor make the redactions referred to in paragraph 27;

ORDERS therefore the disclosure of the statements of the persons listed in confidential and *ex parte* Annex A no later than 13 October 2011, after a final check of the consistency of redactions in keeping with the aims of the Pre-Trial Judge's instructions in his 12 May 2011 order;

³⁸ Reply, paras 32 to 34.

³⁹ *In re: Application of El Sayed*, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, CH/AC/2011/01, 19 July 2011, para. 63.



ALLOWS the Appeal in relation to the statements of persons listed in confidential and *ex parte* Annexes B and C;

SETS ASIDE the Decision of 2 September 2011 in relation to the statements of the persons referred to in confidential and *ex parte* Annexes B and C;

DIRECTS the Pre-Trial Judge to issue a scheduling order with, *inter alia*, a time-frame for the Prosecutor to check, with the assistance of VWU if necessary, what redactions would be required to disclose the statements of the persons listed in confidential and *ex parte* Annexes B and C, which may include a list setting priorities for decisions to be made;

DIRECTS the Pre-Trial Judge to consider the Prosecutor's Submissions and to issue one or more comprehensive and reasoned decision(s) on the statements that should be disclosed upon redaction and the statements that may not be disclosed even upon redaction;

DIRECTS the Prosecution to give careful consideration to what contribution the VWU may be able to make to the process of risk evaluation in relation to the statements of such persons;

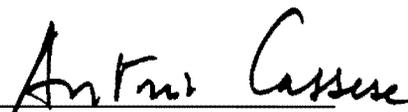
CLARIFIES that the dismissal in part of this Appeal in no way affects the limitations in the Pre-Trial Judge's decision of 2 September 2011 regarding how Mr El Sayed and his counsel may use these documents, and that the limitations and requirements established by the Pre-Trial Judge remain fully in force.

DISMISSES the applications by Mr El Sayed that the Appeals Chamber disqualify the Prosecutor under the Rules and require him to indemnify Mr El Sayed by a monetary payment.

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

Filed this 7th day of October 2011,

Leidschendam, the Netherlands


Judge Antonio Cassese
President

