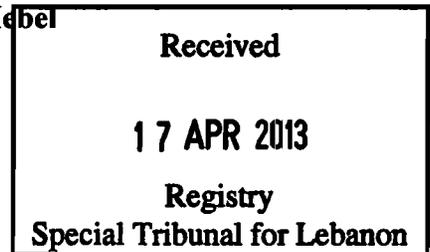




**THE PRE-TRIAL JUDGE**

Case No.: CH/PTJ/2013/02  
The Pre-Trial Judge: Mr Daniel Fransen  
The Registrar: Mr Herman von Hebel  
Date: 22 March 2013  
Original language: French  
Classification: Confidential



**DECISION ON THE URGENT REQUESTS OF MR EL SAYED FOR DISCLOSURE  
OF ATTESTATIONS REGARDING THE SUBSTANCE OF "WITNESS"  
STATEMENTS AND THEIR CREDIBILITY AND FOR AN *EX PARTE* HEARING  
TO BE HELD**

**Counsel:**  
Mr Akram Azoury

**Office of the Prosecutor:**  
Mr Norman Farrell

**Defence Office:**  
Mr François Roux



## **I. THE SUBJECT OF THE DECISION**

1. By way of this decision, the Pre-Trial Judge rules on the request for the disclosure of attestations regarding the substance of witness statements and their credibility and for an *ex parte* hearing to be held submitted on 14 January 2013 by Mr El Sayed (respectively the “Request” and the “Applicant”).<sup>1</sup>

## **II. PROCEDURAL BACKGROUND**

2. On 19 September 2012, the Applicant submitted to the Pre-Trial Judge an “Urgent Request for Specification of a Time Limit for the Prosecution to Disclose the Documents Referred to in the Pre-Trial Judge’s Order of 12 May 2011”.<sup>2</sup> He also requested that a final deadline be set for the Prosecution to disclose to him the remaining documents referred to in the aforementioned order.<sup>3</sup>

3. On 8 October 2012, the Pre-Trial Judge admitted in part the Applicant’s request by ordering the Prosecution to disclose all the documents mentioned in the Order of 21 May 2012 by 25 October 2012 at the latest, with the exception of the documents relating to nine witnesses exposed to “high” and “very high” risks.<sup>4</sup> The Pre-Trial Judge also ordered the Prosecution to carry out, at least every six months, an assessment of the risks for the witnesses classified in the aforementioned categories, to submit its conclusions to the Victims and Witnesses Unit (“VWU”) and to inform him of the completion of that process and of its results.<sup>5</sup>

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<sup>1</sup> STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2013/01, *Demande urgente de communication d’attestations sur la substance de dépositions de “témoins” et sur leur manque de crédibilité et de tenue d’une audience ex parte*, confidential, 14 January 2013. A public redacted version was filed on the same day.

<sup>2</sup> STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2011/08, Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, 12 May 2011 (the “Decision of 12 May 2011”).

<sup>3</sup> STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/05, Urgent Request for Specification of a Time Limit for the Prosecution to Disclose the Documents Referred to in the Pre-Trial Judge’s Order of 12 May 2011, 19 September 2012.

<sup>4</sup> STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/04, Decision Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge’s Decision of 12 May 2011, 8 October 2012 (the “Decision of 8 October 2012”), para. 13 and p. 6. The title of the decision initially contained an error which was subsequently corrected. The Pre-Trial Judge referred, in fact, to the date of 21 May 2011 and not to that of 12 May 2011. See STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/05, Corrigendum to the Decision Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge’s Decision of 21 May 2011, 11 October 2012.

<sup>5</sup> Decision of 8 October 2012, p. 6.

4. On 11 October 2012, the Appeals Chamber was seized by the Applicant of a partial appeal of the Pre-Trial Judge's Decision of 8 October 2012.<sup>6</sup>
5. On 23 November 2012, the Appeals Chamber dismissed the Applicant's appeal.<sup>7</sup>
6. On 14 January 2013, the Applicant filed the Request to the Pre-Trial Judge.
7. On 1 February 2013, the Prosecution responded to the Request (the "Response").<sup>8</sup>
8. On 5 February 2013, the Pre-Trial Judge was seized of a request from the Applicant for authorisation to file a reply to the Response<sup>9</sup> (the "Request to Reply").
9. On 6 February 2013, the Prosecution responded to the Request to Reply.<sup>10</sup>

### III. THE ARGUMENTS OF THE PARTIES

#### A. The Request

10. The Applicant requests that the Pre-Trial Judge order the Prosecutor to disclose to him an official attestation containing the facts imputed to the Applicant by the nine witnesses whose statements he has not received, without the witnesses being identified. The Applicant also requests that he be provided with an exhaustive inventory of the opinions and assessment reports of the United Nations International Independent Investigation Commission (the "Commission") which concluded that the statements of the nine witnesses were lacking in credibility and, with regard to the other witnesses, the opinions issued by the Commission on

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<sup>6</sup> STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/05, Partial Appeal of the Pre-Trial Judge's Decision of 8 October 2012 "Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge's Order of 12 May 2011", 11 October 2012.

<sup>7</sup> STL, *In the Matter of El Sayed*, Case No. CH/AC/2012/02, Decision on Partial Appeal by Mr El Sayed against Pre-Trial Judge's Decision of 8 October 2012, 23 November 2012.

<sup>8</sup> STL, *In the Matter of El Sayed*, Case No. OTP/PTJ/2013/13, Prosecution's Response to Mr. El Sayed's "Urgent Request for Disclosure of Attestations regarding the Substance of 'Witness' Statements and their Lack of Credibility and for an *Ex Parte* Hearing to be Held", confidential and *ex parte*, 1 February 2013. A public redacted version of the Response, dated the same day, was filed on 4 February 2013.

<sup>9</sup> STL, *In the Matter of El Sayed*, Case No. OTP/PTJ/2013/14, *Demande d'autorisation de déposer une réplique* à "Public Redacted Version of the Prosecution's Response to Mr. El Sayed's "Urgent Request for Disclosure of Attestations regarding the Substance of 'Witness' Statements and their Lack of Credibility and for an *Ex Parte* Hearing to be Held" of 4 February 2013, 5 February 2013.

<sup>10</sup> STL, *In the Matter of El Sayed*, Case No. OTP/PTJ/2013/15, Prosecution's Response to Mr. El Sayed's "*Demande d'autorisation de déposer une réplique*" to the Prosecution's Response of 4 February 2013, 6 February 2013.

the basis of its conclusions and relating to the Applicant's detention. Lastly, the Applicant requests that an *ex parte* hearing be held between his Counsel and the Pre-Trial Judge.<sup>11</sup>

11. In his Request, the Applicant recalls his right to effective remedy established by international law and enshrined in the case law of the Special Tribunal for Lebanon (the "Tribunal")<sup>12</sup> which recognised the jurisdiction of the Tribunal and the standing of the Applicant before the Tribunal to seek access to the documents from the criminal file relating to his detention which occurred between 30 August 2005 and 29 April 2009.<sup>13</sup> He infers from that a liability on the part of the Tribunal which recognises those rights. Consequently, the Tribunal should allow the Applicant to exercise them, in practice, in an effective manner.<sup>14</sup> The Applicant also recalls that he has seized the Lebanese Court of Cassation in order to highlight the serious malfunctioning of the public service of justice which led to his arbitrary detention. He states that the effectiveness of his action, which is still pending before the Plenary Assembly of that Court, is conditional upon the presentation of evidence which would demonstrate the arbitrary nature of his detention and the continuation thereof.<sup>15</sup> However, according to the Applicant, it is essential that he be able to demonstrate that the Commission found that the statements of the nine witnesses who testified against him were inaccurate and lacking in credibility. The Applicant states, in this respect, that the Plenary Assembly is not seized of those documents insofar as the Assembly is extraneous to the criminal proceedings of the Hariri case.<sup>16</sup>

12. The Applicant also notes that the statements of the other witnesses which have already been disclosed were not accompanied by the conclusions of the Commission which would allow the lack of credibility of those witnesses to be established and provide the Plenary Assembly of the Court of Cassation with information as to the position of the Commission relating to the detention or release of the Applicant. However, according to the

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<sup>11</sup> Request, para. 25.

<sup>12</sup> Decision of 12 May 2011; STL, *In the Matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011 (the "Decision of 19 July 2011").

<sup>13</sup> Request, para. 10; STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2010/005, Order relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2012 and Whether Mr El Sayed Has Standing Before the Tribunal, 17 September 2010. That decision was confirmed on appeal. See STL, *In the Matter of El Sayed*, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010.

<sup>14</sup> Request, para. 19.

<sup>15</sup> *Id.*, para. 11.

<sup>16</sup> *Id.*, paras 15 to 17.

Applicant, the disclosure of those materials is also necessary for establishing the gross negligence attributable to the Lebanese judges and those responsible for the Applicant's arbitrary detention.<sup>17</sup>

13. In the opinion of the Applicant, the outcome of the action before the Plenary Assembly is intrinsically linked to the progress of the matter before the Tribunal, as well as to the disclosure to the Applicant of materials in the exclusive possession of the Prosecutor. As such, the Applicant states that he has no knowledge of the substance of the statements and subsequently their effect on the responsibility of the Lebanese judges. Under these circumstances, he is unable to assess precisely how the statements of the nine witnesses, for which the Pre-Trial Judge and the Appeals Chamber denied disclosure, would influence the decision of the Plenary Assembly. According to the Applicant, the Plenary Assembly might, in fact, find that those statements justify the decisions of the Lebanese judges relating to his detention.<sup>18</sup>

14. As such, in order to maintain the necessary balance between the effectiveness of his action and the protection of the nine witnesses considered as being exposed to "high" or "very high" risks, the Applicant proposes an interim measure which would consist in authorising the provision of an official attestation which, without revealing the identity of the witnesses, would allow him to have access to the content of the statements which the Commission found to be lacking in credibility. He also requests an exhaustive inventory of the opinions and assessment reports of the Commission which concluded that the statements of the nine witnesses were lacking in credibility. With regard to the other witnesses, the Applicant requests that the conclusions of the Commission attesting to the lack of credibility of the witness be disclosed together with the opinions issued by the Commission on the basis of its findings and relating to the Applicant's detention. Lastly, he requests that an *ex parte* hearing be held between the Pre-Trial Judge and his Counsel so that the latter might submit, firstly, the urgent nature of this request as a result of the action before the Plenary Assembly and secondly, his point of view regarding each document mentioned in the Request as well as the fact that their disclosure is in compliance with the decisions of the Tribunal.<sup>19</sup>

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<sup>17</sup> *Id.*, para. 25.2.

<sup>18</sup> *Id.*, paras 12 to 15.

<sup>19</sup> *Id.*, paras 18 and 25.

## **B. The Response**

15. The Prosecution is of the opinion that, firstly, the provision of an attestation setting out the content of the statements of the nine witnesses concerned would necessarily lead to their identities being revealed. On this point, it recalls that the Pre-Trial Judge, in the Decision of 8 October 2012, already had the opportunity to determine, in light of the evidence submitted and after having taken account of the considerations of the Prosecution and the VWU according to which the disclosure of those statements should not be authorised. It appears as such that to reply favourably to the Request would circumvent the protection granted to those witnesses by the Pre-Trial Judge.<sup>20</sup>

16. Secondly, the Prosecution considers that, in the Decision of 8 October 2012, the Pre-Trial Judge carefully assessed the documents which could be disclosed and on what basis. Among them, certain documents can only be disclosed on condition that they satisfy the principles of protection validated by the VWU. It firstly considered that the disclosure of documents was dependent on the level of the risks faced by the witnesses and therefore in the case of “high” or “very high” risks, no disclosure should be authorised on account of the insufficient nature of the protection guaranteed under those circumstances.<sup>21</sup> For that reason, the Prosecution considers that the Request for the disclosure of those official attestations must be denied as the disclosure of those documents, even redacted of the identity of the witnesses, would not allow for the protection of those witnesses to be sufficiently ensured.

17. According to the Prosecution, it is clear from the foregoing that insofar as those attestations cannot be provided, any assessment by the Commission of the facts contained in those documents becomes irrelevant.

18. Moreover, with regard to the documents relating to the other witnesses, the Prosecution states that it reviewed all the documents submitted to the Appeals Chamber which, after having studied the categories of the documents to be disclosed, rendered its Decision of 19 July 2011.<sup>22</sup> In accordance with that decision, the Prosecution points out that the underlying materials of the documents to be disclosed were not themselves subject to that disclosure. As a consequence, on 25 October 2012, the Prosecution filed with the Registry all

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<sup>20</sup> Response, para. 4.

<sup>21</sup> *Id.*, para. 5.

<sup>22</sup> *Id.*, para. 6; Decision of 19 July 2011.

the documents that had to be disclosed to the Applicant. Amongst those documents were those relating to the witnesses exposed to “low”, “very low” and “medium” risks. The Prosecution is of the opinion therefore that it has met its disclosure obligations to the Applicant. It thus concludes that the Applicant presents no basis for submitting that the content of certain documents, the disclosure of which has been ordered, has not been provided.<sup>23</sup> Consequently, on this point, according to the Prosecution, the Request should likewise be dismissed.

#### IV. STATEMENT OF REASONS

19. Firstly, the Pre-Trial Judge considers that the Applicant’s Request to Reply should not be authorised. Indeed, the Pre-Trial Judge recalls that, pursuant to Rule 8 of the Rules of Procedure and Evidence (the “Rules”) and to the Tribunal’s case law,<sup>24</sup> any reply must, in principle, be limited to circumstances where new issues arise from the response and must not merely allow the requester to re-iterate the arguments contained in its request. However, the Pre-Trial Judges notes that, in the Request to Reply, the Applicant fails to refer to new issues that might have arisen out of the Response. For that reason, the Pre-Trial Judge dismisses the Request to Reply.

20. Lastly, with regard to the merits, the Pre-Trial Judge recalls that, in his Decision of 8 October 2012, he considered that in accordance with the risk assessment conducted by the Prosecution and approved by the VWU, the documents mentioned in the Order of 21 May 2012 could be disclosed to the Applicant, with the exception of the statements concerning nine witnesses exposed to “high” or “very high” risks.<sup>25</sup>

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<sup>23</sup> Response, paras 6 and 8.

<sup>24</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR90.1, Scheduling Order on Interlocutory Appeals, 27 August 2012, para. 2; STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/R176bis, Order by the Judge Rapporteur on Filing of Reply, 4 July 2012, para. 2; STL, *In the Matter of El Sayed*, Case No. CH/AC/2012/01, Order on Request by Mr El Sayed for Leave to File a Reply, 7 November 2012, para. 3; STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Motion of the Defence for Mr Badreddine Seeking an Order to Strike Out Certain Sections of the Prosecutor’s Pre-Trial Brief, 7 February 2013, para. 12.

<sup>25</sup> Decision of 8 October 2012, para. 13: STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/03, Decision Setting a Deadline for the Victims and Witnesses Unit to Decide on the Risk Assessments for the Witnesses Mentioned in the Order of 21 May 2012, 26 July 2012; STL, *In the Matter of El Sayed*, Case No. REG/PTJ/2012/04, Submission by the Victims and Witnesses Unit Pursuant to Rule 50 (D) and in Compliance with the Pre-Trial Judge’s Decision of 26 July 2012, 17 September 2012 (the “Submission of 17 September 2012”) including Annex A Results of VWU’s Individual Risk Assessment for Witnesses Mentioned in the Pre-Trial Judge’s Order of 21 May 2012, confidential and *ex parte*, 17 September 2012.

21. Indeed, the Pre-Trial Judge recalls that, in its Submission of 17 September 2012,<sup>26</sup> the VWU accepted the Further Updated Principles relating to the redactions of the documents established by the Prosecution on 28 June 2012.<sup>27</sup> With regard to witnesses exposed to “high” or “very high” risks, the Prosecution re-iterated its position of not disclosing to the Applicant the documents relating to those two categories of witnesses, even with redactions, which was confirmed by the VWU, which held that the existence of a “high” or “very high” level of risk was such as to justify the non-disclosure of the statements, thereby excluding redactions.<sup>28</sup> Therefore, even if the identity of the witnesses or other information were not to be revealed, the disclosure of an attestation setting out the content of the statements of the witnesses cannot, according to those principles, guarantee the security of the witnesses and the protection they require. Consequently, the Pre-Trial Judge dismisses that request while recalling that a reassessment of the risks and threats to those witnesses must be carried out every six months. That reassessment might have an impact on the disclosure of the statements at issue.

22. With regard to the request for the disclosure of an exhaustive inventory of the opinions and assessment reports of the Commission which concluded that the nine witnesses were lacking in credibility, the Pre-Trial Judge considers that those reports and opinions relate to the statements of the witnesses who are exposed to “high” or “very high” risks for which disclosure has been ruled out. Consequently, the disclosure of an exhaustive inventory of those documents cannot be authorised.

23. With regard to the Commission’s conclusions attesting to the lack of credibility of the other witnesses, as well as the opinions issued by the Commission on the basis of its findings and relating to the Applicant’s detention, the Pre-Trial Judge recalls that since the documents relating to the opinions and reports of the Commission form part of the Applicant’s file, the

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<sup>26</sup> Submission of 17 September 2012, para. 8.

<sup>27</sup> STL, *In the Matter of El Sayed*, Case No. OTP/PTJ/2012/03, Prosecution’s Submissions Informing the Pre-Trial Judge of its Intention to Disclose Materials to Mr. El Sayed and in Response to Mr. El Sayed’s “Urgent Request to Set a Time-Limit for the VWU and for the Submission of Documents Excluded from the *Ex Parte* Proceedings”, Annex A, Further Updated General Principles for the Redactions of Documents in the El Sayed Matter, confidential and *ex parte*, 28 June 2012. A public redacted version of this document is in the Annex to the Order of the Appeals Chamber of 14 March 2013; see STL, *In the Matter of El Sayed*, Case No. CH/AC/2013/01, Annex C to Interim Order on Prosecutor’s Appeal, 14 March 2013; Decision of 8 October 2012, para. 9; Submission of 17 September 2012, para. 8.

<sup>28</sup> STL, *In the Matter of El Sayed*, Case No. REG/PTJ/2012/01, Registry Submission Pursuant to Rule 48 (C) and Further to the Pre-Trial Judge’s Order of 20 February 2012, confidential and *ex parte*, 17 May 2012, para. 9; Submission of 17 September 2012, para. 8.

disclosure of which was authorised by the Tribunal, they should have already been disclosed. However, the Pre-Trial Judge considers that there is no justification for the fact that the underlying materials of the other documents from the Applicant's file should not, in principle, be disclosed. On this point, the Pre-Trial Judge recalls the position of the Appeals Chamber, according to which, among the categories of documents which in principle fall under the exception of Rule 111 of the Rules, "Proper classification depends not on a document's title, but on its content, function, purpose and source".<sup>29</sup> The Pre-Trial Judge considers therefore that the Prosecution must clarify whether the documents mentioned by the Applicant at paragraph 25.2 of the Request have been subjected to such a review, notwithstanding the fact that the Prosecution considers them as underlying materials to other documents. Where appropriate, it should disclose those documents in accordance with the Decision of the Appeals Chamber of 19 July 2011.

24. Lastly, with regard to whether it is appropriate to hold an *ex parte* hearing as the Applicant requests, the Pre-Trial Judge considers that he has been apprised of all the information that he requires in order to consider the Applicant's position. For that reason, the Pre-Trial Judge concludes that that hearing should not be held.

## **V. DISPOSITION**

### **FOR THESE REASONS,**

Pursuant to Rules 8 and 77 of the Rules,

### **THE PRE-TRIAL JUDGE,**

**DECLARES** the Request to Reply unfounded;

**ORDERS** the Prosecution to clarify whether the documents mentioned by the Applicant in paragraph 25.2 of the Request have been subjected to the review set forth by the Appeals Chamber in the Decision of 19 July 2011 and, where appropriate, to disclose those documents in accordance with that decision by 22 April 2013 at the latest; and

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<sup>29</sup> Decision of 19 July 2011, para. 117.  
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**DECLARES** the Request unfounded in all other respects.

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

Leidschendam, 22 March 2013

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[signature]

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Daniel Fransen  
Pre-Trial Judge

