



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No.: STL-El Sayed/AC

Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine, Judge Rapporteur
Judge Daniel David Ntanda Nsereko
Judge Ivana Hrdličková

Registrar: Mr Daryl Mundis, Acting Registrar

Date: 17 May 2013

Original language: English

Classification: Public

IN THE MATTER OF EL SAYED

**DECISION ON PARTIAL APPEAL BY MR EL SAYED AGAINST PRE-TRIAL
JUDGE'S DECISION OF 22 MARCH 2013**

Counsel for Mr El Sayed:
Mr Akram Azoury

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux





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INTRODUCTION

1. This Tribunal has recognized the right of Mr El Sayed to access information relating to his detention in order for him to seek remedy as a civil party before national courts of Lebanon.¹ This right has always been made subject to the need to keep certain classes of information confidential where there is a legitimate and well-founded public interest to do so, including where this is necessary to protect individuals from risk.² Since this Chamber's Decision of 19 July 2011, the Prosecutor has disclosed a number of documents to Mr El Sayed, and the Pre-Trial Judge and the Appeals Chamber have entertained numerous requests for determinations of the Prosecutor's disclosure obligations in relation to Mr El Sayed.³
2. Counsel for Mr El Sayed has now filed an appeal⁴ against a decision of the Pre-Trial Judge which rejected an application for the disclosure of information relating to nine confidential witness

¹ STL, *In the matter of El Sayed*, 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, ("19 July 2011 Decision"), paras 33-34, 68, 119; *see also* STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, paras 63-70.

² 19 July 2011 Decision, paras 50-51; STL, *In the matter of El Sayed*, 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, ("23 November 2012 Decision"), paras 8-10 (with further references to our previous decisions).

³ *See, e.g.*, STL, *In the matter of El Sayed*, CH/PTJ/2011/15, Decision Relating to the Prosecution's Second Application for Suspension of the Decision of 6 July 2011, 2 September 2011; STL, *In the matter of El Sayed*, CH/AC/2011/02, 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, 7 October 2011; STL, *In the matter of El Sayed*, CH/PTJ/2011/19, Decision Relating to Mr El Sayed's Observations of 17 August 2011 Concerning the Scope of the Decision of 12 May 2011, 1 November 2011; STL, *In the matter of El Sayed*, CH/PTJ/2012/01, Order Relating to the Submissions of the Prosecutor Filed on 8, 15 and 28 November 2011, 12 and 30 December 2011 and 15 February 2012 and to the Observations from Mr El Sayed of 11 January 2012, 20 February 2012; STL, *In the matter of El Sayed*, CH/AC/2012/03, Decision on Prosecutor's Partial Appeal of the Pre-Trial Judge's Order of 20 February 2012, 18 April 2012 ("18 April 2012 Decision"); STL, *In the matter of El Sayed*, 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 Order of 12 May 2011, 8 October 2012 ("8 October 2012 Decision"); 23 November 2012 Decision; STL, *In the matter of El Sayed*, CH/PTJ/2013/01, Public Redacted Version of the "Decision on the Prosecution Request to Suspend the Disclosure of Certain Documents" of 11 January 2013, 2 April 2013; STL, *In the matter of El Sayed*, CH/AC/2013/01, Public Redacted Version of Decision on Appeal by the Prosecutor against Pre-Trial Judge's Decision of 11 January 2013, 28 March 2013 ("28 March 2013 Decision").

⁴ STL, *In the matter of El Sayed*, CH/AC/2013/03, Partial Appeal of the "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" of 22 March 2013, Confidential, 2 April 2013 ("Appeal"). The Prosecutor filed a response, *see* STL, *In the matter of El Sayed*, OTP/AC/2013/01, Prosecution Response to Mr. El Sayed's Appeal from the Pre-Trial Judge's 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, Confidential, 17 April 2013 ("Prosecutor's Response").



statements.⁵ The Pre-Trial Judge had previously held that these witnesses are at a “high” or “very high” level of risk and consequentially, that their statements and other documents relating to these witnesses could not be disclosed.⁶ This finding was confirmed by the Appeals Chamber.⁷ Mr El Sayed now seeks summaries, lists and certificates attesting to the content of these documents.

3. We find the Appeal admissible, but unanimously dismiss it on the merits. We affirm the decision of the Pre-Trial Judge to refuse to grant the relief requested by Mr El Sayed, and dismiss the additional forms of relief he requests on appeal.

DISCUSSION

I. Admissibility of the Appeal

A. Whether the Appeal was filed out of time

4. While Mr El Sayed originally filed his Appeal on 2 April 2013 at 19:42, which was within the seven-day time limit for filing an appeal as of right,⁸ the cover page submitted along with the document contained an error. Mr El Sayed submitted the corrected document only the next day.⁹ However, given that he had filed the substance of the document in time and his error was limited to the cover page, we find that there is good cause to accept the filing of the Appeal as validly done pursuant to Rule 9(A)(ii) of the Rules of Procedure and Evidence (“Rules”) and Article 10(2) of the Practice Direction on Filings.

B. Whether Mr El Sayed could appeal without seeking certification

5. Mr El Sayed did not seek certification to appeal the decision of the Pre-Trial Judge. However, we have held that in the context of these proceedings, which fall outside the scope of our Rules, no

⁵ STL, *In the matter of El Sayed*, CH/PTJ/2013/02, 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, 22 March 2013 (“Impugned Decision”).

⁶ 8 October 2012 Decision, para. 14.

⁷ 23 November 2012 Decision, paras 10-16, 21.

⁸ 28 March 2013 Decision, para. 11; Article 2(9), STL, STL/PD/2010/01/Rev.1, Practice Direction on Filing of Documents before the Special Tribunal for Lebanon, 23 April 2012, (“Practice Directions on Filings”).

⁹ Email from Court Records Office (Court Management Services Section) to Legal Officer, Appeals Chamber, 3 April 2013.



certification is required where the Pre-Trial Judge's decision "potentially deals finally" with his application.¹⁰

6. In our Decision of 23 November 2012, we found that the appeal against a decision denying disclosure of the statements and other documents of the nine witnesses was admissible on the basis that:

[...] the mere possibility of future review cannot alter the present status of the Impugned Decision which must be classed as final. It follows that the Impugned Decision may be appealed without certification, even if the assessment of risk may change with respect to certain individuals. This conclusion is underscored by the fact that any prejudice suffered by Mr El Sayed because of delay in accessing the documents in question may not be cured by such a potential future change in circumstances.¹¹

7. We find that the present situation is comparable. The Pre-Trial Judge in the Impugned Decision determined that the specific form of relief requested by Mr El Sayed was not available. Future revisions to the risk assessments of the nine witnesses will not change the status of this decision as final, and cannot remedy any prejudice to the applicant resulting from delay in his accessing the documents. As such, the Impugned Decision can be considered "final" and subject to appeal without certification. The appeal is therefore validly filed and admissible.

II. Merits of the Appeal

8. Mr El Sayed submits that the Pre-Trial Judge committed two distinct errors in the Impugned Decision. First, he argues that the Pre-Trial Judge erred in denying his request to obtain an official attestation from the Prosecutor which would include the "facts imputed to the Applicant by the nine 'witnesses'" and an exhaustive inventory of certain UNIIIC material on their alleged lack of credibility.¹² Secondly, he argues that the Pre-Trial Judge, when rejecting his request, should have considered alternative remedies.¹³ We will address Mr El Sayed's contentions in turn.

A. Whether the Pre-Trial Judge erred when refusing to grant Mr El Sayed's request

9. El Sayed alleges that the Pre-Trial Judge erred when he refused his request to order the Prosecutor to provide Mr El Sayed with an "attestation" of the following:

¹⁰ See 18 April 2012 Decision, para. 15 (with further references to our previous decisions).

¹¹ 23 November 2012 Decision, para. 6.

¹² Appeal, para. 13; see also *id.* at paras 14-27.

¹³ Appeal, paras 27-28.



- The facts imputed to the Applicant by the nine “witnesses” considered as being exposed to “high” or “very high” risks. To this end the witnesses would be identified by using numbers while concealing their respective identities.

- An exhaustive inventory of the various opinions and assessment reports of the UNIIC which concluded that the facts imputed to the Applicant by those nine “witnesses” proved to be “lacking in credibility”, and including the respective date or dates on which the UNIIC notified the Lebanese judicial authorities of those opinions and reports.¹⁴

1. Witness statements

10. With respect to witness statements, the Pre-Trial Judge first recalled the protective measures in place with respect to all documents relating to the nine witnesses, namely, that, as he had previously held, they could not be disclosed to Mr El Sayed, even in redacted form. He then held that “[t]herefore, 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.”¹⁵

11. Mr El Sayed argues on appeal that the Pre-Trial Judge erred in failing to justify how the disclosure of these “attestations” of the content of these documents would cause prejudice to witnesses¹⁶ and that he wrongly applied the principles relating to redactions to the proposed attestations.¹⁷ The Prosecutor responds that the Pre-Trial Judge did not err in this regard.¹⁸

12. The Pre-Trial Judge’s finding that the disclosure of “attestations” of the contents of the statements by the nine witnesses would run counter to the objective of guaranteeing these witnesses’ security and protection was a finding of fact. In the light of the standard of review that we have set out previously, we can interfere with the Pre-Trial Judge’s finding only if it was unreasonable.¹⁹

13. We first emphasize that the Appeals Chamber has already determined the question of whether Mr El Sayed has a right to information relating to the nine witnesses who are considered to be “high

¹⁴ Appeal, para. 13; see also STL, *In the matter of El Sayed*, CH/PTJ/2013/01, 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, 14 January 2013, para. 25 (a public redacted version was filed the same day).

¹⁵ Impugned Decision, para. 21.

¹⁶ Appeal, paras 17-19.

¹⁷ Appeal, para. 20.

¹⁸ Prosecutor’s Response, paras 5-14.

¹⁹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.2, Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 5.



risk” or “very high risk” witnesses. We decided that the Pre-Trial Judge did not err in denying El Sayed access to their statements and related documents.²⁰ Indeed in our decision we recalled the principle, reiterated in a number of decisions, that Mr El Sayed’s right of access to information is subject to certain limitations:²¹

In our previous decisions we stressed that, while Mr El Sayed has a general right to access certain documents in the possession of the Prosecutor, this right is by no means absolute.²² In particular, we held that “any claim Mr. El Sayed has to information held by this Tribunal must be properly weighed against well-founded contrary interests that may be asserted by the Prosecution on behalf of the larger community.”²³ We also clarified that although not directly applicable to Mr El Sayed’s case, we are guided in this regard by our Rules of Procedure and Evidence, including the provisions on disclosure.²⁴

Indeed, the stringent disclosure obligations under our Rules are subject to certain exceptions, which include situations where non-disclosure is required for the protection of victims and witnesses.²⁵ For instance, the Rules permit the withholding of documents that reveal the identity of witnesses or provide their statements as a proper counterbalancing measure to minimize any risk to them.²⁶

Consequently, while Mr El Sayed’s interest in securing access to documents in the possession of the Prosecutor is an important one, the Tribunal has nonetheless an obligation to ensure the safety of the individuals to whom these documents relate. If their life is put at risk by disclosing their identities and other information to Mr El Sayed, then his interest in seeking judicial redress cannot prevail; he cannot be accorded any absolute right to access. As we have held before, “[o]ur obligation is to ensure due process: both disclosure to Mr El Sayed of his entitlement and protection of individuals where that is justified.”²⁷

²⁰ 23 November 2012 Decision, para. 21.

²¹ 23 November 2012 Decision, paras 8-10.

²² [fn. 21 in the original] 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 (“Jurisdiction and Standing Decision”), para. 69; 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 (“19 July 2011 Decision”), para. 50.

²³ [fn. 22 in the original] 19 July 2011 Decision, para. 51.

²⁴ [fn. 23 in the original] *Id*, para. 30.

²⁵ [fn. 24 in the original] See Rules 115 and 116 STL RPE. Rule 115(A) allows the Prosecutor to “apply to the Pre-Trial Judge or Trial Chamber to order interim non-disclosure of the identity of a victim or witness who may be in danger or at risk until appropriate protective measures have been implemented.” Likewise, Rule 116 provides that the Prosecutor may apply to be relieved of an obligation to disclose material if such disclosure “(i) [...] ii) may cause grave risk to the security of a witness or his family, or iii) [...]” These provisions are a reflection of legislation and case-law, both national and international, considering that access to a criminal file is not an absolute right because it is subject to the need not to compromise an ongoing investigation, or the physical well-being of persons, or affect national or international security. See STL, *In the matter of El Sayed*, Case No. CH/PTJ/2010/05, 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, 17 September 2010, para. 53.

²⁶ [fn. 25 in the original] Rules 115, 116 and 133 STL RPE.

²⁷ [fn. 26 in the original] STL, *In the matter of El Sayed*, Case No. CH/AC/2011/02, 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, 7 October 2011 (“Disclosure Decision”), para. 34.



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14. Contrary to Mr El Sayed's claim,²⁸ there is no question of "reconciling" the requirement to protect those nine witnesses who were adjudged to be exposed to "high risk" or "very high risk" with his competing right to gain access to information useful to his case in the Lebanese courts. We repeat that while the Tribunal's disclosure rules provide for counterbalancing measures if certain information cannot be revealed,²⁹ in case of conflict the safety of witnesses must ultimately prevail over Mr El Sayed's right of access to this information.

15. Mr El Sayed provides no support for his contention that the Tribunal has a "positive obligation" to facilitate the effectiveness of his actions before the Lebanese courts.³⁰ Mr El Sayed's success or failure in making his case before the Plenary Assembly is irrelevant to our determination of whether certain documents must be disclosed to him. This determination is only subject to our Statute and Rules and the principles set out in our decisions.

16. Therefore, the only question before us is whether the Pre-Trial Judge's decision to refuse to order the disclosure of the *content* of the statements of the nine witnesses in summarized format for reasons of witness protection was reasonable or not. We first recall that *redactions* of the statements were explicitly rejected by the Victims and Witness Unit ("VWU") and the Prosecutor on the basis that the documents could not be redacted in a way that would guarantee the protection of the nine individuals.³¹ Consequently, the protective measure ordered by the Pre-Trial Judge was to withhold

²⁸ Appeal, paras 17, 25.

²⁹ See, e.g., Rule 116 (B) STL RPE, providing for "identification of new similar information; provision of the information in summarised or redacted form; or stipulation of the relevant facts."

³⁰ Neither case referred to by El Sayed supports the contention that there is a duty on a court to provide a person with unrestricted access to the documents necessary for them to pursue a civil claim, or a duty of a court to ensure that an individual is able to pursue a civil remedy. The *El Masri* case relates to a failure of a state to investigate the applicant's ill-treatment and deprivation of liberty at the hands of the CIA. The court found the applicant's right to effective remedy had been "unjustifiably hindered" by the state's failure to conduct a sufficient criminal investigation into the matter. It is thus not relevant to the present case, which concerns access to documents (see ECtHR, *El Masri v The Former Yugoslav Republic of Macedonia*, 39630/09, Judgement, 13 December 2012, paras 255-262). The *McGinley* proceeding did relate to access to documents, but is not authority for an unrestricted right of access. In the decision cited by Mr El Sayed, the court found that the specific procedures available to the applicant for requesting the relevant documents from the UK Government were flawed to the extent that they constituted a "disproportionate limitation" on the applicant's access (see ECommHR, *McGinley and EE v UK*, 21825/93 and 23414/94, 26 November 1996, paras 114-119). This finding was later overturned by the ECtHR on the basis that the documents in question most likely did not exist, and in any case, the applicants had made no attempt to actually use the available procedures for acquiring them. The court further noted that the right of access to administrative documents may be limited where there is good cause to do so (see ECtHR, *McGinley and Egan v. UK*, 10/1997/794/995-996, Judgment, 9 June 1998, paras 86-106); see also Prosecutor's Response, paras 12-13.

³¹ Impugned Decision, para. 21; see also STL, *In the matter of El Sayed*, OTP/PTJ/2013/13, 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, 1 February 2013, paras 4-5; STL, *In the matter of El Sayed*, REG/PTJ/2012/04, Submission by the Victims and Witnesses Unit Pursuant to Rule



completely any disclosure of the statements. In our previous decision, we confirmed this decision of the Pre-Trial Judge and also approved of the methodology applied by the VWU in arriving at the conclusion that the witness statements could not be provided to Mr El Sayed.³² We consider that a summary of a witness statement in this case would not be substantially different from its redaction (which we have confirmed is not possible in the circumstances). Therefore, we agree with the Pre-Trial Judge that to disclose such summaries to Mr El Sayed would undermine the protection measures for these individuals and run counter to our previous decisions because such disclosure may still risk their identification.

17. In this context, it is immaterial in the present case that Mr El Sayed is requesting the summaries not for the purpose of litigation against the nine witnesses (as he did previously) but rather to pursue his claims against the Lebanese state for the alleged misconduct of certain Lebanese officials.³³ We have previously held that Mr El Sayed may seek information from the Tribunal only to the extent that it enables him to bring civil claims in domestic courts relating to his detention.³⁴ His litigation before the Plenary Assembly falls under that theme.³⁵ However, the information he seeks from the Prosecutor has remained essentially the same. Hence, the assessment of his request with respect to witness protection has also not changed.

18. Consequently, the Pre-Trial Judge did not err when he decided that the policy of withholding disclosure of the witness statements in any format should be applied with respect to the summaries now requested by Mr El Sayed.

2. UNIIC documents

19. As for the requested inventory of any UNIIC documents concluding that the nine witnesses lacked in credibility, the Pre-Trial Judge stated that these reports related to the witnesses' own

50(D) and in Compliance with the Pre-Trial Judge's Decision of 26 July 2012, Confidential and *Ex Parte*, 17 September 2012; 23 November 2012 Decision, paras 14, 20-21.

³² 23 November 2012 Decision, para. 21.

³³ See Appeal, para. 5.

³⁴ 19 July 2011 Decision, para. 68, fn. 5.

³⁵ STL, *In the matter of El Sayed*, CH/PTJ/2010/01, Public redacted version of Memo number 112 Application: Request for release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention, 17 March 2010, p. 1 (requesting documents "in order that he shall have an effective and efficacious remedy, having instituted a civil action against the perpetrators [responsible for his detention] before the various national courts that are competent in this matter"); see also *id.* at p. 5 (referring to his civil action to "claim reparation from those persons responsible for these offences for the material and non-material damage he has suffered").



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statements for which disclosure had been ruled out. Consequently, he found that “the disclosure of an exhaustive inventory cannot be authorised.”³⁶

20. Mr El Sayed argues that the Pre-Trial Judge failed to provide justification why disclosure of the alleged opinions and the dates on which they were allegedly transmitted to the Lebanese authorities would endanger the witnesses whose names would not be revealed.³⁷ The Prosecutor responds that the Pre-Trial Judge did not err.³⁸ He argues that in any case, UNIIC documents are protected by Rule 111 of the Rules and need not be disclosed.³⁹

21. We first recall our previous decisions in which we have clarified that in principle internal documents of the UNIIC, including correspondence with the Lebanese authorities are protected by Rule 111 of the Rules and are exempt from disclosure.⁴⁰ Generally, therefore, Mr El Sayed’s request for an inventory of such documents must be rejected. However, even if such documents were not protected by Rule 111 (because they constituted “(i) unambiguous acceptance; (ii) by a decision maker; (iii) which is fairly to be characterised as a decision as to relevant guilt or innocence”⁴¹) the overriding provisions of witness protection would militate against disclosure of the material. Indeed, we have made clear that in cases where Rule 111 does not apply, other reasons for non-disclosure must be taken into account, including the protection of witnesses.⁴² In this case, we find that even though he could have primarily relied on the protections of Rule 111, the Pre-Trial Judge’s decision to withhold an inventory of UNIIC documents on the basis of witness protection concerns was entirely reasonable, given that such disclosure would at least increase the risk of exposing the witnesses’ identities.⁴³

³⁶ Impugned Decision, para. 22.

³⁷ Appeal, para. 18.

³⁸ Prosecutor’s Response, paras 5-14.

³⁹ Prosecutor’s Response, paras 15-21.

⁴⁰ 19 July 2011 Decision, para 92 *et seq.*

⁴¹ *See id* at para 105. We find inaccurate in this regard the Prosecutor’s assertion that we have “determined that any exception to Rule 111 does generally apply to correspondence from UNIIC to the Lebanese authorities related to the assessment of evidence potentially linked to Mr El Sayed.” (Prosecutor’s Response, para. 20). Our decision of 28 March 2013, on which the Prosecutor relied, did not make such a general pronouncement. Rather, it only addressed the disclosure obligations of the Prosecutor with respect to three specific documents which were in fact before the Appeals Chamber.

⁴² *See* 19 July 2011 Decision, paras 105, 110, 115, 118.

⁴³ *See above*, para. 16.



3. Conclusion

22. We find that the Pre-Trial Judge did not err when he rejected Mr El Sayed's request for an "attestation" of the content of the statements of the nine witnesses and an inventory of any UNIIC documents relating to them.

B. Whether the Pre-Trial Judge erred when not considering other remedies

23. Mr El Sayed argues that once the Pre-Trial Judge had rejected his initial request, he should have still considered an "intermediate solution".⁴⁴ To that end he suggests that the Prosecutor be ordered to certify the following (or something similar):

The Prosecutor certifies that as part of the investigation conducted by the UNIIC between 30 August 2005 and 29 April 2009, nine individuals gave evidence before it to the prejudice of the Appellant that was likely to render him liable for the attack of 14 February 2005.

The statements of those nine individuals proved to be inaccurate or lacking in credibility on the following dates: ...

The UNIIC disclosed to the Lebanese judicial authorities its conclusions regarding the lack of credibility of each of those nine witnesses on the following dates ...⁴⁵

The Prosecutor has not responded to this particular point.

24. At the outset, we note that Mr El Sayed did not request before the Pre-Trial Judge the alternative remedy he now seeks. Generally, a party is required to raise formally any issue of contention before the Judge or Chamber of first instance. Failure to do so may constitute waiver of a right to bring the issue on appeal. In particular, a party cannot remain silent on a matter only to litigate it for the first time on appeal.⁴⁶ Indeed, our appellate proceedings are corrective in nature; they do not constitute a *de novo* review of the case.⁴⁷ In this case, Mr El Sayed now seeks a form of relief that is different from the one he sought before the Pre-Trial Judge. While his initial request was concerned with obtaining summaries of the statements and an inventory of UNIIC documents, he now asks the Appeals Chamber for a certificate that would essentially require an *evaluation* of the

⁴⁴ Appeal, para. 27.

⁴⁵ Appeal, para. 28.

⁴⁶ See ICTY, *Prosecutor v Bošković and Tarčulovski*, IT-04-82-A, Judgement, 19 May 2010, para. 185; ICTY, *Prosecutor v Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para. 654; ICTR, *Prosecutor v Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, para. 361.

⁴⁷ See, e.g., ICTY, *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 5; see also STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/AC/AR126.1, *Corrected Version of Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial In Absentia Decision*, 1 November 2012, para. 5.



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statements and UNIIC documents. This raises new legal questions such as whether this form of relief is actually available. The Pre-Trial Judge did not decide these questions because Mr El Sayed did not bring them before him. He therefore did not commit an error and we could reject the appeal in this regard on that basis alone. However, we find in this specific case that exceptional circumstances exist to address Mr El Sayed's request. We note that this litigation has been going on for an excessive period of time and that there is a need for finality. There is also a need to protect the resources of this Tribunal. Given the possibility that Mr El Sayed would seize the Pre-Trial Judge again with his alternative request and that any decision of the Pre-Trial Judge would be appealed by one of the parties, it is in the interests of justice to resolve this issue exceptionally at this stage. We also consider that Mr El Sayed's alternative request is closely related to the main relief he seeks.

25. As pointed out above, what Mr El Sayed now seeks in the alternative is an attestation that would in essence require the Prosecutor to provide a fresh *opinion* on the content of the nine witness statements and any relevant UNIIC documents. Under our Rules of Procedure and Evidence, which guide the disclosure regime applicable in the *El Sayed* proceedings,⁴⁸ there is no specific provision for such a possibility or requirement. Indeed, even those counterbalancing measures under the Rules that allow for the withholding of information while at the same time providing some form of remedy do not include relief in the form of an opinion on or assessment of the information that is sought.⁴⁹

26. In general, under our Rules, all the Prosecutor is required to do is to disclose information that in his view "may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence".⁵⁰ This obligation is not limited to documents but refers to all information in any form.⁵¹ The Prosecutor is required to hand over such information; however, he has generally no obligation to provide a detailed assessment of the information apart from indicating that it is potentially exculpatory. In particular, there is no obligation to inform the Defence *why* he

⁴⁸ We have repeatedly clarified "that although not directly applicable to Mr El Sayed's case, we are guided in this regard by our Rules of Procedure and Evidence, including the provisions of disclosure." (23 November 2012 Decision, para. 8)

⁴⁹ See Rule 116 (B) STL RPE.

⁵⁰ See Rule 113 (B) STL RPE.

⁵¹ See ICTY, *Prosecutor v Brđanin and Talić*, IT-99-36, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para. 8; ICTR, *see also Prosecutor v Nzirorera et al.*, ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, paras 12-13; cf Ian Eagles *et al.*, *Freedom of Information in New Zealand* (Oxford University Press 1992), pp. 20 (on the scope of the New Zealand Freedom of Information Act).



thinks certain material may be exculpatory.⁵² Whether and how to use the information disclosed in that way is for the Defence to decide.

27. The question before us then is whether the same approach should apply in the framework of the *El Sayed* proceedings. We have held that these proceedings are not criminal proceedings but rather administrative or civil in nature.⁵³ *A fortiori*, in determining the Prosecutor's disclosure obligations we should not exceed the stringent disclosure obligations applicable to criminal cases, where an individual's liberty is at stake. This is not the case here, where Mr El Sayed is seeking the attestation for the purposes of his civil litigation.⁵⁴ We therefore determine that, analogous to our Rules pertaining to criminal cases, the Prosecutor cannot be required to provide any evaluation of the content of the nine witness statements and/or the UNHIC documents to Mr El Sayed.

28. In the light of this conclusion, it is not necessary for us to explore further whether the required attestation would have an impact on the protection of the nine witnesses and the status of the UNHIC internal documents. Mr El Sayed's request is dismissed in this regard.

III. Confidentiality

29. Finally, despite the fact that Mr El Sayed's Appeal and the Prosecutor's Response were filed confidentially, there is no reason to accord the same status to this decision. We also note that the Pre-Trial Judge has made the Impugned Decision public in its entirety.⁵⁵ We therefore issue our decision in public format and order that the Appeal is made public. We also order the Prosecutor to file a public redacted version of his Response, given that he has provided a full citation from a decision that was issued confidentially and *ex parte*.⁵⁶ In particular, we remind him to exercise more caution in the future when referring to or citing from a decision when that decision or its relevant parts were ordered to be withheld from the other party.⁵⁷

⁵² See also Rule 121 (B) STL RPE (stating only that "[a] Party shall, as far as practicable, provide information identifying documents, or classes of documents, disclosed to the other Party").

⁵³ 19 July 2011 Decision, para. 28.

⁵⁴ See *id.* at paras 63, 67.

⁵⁵ STL, *In the matter of El Sayed*, CH/PTJ/2013/04, Order to Lift the Confidentiality of the 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, 11 April 2013.

⁵⁶ Prosecutor's Response, para. 20.

⁵⁷ See ICTY, *In the Case Against Hartmann*, IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 52 (holding that the "discretion as to whether the confidential status of a decision may be lifted in whole or in part belongs exclusively to a competent Chamber of the Tribunal"); cited approvingly by STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/AC, Corrected Version of Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012, paras 13-14.



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

DISPOSITION**FOR THESE REASONS;****THE APPEALS CHAMBER;****FINDS** the Appeal admissible;**UNANIMOUSLY DISMISSES** the Appeal;**ORDERS** the Registrar to reclassify the Appeal as public;**ORDERS** the Prosecutor to file a public redacted version of his Response, redacting the citation of a confidential and *ex parte* decision in paragraph 20 of the Response.

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

Filed 17 May 2013,

Leidschendam, the Netherlands

Judge David Baragwanath

Presiding

