

**THE APPEALS CHAMBER**

Filing No.: CH/AC/2012/03

Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko
Judge Kjell Erik Björnberg, Judge Rapporteur

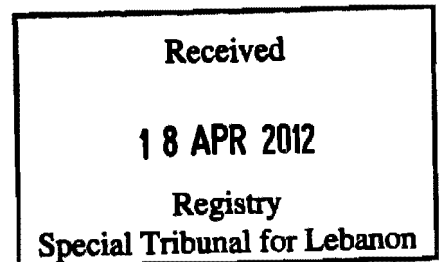
Registrar: Mr Herman von Hebel

Date: 18 April 2012

Original language: English

Type of document: Public

Case: In the matter of Mr El Sayed's application for disclosure of documents

**DECISION ON THE PROSECUTOR'S PARTIAL APPEAL OF THE PRE-TRIAL
JUDGE'S ORDER OF 20 FEBRUARY 2012**

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**HEADNOTE¹**

In April 2009 Mr Jamil El Sayed was released after having spent almost three and half a years in custody on suspicion of involvement in the killing of former Lebanese Prime Minister Rafiq Hariri and others. He was never charged with a crime. After his release, Mr El Sayed turned to the Special Tribunal for Lebanon requesting access to evidence in relation to his detention in order to prosecute those responsible for it. By decisions of the Pre-Trial Judge and the Appeals Chamber of the Tribunal, the Tribunal's Prosecutor, who is in possession of the evidentiary material, has been ordered to disclose to Mr El Sayed a number of documents, albeit with limitations and restrictions required to protect the safety of victims and witnesses, the protection of ongoing investigations and in the interests of national and international security.

The Pre-Trial Judge on 20 February 2012 rejected a request by the Prosecutor to redact or withhold disclosure of documents which according to the Prosecutor were irrelevant or of a duplicative nature, and ordered the Prosecutor to disclose the documents. The Prosecutor appealed to the Appeals Chamber against this decision ("Impugned Decision").

The Appeals Chamber first clarifies that its decision concerns only a limited number of documents dealt with in the Impugned Decision. Documents which have already been disclosed or dealt with in previous decisions are outside the scope of the appeal

Mr El Sayed claims that the appeal is inadmissible because (i) the Prosecutor had failed to obtain certification from the Pre-Trial Judge as required by the Rules of Procedure and Evidence, and (ii) the matters have been dealt with finally by the Pre-Trial Judge in his decision of 12 May 2011 so that the appeal is barred by res judicata. The Appeals Chamber holds that the Impugned Decision "potentially deals finally" with Mr El Sayed's application, and therefore no certification of the appeal was required. The Appeals Chamber furthermore considers that the Pre-Trial Judge's decision of 12 May 2011 lacks certainty as to what precisely was decided on the criterion of relevance. Consequently, the Appeals Chamber finds that this decision cannot be considered as final so as to give rise to res judicata and bar the appeal. Thus, it declares the appeal admissible.

On the merits of the case, the Prosecutor argues that he is entitled not to disclose irrelevant and/or duplicative documents. He also claims that he was not given an opportunity to include further redactions before disclosure

Concerning the arguments raised with respect to relevance, the Chamber decides that only documents that may assist in explaining why Mr El Sayed was kept in detention—or why he should not have been kept in detention—are relevant. It concludes that the Prosecutor is entitled to apply this objective criterion whenever the question of disclosure of a document arises. The Pre-Trial Judge erred in denying non-disclosure/redactions of documents that are not relevant. With respect to duplicative documents, the Appeals Chamber decides that a duplicate is an exact copy of a previously disclosed document. Only such exact replicas can be withheld from disclosure. As regards the allegation that the Pre-Trial Judge ordered disclosure of documents without further redactions, the Appeals Chamber holds that the Impugned Decision read as a whole makes clear that the Pre-Trial Judge permitted further redactions for the protection of victims and witness and other reasons. The Pre-Trial Judge did not err in this respect.

The Appeals Chamber directs the Prosecutor to execute the disclosure process in the light of its decision and also reinforces the need for expedition in the disclosure process.

Finally, Mr El Sayed requests sanction of the Prosecutor for misconduct and contempt. The Appeals Chamber concludes that there is no justification for such sanctions.

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 might find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.



INTRODUCTION

1. In proceedings concerning a request by Mr Jamil El Sayed for disclosure of documents in the Prosecutor's custody, the Pre-Trial Judge on 20 February 2012 rejected a request by the Prosecutor to redact or withhold disclosure of documents that the Prosecutor considered irrelevant or duplicative to Mr El Sayed's claims, and ordered the Prosecutor to disclose the documents in question.² On 29 February 2012, the Prosecutor filed a partial appeal before the Appeals Chamber against the Pre-Trial Judge's Order of 20 February 2012 ("Impugned Decision").³ We allow the Prosecutor's appeal in part.

SUBMISSIONS OF THE PARTIES

2. In the Appeal, the Prosecutor requests the Appeals Chamber to:
- a. reverse the Impugned Decision in part;
 - b. authorize him to consider "relevance" in determining what documents are to be disclosed;
 - c. authorize the non-disclosure of duplicative documents;
 - d. refer the case back to the Pre-Trial Judge for consideration of Mr El Sayed's application for disclosure according to these principles; and
 - e. suspend the disclosure order in the Impugned Decision.⁴
3. The Prosecutor argues that, contrary to the Impugned Decision, neither the Pre-Trial Judge's decision of 12 May 2011 on disclosure⁵ nor the Appeals Chamber's decision of 7 October 2011⁶

² STL, *In re: Application of El Sayed*, Case No. 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.

³ STL, *In re: Application of El Sayed*, Case No. OTP/AC/2012/01, Prosecution's Partial Appeal of the Pre-Trial Judge's Order of 20 February 2012 and Request for Suspensive Effect Pending Appeal, 29 February 2012 (filed confidentially and *ex parte* with a public redacted version) ("Appeal").

⁴ Appeal, paras 24-25.

⁵ STL, *In re: Application 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 ("12 May 2011 Decision").

⁶ *In re: Application 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 Disclosure of Documents, 7 October 2011 ("7 October 2011 Decision").



ordered disclosure of documents that the Prosecutor deemed to be irrelevant.⁷ He asserts that the Impugned Decision deals finally with documents that are irrelevant or duplicative.⁸ He claims that the Impugned Decision requires him to disclose those documents without any further redactions that may be necessary for the safeguarding of victims and witnesses and other important protected values.⁹

4. The Appeals Chamber held a judicial conference on 1 March 2012. Counsel for the Prosecutor and the Head of Defence Office were present, while Mr El Sayed's counsel participated by telephone.

5. On 2 March 2012, the Appeals Chamber issued a Scheduling Order directing the Parties to file further submissions.¹⁰ In his Response to the Appeal,¹¹ filed in compliance with the Scheduling Order on that same day, Mr El Sayed requests that:

- a. the Appeal be declared procedurally inadmissible;
- b. the Appeal be declared ill-founded;
- c. the Pre-Trial Judge's decision be confirmed; and
- d. the Prosecution's request for suspension be rejected.¹²

6. Mr El Sayed argues that these questions have already been finally decided by the Pre-Trial Judge in his 12 May 2011 Decision, and that therefore the Prosecutor is not entitled to raise these issues again (*res judicata*). He also seeks a determination that "the Prosecutor does not fulfil the necessary conditions to act in the present case, pursuant to Rule 60 [the Rule governing misconduct of counsel]" of the Tribunal's Rules of Procedure and Evidence ("Rules"), meaning that the Prosecutor has been guilty of misconduct and is no longer eligible to appear before the Tribunal.¹³

⁷ Appeal, para. 3.

⁸ *Ibid.*

⁹ Appeal, para. 5.

¹⁰ STL, *In re: Application of El Sayed*, Case No. CH/AC/2012/01, Scheduling Order, 2 March 2012 ("Scheduling Order").

¹¹ STL, *In re: Application of El Sayed*, Case No. OTP/AC/2012/01, Reply to "Prosecution's Partial Appeal of the Pre-Trial Judge's Order of 20 February 2012 and Request for Suspensive Effect Pending Appeal" and Objection to the Request for Suspension, 2 March 2012 ("Response").

¹² Response, p. 5.

¹³ *Ibid.*, referring to Rule 60(A)(iii) of the Rules.



7. On 5 March 2012, the Prosecutor filed a further submission¹⁴ and on 7 March 2012, Mr El Sayed filed a Reply.¹⁵
8. On 27 March 2012, the Chamber ordered suspension of the Pre-Trial Judge's Impugned Decision, pending final determination of the Appeal.¹⁶

SCOPE OF THE APPEAL

9. The Appeal is against the Pre-Trial Judge's decision to disclose documents which the Prosecutor claims are irrelevant or duplicative. The Parties did not clarify the precise scope of the Appeal by identifying specifically the documents to which it refers. Irrelevance and duplication may be arguments raised with respect to a multitude of documents, many of which would not be the subject of these proceedings. Therefore, in order to define the scope of the Appeal, we must exclude those documents that fall outside of it.
10. We first determine that all documents already disclosed to Mr El Sayed are not covered by the present Appeal. Similarly, documents whose status is determined by our decisions of 19 July 2011¹⁷ and 7 October 2011 are also outside the scope of this Appeal. In accordance with the directions given in the latter decision, these documents should have already been disclosed to Mr El Sayed. If such disclosure has not yet taken place, it should be carried out without delay.
11. This Appeal must be seen in the context of the six submissions made by the Prosecutor to the Pre-Trial Judge and addressed in the Impugned Decision: they are dated (i) 8 November 2011;¹⁸ (ii) 15 November 2011;¹⁹ (iii) 28 November 2011;²⁰ (iv) 12 December 2011;²¹

¹⁴ STL, *In re: Application of El Sayed*, Case No. OTP/AC/2012/01, Prosecution Filing in Compliance with the Scheduling Order of 2 March 2012 and Related Submissions, 5 March 2012 ("Prosecution Filing of 5 March 2012").

¹⁵ STL, *In re: Application of El Sayed*, Case No. OTP/AC/2012/01, Reply by General Jamil El Sayed to "Prosecution Filing in Compliance with the Scheduling Order of 2 March 2012 and Related Submissions" pursuant to the Scheduling Order of 2 March 2012, 7 March 2012 ("Reply").

¹⁶ STL, *In re: Application of El Sayed*, Case No. OTP/AC/2012/02, Order on Prosecution's Request for Suspensive Effect of the Pre-Trial Judge's Order of 20 February 2012, 27 March 2012.

¹⁷ STL, *In re: Application 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").

¹⁸ STL, *In re. Application of El Sayed*, Case No. CH/PTJ/2011/19, Prosecution's Submission Following the Pre-Trial Judge's Decision Relating to Mr El Sayed's Observations of 17 August 2011 Concerning the Enforcement of the Decision of 12 May 2011, 8 November 2011.

¹⁹ STL, *In re: Application of El Sayed*, Case No. CH/PTJ/2011/17, Prosecution's Submission Following the Pre-Trial Judge's Order of Enforcement of the Appeals Chamber Decision of 19 July 2011, 15 November 2011.



(v) 30 December 2011;²² and (vi) 15 February 2012.²³ The scope of the Appeal is therefore limited to the documents referred to in these six submissions and which the Pre-Trial Judge ordered to be disclosed to Mr El Sayed.

12. However, only two of the six aforementioned submissions raise the argument of irrelevance or duplication.²⁴ In the submissions of 30 December 2011 and 15 February 2012, the Prosecutor requested the Pre-Trial Judge to authorize non-disclosure of certain statements or redaction of information contained in them, because of their repetitive nature or because they had no connection to Mr El Sayed or to the Hariri attack and were therefore irrelevant. In our view, only the documents listed in those two submissions and claimed to be irrelevant or duplicative fall within the scope of this Appeal. In all other respects, the Impugned Decision stands unchallenged.

²⁰ STL, *In re: Application of El Sayed*, Case No. CH/PTJ/2011/08, Prosecution's Further Submission of Translated Documents Following the Pre-Trial Judge's 12 May 2011 Decision, 28 November 2011.

²¹ STL, *In re: Application of El Sayed*, Case No. CH/PTJ/2011/08, Prosecution's Submission of Translated Documents Following the Pre-Trial Judge's 12 May 2011 Decision, 12 December 2011.

²² STL, *In re: Application of El Sayed*, Case No. CH/PTJ/2011/18, Prosecution's Submission in Compliance with the Pre-Trial Judge's Scheduling Order of 21 October 2011, 30 December 2011.

²³ STL, *In re: Application of El Sayed*, Case No. OTP/PTJ/2012/01, Prosecution's Submission of Documents Following the Pre-Trial Judge's Decision of 1 November 2011, 15 February 2012.

²⁴ In the submission of 8 November 2011 the Prosecutor responded to a request by the Pre-Trial Judge in a decision of 1 November 2011 to clarify the status of a number of documents within a certain period of time, asked that he prepare a detailed inventory of the documents disclosed to the Applicant and to his counsel and that he draw up a report relating to the fulfilment of his obligations. In the submission of 15 November 2011, the Prosecutor responded to an order of the Pre-Trial Judge dated 17 October 2011 on the enforcement of the Appeals Chamber's Decision of 19 July 2011 concerning documents potentially falling under Rule 111 of the Rules and if so not to be disclosed. There was no reference to the question of non-disclosure based on irrelevance or repetition. In the submissions of 28 November 2011 and 12 December 2011, the Prosecutor filed a number of translated documents with suggested redactions. In the submission of 30 December 2011, the Prosecutor dealt with the Pre-Trial Judge's Order of 17 October 2011 for Enforcement of the Appeals Chamber Decision of 19 July 2011 and the Scheduling Order of 21 October 2011 on the implementation of the Appeals Chamber Decision of 7 October 2011 on risk assessment relating to witnesses whose statements should be disclosed to Mr El Sayed. Following a risk assessment, the Prosecutor proposed non-disclosure of statements where the risk with regard to a witness is described as "high" or "very high". Furthermore, the Prosecutor identified a number of statements which he found should not be disclosed because the information therein is repetitive or has no connection with Mr El Sayed or with the attack against Mr Hariri and should therefore not be considered to form a part of Mr El Sayed's "criminal file". In addition, the Prosecutor proposed complete redaction of witness statements which do not refer to Mr El Sayed or the attack against Mr Hariri. Furthermore, redaction of names of investigators was proposed. In the submission dated 15 February 2012 the Prosecutor requested approval of redactions in some documents and mentioned a witness statement related to the investigation that should not be disclosed and referred to future redactions when a risk assessment would be carried out. None of the submissions of 8 November 2011, 30 December 2011 and 15 February 2012 touched upon the issues of irrelevance or repetition. The Prosecutor also requested in the submissions of 30 December 2011 and 15 February 2012 non-disclosure of statements from witnesses incurring risks described as "high" or "very high". This did not deal with the matters of irrelevance or repetition and therefore falls outside of the appeal.



ADMISSIBILITY OF THE APPEAL

13. Mr El Sayed argues that the Appeal is inadmissible for lack of certification.²⁵ He claims that the Appeal is also inadmissible because the Prosecutor failed to appeal in time against the Pre-Trial Judge's 12 May 2011 Decision, and that therefore the Prosecutor waived his right of appeal. He submits that an appeal against the 12 May 2011 Decision is barred by the principle of *res judicata*.²⁶

L. Whether the appeal needed to be certified

14. Mr El Sayed contends that the Appeal is inadmissible because the Prosecutor failed to request certification from the Pre-Trial Judge under Rule 126(C) of the Rules.²⁷ The Prosecutor on the other hand asserts that he can bring the Appeal without certification. He submits that the Impugned Decision orders him to disclose documents and that this decision is one that "potentially deals finally with" parts of Mr El Sayed's request for disclosure, namely with regard to documents deemed irrelevant or duplicative.²⁸

15. The Appeals Chamber's decisions of 19 July 2011 and of 7 October 2011 clarified that whilst Rule 126 of the Rules relates to motions in criminal appeals, in civil or administrative applications²⁹ we would also normally require certification for "any appeal before full and final judgment;" but not for an appeal which "potentially deals finally with" the application.³⁰ A decision that "potentially deals finally with" an application is not an interlocutory decision requiring certification.³¹ We accept that the Impugned Decision "potentially deals finally with" Mr El Sayed's application for disclosure because it orders the Prosecutor to disclose "the statements which he proposed not to disclose or proposed to redact on the basis of relevance and repetition criteria".³² In our view, once the documents are ordered to be disclosed there is nothing more to decide because once it is

²⁵ Response, para. 2.

²⁶ Response, paras 8-14; Reply, para. 20.

²⁷ Response, para. 2. According to Rule 126(C) of the Rules, "[d]ecisions on all motions under this rule are without interlocutory appeal save with certification, if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings".

²⁸ Appeal, para. 3.

²⁹ 19 July 2012 Decision, para. 28.

³⁰ 19 July 2012 Decision, paras 19-20. See also 7 October 2011 Decision, paras 2-5.

³¹ 7 October 2011 Decision, para. 5.

³² Impugned Decision, p. 21.



implemented that order becomes irreversible.³³ It follows that the Appeal did not require certification.

II. Whether the Prosecutor is otherwise barred from bringing his Appeal

16. Mr El Sayed claims that the Pre-Trial Judge has finally decided upon the criterion of relevance in the disclosure of documents in his 12 May 2011 Decision. Referring to the principle of *res judicata*, he argues that because the Prosecutor decided not to appeal that decision, he is barred from re-litigating the issue now.³⁴ Consequently, he contends the Prosecutor's appeal is "ill-founded".³⁵ He also argues that the Prosecutor has waived his right to appeal.³⁶ With respect to the issue of duplicative documents, Mr El Sayed contends that the Prosecutor's appeal lacks a legal basis because it is "merely an additional delaying tactic".³⁷

17. The Prosecutor asserts that there has been no final decision by the Pre-Trial Judge on either the issue of relevance or the issue of the duplicative nature of documents.³⁸ He also argues that he has neither explicitly nor implicitly waived any right of appeal.³⁹

18. As a preliminary matter, we note that the question whether duplicates of documents already disclosed need to be handed over to Mr El Sayed was addressed by the Pre-Trial Judge for the first time in the Impugned Decision.⁴⁰ Consequently, the Prosecutor is not barred by *res judicata* from appealing that aspect of the Impugned Decision.

19. Similarly, *res judicata* does not arise unless there has been a final ruling on the issue which is unambiguous and free of uncertainty.⁴¹ So we turn next to the question whether the Pre-Trial Judge

³³ See 7 October 2011 Decision, para. 5.

³⁴ Response, para. 9; Reply, paras 15-21.

³⁵ Response, para. 13.

³⁶ Reply, para. 21(iv).

³⁷ Response, para. 16; see also Reply, para. 2.

³⁸ Prosecution Filing of 5 March 2012, paras 23-33.

³⁹ Prosecution Filing of 5 March 2012, paras 34-39.

⁴⁰ See Impugned Decision, paras 70-72.

⁴¹ See A. Chamseddine, *Al 'ousoul almadanieh bein el kanoun wa al ijthihad* [Civil Procedures Between Law and Jurisprudence], (Beirut: 2006), p. 544, para. 6; G. Spencer Bower & K. Handley, *Res Judicata*, 4th edn. (London: LexisNexis Butterworths, 2009), at 5.11.: "A decision is not final which leaves the parties in doubt as to their rights and liabilities [...]."; see also *id.* at 5.01, citing United Kingdom, *Eastwood and Holt v Studer*, 31 Com. Cas. 251, at pp. 256-257 (1926): "[w]here a decision of a competent tribunal is relied on as creating an estoppel and preventing a subsequent



has ruled finally on the question of relevance as a criterion that may be applied during the disclosure process. Upon a careful review of the Pre-Trial Judge's 12 May 2011 Decision and the Impugned Decision, we find that the Prosecutor is also not precluded from lodging his appeal in this regard. As pointed out by the Prosecutor,⁴² there are certain ambiguities within those decisions that militate against denying appellate review of the Impugned Decision.

20. First, we note that the passages of the 12 May 2011 Decision dealing with the question of relevance—made in the context of an application by the Prosecutor to withhold two documents from disclosure because they were “not relevant”⁴³—are internally contradictory. The Pre-Trial Judge decided that these documents could be withheld only for “reasons other than that they are not relevant”.⁴⁴ Nevertheless, he proceeded to make an assessment that the documents might in fact be relevant, thereby applying the very relevance criterion he had just rejected.⁴⁵ In particular, he considered that Mr El Sayed “should, in principle, have access to all the witness statements which were produced in the context of the examination of his file *and* on which his detention was based”.⁴⁶ This is an explicit, and indeed double, requirement of relevance. Given that the Pre-Trial Judge took note of the Prosecutor's explanation that there was no “case file” as such, but that documents were identified during an electronic review of its database,⁴⁷ the reference to the “examination of [Mr El Sayed's] file” must be understood to refer to these searches. It thus appears that the Pre-Trial Judge intended to limit Mr El Sayed's access to those documents “on which his detention was based,” and not each and every document that appeared in the Prosecutor's initial searches.

21. Yet in the same paragraph, the Pre-Trial Judge stated that Mr El Sayed's access should not “be limited to the statements made by witnesses or suspects which it would appear directly implicate him in the Hariri case” and that “the statements from all the witnesses or suspects which were taken in the context of the examination of Mr El Sayed's file might be relevant, and therefore, could be

review of the matter, it is necessary that the matter should have been raised and controverted before the earlier tribunal and shall have been clearly, and finally, decided by it.”

⁴² Prosecution Filing of 5 March 2012, paras 25-32.

⁴³ 12 May 2011 Decision, para. 40. We note that in the Prosecutor's submission of 15 February 2012, these documents are marked as disclosed.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*: “In so far as the Pre-Trial Judge considers that these documents might be relevant [...]”.

⁴⁶ *Id.* at para. 41 (emphasis added).

⁴⁷ *Id.* at paras 22-23.



disclosed to him,”⁴⁸ subject to certain exceptions. Likewise, in relation to redactions, the Pre-Trial Judge appeared to not to permit them for any reason “except for that of their alleged relevance”.⁴⁹ This language, which must be read together with the contrasting statements we have noted, indicates either some very general notion of relevance which has not been made explicit or the presence of inconsistent themes.

22. Indeed, the 12 May 2011 Decision is open to three possible interpretations: (1) the Pre-Trial Judge decided that relevance should not at all be a criterion that the Prosecutor should employ when making a decision whether to disclose material to Mr El Sayed (or whether to make redactions); (2) the Pre-Trial Judge applied the criterion of relevance and limited the disclosure obligations of the Prosecutor to those documents on which his detention was based; or (3) the Pre-Trial Judge applied a criterion of relevance but expanded that concept to all statements found by the Prosecutor by way of searching his electronic database.

23. We note as well that the litigation leading to the 12 May 2011 Decision concerned only documents which the Prosecutor submitted to the Pre-Trial Judge after first excluding documents that the Prosecutor considered irrelevant.⁵⁰ So, in other words, the Prosecutor had already made a relevance decision, a fact that was considered but not further addressed by the Pre-Trial Judge when he stated “the Prosecutor [...] is the only one who has in-depth knowledge of the file relating to Mr El Sayed, which allows him to assess [...] from amongst all the materials in his possession, those which have a bearing on the proceedings against [Mr El Sayed]”.⁵¹

24. In sum, we are simply left in a state of uncertainty as to what precisely the Pre-Trial Judge decided in his 12 May 2011 Decision with respect to the relevance of documents.

25. Given such uncertainty, we cannot view this part of the decision as final. In this regard, we are also not aided by the Impugned Decision, in which the Pre-Trial Judge noted that the Prosecutor had “invoked once again” the relevance criterion and considered that he had previously ruled on the matter, because in support of this finding he merely recited the ambiguous paragraph of the

⁴⁸ *Id.* at para. 41.

⁴⁹ *Id.* at para. 42.

⁵⁰ 12 May 2011 Decision, para. 22.

⁵¹ *Id.* at para. 28.



12 May 2011 Decision.⁵² In any event, a judge cannot disadvantage a party by elucidating an earlier uncertain decision through later explanation.

26. We therefore conclude that the Prosecutor is not precluded by the 12 May 2011 Decision from bringing the present Appeal. Nor did the Prosecutor waive his right to appeal when he chose not to appeal the ambiguous findings of the Pre-Trial Judge in the 12 May 2011 Decision. Given that this decision did not order the disclosure of the two documents at issue or resolve the issue of relevance in general, the Prosecutor was not required to seek certification in order to preserve his right to bring an appeal on this issue at a later stage.

III. Conclusion

27. We find that the Appeal is admissible.

THE MERITS OF THE PROSECUTOR'S APPEAL

28. Turning to the merits of the Appeal, we recall that the Appeals Chamber will only reverse a decision if the Pre-Trial Judge or Trial Chamber committed a specific error of law or fact invalidating the decision, or took into account irrelevant considerations or weighed relevant considerations in an unreasonable manner.⁵³ Consequently, we need to determine whether the Pre-Trial Judge erred in rejecting the Prosecutor's argument that he can withhold documents from disclosure because they are not relevant to Mr El Sayed or that are duplicates of documents already disclosed.

29. The Prosecutor argues that such documents need not be disclosed and that appropriate redactions on that basis should be allowed. He submits that the Pre-Trial Judge committed a reversible error in ordering disclosure and that the Impugned Decision should be reversed in that regard.⁵⁴ The Prosecutor also argues that the Pre-Trial Judge erred in ordering disclosure of such documents without allowing further redactions based on other limitations and restrictions, such as

⁵² Impugned Decision, paras 70-71.

⁵³ See 19 July 2011 Decision, para. 22.

⁵⁴ Appeal, paras 6-20.



those necessary for the protection of victims and witnesses and the safeguarding of ongoing investigations.⁵⁵

30. Mr El Sayed responds that the purpose of the Prosecutor's appeal is to delay the proceedings.⁵⁶ He argues that the Prosecutor should not be allowed to make a unilateral determination whether or not a document is relevant.⁵⁷ He states that, in any event, the Prosecutor has made a determination that certain documents are relevant and should not now be allowed to backtrack from that determination.⁵⁸ Mr El Sayed challenges the Prosecutor's argument that the Impugned Decision orders him to disclose certain documents without making any redactions for other reasons than relevance, claiming that the submission is "clearly false".⁵⁹

I. Whether the Pre-Trial Judge erred in ordering the disclosure of documents not deemed relevant by the Prosecutor

31. In the Impugned Decision, the Pre-Trial Judge dismissed the Prosecutor's request to withhold documents from Mr El Sayed that should not be disclosed (or at least not without appropriate redactions) on the basis that they contain information that has no connection with Mr El Sayed or with the attack against Mr Hariri.⁶⁰ We find that this decision was in error.

32. The basis for Mr El Sayed's original application to the Tribunal was his request for the "release of all the evidence *related* to the crimes against" him.⁶¹ Among his specific requests, he asked for documents relating to witnesses "who implicated him either directly or indirectly in the assassination of the former Prime Minister Rafic Hariri"⁶² and "[a]ny other piece of evidence [...]"

⁵⁵ Appeal, para. 21; Prosecution Filing of 5 March 2012, paras 40-43.

⁵⁶ Response, paras 3, 16; Reply, para. 2.

⁵⁷ Reply, paras 8-14.

⁵⁸ Reply, paras 11-14.

⁵⁹ Response, para. 5.

⁶⁰ Impugned Decision, paras 52, 58, 70-72. We note the Prosecutor's claim that the Pre-Trial Judge "has the authority to establish criteria or guidelines for determining relevance" but "does not have the authority [...] to order [the prosecution] to disclose to Mr El Sayed documents that are not relevant to him or his application". (Appeal, para. 12). In doing so, the Prosecutor refers to paragraph 74 of our decision of 19 July 2011, by way of comparison (Appeal, fn. 18). Paragraph 74 of the 19 July 2011 Decision provides guidance as to the best way for a Judge to review documents for the purpose of disclosure. It does not imply that a Judge's authority is limited to the review. On the contrary, the Judge may always take action based on the review. Such action can be revised on appeal if error is found.

⁶¹ STL, *In re: Application of El Sayed*, 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.

⁶² *Id.* at p. 8.



which is necessary for the prosecution of the offences”.⁶³ Mr El Sayed has confirmed in these proceedings that he is “only asking for the evidence of his arbitrary detention in order to prosecute those responsible for the offences committed against him before a competent national judge”.⁶⁴

33. We also recall that we set out in our 19 July 2011 Decision the limits of Mr El Sayed’s entitlement to documents. In particular, we found that Mr El Sayed has a “right to access to justice”⁶⁵ but that this right “does not however justify discovery of documents for purposes other than those asserted by Mr El Sayed, namely the pursuit of legal claims against the individuals allegedly responsible for his detention”.⁶⁶ This means that “the use of information obtained on disclosure [must] be limited to the asserted purposes of Mr El Sayed’s claim, which establish a legitimate interest in the documents”.⁶⁷ We also stated that “[u]se for any other purpose would not be justified and would be improper”.⁶⁸ The decision does not use the word “relevance”. But it is clear that our analysis was premised on the assumption that only those documents related to Mr El Sayed’s detention by the Lebanese authorities should be disclosed. These are documents that may assist in explaining why Mr El Sayed was kept in detention or why he should not have been kept in detention. Only such documents are relevant for the purposes of the proceedings in this matter. The Prosecutor is entitled to apply this objective criterion of relevance whenever the question of disclosure of a document or other evidentiary material arises. While he carries primary responsibility for implementing the disclosure process,⁶⁹ his subjective assessment of what is relevant and what is not, however, remains subject to correction by the Pre-Trial Judge, and ultimately, the Appeals Chamber.

34. The Pre-Trial Judge’s order to the Prosecutor to disclose documents that were not relevant under these criteria was in error. The same applies to his dismissal of the Prosecutor’s request to redact irrelevant information.

⁶³ *Id.* at p. 9.

⁶⁴ Reply, para. 4.

⁶⁵ 19 July 2011 Decision, para. 40.

⁶⁶ *Id.* at para. 44.

⁶⁷ *Id.* at para. 51.

⁶⁸ *Id.* at para. 68.

⁶⁹ See also on the responsibilities of the Prosecutor: 19 July 2011 Decision, para. 71; 7 October 2011 Decision, para. 25.



II. Whether the Pre-Trial Judge erred in ordering the disclosure of documents deemed by the Prosecutor to be duplicative of documents previously disclosed

35. The Impugned Decision also denied the Prosecutor the right to withhold from disclosure documents that are merely duplicative of a previously disclosed document.⁷⁰ We note that the Prosecutor has failed to define clearly what he contends are “duplicates”. He only argues that “[m]ultiple versions of the same document are of no use to Mr El Sayed”.⁷¹

36. In our 19 July 2011 Decision, we held that “duplicate documents could perhaps be classified as irrelevant, provided the originals are treated correctly”.⁷² However, this was predicated on the understanding that a duplicate is an *exact* copy of a document. Duplication does not occur if the same information is contained in two or more different documents or if a copy of a document carries any markings or is in any other way different from the original document. This is because, for instance, repetition of the same information in separate sources may make the information more credible, while even small inconsistencies may have an impact on the credibility of a witness.

37. It follows that the Pre-Trial Judge was in error only insofar as he ordered the disclosure of exact copies of documents previously disclosed. Moreover, disclosing such material would potentially require more time, slowing down the disclosure process and burden Mr El Sayed with material that is already in his possession.

III. Whether the Pre-Trial Judge erred in ordering disclosure of irrelevant/duplicate documents without giving the Prosecution the opportunity to apply further redactions based on other criteria

38. Mr El Sayed does not dispute that the Prosecutor may withhold or redact information that if disclosed to Mr El Sayed would endanger his ongoing investigations or threaten the safety of victims and witnesses or the interests of national and international security.⁷³ Indeed, the Pre-Trial Judge reiterated that the redaction process was approved with the sole purpose of protecting such

⁷⁰ Impugned Decision, paras 71-72.

⁷¹ Appeal, para. 19.

⁷² 19 July 2011 Decision, para. 90.

⁷³ Response, para. 4.



information.⁷⁴ Contrary to the Prosecutor's arguments,⁷⁵ we are satisfied that the Impugned Decision, when it is read as a whole, makes clear that the Pre-Trial Judge did not order the disclosure of irrelevant/duplicate documents without allowing the Prosecutor to make other necessary redactions. The Pre-Trial Judge ordered the Prosecutor to review "the statements he proposes for non-disclosure or for redaction on the basis of these criteria [safeguarding of protected interests]".⁷⁶ While the Disposition orders disclosure of the documents without mentioning again this review process, the intention of the Pre-Trial Judge was obvious. While we do not agree with Mr El Sayed that the Prosecutor's Appeal in this regard amounts to "abusive conduct"⁷⁷, a simple request for clarification to the Pre-Trial Judge by the Prosecutor would have helped avoiding any need to bring this issue before the Appeals Chamber.⁷⁸ We do not find that the Pre-Trial Judge made an error in this regard.

IV. The directions of the Appeals Chamber

39. We note the Prosecutor's request to remand the case to the Pre-Trial Judge.⁷⁹ However, in the light of our conclusions, it is sufficient for us to direct the Prosecutor to review without delay the documents dealt with in this decision and to disclose them. This of course is subject to the Prosecutor's right to withhold documents or to make appropriate redactions to protect the safety of witnesses and victims, and to safeguard the ongoing investigations as well as the interests of national and international security.⁸⁰

⁷⁴ Impugned Decision, para. 71.

⁷⁵ Appeal, para. 21; Prosecution Filing of 5 March 2012, paras 40-43.

⁷⁶ Impugned Decision, para. 72.

⁷⁷ Response, para. 5. In relation to Mr El Sayed's claims that the Prosecutor was making "false submissions" (Response, para. 4), "obstructed the proceedings" (para. 5) and was acting in "bad faith", we note with approval the reminder of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia that "while vigorous advocacy is inherent to the thrust and parry of adversarial court proceedings, the Appeals Chamber expects all parties before the Tribunal to maintain high standards of professional conduct". ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-A, Decision on Prosecution's Request for Leave to File Sur-Reply to Respond to False Allegations in Markač's Reply Brief, 1 November 2011, p. 1 (fn. omitted).

⁷⁸ See also STL, *In re: Application of El Sayed*, Case No. CH/AC/2010/02, Decision on Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 37.

⁷⁹ Appeal, para. 24.

⁸⁰ We consider that such redactions should be limited to the extent absolutely necessary and should not frustrate the purpose of the whole disclosure, that is, to allow Mr El Sayed whatever is his legitimate entitlement to seek redress before domestic courts for the alleged violation of his rights.



MR EL SAYED'S REQUEST FOR SANCTIONS

40. We take note of Mr El Sayed's request to remove the Prosecutor from the case;⁸¹ his claim that the Prosecutor's actions constitute contempt of the Tribunal both in relation to the filing of the Appeal⁸² and the Prosecutor's alleged delay in enforcing the Pre-Trial Judge's 12 May 2011 Decision;⁸³ and his call for action under Rule 60 of the Rules.⁸⁴ While we consider delay in the disclosure process may well to some extent have been attributable to the Prosecutor, for the following reasons we do not find that Mr El Sayed's requests are warranted at this time.

41. As regards the removal of the Prosecutor from the case, allegations of contempt should be made before the relevant Judge or Chamber.⁸⁵ With respect to Mr El Sayed's argument that the Prosecutor's delay in enforcing the Pre-Trial Judge's 12 May 2011 Decision constitutes contempt, he should direct his claim to the Pre-Trial Judge.

42. In any event, Mr El Sayed has not established that either the Prosecutor's conduct or the integrity of the proceedings justify such an extreme measure, which also carries with it the potential for further delay.⁸⁶

43. Regarding allegations of contempt in the face of the Appeals Chamber, there is no factual basis for the submission that the Prosecutor's appeal was "manifestly abusive" as argued by Mr El Sayed, especially when it has succeeded in part.⁸⁷

44. As for the initiation of action against the Prosecutor pursuant to Rule 60, we again find that there is no factual basis for the submission of misconduct under Rule 60(A). We have already reminded the Prosecutor of his obligation to provide Mr El Sayed with the documents expeditiously following review. We record that we will not countenance further delay.

⁸¹ Response, para. 3.

⁸² Response, para. 5.

⁸³ Response, para. 6.

⁸⁴ Response, p. 5, Reply, p. 8.

⁸⁵ See 7 October 2011 Decision, paras 41-42.

⁸⁶ See also 7 October 2011 Decision, para. 37.

⁸⁷ Reply, para. 22.

**DISPOSITION**

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

ACCEPTS the Appeal as admissible;

ALLOWS the Appeal in part;

REVERSES the Impugned Decision in part;

QUASHES the Pre-Trial Judge's order to the Prosecutor to disclose to Mr El Sayed the statements which the Prosecutor had proposed not to disclose or proposed to redact on the basis of relevance and repetition criteria;

DIRECTS the Prosecutor without delay but no later than 18 May 2012 to review the documents; assess whether they are relevant to Mr El Sayed and/or duplicate of documents previously disclosed, as defined in this decision; and disclose in whole or in part any document that is relevant and/or not a duplicate of a previously disclosed document; make if necessary appropriate redactions based on the need to protect the safety of victims and witnesses, the integrity of the ongoing investigation, or the interests of national or international security;

DISMISSES the remainder of the Prosecutor's Appeal;

REJECTS Mr El Sayed's request for sanctions against the Prosecutor;

LIFTS the suspension of the remainder of the Impugned Decision and directs the Prosecutor to comply with the Pre-Trial Judge's order no later than 27 April 2012.

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

Dated this 18th day of April 2012,

Leidschendam, the Netherlands

David Baragwanath
Presiding

