

**BEFORE THE APPEALS CHAMBER  
SPECIAL TRIBUNAL FOR LEBANON**

Case No.: **OTP/AC/2012/01**

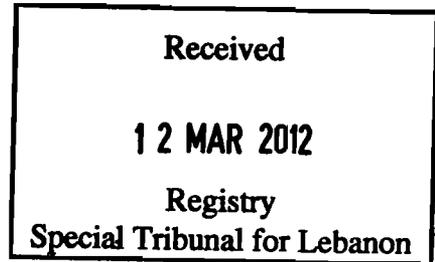
Filed before: **The Appeals Chamber**

Date of document: **2 March 2012**

Filing entity: **General Jamil El SAYED, represented by his counsel  
Mr Akram AZOURY**

Original language: **FRENCH**

Type of document: **Public**



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**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**

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Filed by:  
**General Jamil El SAYED**

Distribution:  
**Judge Sir David Baragwanath**

Represented by his counsel  
**Mr Akram AZOURY**

**Office of the Prosecutor  
Mr Daniel BELLEMARE**

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Mr François ROUX**



**May it please the Appeals Chamber,**

1. In accordance with the decision taken by the Appeals Chamber during the hearing of 1 March 2012 which was held by telephone conference, General Jamil El Sayed<sup>1</sup> presents his observations on the Prosecution's Request of 29 February 2012<sup>2</sup> to suspend the Pre-Trial Judge's Decision of 20 February 2012.<sup>3</sup>

**1- Inadmissibility of the appeal with regard to form**

2. Rule 126 (C) of the Rules of Procedure and Evidence sets forth that "Decisions on all motions under this rule are without interlocutory appeal save with certification ..."

In the present case, as the Prosecution has not presented a request for certification to the Pre-Trial Judge, the appeal is therefore inadmissible.

**2- Historical background of the Prosecution's applications for suspension**

3. Since the Pre-Trial Judge's Decision of 12 May 2011,<sup>4</sup> against which the Prosecution did not lodge an appeal and which has therefore become definitive, the Prosecution has presented eight applications for suspension; the present request is the ninth.<sup>5</sup>

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<sup>1</sup> Hereinafter: the "Respondent".

<sup>2</sup> Prosecution's Partial Appeal of the Pre-Trial Judge's Order of 20 February 2012 and Request for Suspensive Effect Pending Appeal of 29 February 2012. Hereinafter: "Prosecution's Request of 29 February 2012".

<sup>3</sup> 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 of Mr El Sayed of 11 January 2012 of 20 February 2012. Hereinafter: "Pre-Trial Judge's Decision of 20 February 2012".

<sup>4</sup> Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011. Hereinafter: "Pre-Trial Judge's Decision of 12 May 2011".

<sup>5</sup> \*- First Application of 25 May 2011: submission of information, requests for clarification and suspension of documents 20, 40 and 53 and requests for witness protection.

\*- Second Application 1 June 2011: Prosecution's Request for Extension of Time.

\*- Third Application of 14 July 2011: Urgent Prosecution's Application for Suspension of the Disclosure Order of 6 July 2011.

\*- Fourth Application of 21 July 2011: Prosecution's Further Submission of Translated Documents Following the Pre-Trial Judge's 12 May 2011 Decision.

\*- Fifth Application of 22 August 2011: Public Redacted Version of the 19<sup>th</sup> August 2011 *Ex Parte & Confidential*: Prosecution's Submissions Following the Pre-Trial Judge's Decision of 21 July 2011.

\*- Sixth Application of 8 September 2011: Prosecution's Request for Suspensive Effect Pending Appeal of the Pre-Trial Judge's Decision of 2 September 2011.

\*- Seventh Application of 30 December 2011: Prosecution's Submission in Compliance with the Pre-Trial Judge's Scheduling Order of 21 October 2011.

\*- Eighth Application of 30 January 2012: Prosecution's Submission of Documents Following the Pre-Trial Judge's Decision of 1 November 2011.

This clearly demonstrates the Prosecution's intention not to execute the Pre-Trial Judge's Decision of 12 May 2011 or only to execute it belatedly.

That intention has moreover been noted by the Pre-Trial Judge and the Appeals Chamber<sup>6</sup> and it justified for that matter the request for the Prosecutor's removal from the case.<sup>7</sup>

### **3- The false line of reasoning of the Prosecution in paragraph 21 of the Request of 29 February 2012**

4. In support of its partial appeal and request for suspension, the Prosecution presents false submissions which are contrary to law and fact.

i. In paragraph 21, the Prosecution claims that the Pre-Trial Judge's Decision of 20 February 2012 deprived it of its right to propose redactions for reasons relating to protecting the investigation, witnesses or third parties, or national or international security.

This is false. Indeed, the Pre-Trial Judge's Decision of 20 February 2012 specifically stated that "the redaction process was approved with the sole purpose of protecting information relating to the ongoing investigation, the safety of the witnesses and the interests of national and international security."<sup>8</sup>

ii. Furthermore, those limitations were definitively determined by way of the Decision of the Appeals Chamber of 23 September 2011.<sup>9</sup>

iii. In addition, in the proceedings that are currently taking place before the Pre-Trial Judge, the Prosecution is in the process of proposing *ex parte* to the Pre-Trial Judge redactions which, in its opinion, are of such a nature as to ensure the protection of the investigation, the witnesses or third parties.

5. In light of the explicit provisions of the Pre-Trial Judge's Decision of 12 May 2011 that the Prosecution is in the process of executing in the ongoing proceedings, it is completely unacceptable that the Prosecution simultaneously presents to the Appeals Chamber a different picture and that it falsely puts forward to that Chamber that in his Decision of 20 February 2012 the Pre-Trial Judge deprived it of its right to propose redactions based on protecting the investigation, the witnesses or third parties.

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<sup>6</sup> Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing of 1 December 2010, number 13; Decision Relating to Mr El Sayed's Observations of 17 August 2011 Concerning the Enforcement of the Decision of 12 May 2011 of 1 November 2011, number 37.

<sup>7</sup> *Réplique à "Prosecution's Appeal of the Pre-Trial Judge's Decision of 2 September 2011 and Request for the Suspensive Effect Pending Appeal"* pursuant to the "Scheduling Order" of 13 September 2011, numbers 40 to 54.

<sup>8</sup> Pre-Trial Judge's Decision of 20 February 2012, number 71.

<sup>9</sup> Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011.

To present the Appeals Chamber with submissions that are clearly false constitutes abusive conduct that obstructs the proper conduct of the proceedings within the meaning of Rule 60 of the Rules of Procedure and Evidence.

That behaviour is tantamount to bad faith and, in our opinion, constitutes contempt of the Tribunal.

6. The Prosecution submits that its appeal and request for suspension contribute to the Pre-Trial Judge's Decision of 12 May 2011 being enforced expeditiously. That line of reasoning is shocking. It is difficult to see how a request for suspension and a partial appeal can speed up the enforcement of the Decision of 12 May 2011. Indeed, quite on the contrary, the sole purpose of the present request, as with the eight others which preceded it, is to delay the enforcement of the Pre-Trial Judge's Decision of 12 May 2011.

The Appeals Chamber is bound to point out that ten months after the Decision of 12 May 2011, as is the case with the one preceding it, the decision has still not been enforced, and the Respondent is still unable to seek effective remedy against those responsible for his arbitrary detention but all the same runs the risk that the prescription period might expire before the competent national courts, which, in our opinion, also constitutes contempt of the Tribunal.

7. Nevertheless, the position of the Respondent is as follows: The application of the limitations set out in the Decision of 12 May 2011 cannot lead to the redaction of an individual's statement to the prejudice of the Respondent to the point of reaching a degree where:

- i. The identity of the individual is concealed.
- ii. An essential element of the statement, which might establish before a competent national judge his responsibility for the arbitrary detention of the Respondent, is concealed.

This is in violation in fact of Articles 5 and 14 of the International Covenant on Civil and Political Rights of 1966 which give everyone the right to a fair and public hearing by a competent, independent and impartial tribunal and the declared foundation of the establishment of the STL, namely to combat the culture of impunity.<sup>10</sup>

In this way, the practical consequence of any redaction of a document which conceals either the identity of its author or material linked to the detention of the Respondent would virtually make it impossible to bring appropriate and effective legal proceedings against that individual before a competent judge and, in the same way, would confer on him in fact universal immunity which the law refuses to the Respondent by depriving him of his right of access to a judge.

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<sup>10</sup> In accordance with the statements put forward in the report of the President of the STL at that time, the late Antonio Cassese, dated 1 March 2010.

**4 - The authority of *res judicata* of the Pre-Trial Judge's Decision of 12 May 2011 in relation to the criterion of relevance**

8. The Prosecution was notified of the Pre-Trial Judge's Decision and started to enforce it. It was therefore in agreement. It has already even submitted eight applications for suspension of that decision.

9. By omitting to lodge an appeal, that decision therefore became definitive insofar as both the time period for recourse had expired and the Prosecution was in agreement. Therefore it can no longer be challenged on all the points on which the decision has determined. The Prosecution's appeal against this decision is therefore inadmissible.

10. The Prosecution claims in its Request of 29 February 2012 that the Pre-Trial Judge already established in his Decision of 12 May 2011 the relevance criterion as being a criterion for disclosing the statements of witnesses and this was on the basis of the fact that the Pre-Trial Judge noted that the Prosecutor is the only one who has in-depth knowledge of the file relating to the Respondent and this allows him to assess the materials which should be disclosed to the Respondent and that the Prosecutor has effectively and faithfully fulfilled that task.<sup>11</sup>

The Prosecution distorts the Pre-Trial Judge's Decisions of 12 May 2011 and 20 February 2012 and thus contravenes even the authority of the *res judicata* of the Decision of 12 May 2011.

11. Indeed, the Decision of 20 February 2012 makes it clear that in the Decision of 12 May 2011 it was established that the Pre-Trial Judge directed the Prosecutor to "indicate clearly in his suggested redactions the reasons behind them, except for that of their alleged relevance" and that consequently suggested redactions cannot on any account be based on the relevance criterion.<sup>12</sup>

The issue of relevance has therefore been determined definitively by way of the Pre-Trial Judge's Decision of 12 May 2011 which is subject to the authority of *res judicata*.

12. According to applicable French and Lebanese legislative texts, a decision determining in its disposition, all or in part, the main proceedings or that which rules on a procedural objection, a dismissal of the case or any other interlocutory application has, once it has been determined, the authority of *res judicata* in relation to the objection on which it rules.<sup>13</sup>

13. The Prosecution is therefore ill-founded in challenging what has already been ruled *res judicata*.

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<sup>11</sup> The Pre-Trial Judge's Decision of 12 May 2011, number 28.

<sup>12</sup> The Pre-Trial Judge's Decision of 12 May 2011, numbers 41 and 42; the Pre-Trial Judge's Decision of 20 February 2012, number 70.

<sup>13</sup> Article 553 of the Lebanese Code of Civil Procedure and Article 480 of the French Code of Civil Procedure.

14. In addition to the submission with regard to the authority of *res judicata*, simple common sense calls for any discussion on the relevance of the documents to be dismissed, given that the 835 documents which are the subject of the proceedings which are currently taking place before the Pre-Trial Judge and that the Prosecution refuses to disclose to the Respondent, were preselected by the Prosecutor himself under his sole responsibility without the Pre-Trial Judge or the Respondent having any part in the matter. And the Prosecutor was moreover complimented by the Pre-Trial Judge on this matter.<sup>14</sup>

**5- The duplicative criterion has no legal standing**

15. The Prosecution claims in its Request of 29 February 2012 that duplicative documents are of no use to the Respondent and consequently should not be disclosed to him.<sup>15</sup>

As President Baragwanath noted during the hearing of 1 March 2012, the contention of the duplicative criterion is of undue influence in that the cost of the photocopy cannot be used a criterion for the disclosure of the documents.

16. That claim is not only irrelevant but cannot be described as having legal standing as it is merely an additional delaying tactic to prevent, or at least delay, the enforcement of the Pre-Trial Judge's Decision of 20 February 2012.

**For these reasons,**

The Respondent seeks that:

- 1- The Prosecution's Request of 29 February 2012 be declared procedurally inadmissible due to the lack of certification to appeal from the Pre-Trial Judge, pursuant to Rule 126 (C) of the Rules of Procedure and Evidence.
- 2- The Prosecution's Request for suspension of the Pre-Trial Judge's Decision of 20 February 2012 be rejected.
- 3- The Prosecution's appeal be declared ill-founded.
- 4- The Pre-Trial Judge's Decision of 20 February 2012 be confirmed.
- 5- It is determined that the Prosecutor does not fulfil the necessary conditions to act in the present case, pursuant to Rule 60 of the Rules of Procedure and Evidence.

2363 Words [French original]

2 March 2012	Akram Azoury	Beirut, Lebanon	[signature]
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<sup>14</sup> Pre-Trial Judge's Decision of 12 May 2011, number 28.

<sup>15</sup> Prosecution's Partial Appeal of the Pre-Trial Judge's Order of 20 February 2012 and Request for Suspension of the Effect Pending Appeal of 29 February 2012, number 19.

