Office of the Prosecutor

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SPECIAL TRIBUNAL FOR LEBANON
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مكتب المدعي العام

Bureau du Procureur

BEFORE THE APPEALS CHAMBER
Special Tribunal for Lebanon

Case No:	**OTP/AC/2012/01**
Before:	**Pre-Trial Judge**
Registrar:	**Mr. Herman von Hebel**
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PROSECUTION FILING IN COMPLIANCE WITH THE SCHEDULING ORDER OF 2 MARCH 2012 AND RELATED SUBMISSIONS

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I. INTRODUCTION

1. On 20 February 2012, the Pre-Trial Judge rejected the Prosecution's request to redact non-relevant or duplicative information from certain documents or to withhold documents on the basis that they were wholly irrelevant to Mr. El Sayed or duplicative and ordered the Prosecution to disclose such documents to Mr. El Sayed.[1] The Impugned Decision recalls the relevant procedural history in detail.[2]

2. By filing dated 29 February 2012, the Prosecution appealed these aspects of the Impugned Decision and requested that the Appeals Chamber suspend the order for the disclosure of documents identified by the Prosecution as wholly or partially irrelevant or duplicative.[3]

3. On 1 March 2012, the Presiding Judge of the Appeals Chamber convened a judicial conference where legal matters relevant to the Prosecution Appeal were discussed.

4. As a result of this conference, the Appeals Chamber issued a scheduling order on 2 March 2012 directing Mr. El Sayed to address in writing "his precise position with respect to redactions to documents 'for the protection of witnesses and to protect ongoing investigations'". The Scheduling Order also directed the Prosecution to provide submissions regarding the legal principle of *res judicata* and its "applicability to the present facts" and to respond to Mr. El Sayed's submissions".[4]

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1 *In the Matter of El Sayed*, Case No. CH/PTJ/2012/01, Order relating to the Prosecution's Submissions 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, paras. 70-72, Dispositive (Impugned Decision).

2 *Idem*, paras. 2-32. Of particular importance to this appeal is the Pre-Trial Judge's Decision of 12 May 2011, which mentioned the issue of relevance. *In the Matter of El Sayed*, Case No. CH/PTJ/2011/08, Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, 12 May 2011 (12 May 2011 Decision). The relevant aspects of the 12 May 2011 Decision are discussed in detail below.

3 *In the Matter 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 (Prosecution Appeal).

4 *In the Matter of El Sayed*, Case No. CH/AC/2012/01, Scheduling Order, 2 March 2012 (Scheduling Order).

5. On 2 March 2012, Mr. El Sayed responded to the Prosecution Appeal in compliance with the Scheduling Order.[5]

II. PROSECUTION'S SUBMISSIONS

A. Overview of Submissions

6. The Scheduling Order directs the Prosecution to provide further written submissions on:

   a. The relevant law as to *res judicata* (including both common law and civil law authorities, including Lebanese law);

   b. Whether there are exceptions to this principle, and if so, of what nature;

   c. The application of the *res judicata* principle to the present facts; and

   d. The Prosecution's position in the light of Mr. Azoury's submission of 2 March 2012.[6]

7. The main issue before the Appeals Chamber with respect to *res judicata* is that described in paragraph 2 (c) of its Scheduling Order, namely the application of *res judicata* to the circumstances. For fundamental reasons, *res judicata* is not a bar to the present appeal. These reasons are discussed at the outset of the filing, followed by additional submissions on the general law of *res judicata* as directed in the Scheduling Order.

8. In order to further assist the Appeals Chamber, the Prosecution also offers submissions on its request for suspensive effect in light of the principles enunciated by the Appeals Chamber in its Order of 12 September 2011.[7] Since the issue of suspensive effect must be addressed by the Appeals Chamber before it can turn to the merits of the appeal, the Prosecution turns to that issue immediately after addressing *res judicata*.

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5 *In the Matter of El Sayed*, OTP/AC/2012/01, Réplique à "Prosecution's partial appeal of the Pre-Trial Judge's order of 20 february 2012 and request for suspensive effect pending appeal" et objection à la demande de suspension, 2 March 2012 (Response).

6 Scheduling Order, numbered para. 2.

7 *In the Matter of El Sayed*, CH/AC/2011/01, Order on Urgent Prosecution's Request for Suspensive Effect Pending Appeal, 12 September 2011.

9. The Prosecution then turns to submissions on the 12 May 2011 Decision as it relates to the issues of relevance and duplicative documents. The impact of the 12 May 2011 Decision on the Prosecution Appeal depends on whether it was final with respect to any of the issues on appeal, namely the issues of relevance and duplicative documents. In determining finality, it is helpful to consider two questions: (i) whether the 12 May 2011 Decision deals finally with documents or issues relevant to this appeal; and (ii) whether the Prosecution has waived its right to appeal with respect to issues addressed in the 12 May 2011 Decision. To determine the first question, the Prosecution submits that the Appeals Chamber should also consider the clarity and consistency of the 12 May 2011 Decision. The answer to the second question follows in part from the answer to the first.

B. The Prosecution Appeal is not barred by the principle of Res Judicata

10. As a general rule, *res judicata* bars litigants from raising a claim or an issue in a separate proceeding where that claim or issue has already been decided between the same parties in an earlier proceeding.[8] It does not operate to bar reconsideration or appeal of issues within the same proceeding.[9] Moreover, even if *res judicata* did apply to issues litigated before the same judge in the same proceedings, the principle

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8 *See MZXEF, MZXEG & MZXEM v. Minister for Immigration & Multicultural & Indigenous Affairs*, [2006] FMCA 187, para. 9 (Federal Magistrates Court) ("[S]ubmitted the cause of action in the present application is in substance the same cause of action that was dismissed in the first application ... where res judicata applies as a matter of law it bars a litigant from pursuing a claim."); *Chamberlain v Deputy Federal Commissioner of Taxation*, [1988] HCA 21, para. 10(High Court of Australia); *Port of Melbourne Authority v. Anshun Pty Ltd*, [1981] HCA 45, para. 20 (High Court of Australia), citing to *Henderson v. Henderson*, [1843] EngR 917, (,; *R. v. Mahalingan*, 2008 SCC 63, para. 52 (Supreme Court of Canada); *E.E.O.C. v. U. S. Steel Corp.*, 921 F. 2d 489 (U.S. Circuit Court of Appeals, Third Circuit) (individuals who litigated their own claims were precluded by *res judicata* from obtaining individual relief in a subsequent E.E.O.C. action based on the same claims).

9 *See Nominal Defendant v. Hook*, 113 CLR 641, p. 2 (Australia, Supreme Court of New South Wales) (which made it clear that *res judicata* and reconsideration are separate remedies, "simple question of res judicata ... the remedy sought by the party was of an entirely different description and did not involve a reconsideration"); *Bull and Kerr, In Marriage of*, 122 FLR 411, p. 11 (Family Court of Australia), ("[W]hilst the judgment is thus inchoate and incomplete, it is still ... open to reconsideration and review ... it may be said that it is not yet res judicata – it has not yet passed from the control of the judge who pronounced it.").

applies only to final judgements or decisions on the merits that are no longer subject to appeal.[10] Interlocutory orders are not generally considered *res judicata*.[11]

11. The *El Sayed* proceedings were initiated by a single request from Mr. El Sayed and have been heard by the same Judge, the Pre-Trial Judge, before the same court, the Tribunal. Under proper circumstances, the Pre-Trial Judge may reconsider any of the issues that he has decided thus far in the *El Sayed* proceedings.[12] Moreover, decisions of the Pre-Trial Judge in this matter are subject to appeal.[13] For these reasons, the *Matter of El Sayed* is properly considered a single matter or proceedings, and not a series of separate proceedings. As such, the principle of *res judicata* does not apply.

12. Even if the principle of *res judicata* were applicable to decisions within the same proceedings – and the Prosecution submits that it is not – its applicability would still depend on the finality of the decision, which in turn depends in part on the question of whether there is a right to appeal and whether that right has been exhausted by the filing of an appeal or by waiver. Since the answer to the question of whether the

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10 *See Featherstone Park Developments Ltd v. Bradley HC Auckland*, [2011] NZHC 530, para. 40 (High Court of New Zealand Auckland Registry) ("Res judicata applies when there is a final decision on the merits"); *Link Technology 2000*, *supra* note 1, para. 40; *Rogers v. The Queen*, 181 CLR 251, para. 79 (Australia, Supreme Court of New South Wales); *R. v. Mahalingan*, 2008 SCC 63, (Supreme Court of Canada); *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, paras. 25, 33 (Supreme Court of Canada); *New Hampshire v. Maine*, 121 S.Ct. 1808 (Supreme Court of the United States) ("Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'").

11 *See Svenska Petroleum Exploration v. Government of the Republic of Lithuania*, 2006 WL 3206205, para. 109 (United Kingdom, Court of Appeal (Civil Division)), ("[I]t is well-established that an ... interlocutory, decision of this type does not give rise to res judicata ... [unless] an issue ... is capable of being finally determined on such an application and is finally determined"); *Batterham et al v. QSR Limited et al*, 225 CLR 237, para. 110 (Australia, Supreme Court of New South Wales) ("[A]n interlocutory decision ... does not pre-judge the final decision or create any res judicata"); *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, para. 34 (Supreme Court of Canada) (the Court held that the decision rendered in the leave application had only the weight of an interlocutory judgment, and that it was not *res judicata*); pursuant to Article 482 of the French Code of Civil Procedure, the authority of *res judicata* does not apply to interlocutory decisions (*"jugements avant dire-droit"* in French) with regard to the merits of the case. Interlocutory decisions are defined as judgements which are limited in their Disposition (*"dispositif"* in French) to preliminary (*"instruction"* in French) or provisional measures.

12 *See* Rules 97 and 140 of the Rules of Procedure and Evidence.

13 *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 Disclosure of Documents, 7 October 2011 (Order of 7 October 2011), para. 5; *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 (Decision on Partial Appeal), paras. 19-20.

Prosecution has waived its right to appeal would be determinative of the Prosecution Appeal as to relevance, there would be no need to reach the issue of *res judicata* in the event that the Appeals Chamber considered the Prosecution to have waived its right to appeal.

C. The Principle of Res Judicata under Lebanese Law, in Common Law jurisdictions, and Civil Law jurisdictions

1. *Res Judicata* under Lebanese Law

13. Pursuant to Article 556 of the Lebanese Code of Civil Procedure (LCCP) final judgments have preclusive effect (*i.e.*, are considered *res judicata*) from the date they are issued with regards to each dispute adjudicated in accordance with Article 303 of the LCCP. Final judgements also enjoy executive force by virtue of the provisions of Article 564.

14. Article 303 of the LCCP stipulates that the final judgments have *res judicata* effect with regards to the rights adjudicated therein. Article 564 of the LCCP states that a judgment acquires executive force from the date it is issued if it is definitive or from the date in which it becomes definitive. Therefore, a judgment does not become *res judicata* until it becomes definitive.

2. *Res Judicata* in Common Law Jurisdictions

15. In Canada and the United States, issue estoppel or preclusion, respectively, is a branch of *res judicata* (the other branch being cause of action estoppel or claim preclusion, respectively), which precludes the re-litigation of issues previously decided in court in another proceeding.[14] Although there are differences between the Common Law jurisdictions, *res judicata*, or specifically issue estoppel, is generally applied when the following elements are present where: (i) the first decision has been pronounced by a judicial tribunal of competent jurisdiction; (ii) the first decision itself must be a judicial decision, (iii) the first decision is final, conclusive and on the merits; (iv) the first decision involves the same legal issue or question that is currently being adjudicated; and (v) the parties to both proceedings must be the same, or their

[14] *Toronto (City) v. C.U.P.E.*, 2003 SCC 63 (Supreme Court of Canada), para. 23; *Taylor v. Sturgell* (2008), 553 U.S. 880 (United States Supreme Court), p. 892.

privies.[15] In *Danyluk*, the seminal case in Canada, Justice Binnie of the Supreme Court (for an unanimous bench) cautioned that "a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."[16] In that case, the Court refused to apply issue estoppel as a matter of discretion, which was held to undoubtedly exist for estoppel.[17] The House of Lords also upheld the discretionary authority of the court in applying *res judicata*, determining that it can be overturned to ensure that practical justice be done.[18]

3. *Res Judicata* in Civil Law Jurisdictions other than Lebanon

16. In many civil law countries, the principle of *res judicata* is codified.[19] To take the example of French law for the purposes of this filing, pursuant to Article 1351 of the French Civil Code: "[t]he authority of *res judicata* only applies to the subject of a judgment. The subject-matter of the claim must be the same; the claim must be based on the same ground; and the claim must be between the same parties, and brought by and against them in the same capacity."[20]

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15 *See Carl-Zeiss-Stiftung v Rayner & Keeler Ltd. et al*, [1967] 1 AC 853, p. 41 (United Kingdom, House of Lords); *R (on the application of Coke-Wallis) v Institute of chartered Accountants in England and Wales*, [2011] 2 AC 146, para. 34 (Supreme Court of the United Kingdom), which sets out the same elements, though with specific reference to cause of action estoppel; *Walker v. Wilson et al.* (2002), Reserved Judgement of Randerson J., 16 April 2002 (High Court of New Zealand), para. 51 (citing *Shiels v. Blakely*, [1986] 2 NZLR 262, 266 (New Zealand Court of Appeal)); *Toronto (City) v. C.U.P.E.*, 2003 SCC 63 (Supreme Court of Canada), para. 23; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (Supreme Court of Canada), para. 25; *Effem Foods Pty Limited v. Trawl Industries of Australia Pty Limited et al.*, (1993) 115 ALR 377 (Federal Court of Australia), para. 1; *see also* International Law Association, Conference Report Berlin 2004, International Commercial Arbitration, p. 6 (online: http://www.ila-hq.org/en/committees/index.cfm/cid/19).

16 *Danyluk*, para. 1.

17 *Danyluk*, paras. 62, 81.

18 *See Republic of India et al v India Steamship Co. Ltd.*, [1993] AC 410, p. 10 (United Kingdom, House of Lords), where practical justice is raised; *Ahsan v Watt*, [2007] UKHL 51, para. 34 (United Kingdom, House of Lords), where discretion is cited as a justification for overturning *res judicata* when special circumstances exist that injustice would be done by allowing *res judicata*.

19 *See* ILA Document, page 13, fn. 70 (gathering sources).

20 Translated by OTP. The original provision reads as follows: "[l]' autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité."

17. Pursuant to Articles 122 and 125(2) of the French Code of Civil Procedure (FCCP), any claim which violates the principle of the authority of *res judicata* shall be dismissed, if necessary *proprio motu*.[21] The French Cassation Court specified that this authority also applies to judgments which have not been appealed, whatever errors may affect them.[22]

18. Pursuant to Article 480 FCCP, the authority of *res judicata* applies from the time of issuance to those judgments which decide on all or part of the merits of the case, or which rule on a procedural objection, a dismissal or any other procedural issue, with regard to the dispute they resolve.[23] However, pursuant to Article 482 of the French Code of Civil Procedure, the authority of *res judicata* does not apply to interlocutory decisions ("*jugements avant dire-droit*" in French) with regard to the merits of the case.[24] Interlocutory decisions are defined as judgements which are limited in their Disposition ("*dispositif*" in French) to preliminary ("*instruction*" in French) or provisional measures.[25]

D. Further Submissions on the Request for Suspension of the Disclosure Order in the Impugned Decision

19. In its Order dated 12 September 2011, the Appeals Chamber enunciated factors relevant to requests for suspensive effect pending appeal. Specifically, the Appeals Chamber considered Lebanese law as well as the following three considerations for suspension articulated by the ICTY:

    a. There is good cause for the requested suspension;

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21 Article 122 FCCP reads as follows: "Constitue une fin de non-recevoir tout moyen qui tend à faire déclarer l'adversaire irrecevable en sa demande, sans examen au fond, pour défaut de droit d'agir, tel le défaut de qualité, le défaut d'intérêt, la prescription, le délai préfix, la chose jugée." Article 125(2) FCCP provides further that "[le] juge peut relever d'office la fin de non-recevoir tirée du défaut d'intérêt, du défaut de qualité ou de la chose jugée."

22 2nd Civil Chamber, Request No. 02-17069, Judgment, 18 December 2003 (French Cassation Court).

23 Article 480 FCCP reads as follow: "Le jugement qui tranche dans son dispositif tout ou partie du principal, ou celui qui statue sur une exception de procédure, une fin de non-recevoir ou tout autre incidenta, dès son prononce, l'autorité de la chose jugée relativement à la question qu'il tranche."

24 Article 482 FCCP reads as follow: "Le jugement qui se borne, dans son dispositif, à ordonner une mesure d'instruction ou une mesure proviso ire n'a pas, au principal, l'autorité de la chose jugée."

25 *Idem.*

b. The duration of the requested suspension is reasonable; and

c. The appeal itself has reasonable prospects of success on its merits.[26]

20. The Prosecution shall refer to the three conditions articulated by the Appeals Chamber of the ICTY, which are consistent with and broader than the conditions identified by Lebanese courts. The Prosecution submits that it has met the three conditions for suspension for the reasons articulated in the Prosecution Appeal as well as for the reasons in this filing. Specifically, with respect to good cause, the Appeals Chamber noted that the preservation of the object of the appeal has been found to constitute "good cause" for granting a request for a stay.[27] As noted in the Prosecution Appeal, failure to suspend the disclosure order in the Impugned Decision would render the Prosecution Appeal moot. Moreover, the disclosure of documents without any redactions would potentially harm witnesses and may expose materials related to ongoing investigations.[28]

21. With respect to the duration of the requested suspension, the Prosecution requests suspension until such time as the Appeals Chamber determines the Prosecution Appeal and, to the extent applicable, as long as necessary to implement any orders of the Appeals Chamber. The Prosecution submits that this is the minimal possible time-period for suspension and that it is reasonable.

22. Turning to the prospects of the Prosecution Appeal on the merits, given the fundamental nature of relevance as a criterion for disclosure, as submitted in the Prosecution Appeal,[29] the fact that the Appeal is not barred for the reasons below, and the fact that, on its face, the disclosure order in the Impugned Decision does not even allow for redactions based on categories previously accepted in principle in this matter, the Prosecution submits that it has reasonable prospects for success.

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26 *In the Matter of El Sayed*, Case No. CH/AC/2011/01, Order on Urgent Prosecution's Request for Suspensive Effect Pending Appeal, 12 September 2011, para. 8.

27 *Idem*, para. 9.

28 Prosecution Appeal, para. 23.

29 *Idem.*, paras. 6-17.

E. The finality of the 12 May 2011 Decision

1. The 12 May 2011 Decision and the Issue of Relevance

23. The 12 May 2011 Decision did not order the disclosure of any documents that the Prosecution had stated were either wholly or partially irrelevant to Mr. El Sayed.[30] Rather, the Pre-Trial Judge invited the Prosecution to submit all such documents with redactions based on criteria other than relevance for his consideration for possible disclosure to Mr. El Sayed.[31] In this sense, the 12 May 2011 Decision cannot be said to be final with respect to any of the documents the Prosecution considered wholly or partially irrelevant.[32]

24. Although the 12 May 2011 Decision did not deal finally with any of the documents related to the relevance issue, the question remains as to whether the 12 May 2011 Decision finally determined anything with respect to the issue of relevance. In order to consider this question, the Prosecution submits that the Appeals Chamber should consider the context of the 12 May 2011 Decision and should carefully consider what the 12 May 2011 Decision stated.

25. As noted in the Prosecution Appeal, the Prosecution informed the Pre-Trial Judge prior to his rendering of the 12 May 2011 Decision that it did not have in its possession an El Sayed criminal or case file.[33] Following from these submissions, the Pre-Trial Judge, in the 12 May 2011 Decision, acknowledged that the Prosecution "conducted an electronic review of [its] database which contains documents originating from the Investigation Commission, the Lebanese authorities and [its] own investigations". The 12 May 2011 Decision further noted that the Prosecution considered as irrelevant those documents that did not, directly or indirectly, involve

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30 The 12 May 2011 Decision did order the immediate disclosure of some documents, but none of these were documents that the Prosecution had identified as wholly or partially irrelevant. *See* 12 May 2011 Decision, Dispositive; *see also In the Matter of El Sayed*, CH/PTJ/2011/06, Prosecutor's Submission of Documents that can only be Disclosed to the Applicant in Redacted or Summarised Form, 1 April 2011, Annex A, confidential and ex parte Amended Spreadsheet.

31 12 May 2011 Decision, para. 42, Dispositive.

32 Order of 7 October 2011, para. 5; Decision on Partial Appeal, paras. 19-20.

33 Prosecution Appeal, para. 10.

Mr. El Sayed or relate to the credibility of the witnesses who had implicated him in the assassination of Mr. Hariri. The Pre-Trial Judge explicitly recognized that the Prosecution had to identify "from amongst all the materials in his possession, those which have a bearing on the proceedings against the Applicant and which must be disclosed to him".[34]

26. The 12 May 2011 Decision therefore explicitly recognized that the Prosecution had conducted electronic searches and applied relevance criteria in order to identify documents possibly relevant to Mr. El Sayed. This aspect of the 12 May 2011 Decision is in seeming recognition of the fact that the Prosecution did not possess a criminal or case file related to Mr. El Sayed. For if it had such a file, then there would have been no need to conduct such electronic searches or to apply relevance criteria to identify documents relevant to Mr. El Sayed. In such a case, the relevant documents would be the documents in the file.

27. The 12 May 2011 Decision also states that Mr. El Sayed should, "in principle, have access to all the witness statements that were produced in the context of the examination of his file and on which his detention was based" and therefore, "that the statements from all 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 disclosed to him, subject to the exceptions and conditions set out [elsewhere in the 12 May 2011 Decision.]"[35]

28. The Prosecution submits that paragraph 41 of the 12 May 2011 Decision did not clearly or finally deal with the issue of relevance. Despite the accurate description of the Prosecution's review in paragraphs 22, 23 and 28 of the 12 May 2011 Decision, paragraph 41 of the 12 May 2011 Decision suggests that the Pre-Trial Judge was under the misconception that the Prosecution had in its possession a criminal or case file related to Mr. El Sayed. Possibly as a result of this misconception, the statements in paragraph 41 referring to the examination of Mr. El Sayed's file bear no relation to the actual review process engaged in by the Prosecution and are inconsistent with

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34 12 May 2011 Decision, paras. 22, 23, 28.

35 *Idem.*, para. 41.

paragraphs 22, 23, and 28 of the 12 May 2011 Decision. As a result of this inconsistency, paragraph 41 should not be understood as a final determination of the issue of relevance as to all witness statements identified by the Prosecution in its review process because it does not clearly and expressly refer to all witness statements identified by the Prosecution in its actual review process.

29. Moreover, to the extent Paragraph 41 was intended to be interpreted as requiring the Prosecution to provide all witness statements it identified through its review process, it is internally inconsistent as it also limits Mr. El Sayed's access to documents on which his detention was based, which is itself one of the relevance criterion applied by the Prosecution.[36] In addition, given that the original searches by the Prosecution were based in part on names provided by Mr. El Sayed himself, interpreting the phrase "produced in the context of the examination of [Mr. El Sayed's] file" to mean all statements originally identified by the Prosecution through its electronic searches of its investigative database would lead to the absurd result that Mr. El Sayed has the right to access the statement of any witness he can name.

30. Turning to the Impugned Decision, the Prosecution notes that paragraphs 70 through 72 of the Impugned Decision, which are the basis of the Prosecution appeal, address submissions in paragraph 18 of the Prosecution's 30 December 2011 Filing which reads as follows:

> 18. Through the process of this review, the Prosecution identified certain documents that should not be disclosed because the information therein was duplicative or because the information therein bore no relation to either the Applicant or the Hariri attack, and thus could not be considered to form part of the Applicant's case or criminal file. The specific items and reasons are identified in the confidential and *ex parte* updated spreadsheet, annexed as confidential and *ex parte* Annex E.[37]

31. The Prosecution submits that these submissions and the proposed redactions related thereto are consistent with the 12 May 2011 Decision. The 12 May 2011 Decision

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36 Regardless of what is meant by "produced in the context of the examination of his file," the use of the conjunctive "and" in the statement that "the Applicant should, in principle, have access to all witness statements which were produced in the context of the examination of his file and on which his detention was based" may reasonably be interpreted as limiting access to statements on which Mr. El Sayed's detention was based.

37 *In the Matter 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, para. 18.

does not state that Mr. El Sayed has a right to access documents that do not refer to him at all and that are not even related to the Hariri attack.[38]

32. In conclusion, the Prosecution submits that the 12 May 2011 Decision did not deal finally with any of the documents for which the Prosecution sought non-disclosure or to apply redactions on the basis of irrelevance. Moreover, the 12 May 2011 Decision did not address the issue of relevance clearly or consistently. Therefore, the 12 May 2011 Decision should not be considered to have made a final determination on the issue of relevance. In any event, the Prosecution submits that the bases for its proposed redactions as submitted in the 30 December 2011 filing are consistent with the 12 May 2011 Decision.

2. Neither the 12 May 2011 Decision nor any other decision of the Pre-Trial Judge in the *El Sayed* Matter addressed the issue of duplicative documents prior to the Impugned Decision

33. Turning to the issue of duplicative documents, for the purposes of this filing it need only be noted that this issue has not been addressed by the Pre-Trial Judge prior to the Impugned Decision. The Impugned Decision does not suggest otherwise.[39]

F. The Prosecution has not waived its right of appeal

34. Even if the Appeals Chamber considers that the 12 May 2011 Decision deals finally with the issue of relevance, the question remains whether the Prosecution has waived its right to appeal this issue. For the reasons below, the Prosecution submits that it has not.

35. Pursuant to prior Appeals Chamber Decisions in the *El Sayed* Matter, an order that potentially deals finally with any of the documents at issue is final for appeal

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38 *See* Prosecution Appeal, para. 8, fn. 10 (referring to prior orders by the former President of the Tribunal and the Pre-Trial Judge himself which acknowledge that suspected involvement in the Hariri attack was the basis for Mr. El Sayed's detention). Indeed, it is accepted in this matter that Mr. El Sayed was detained in connection with the Hariri attack.

39 Impugned Decision, para. 71. In its Decision on Partial Appeal of 19 July 2011, the Appeals Chamber considered the possibility that duplicative documents might be treated as irrelevant under proper circumstances, but this statement was not relevant to the Appeals Chamber's holding in that Decision and were *obiter dicta*. Decision on Partial Appeal, para. 90. In any event, this statement supports the Prosecution Appeal.

purposes.[40] The 12 May 2011 Decision did not order the disclosure of any of the documents for which the Prosecution sought to apply redactions on the basis of irrelevance to Mr. El Sayed. Nor did it order disclosure of any of the documents that the Prosecution had indicated it considered to be wholly irrelevant. Therefore, the 12 May 2011 Decision did not deal finally with these documents and no appeal lay as of right as to that issue at that time.

36. Although the Prosecution could have sought certification from the Pre-Trial Judge to appeal on the issue of relevance, the Prosecution was not required to do so in order to preserve its right to appeal this issue after a final order. Neither the Statute nor the Rules address the issue of waiver of appeal or what steps a party must take to preserve its right to an appeal. There is no general principle of law stating that a party must seek permission to file an appeal on interlocutory decisions in order to preserve its right to do so.[41] Rather, the general rule followed by international criminal tribunals is that a party waives its right to appeal an issue where it fails to raise that issue before the lower court and cannot demonstrate good cause for its failure to do so.[42] Even

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40 Order of 7 October 2011, para. 5; Decision on Partial Appeal, paras. 19-20.

41 Indeed, the favoured rule in the United States Federal Courts, for example, is that a party does not need to seek leave to file a permissive appeal from an interlocutory order to preserve its right to appeal the issue at final judgement. *See United States v. Clark*, 25 100 S.Ct. 895, 899 (Supreme Court of the United States); *see also In the Matter of UAL Corporation (Pilots Pension Plan Termination)*, 468 F. 3d 444, 453-454 (US Court of Appeals, Seventh Circuit). The Appeals Chamber may find the position of the United States Federal Courts persuasive on the issue of the impact of foregoing applications for leave to appeal interlocutory decisions, as the United States Federal law regarding permissive appeals of interlocutory decisions is similar to the Rules regarding certification to Appeal at this Tribunal. *See* 28 United States Code Annotated, Section 1292(b) (authorizing certification to appeal interlocutory decisions where, *inter alia*, an immediate appeal may materially advance the ultimate termination of the litigation.") In contrast, there is no system for permissive appeals or certification to appeal in the Lebanese (or French) system(s). The Prosecution submits that this distinction renders reference to the Lebanese law on waiver of appeal less useful for the Appeals Chamber in considering the matter before it. Still, Article 653 of the Lebanese Code of Civil Procedure concerns the issue of waiver of appeal. Turning to French law, pursuant to Article 545 of the French Code of Civil Procedure, an interlocutory decision cannot be appealed independently from the final judgement, unless the law provides otherwise. So, as a general rule, interlocutory decisions may be appealed along with the rest of the case at the time of final judgement. *See* 2nd Civil Chamber, Request No. 09-14596, Judgment, 2 December 2010 (French Cassation Court). Where the law expressly authorizes appeals of interlocutory matters, such appeals do not require certification and must be appealed within a specific time period.

42 For examples before the International Criminal Tribunal for the former Yugoslavia (ICTY), *seeProsecutor v.Boškoski*, Case No. IT-04-82-A, Judgement, 19 May 2010, para. 244 (ICTY); *Prosecutor v.Krajisnik*, Case No. IT-00-39-A, Judgement, 17 March 2009, para. 654 (ICTY); *Prosecutor v.Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 222 (ICTY); *Prosecutor v.Čelebići*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 640 (ICTY). For examples before the International Criminal Tribunal for Rwanda (ICTR), *see Prosecutor v.Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007, para. 6

where parties fail to raise an issue at trial, Appeals Chambers at international criminal tribunals have discretion to consider the issue.[43] Here, the Prosecution has unquestionably raised the issue of relevance before the Pre-Trial Judge in these proceedings.[44]

37. Moreover, there were good reasons for the Prosecution not to seek permission to appeal the 12 May 2011 Decision at the time. First, as described above, the 12 May 2011 Decision does not clearly or consistently address the issue of relevance, so, at the time, it was not clear that a final determination on this issue had been rendered. Second, in the absence of a disclosure order related to documents considered by the Prosecution to be wholly or partially irrelevant and given that the Pre-Trial Judge had authorised the Prosecution to propose additional redactions to all such documents, the Prosecution reasonably considered that it would face difficulty meeting the requirements of the test for certification, which requires it to show, *inter alia*, that the decision would impact the fair conduct of the proceedings and that an immediate resolution would materially advance the proceedings.

38. As a policy matter, if the Appeals Chamber determines that the Prosecution waived its right to appeal the final determination on relevance in the Impugned Decision by failing to seek permission to file an interlocutory appeal from the 12 May 2011 Decision, this will inexorably result in applications to appeal all interlocutory decisions rendered in proceedings before this Tribunal.

39. For these reasons, the Prosecution has effectively preserved its right to appeal the issue of relevance that was finally determined by disclosure order in the Impugned Decision, and should not be considered to have waived that right.

(ICTR); *Prosecutor v.Niyitegeka*, Case No. ICTR-96-14-A, Judgement, paras. 199-200 (ICTR). Based on the Prosecution's research, it does not seem that either the International Criminal Court or the Extraordinary Chambers in the Courts of Cambodia have addressed this issue.

43 *See Prosecutor v.Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 34 (ICTY).

44 12 May 2011 Decision, para. 23; *see also*, Prosecution Appeal, para. 12, fn. 17 (referring to prior Prosecution filings on this issue).

G. Reply to the Submissions of Mr. El Sayed

40. Mr. El Sayed argues that the Prosecution's partial appeal is inadmissible because the Prosecutor did not request certification.[45] For the reasons stated in the Prosecution's partial appeal, no certification is required against decisions that deal finally with a matter.[46]

41. Mr. El Sayed denounces the Prosecution's interpretation of the Impugned Decision found at paragraph 21 of the Prosecution's partial appeal.[47] According to Mr. El Sayed, the Prosecution falsely argues that the Decision of 20 February 2012 deprived the Prosecution of its "right" to suggest redactions pertaining to the ongoing investigation or the protection of witnesses and third parties. To the contrary, there is a discrepancy between the reasoning and the dispositive of the Impugned Decision which potentially exposes to disclosure information which ought to be protected pursuant to the rationale of the Pre-Trial Judge's prior decisions in this matter.

42. At paragraphs 71 and 72 of the Decision of 20 February 2012, the Pre-Trial Judge rejects the Prosecution's submission that irrelevant documents should not be disclosed to Mr. El Sayed and that irrelevant information contained in otherwise relevant documents should not be redacted. At paragraph 72, the Pre-Trial Judge invites the Prosecution to *review* documents it deems irrelevant "on the basis of these criteria" and to communicate them to the Applicant.[48] It is unclear whether the criteria referred to by the Pre-Trial Judge in paragraph 72 refer to those listed in paragraph 71 with respect to the ongoing investigation, witness safety and national and international security, or to the rejected criteria referred to in the immediately preceding sentence.

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45 Response, para. 2.

46 Prosecution Appeal, para. 3.

47 Response, paras. 4-7.

48 In the original French, the relevant passage reads : "Le Procureur doit donc réviser les déclarations qu'il propose de ne pas communiquer ou d'expurger sur base de ces critères et les communiquer au Requérant."

In any event, the dispositive does not authorize any further review or redactions and orders the Prosecutor to *disclose* documents that it deemed irrelevant.[49]

43. The Prosecution recalls that information that might be irrelevant to Mr. El Sayed might still affect third parties' safety and privacy interests. Moreover, information irrelevant to Mr. El Sayed with regard to the alleged intended use of the documents he is seeking might also jeopardize the ongoing investigation. In that sense, the Prosecution submits that, even if the Appeals Chamber rejects the other aspects of the Prosecution's appeal, the Prosecution should be authorised to review documents to ensure that redactions are applied on the basis of accepted limitations and restrictions.

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[49] In prior orders for disclosure the Pre-Trial Judge more clearly authorised the implementation of redactions so to ensure the protection of such information. *See In the Matter of El Sayed*, Case No. CH/PTJ/2011/08, Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, CH/PTJ/2011/08, 12 May 2011, para. 31: "In point of fact, where suggested redactions are, in particular, aimed at protecting witnesses and third persons, once redacted a document must, in principle, be disclosed to the Applicant and to his counsel." Para. 38: "In so far as the Prosecutor is prepared to make available the documents mentioned above, and given that after they have been redacted the documents must in principle be disclosed..." Para. 43: "According to the principle whereby the redacted documents must be able to be disclosed to the Applicant and to his counsel, the Pre-Trial Judge considers that all the documents mentioned above must be disclosed to the Applicant and to his counsel after they have been redacted..." Para. 49: "...the Pre-Trial Judge notes that the Prosecutor cannot redact this document until it has been translated and deems that after it has been translated and redacted, as appropriate, the document should be disclosed to the Applicant and to his counsel." Para. 53: "...the Pre-Trial Judge deems, at first sight, that it is relevant and therefore that it should be translated before the Prosecutor is able to say whether it should be disclosed, if necessary, after being redacted." Para. 54: "Finally, there is nothing that would justify non-disclosure of the following documents to the Applicant after sensitive information has been redacted from them: 443 and 444 after they have been translated, 447, 449 and 450." Para. 56: "...should be disclosed to the Applicant after sensitive information has been redacted from them." *See also* Dispositive at pages 18-19. *See also* Decision on the Proposed Redactions to the Documents in the Criminal File of Mr El Sayed Submitted by the Prosecutor, CH/PTJ/2011/12, 6 July 2011, para. 19, para. 20: "Having conducted this examination, the Pre-Trial Judge considers that once they have been redacted as proposed by the Prosecutor, the following documents must be disclosed to Mr El Sayed and to his counsel..." Dispositive p. 8: "...orders the Prosecutor, within 15 days of their being translated, to disclose them in their current state to the Applicant and to his counsel, or if appropriate, to seize the Pre-Trial Judge with any reasoned proposal for them to be inspected in their entirety or to be red acted with a view to their being disclosed to the Applicant and to his counsel." *In the Matter of El Sayed*, Case No. CH/PTJ/2011/16, Ordonnance en exécution de la décision de la chambre d'appel du 7 octobre 2011, 10 October 2011, Dispositive p. 4. *In the Matter of El Sayed*, Case No. CH/PTJ/2011/19, Decision Relating to Mr El Sayed's Observations of 17 August 2011 Concerning the Enforcement of the Decision of 12 May 2011, 1 November 2011, Dispositive p. 17: "ORDERS the Prosecutor to disclose to the Applicant and to his counsel, by 8 November 2011 at the latest, a certified copy of document 237, after it has been redacted; ORDERS the Prosecutor to clarify, by 8 November 2011 at the latest, the status of document 36 by specifying whether the pages in Arabic contained therein have already been translated and to re-file the document including the proposed redactions in full with a view to it being disclosed to the Applicant and to his counsel."

III. RELIEF SOUGHT

44. The Prosecution requests that the Appeals Chamber:

1. Accept these additional submissions resulting from the judicial conference of 1 March 2012;

2. Suspend the disclosure order of the Impugned Decision until such time as the Appeals Chamber renders a decision on the merits of the Prosecution Appeal; and

3. Grant the relief requested in the Prosecution Appeal.

Ekkehard Withopf
Senior Trial Counsel

SPECIAL TRIBUNAL FOR LEBANON
THE PROSECUTOR

Dated this 5th day of March 2012
Leidschendam, The Netherlands

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Word count