



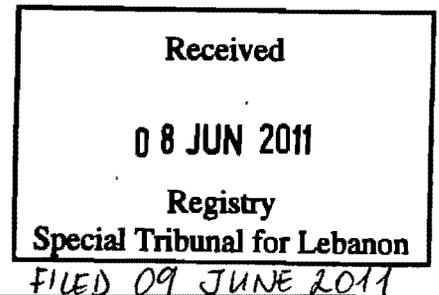
The Pre-Trial Judge

Le Juge de la mise en état

المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case No.: CH/PTJ/2011/10
The Pre-Trial Judge: Mr Daniel Fransen
The Registrar: Mr Herman von Hebel
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**DECISION ON PROSECUTOR'S REQUEST FOR SUSPENSION AND
CLARIFICATION OF THE DECISION ON THE DISCLOSURE OF
MATERIALS FROM THE CRIMINAL FILE OF MR EL SAYED AND
WITNESS PROTECTION MEASURES**

Counsel:
Mr Akram Azoury

Office of the Prosecutor:
Mr Daniel A Bellemare, QC

Defence office:
Mr François Roux

STL Official Translation



I. Procedural background:

1. On 17 March 2010, Mr Jamil El Sayed (the “Applicant” or “Mr El Sayed”), represented by his counsel, attorney Akram Azoury, filed an application with the Special Tribunal for Lebanon (the “Tribunal”), the subject of which was the “request for release of evidentiary materials related to the crimes of libellous denunciations and arbitrary detention”.¹
2. On 12 May 2011, the Pre-Trial Judge issued a decision on the disclosure of materials from the criminal file of Mr El Sayed (the “Decision of 12 May 2011”).²
3. On 20 May 2011, Mr El Sayed filed a partial appeal of the Decision of 12 May 2011.³
4. On 25 May 2011, the Prosecutor filed an urgent submission requesting clarification of some points in the Decision of 12 May 2011, as well as the suspension of the inspection of documents 20, 40 and 53 as ordered in that decision (the “Prosecutor’s Request”).⁴
5. On 26 May 2011, the Pre-Trial Judge ordered, in the interests of justice, the suspension of the part of the Decision of 12 May 2011 relating to the inspection of the said documents until he had ruled on the Prosecutor’s Request. He likewise authorised Mr El Sayed to submit his observations on this subject.

¹ Public redacted version of Memo No. 112. The Application: Request for Release of Evidentiary Materials Related to the Crimes of Libellous Denunciations and Arbitrary Detention, CH/PTJ/2010/01, 17 March 2010.

² Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, CH/PTJ/2011/08, 12 May 2011.

³ Partial Appeal of the Pre-Trial Judge’s Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011, CH/PTJ/ 2010/01, 20 May 2011.

⁴ Urgent Prosecution’s Submission of Information, Request for Clarification and Suspension of the Inspection of Documents 20, 40 and 53, and Request for Witness Protection Following the Pre-Trial Judge’s Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, CH/PTJ/2011/08, 25 May 2011.

6. On 30 May 2011, Mr El Sayed filed a reply to the Prosecutor's Request.⁵

II. The Prosecutor's Request:

7. To summarise, the Prosecutor invites the Pre-Trial Judge:

- i. to take into consideration the fact that one of the documents earmarked for inspection in the Decision of 12 May 2011 is being used within the context of the ongoing investigation;
- ii. to clarify the Decision of 12 May 2011 with regard to documents 20, 40 and 53 that, in his opinion, should be redacted and, in the meantime, suspend the inspection which should have taken place on 27 May 2011 at the latest; and
- iii. to take additional witness protection measures and order Mr El Sayed to comply with them.

III. Mr El Sayed's Reply:

8. Mr El Sayed submits that the Prosecutor's Request be dismissed for the following reasons:

- i. the Pre-Trial Judge has ruled definitively on the inspection of documents 20, 40 and 53; and
- ii. additional witness protection measures are not justified as Mr El Sayed undertakes to comply with the provisions set forth in paragraph 32 of the Decision of 12 May 2011.

⁵ General El Sayed's Reply to "Prosecution's Submission of Information, Request for Clarification and Suspension of the Inspection of Documents 20, 40 and 53, and Request for Witness Protection Following the Pre-Trial Judge's Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed", CH/PTJ/2010/01, 30 May 2011 ("Mr El Sayed's Reply").

9. Mr El Sayed also requests that an *ex parte* hearing in closed session be held in order to provide the Pre-Trial Judge with the clarifications required to shorten the execution phase of the Decision of 12 May 2011.⁶

IV. Statement of reasons:

i. The jurisdiction of the Pre-Trial Judge

10. The Pre-Trial Judge notes that, on 20 May 2011, Mr El Sayed lodged a partial appeal of the Decision of 12 May 2011. However, insofar as this partial appeal does not involve the points raised in the Prosecutor's Request, the Pre-Trial Judge deems that he has jurisdiction to rule on these.

ii. The inspection of documents 20, 40 and 53 in their entirety

11. It would be helpful in the first instance to review the proceedings.
12. Following the Order of the Pre-Trial Judge of 7 February 2011, which invited the Prosecutor to file an application containing grounds relating to the non-disclosure of materials in his possession concerning the detention of the Applicant, the Prosecutor filed three spreadsheets, which listed the documents mentioned, on 10 March, 1 April and 5 May 2011 successively. In these spreadsheets, the Prosecutor suggested the inspection of documents 20, 40 and 53 in their entirety⁷ without specifying that some information required redaction before it could be inspected.
13. During the *ex parte* hearing on 19 April 2011, following the request from the Pre-Trial Judge to clarify the status of document 40, the Prosecutor explained that this document should be redacted and that a new inventory would be filed. On 5 May

⁶ *Idem*, para. 27.

⁷ Decision of 12 May 2011, para. 43.

2011, he filed this inventory without however specifying that document 40, or documents 20 and 53 mentioned in the previous paragraph, needed to be redacted but instead authorised an inspection of these documents in their entirety.⁸

14. Consequently, insofar as the Prosecutor himself acknowledged in his submissions that these documents did not require redaction and could be inspected in their entirety, the Pre-Trial Judge confirmed the position of the Prosecutor in his Decision of 12 May 2011.
15. In his Request, the Prosecutor states that documents 20 and 53 should be redacted before disclosure. He likewise submits that there might be a discrepancy between the reasoning developed in the Decision of 12 May 2011, according to which he has a choice between the inspection of non-redacted documents or the disclosure of redacted documents,⁹ and the disposition of this same decision which no longer grants him a choice.
16. In this respect, the Pre-Trial Judge recalls and confirms that, as mentioned in the Decision of 12 May 2011, where dual protection is not justified, the Prosecutor has the right to suggest to the Pre-Trial Judge, in particular for reasons of witness protection, either the redaction of a document which must, in principle, be disclosed to the Applicant and to his counsel, or the inspection of a document in its entirety.¹⁰ However, as in this case the Prosecutor himself chose the option of the inspection in its entirety, the disposition of the Decision of 12 May 2011 mentions solely this.
17. The Pre-Trial Judge notes that the Prosecutor now invokes the need to redact the aforementioned documents based on reasons of security or of safeguarding the investigation. Taking into account the reasons invoked by the Prosecutor, the Pre-

⁸ Prosecutor's Request, para. 12, footnote 7.

⁹ Decision of 12 May 2011, para. 31.

¹⁰ *Ibidem*.

Trial Judge deems that this additional request must be taken into consideration. Consequently, he invites the Prosecutor to indicate clearly whether he requests that documents 20 and 53 be inspected in their entirety or disclosed in part, and, if appropriate, to file suggested redactions to those documents, together with the reasons for so doing.

18. The Pre-Trial Judge recalls in this respect that “as for any other restriction of access to the file, [the suggested redactions] must be reasoned, in particular by the need to safeguard the ongoing investigation, the safety of the witnesses and the interests of national and international security”¹¹ and not based on the criterion of relevance.
19. According to the Prosecutor, document 40 is one of the documents being used in the ongoing investigation concerning the Hariri case and cannot, as a consequence, be disclosed to the Applicant.¹² The Pre-Trial Judge notes that the Prosecutor fails to explain why this information was not given to him at an earlier stage in the proceedings. However, taking into account this new development and the fact that the Prosecutor considers that the disclosure of this document might jeopardise the ongoing investigation, the Pre-Trial Judge finds that, at this stage of the proceedings, it cannot be made the subject of an obligation to disclose.

iii. Changes to the witness protection measures

20. With regard to the Prosecutor’s Request relating in particular to altering the witness protection measures because the term “legitimate grounds” mentioned in the Decision of 12 May 2011 is “too vague and sets insufficient parameters to comprehensively cover all issues relating to the protection of witnesses”,¹³ the Pre-Trial Judge finds it to be based on insufficient reasons.

¹¹ Decision of 12 May 2011, para. 42.

¹² The Prosecutor refers to this document as being document 40 in footnote 3 and as being document 20 in paragraph 11 of the Prosecutor’s Request.

¹³ Prosecutor’s Request, para. 15.

21. The Pre-Trial Judge recalls that, as mentioned in the Order of 17 September 2010, “with regard to the question of the exercising of the right of access to the criminal file, it follows from legislation and case law, both national and international, that this right is not an absolute one.”¹⁴ Indeed, limitations and restrictions can be justified, in particular in connection with witness protection or when “[making] the documents available might compromise an ongoing or future investigation, undermine fundamental interests, such as the physical well-being of persons concerned by those documents, or affect national or international security. These limitations can also stem from difficulties inherent to the conduct of terrorist investigations.”¹⁵ As this right is likely to be subject to restrictions, before ruling on the merits, he invited the Prosecutor notably to take into account this fact when putting forward his submissions concerning the limitations to be applied to the disclosure of documents from Mr El Sayed’s criminal file.
22. Consequently, the restrictive measures suggested by the Prosecutor, as well as those ordered by the Pre-Trial Judge in the Decision of 12 May 2011, have already taken into account the need to protect witnesses.
23. By stating in the Decision of 12 May 2011 that the documents “can only be used for legitimate grounds, provided that the presumption of innocence, the rights of the defence and the privacy of third parties are respected”, the Pre-Trial Judge added an additional safeguard regarding the way in which Mr El Sayed and his counsel may make use of these documents.
24. Furthermore, the Pre-Trial Judge considers that the Prosecutor’s Request relating to witness protection measures is in fact a request for reconsideration of the Decision of 12 May 2011 pursuant to Rule 140 of the Rules of Procedure and Evidence (the

¹⁴ Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed dated 17 March 2010 and whether Mr El Sayed has Standing before the Tribunal, CH/PTJ/2010/005, 17 September 2011, para. 53.

¹⁵ *Ibidem*.

“Rules”). However, the Prosecutor has not shown, as required by this Rule, that he has suffered any injustice. Nor did the Prosecutor lodge an appeal of the Decision of 12 May 2011 on this point. Consequently, this request is not founded.

iv. Mr El Sayed’s request for an *ex parte* hearing held in closed session

25. After having acquainted himself with the submissions of the Prosecutor and Mr El Sayed, the Pre-Trial Judge finds it unnecessary to organise a hearing at this stage of the proceedings. Consequently, the Pre-Trial Judge dismisses Mr El Sayed’s request in this regard.

FOR THESE REASONS,

Pursuant to Rule 77 (A) of the Rules,

THE PRE-TRIAL JUDGE,

DECLARES the Prosecutor’s Request founded in part as follows:

ORDERS the Prosecutor, by 8 June 2011 at the latest, to indicate whether he requests that documents 20 and 53 be inspected in their entirety or disclosed in part and, if appropriate, to file suggested redactions containing grounds, with a view to their disclosure to Mr El Sayed and to his counsel;

STATES THAT, at the current stage of the proceedings, document 40 must not be disclosed to Mr El Sayed and to his counsel;

DECLARES the Prosecutor’s Request not founded in all other respects; and

STATES that, at this stage of the proceedings, it is not appropriate to hold an *ex parte* hearing in closed session.

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

Leidschendam, 3 June 2011.

[signature]

Daniel Fransen
Pre-Trial Judge

