



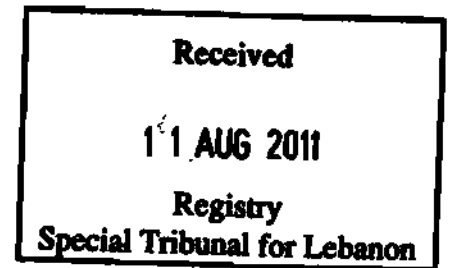
**The Pre-Trial Judge**

**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/2011/13  
The Pre-Trial Judge: Mr Daniel Fransen  
The Registrar: Mr Herman von Hebel  
Date: 21 July 2011  
Original: French  
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**DECISION RELATING TO THE PROSECUTION'S URGENT  
APPLICATION OF 14 JULY 2011 FOR SUSPENSION OF THE DECISION  
OF 6 JULY 2011 AND TO THE PROSECUTION'S FURTHER  
SUBMISSIONS OF 15 AND 21 JULY 2011**

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**Counsel:**  
Mr Akram Azoury

**Office of the Prosecutor:**  
Mr Daniel A. Bellemare, QC

**Defence Office:**  
Mr François Roux



**NOTING** the urgent application of 14 July 2011 from the Prosecutor of the Special Tribunal for Lebanon (respectively the “Prosecutor” and the “Tribunal”) to suspend the disclosure of documents ordered by the Pre-Trial Judge of the Tribunal (the “Pre-Trial Judge”) on 6 July 2011 (the “Application”);<sup>1</sup>

**NOTING** the further submissions of 15 and 21 July 2011 from the Prosecutor of the Special Tribunal for Lebanon relating to the documents translated following the decision of the Pre-Trial Judge dated 12 May 2011 (respectively the “Further Submission of 15 July 2011”, the “Further Submission of 21 July 2011” or the “Further Submissions”);<sup>2</sup>

**NOTING** the reply of Mr El Sayed of 15 July 2011 which opposes the Application (the “Reply”);<sup>3</sup>

**NOTING** the decision of the Pre-Trial Judge of 6 July 2011 (the “Decision of 6 July 2011”) ordering in particular the Prosecutor to disclose to Mr El Sayed and to his counsel by 14 July 2011 at the latest, through the Registry of the Tribunal (the “Registry”), a certified copy of the documents listed in the Confidential Annex to that Decision;<sup>4</sup>

**NOTING** the decision of the Pre-Trial Judge of 12 May 2011 (the “Decision of 12 May 2011”) ordering in particular the translation, by the offices of the Registry, of the documents listed in the Confidential Annex to that Decision and ordering the Prosecutor, within 15 days of their being translated, to disclose them to Mr El Sayed 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 redacted with a view to their being disclosed to Mr El Sayed and to his counsel;<sup>5</sup>

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<sup>1</sup> Urgent Prosecution’s Application for Suspension of the Disclosure Order of 6 July 2011, CH/PTJ/2011/12, 14 July 2011.

<sup>2</sup> Prosecution’s Further Submission of a Translated Document Following the Pre-Trial Judge’s 12 May 2011 Decision, CH/PTJ/2011/08, 15 July 2011; Prosecution’s Further Submission of Translated Documents Following the Pre-Trial Judge’s 12 May 2011 Decision, CH/PTJ/2011/08, 21 July 2011.

<sup>3</sup> Reply to “Urgent Prosecution’s Application for Suspension of the Disclosure Order of 6 July 2011”, CH/PTJ/2011/12, 15 July 2011.

<sup>4</sup> 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.

<sup>5</sup> Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, CH/PTJ/2011/08, 12 May 2011.

**NOTING** the submissions filed by the Prosecutor on 7,<sup>6</sup> 8,<sup>7</sup> 16,<sup>8</sup> 17,<sup>9</sup> 24 June 2011<sup>10</sup> and 1 July 2011<sup>11</sup> in accordance with the Decision of 12 May 2011;

**CONSIDERING** that, in the Application, the Prosecutor requests that the Pre-Trial Judge suspend disclosure of the documents mentioned in the Decision of 6 July 2011 until the Victims and Witnesses Unit has been able, where appropriate, to recommend any necessary protective measures, in accordance with Rule 50 of the Rules of Procedure and Evidence (the “Rules”);<sup>12</sup>

**CONSIDERING** that, in the Further Submission of 15 July 2011, the Prosecutor requests that the Pre-Trial Judge delay his decision on the suggested redactions to document no. 4 included with the Further Submission until he has ruled on the Application;<sup>13</sup>

**CONSIDERING** that, in the Further Submission of 21 July 2011, the Prosecutor also requests that the Pre-Trial Judge delay his decision on the suggested redactions to documents nos 8, 22 and 57 included with the Further Submission until the Prosecutor has been able to re-assess the validity of those redactions;<sup>14</sup>

**CONSIDERING** that, in support of the Application and of the Further Submissions, the Prosecutor states that he received on 6 July 2011 requests for protective measures from a number

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<sup>6</sup> Prosecution’s Submission of Materials Following the Pre-Trial Judge’s 3 June 2011 Order, CH/PTJ/2011/11, 7 June 2011.

<sup>7</sup> Prosecution’s Submission of Materials Following the Pre-Trial Judge’s 3 June 2011 Decision, CH/PTJ/2011/10, 8 June 2011.

<sup>8</sup> Prosecution’s Additional Submissions of Materials Following the Pre-Trial Judge’s 3 June 2011 Decision, CH/PTJ/2011/11, 16 June 2011.

<sup>9</sup> Prosecution’s Submission of Translated Documents Following the Pre-Trial Judge’s 12 May 2011 Decision, CH/PTJ/2011/08, 17 June 2011.

<sup>10</sup> Prosecution’s Further Additional Submission of Materials Following the Pre-Trial Judge’s 3 June 2011 Decision, CH/PTJ/2011/11, 24 June 2011.

<sup>11</sup> Prosecution’s Additional Submission of Translated Documents Following the Pre-Trial Judge’s 12 May 2011 Decision, CH/PTJ/2011/08, 1 July 2011.

<sup>12</sup> Application, para. 13.

<sup>13</sup> Further Submission of 15 July 2011, para. 8.

<sup>14</sup> Further Submission of 21 July 2011, para. 8.

of persons and witnesses affected by the Application because of alleged threats apparently made to them by Mr El Sayed;<sup>15</sup>

**CONSIDERING** that, in the Reply, Mr El Sayed submits that the Application should be dismissed on the basis that it is a delaying tactic<sup>16</sup> and that the Prosecutor has infringed the Decision of 6 July 2011 in two ways: by not disclosing in due time the documents mentioned therein<sup>17</sup> and by informing the witnesses concerned of the content of the Confidential Annex to the Decision;<sup>18</sup>

**CONSIDERING** that, with regard to the deadlines, the Pre-Trial Judge notes, as a preliminary observation, that the Prosecutor filed the Application on 14 July 2011, shortly before the Registry closed, which was the very same day when he should have disclosed the aforementioned documents to Mr El Sayed and to his counsel, whereas he had been in possession of the information on which the grounds for the Application were based since 6 July 2011;

**THAT** in so doing, he delayed filing the Application whereas he should have done so earlier to avoid presenting the Pre-Trial Judge with a *fait accompli* or he should have at least requested, in time, an extension of the deadline in order to be able to submit such an Application, setting out the difficulties which he was encountering in that respect;

**CONSIDERING** that, with regard to the merits of the Application, it should be emphasised that the documents to be transmitted to Mr El Sayed and his counsel, in redacted form if necessary, mentioned in the Decision of 6 July 2011 are those that the Prosecutor had himself deemed could be disclosed to them;

**CONSIDERING** that, the Pre-Trial Judge has indicated on several occasions that one of the restrictions to the disclosure of documents from the criminal file to Mr El Sayed and to his

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<sup>15</sup> Application, paras 4-13 and Annexes A, B and C of the Application.

<sup>16</sup> Reply, paras 2-4 and Disposition.

<sup>17</sup> *Ibid.*, para. 1 and Disposition.

<sup>18</sup> *Ibid.*, paras 5-8.

counsel might be justified by the need to protect the well-being of the persons concerned by these documents and has asked the Prosecutor to take this restriction into consideration;<sup>19</sup>

**CONSIDERING** that, by suggesting the redactions to the documents to be disclosed in his submissions filed in accordance with the Decision of 12 May 2011, the Prosecutor was therefore obliged to take into account the need for witness protection and to take any necessary measures for that purpose;

**CONSIDERING** therefore that the mere fact that requests for protection were brought to the attention of the Prosecutor on 6 July 2011 should not have had any bearing on the documents to be disclosed pursuant to the Decision of 6 July 2011, all the more so as these requests appear themselves to be based on evidence which for the most part the Prosecutor has been aware of for some time;<sup>20</sup>

**CONSIDERING** that, furthermore, as stated by the Appeals Chamber in its decision of 19 July 2011, the documents to be disclosed to or submitted for inspection by Mr El Sayed and his counsel may only be used for the sole legitimate reason of Mr El Sayed's right to seek remedy against those allegedly responsible, in his opinion, for his unlawful detention;<sup>21</sup>

**CONSIDERING** however that the Prosecutor's submissions linked to the context and to the circumstances of the requests for protection and to the persons who made these requests merit being taken into consideration;<sup>22</sup>

**CONSIDERING** that, in accordance with Rules 97 and 133 of the Rules, applied *mutatis mutandis* to the case at hand, it is incumbent upon the Prosecutor, but also on the judges, to

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<sup>19</sup> 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. 16; 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, CH/PTJ/2011/10, 3 June 2011, para. 16; Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, CH/PTJ/2011/08, 12 May 2011, para. 42; 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 2010, para. 53.

<sup>20</sup> Document submitted to the Pre-Trial Judge by the Prosecution during the hearing of 14 January 2011.

<sup>21</sup> Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, CH/AC/2011/01, 19 July 2011, paras 34 and 119.

<sup>22</sup> Application, paras 11-12.

ensure first and foremost, provided that the rights of the accused are respected, that the well-being of the witnesses and victims is safeguarded in the best possible way and to take appropriate steps for that purpose, if so required, by following the recommendations of the Victims and Witnesses Unit;

**THAT** in this respect, the Pre-Trial Judge notes that the Prosecutor points out that, on the basis of an initial review of the documents, the Victims and Witnesses Unit considers that a risk assessment is justified;

**CONSIDERING** therefore that, taking into account the position taken by the Victims and Witnesses Unit, the precautionary principle would favour awaiting the outcome of this assessment before, if appropriate, disclosing the documents concerned to Mr El Sayed and his counsel;

**CONSIDERING** that, consulting the Victims and Witnesses Unit proves to be justified, the Prosecutor cannot be criticised for using delaying tactics with regard to the disclosure of the documents to Mr El Sayed and his counsel;

**CONSIDERING** moreover that it appears from the documents in the possession of the Pre-Trial Judge that the Prosecutor contacted the witnesses involved after having received the above-mentioned requests for protection, that Rule 133, paragraph (B) of the Rules, applied *mutatis mutandis* to the case at hand provides for this and that furthermore the Prosecutor claims that he spoke with those witnesses on the advice of the Victims and Witnesses Unit;

**CONSIDERING** that, as a consequence, the argument put forward by Mr El Sayed, according to which the Prosecutor, by contacting the witnesses, had breached the confidentiality of the Decision of 6 July 2011, is ill-founded;

**CONSIDERING** lastly that, amongst the documents which should have been disclosed on 14 July 2011, there exist documents (nos 65 and 178 of the Confidential Annex to the Decision of 6 July 2011) which are not affected by the issue of witness protection;

**CONSIDERING** that, as a consequence, those documents should have been released to Mr El Sayed on 14 July 2011, in accordance with the Decision of 6 July 2011;

**FOR THESE REASONS:**

Pursuant to Rules 50, 77, paragraph (A), 97 and 133 of the Rules;

**THE PRE-TRIAL JUDGE,**

**ORDERS** the Prosecutor to apply, by 19 August 2011 at the latest, if he deems he should do so, and if need be in consultation with the Victims and Witnesses Unit, for the protective measures that he seeks so as to ensure the protection of the witnesses concerned by the Application and to specify what he deems should happen to the documents mentioned in the Decision of 6 July 2011;

**SUSPENDS** the Decision of 6 July 2011, with the exception of those parts relating to documents nos 65 and 178 of the Confidential Annex to that Decision, until 19 August 2011 or, if appropriate, until such time as the Pre-Trial Judge has ruled on any possible protective measures sought by the Prosecutor;

**SUSPENDS** point 5 of the disposition of the Decision of 12 May 2011 relating to the obligations of the Prosecutor, until 19 August 2011 or, if appropriate, until such time as the Pre-Trial Judge has ruled on any possible protective measures sought by the Prosecutor;

**NOTES** that the Prosecutor should have transmitted the aforementioned documents nos 65 and 178 to Mr El Sayed and his counsel by 14 July 2011 at the latest; and

**ORDERS** the Prosecutor to transmit the aforementioned documents nos 65 and 178 to the Registry by 25 July 2011 at the latest so that the Registry may disclose them to Mr El Sayed and to his counsel as soon as possible.

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

Leidschendam, 21 July 2011.

[signature]

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Daniel Fransen  
Pre-Trial Judge

