

The Pre-Trial Judge

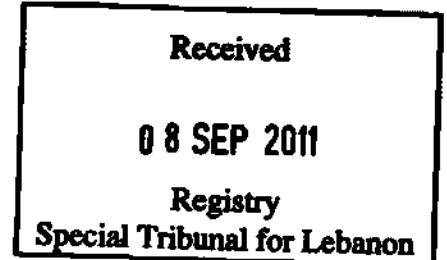


المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

Le Juge de la mise en état

THE PRE-TRIAL JUDGE

Case No.: CH/PTJ/2011/15
The Pre-Trial Judge: Mr Daniel Fransen
The Registrar: Mr Herman von Hebel
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**DECISION RELATING TO THE PROSECUTION'S SECOND APPLICATION FOR
SUSPENSION OF THE DECISION OF 6 JULY 2011**

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

Defence Office:
Mr François Roux

STL Official Translation



I. Procedural background

1. On 6 July 2011, the Pre-Trial Judge ordered the Prosecutor to disclose to Mr El Sayed and to his counsel, by 14 July 2011 at the latest, through the Registry, a certified copy of the documents listed in the Confidential Annex to that decision (the “Decision of 6 July 2011”).¹
2. On 14 July 2011, the Prosecutor filed an application seeking to suspend the disclosure of the documents ordered by the Pre-Trial Judge on 6 July 2011 (the “Application”).²
3. On 21 July 2011, the Pre-Trial Judge suspended part of the disposition of the Decision of 6 July 2011 and ordered 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” (the “Decision of 21 July 2011”).³
4. The Decision of 21 July 2011 also suspended 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”; as well as point 5 of the disposition of the Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed of 12 May 2011 (the “Decision of 12 May 2011”),⁴ “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”.

¹ Case No. CH/PTJ/2011/12, Decision on the Proposed Redactions to the Documents in the Criminal File of Mr El Sayed Submitted by the Prosecutor, 6 July 2011.

² Case No. CH/PTJ/2011/12, Urgent Prosecution’s Application for Suspension of the Disclosure Order of 6 July 2011, 14 July 2011.

³ Case No. CH/PTJ/2011/13, 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, 21 July 2011.

⁴ Case No. CH/PTJ/2011/08, Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, 12 May 2011.

5. On 19 August 2011, the Prosecutor filed confidential and *ex parte* submissions seeking, principally, the continued suspension of the disclosure obligations with respect to witness statements until such time as these documents have been disclosed in the *Ayyash et al.* case⁵ and, in addition, requesting that an *ex parte* hearing be held with the Victims and Witnesses Unit (the “Submissions of 19 August 2011”).⁶

6. On 22 August 2011, the Prosecutor filed a public redacted version of his Submissions of 19 August 2011.⁷

7. On 26 August 2011, Mr El Sayed replied to the Prosecutor’s public submissions filed on 22 August 2011 and opposed them, in particular, for abuse of procedure and violation of the adversarial principle, and noted that the submissions were filed late (the “Reply”).⁸

II. The Submissions of the Prosecutor and Mr El Sayed

8. The Pre-Trial Judge notes that, in the Submissions of 19 August 2011, the Prosecutor recalls that he received on 6 July 2011 requests for protective measures from a number of persons on account of alleged threats made to them by Mr El Sayed.⁹ Following these requests, on 14 July 2011, the Prosecutor requested that the Pre-Trial Judge suspend disclosure of the documents listed in the Decision of 6 July 2011 until such time as the Victims and Witnesses Unit had been able, if appropriate, to recommend the necessary protective measures.

9. In the Submissions of 19 August 2011, the Prosecutor also makes reference to the report dated 17 August 2011 drawn up by the Victims and Witnesses Unit regarding the assessment of the risk incurred by the witnesses concerned (the “Report”).¹⁰ In the Report, the Victims and

⁵ Case No. STL-II-01/I, *The Prosecutor v. Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra*.

⁶ Case No. CH/PTJ/2011/13, *Prosecution’s Submissions Following the Pre-Trial Judge’s Decision of 21 July 2011, Confidential and ex parte*, 19 August 2011.

⁷ Case No. CH/PTJ/2011/13, *Public Redacted Version of the 19 August 2011 ex parte & Confidential: Prosecution’s Submissions Following the Pre-Trial Judge’s Decision of 21 July 2011, 22 August 2011*.

⁸ Case No. CH/PTJ/2011/13, *Observations on the Prosecutor’s Fifth Submission for Suspension of 22 August 2011, 26 August 2011*.

⁹ Application, paras 4-13 and Annexes A, B and C to the Application.

¹⁰ Case No. CH/PTJ/2011/13, *Prosecution’s Submissions of 19 August 2011, Annex A, confidential and ex parte*.

Witnesses Unit points out that according to the assessment it carried out, this risk is currently low.¹¹

10. Consequently, without recommending the suspension of the disclosure of the documents to Mr El Sayed, the Victims and Witnesses Unit proposes a series of measures for overseeing the disclosure by the Prosecutor of the listed documents, namely that Mr El Sayed or his counsel shall not make public use of the documents disclosed to them nor reveal the identities of the witnesses or any information which would allow them to be identified; that the documents shall only be used to exercise the rights of Mr El Sayed before the national courts seized of his case; that Mr El Sayed shall not share the documents, their contents or any other information that would allow the identities of the witnesses to be revealed with anyone other than his counsel or with persons who have the right of access thereto in the context of proceedings instituted before the national courts seized of the case; that a list of the persons who have access to the documents shall be kept by Mr El Sayed and his counsel; and that there shall be no contact between Mr El Sayed or his counsel and the witnesses, unless the witnesses agree to be contacted by Mr El Sayed.¹²

11. Notwithstanding the assessment and the recommendations made in the Report, the Prosecutor requests the continued suspension of his disclosure obligations. He is indeed of the opinion that the Report highlights disturbing information, giving rise to fears that, were the documents to be released to Mr El Sayed, the security of the witnesses would be put at risk.¹³

12. The Prosecutor also makes a further submission, namely that the documents to be disclosed to Mr El Sayed, by virtue of the Decisions of 12 May and 6 July 2011, might have to be disclosed to the defence within the context of the *Ayyash et al.* case, or indeed the connected cases. Consequently, the premature disclosure of these documents could undermine the integrity of these proceedings.¹⁴

13. The Pre-Trial Judge notes that, in the Reply, Mr El Sayed opposes the Prosecutor's Submissions for the following reasons: that they were not filed within the time limit; that the

¹¹ *Idem*, para. 8.

¹² *Idem*, para. 10.

¹³ *Idem*, para. 9.

¹⁴ *Idem*, para. 11.

Prosecutor is using delaying tactics, since this is the fifth request for suspension of the Decision of 12 May 2011 relating to the disclosure of materials from his criminal file; that the application equates in fact to a request for reconsideration in accordance with Rule 140 of the Rules of Procedure and Evidence (the "Rules"), which is dependent on prior authorisation from the President of the Tribunal; that the persons testifying against him do not have the status of victims or witnesses within the meaning of Rule 133 of the Rules, and it is the Lebanese authorities alone who can be seized of protection requests for these persons; that the *ex parte* and confidential nature of the proceedings should not have been used by the Prosecutor, who redacted information concerning the threats Mr El Sayed allegedly made against the witnesses and in so doing prevented him from refuting them; that the suspension of the execution of the Decision of 6 July 2011 until such time as the accused in the *Ayyash et al.* case have had access to their file is without foundation as the present proceedings are not criminal and are being conducted within the context of the inherent and secondary jurisdiction of the Tribunal; and lastly, that the application by the Prosecutor of limitations to the right of access to each document or category of documents has already taken place.

III. Statement of reasons

14. Three preliminary remarks are necessary.

15. Firstly, the Pre-Trial Judge notes that the Prosecutor did not file the public redacted version of the Submissions of 19 August 2011 within the deadline set by the Decision of 21 July 2011, but did so three days after. However, whether they be public or confidential, all documents must be filed within the time limit allotted. In addition, the Prosecutor did not give any reason for the late filing of the public redacted version of the Submissions of 19 August 2011. This delay and the lack of possible justification for it are not in the interests of the proper administration of justice and represent a failure to fulfil obligations, possibly falling within the scope of Rule 60 (A) of the Rules. While reaffirming that the Prosecutor is obliged in the future to comply with the deadlines set, the Pre-Trial Judge nevertheless considers that insofar as they were filed confidentially and *ex parte* within the deadline set, the Submissions of 19 August 2011 are admissible.

16. Secondly, the Pre-Trial Judge would point out that the public conduct of the judicial proceedings is the rule and confidentiality the exception. As a consequence, the parties should, as far as possible, avoid submitting *ex parte* and confidential applications and only redact them where strictly necessary. In order to ensure that there is full compliance with the adversarial principle and the principle of public conduct of proceedings, the Pre-Trial Judge requests the parties to be particularly mindful of this.

17. Finally, and contrary to what Mr El Sayed states, the Submissions of 19 August 2011 do not equate to a request for reconsideration in accordance with Rule 140 of the Rules. Indeed, following his request, the Prosecutor was allowed, in the Decision of 21 July 2011, to seek protective measures for the witnesses where necessary. The Submissions of 19 August 2011 are therefore admissible.

18. Having examined the arguments put forward, the Pre-Trial Judge considers as to the merits that there is nothing to justify in concrete terms the measures recommended by the Prosecutor with reference to the principle of access by Mr El Sayed to the documents in his criminal file, subject to the restrictions laid down which have already given rise to the protective measures allowed.¹⁵

19. Indeed, it should be noted in the first place that the confidential extract of the Report which the Prosecutor uses as a basis to justify his request is worded in a hypothetical manner.¹⁶ Moreover, the assessment made by the Victims and Witnesses Unit does not mention any significant points of which the Prosecutor would not have been aware when he made his suggested redactions and which could cause them to be insufficient.

20. However, as stated in the Decision of 21 July 2011, “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”¹⁷ and “by

¹⁵ Case No. CH/PTJ/2010/005, 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, 17 September 2010, paras 36, 42, and 53; Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, paras 57 and 65.

¹⁶ Case No. CH/PTJ/2011/13, Prosecution’s Submissions of 19 August 2011, Annex A, confidential and *ex parte*, para. 9, i.

¹⁷ Decision of 21 July 2011, p. 4.

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”.¹⁸ The proposed redactions filed by the Prosecutor which led to the Decisions of 12 May and 6 July 2011 are thus supposed to be of the sort as to safeguard in particular the protection of the witnesses.¹⁹

21. Moreover, in his evaluation of the documents to be disclosed, based on the criterion of the requirements of the ongoing or future investigations,²⁰ the Prosecutor took – or at least should have taken – into consideration also the possible effect of disclosure of the documents to Mr El Sayed on other proceedings that are pending or yet to be brought before the Tribunal. In this regard, the Pre-Trial Judge notes that he has not been made officially aware of the fact that the persons whose statements should be disclosed to Mr El Sayed pursuant to the Decision of 12 May 2011 and the Decision of 6 July 2011 would be witnesses in the context of the *Ayyash et al.* case, or *a fortiori* that they would be the subject of protective measures in the context of that case.

22. Finally, as set out in the Decision of 12 May 2011, reiterated in the Decision of 6 July 2011 and confirmed by the Appeals Chamber in the Decision of 19 July 2011, the principle by which the documents disclosed or submitted for inspection to Mr El Sayed and his counsel may only be used for legitimate reasons and provided that the presumption of innocence, the rights of the defence and the privacy of third persons are respected does meet the concerns of the Prosecutor.²¹

23. This principle, expressed in a general manner, encompasses in particular the recommendations of the Victims and Witnesses Unit which form a means by which it can be implemented. For reasons of clarity, it is nevertheless necessary to issue an explicit order

¹⁸ Decision of 21 July 2011, p.5.

¹⁹ See the procedural background in the Decision of 12 May 2011 and in the Decision of 6 July 2011.

²⁰ Case No. CH/PTJ/2010/005, 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, 17 September 2010, para. 53; Decision of 12 May 2011, para. 2 and Decision of 6 July 2011, para.16.

²¹ Decision of 12 May 2011, para. 32 and disposition; Decision of 6 July 2011, para. 24; 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, para. 119; Decision of 21 July 2011, p.5.

regarding the practical measures put forward by the Victims and Witnesses Unit that Mr El Sayed and his counsel must respect.

24. Furthermore, it is not appropriate to grant the Prosecutor's additional request to be heard during a hearing with the Victims and Witnesses Unit in order to examine whether the documents to be disclosed need to be redacted further and what conditions to impose upon Mr El Sayed before those documents are provided to him. Indeed, the Prosecutor has already had the opportunity to suggest redactions on numerous occasions. Moreover, the information contained in the Report does not mention any significant points of which the Prosecutor was previously unaware. Finally, the recommendations made by the Victims and Witnesses Unit are clear and do not appear to be likely to bring about discussion, it being understood, moreover, that the Prosecutor made no reservations in their regard in the Submissions of 19 August 2011.

FOR THESE REASONS,

In application of Rule 77 (A), Rule 97 and Rule 133 of the Rules,

THE PRE-TRIAL JUDGE,

DECLARES the Submissions of 19 August 2011 admissible and ill-founded;

ORDERS the Prosecutor to disclose to Mr El Sayed and to his counsel, by 12 September 2011 at the latest, a certified copy of the documents mentioned in the Decision of 6 July 2011 and its Confidential Annex;

ORDERS, in accordance with point 5 of the disposition of the Decision of 12 May 2011, the translation by the offices of the Registry of the following documents listed in the Confidential Annex to the Decision of 12 May 2011: 4, 5, 6, 8, 9, 12, 13, 21, 22, 24, 26 to 28 inclusive, 30, 31, 34, 35, 43 to 45 inclusive, 56, 57, 206, 437, 443, 444, 451 and 456, and 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 redacted with a view to their being disclosed to the Applicant and to his counsel;

REITERATES to Mr El Sayed and to his counsel that the documents disclosed 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;

ORDERS Mr El Sayed and his counsel to comply with the following measures:

1. to not make public any witness statement or other document which is disclosed to them by the Prosecutor and to not reveal to anyone the identity of the witnesses or any information that will allow them to be identified;
2. to not share the documents, their content and any information that will allow the witnesses to be identified with persons other than those who would be permitted to have access thereto in the context of the proceedings brought before the national courts seized of the case;
3. to keep a list of the persons who have access to the witness statements which are disclosed by the Prosecutor and to provide this list to the Pre-Trial Judge every two months from the date of this decision; and
4. to not contact a witness unless they consent to be contacted. Any request to contact a witness shall be made to the Victims and Witnesses Unit, which will organise the exchanges between Mr El Sayed and the witnesses.

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

Leidschendam, 2 September 2011

[signature]

Daniel Fransen

Pre-Trial Judge

