

The Pre-Trial Judge

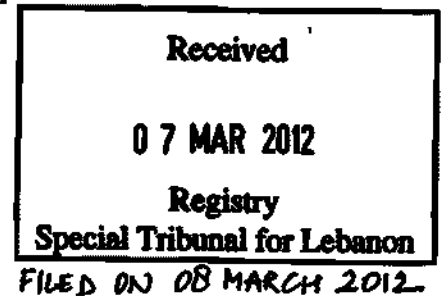


Le Juge de la mise en état

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

THE PRE-TRIAL JUDGE

Case No.: **CH/PTJ/2012/01**
The Pre-Trial Judge: **Mr Daniel Fransen**
The Registrar: **Mr Herman von Hebel**
Date: **20 February 2012**
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ORDER RELATING TO THE SUBMISSIONS OF THE PROSECUTOR FILED ON 8, 15 AND 28 NOVEMBER 2011, 12 AND 30 DECEMBER 2011 AND 15 FEBRUARY 2012 AND TO THE OBSERVATIONS FROM MR EL SAYED OF 11 JANUARY 2012

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

Defence Office:
Mr François Roux



I. Subject of the Order

1. By way of this Order, the Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) rules on the submissions of the Prosecutor of 8, 15 and 28 November 2011, 12 and 30 December 2011 and 15 February 2012 and on the observations from Mr El Sayed (the “Applicant”) of 11 January 2012 following the Orders issued by the Pre-Trial Judge on 12 May 2011 and on 17 and 21 October 2011 in execution of the decisions of the Appeals Chamber of 19 July and 7 October 2011.

II. Background to the proceedings

2. On 12 May 2011, the Pre-Trial Judge ordered the Prosecutor to disclose to the Applicant and to his counsel a number of documents from the Applicant’s criminal file that were listed in a Confidential Annex. The Pre-Trial Judge also invited the Prosecutor to seize him of any reasoned proposals for the redaction of other documents he might have in his possession with a view to their disclosure to the Applicant and to his counsel (the “Decision of 12 May 2011”).¹

3. In the Decision of 12 May 2011, the Pre-Trial Judge also deemed that, in accordance with Rule 111 of the Rules of Procedure and Evidence (the “Rules”), three categories of documents should not be disclosed to the Applicant: (1) correspondence between the Lebanese Authorities and the United Nations Independent Investigation Commission (the “Commission”); (2) internal memoranda of the Commission; and (3) investigators’ notes (“Categories 1, 2 and 3”).²

4. On 20 May 2011, the Applicant lodged an appeal of the Decision of 12 May 2011 in order to gain access to the documents included in the categories 1, 2 and 3.³

5. On 19 July 2011, the Appeals Chamber granted the Applicant’s appeal in part and referred the case back to the Pre-Trial Judge with directions to ensure that the classifications

¹ STL, Case No. CH/PTJ/2011/08, Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, 12 May 2011.

² *Ibid.*, paras 33 and 36.

³ STL, Case No. CH/PTJ/2010/01 (*sic*), 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, 20 May 2011.

of the documents under categories (1), (2) and (3) were made appropriately and expeditiously in the light of its decision (the “Decision of the Appeals Chamber of 19 July 2011”).⁴

6. Meanwhile, in accordance with the Decision of 12 May 2011, on 7,⁵ 8,⁶ 16,⁷ 17,⁸ 24 June 2011⁹ and on 1 July 2011,¹⁰ the Prosecutor proposed the disclosure of other materials, after their redaction as appropriate.

7. On 6 July 2011, the Pre-Trial Judge ordered the Prosecutor to disclose to the Applicant and to his counsel, on 14 July 2011 at the latest, a copy of the documents listed in the Confidential Annex to that decision (the “Decision of 6 July 2011”).¹¹

8. On 14 July 2011, the Prosecutor filed an application to suspend the disclosure of the documents ordered on 6 July 2011.¹²

9. On 21 July 2011, the Pre-Trial Judge temporarily 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 [“VWU”], 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”).¹³

⁴ STL, 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, Disposition.

⁵ STL, Case No. CH/PTJ/2011/11, Prosecution's Submissions of Materials Following The Pre-Trial Judge's 3 June 2011 Order, 7 June 2011.

⁶ STL, Case No. CH/PTJ/2011/10, Prosecution's Submissions of Materials Following The Pre-Trial Judge's 3 June 2011 Decision, 8 June 2011.

⁷ STL, Case No. CH/PTJ/2011/11, Prosecution's Additional Submissions of Materials Following The Pre-Trial Judge's 3 June 2011 Decision, 16 June 2011.

⁸ STL, Case No. CH/PTJ/2011/08, Prosecution's Submission of Translated Documents Following The Pre-Trial Judge's 12 May 2011 Decision, 17 June 2011.

⁹ STL, Case No. CH/PTJ/2011/11, Prosecution's Further Additional Submission of Materials Following The Pre-Trial Judge's 3 June 2011 Decision, 24 June 2011.

¹⁰ STL, Case No. CH/PTJ/2011/08, Prosecution's Additional Submission of Translated Documents Following The Pre-Trial Judge's 12 May 2011 Decision, 1 July 2011.

¹¹ STL, 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.

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

¹³ STL, 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.

10. On 17 August 2011, the Applicant filed observations on the documents disclosed by the Prosecutor in execution of the Decision of 12 May 2011, in which he stated that he had not received certain documents (the “Applicant’s Observations”).¹⁴

11. On 19 August 2011, the Prosecutor filed confidential and *ex parte* submissions in which in particular he requested the continued suspension of the obligation to disclose the witness statements (the “Request for Suspension”).¹⁵

12. On 2 September 2011, the Pre-Trial Judge dismissed the Request for Suspension. In addition, he ordered the Prosecutor to disclose to the Applicant 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 (the “Decision of 2 September 2011”).¹⁶

13. On 7 September 2011, the Prosecutor replied to the Applicant’s Observations of 17 August 2011 relating to the disclosure of the contested documents (the “Prosecutor’s Response”).¹⁷

14. On 12 September 2011, the Prosecutor lodged an appeal of the Decision of 2 September 2011.¹⁸

15. On 12 September 2011, the Appeals Chamber suspended the Decision of 2 September 2011 pending its ruling on the merits of the appeal.¹⁹

16. On 22 September 2011, the Prosecutor filed, confidentially and *ex parte*, suggested redactions to documents 21, 31, 34, 43 and 206 as well as to some parts of document 437

¹⁴ STL, Case No. CH/PTJ/2011/13, Interim Observations of General El Sayed on the Documents Effectively Disclosed by the Prosecutor on 17 August 2011 in Execution of the Decision of 12 May 2011, 17 August 2011.

¹⁵ STL, 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.

¹⁶ STL, Case No. CH/PTJ/2011/15, Decision Relating to the Prosecution’s Second Application for Suspension of the Decision of 6 July 2011, 2 September 2011.

¹⁷ STL, Case No. CH/PTJ/2011/13, Prosecution’s Response to “Interim Observations of General El Sayed on the Documents Effectively Disclosed by the Prosecutor on 17 August 2011 in Execution of the Decision of 12 May 2011”, confidential with Confidential Annexes A, B and Confidential - *Ex Parte* Annexes C, D, 7 September 2011.

¹⁸ STL, Case No. OTP/AC/2011/02, Urgent Prosecution’s Appeal of the Pre-Trial Judge’s Decision of 2 September 2011 and Request for Suspensive Effect Pending Appeal, 12 September 2011.

¹⁹ STL, Case No. CH/AC/2011/01, Order on Urgent Prosecution’s Request for Suspensive Effect Pending Appeal, 12 September 2011.

which had been translated following the Decision of 12 May 2011 (the “Prosecutor’s Submission”).²⁰

17. On 30 September 2011, the Applicant filed a reply to the Prosecutor’s Response of 7 September 2011 (the “Applicant’s Reply”).²¹

18. On 7 October 2011, the Appeals Chamber allowed in part the appeal lodged on 12 September 2011 by the Prosecutor (the “Appeals Chamber Decision of 7 October 2011”).²²

19. On 10 October 2011, in order to comply with the Appeals Chamber Decision of 7 October 2011, the Pre-Trial Judge ordered the Prosecutor to indicate the period of time he considered was required to file, after consulting with the VWU if necessary, the suggested redactions of the statements made by the persons mentioned in Annexes B and C of the Appeals Chamber Decision of 7 October 2011 with a view to disclosing them to Mr El Sayed.²³

20. On 14 October 2011, the Prosecutor filed an estimate of the period of time required to file the suggested redactions.²⁴

21. On 17 October 2011, the Pre-Trial Judge issued an order for enforcement of the Appeals Chamber Decision of 19 July 2011 at the conclusion of which he ordered the Prosecutor, by 15 November 2011 at the latest, to: (i) re-examine the classification of the documents that were placed in Categories 1, 2, and 3 in the light of the Appeals Chamber Decision of 19 July 2011; (ii) submit to the Pre-Trial Judge those documents that could be disclosed to the Applicant and his counsel, with redactions, if appropriate; (iii) submit to the Pre-Trial Judge those documents that could be inspected by the Applicant and/or by his counsel; and (iv) provide the Pre-Trial Judge with a spreadsheet indicating precisely, on the

²⁰ STL, Case No. CH/PTJ/2011/08, Prosecution’s Submission of Translated Documents Following the Pre-Trial Judge’s Decision of 12 May 2011 & Clarification to the Applicant’s Interim Observations, 22 September 2011.

²¹ STL, Case No. CH/PTJ/2011/13, *Réplique du Général El Sayed à « la Réponse du Procureur aux « Observations intérimaires du Général El Sayed sur les pièces effectivement communiquées par le Procureur au 17 août (sic) 2011 en exécution de la décision du 12 mai 2011 » du 7 septembre 2011 »,* 30 September 2011.

²² STL, 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 the Disclosure of Documents, 7 October 2011.

²³ STL, Case No. CH/PTJ/2011/16, *Ordonnance en exécution de la Décision de la Chambre d’appel du 7 octobre 2011,* 10 October 2011.

²⁴ STL, Case No. CH/PTJ/2011/16, Prosecution’s Submissions in Compliance with the Pre-Trial Judge’s Order of 10 October 2011, 14 October 2011.

one hand, the respective titles and contents of the above-mentioned documents and, on the other hand, any changes in category that may have been applied to those documents following the Appeals Chamber Decision of 19 July 2011 (the “Order of 17 October 2011”);²⁵

22. On 21 October 2011, the Pre-Trial Judge ordered the Prosecutor to file, as and when the work is completed, and by 30 December 2011 at the latest, conclusions relating to the witnesses mentioned in Annexes B and C of the Appeals Chamber Decision of 7 October 2011 and ordered the VWU to submit, by Monday 31 October 2011 at the latest, a report concerning, on the one hand, its assignment relating to the assessment of the Prosecution’s Submissions of 21 September 2011 and the review of the suggested redactions proposed by the Prosecutor and, on the other, the methodology used to complete this assignment (the “Order of 21 October 2011”).²⁶

23. On 1 November 2011, the Pre-Trial Judge ruled on the Applicant’s Observations and requested that the Prosecutor clarify the status of a number of documents within a certain period of time, that he prepare a detailed inventory of the documents disclosed to the Applicant and to his counsel and that he draw up a report relating to the fulfilment of his obligations by 11 November 2011. He also ordered the Registrar to verify and attest to the accuracy of that inventory (the “Decision of 1 November 2011”).²⁷

24. On 8 November 2011, the Prosecutor filed submissions in execution of the Decision of 1 November 2011 (the “Submissions of 8 November 2011”).²⁸ The present order shall refer to those Submissions.

25. On 11 November 2011, the Prosecutor filed a report in accordance with the Decision of 1 November 2011.²⁹

²⁵ STL, Case No. CH/PTJ/2011/17, Order for Enforcement of the Appeals Chamber Decision of 19 July 2011, 17 October 2011.

²⁶ STL, Case No. CH/PTJ/2011/18, Scheduling Order for Enforcement of the Appeals Chamber Decision of 7 October 2011, 21 October 2011.

²⁷ STL, 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.

²⁸ STL, Case No. CH/PTJ/2011/19, Prosecution’s Submissions Following the Pre-Trial Judge’s Decision Relating to Mr El Sayed’s Observations of 17 August 2011 Concerning the Enforcement of the Decision of 12 May 2011, confidential and *ex parte*, 8 November 2011. The Prosecutor also filed a public redacted version of these submissions on the same day.

26. On 15 November 2011, the Prosecutor filed submissions relating to the identification of documents that were to be disclosed to the Applicant in accordance with the Order of 17 October 2011 (the “Submissions of 15 November 2011”).³⁰ The present order shall refer to those Submissions.

27. On 28 November 2011, the Prosecutor filed before the Pre-Trial Judge three documents to be disclosed to the Applicant which contained suggested redactions (the “Submission of 28 November 2011”).³¹ The present order shall refer to that Submission.

28. On 12 December 2011, the Prosecutor filed before the Pre-Trial Judge, a document to be disclosed to the Applicant which included suggested redactions (the “Submission of 12 December 2011”).³² The present order shall refer to that Submission.

29. On 19 December 2011, at the request of the Prosecutor,³³ the Pre-Trial Judge gave him leave to file all of his conclusions relating to the suggested redactions by 30 December 2011 at the latest.³⁴

30. On 30 December 2011, the Prosecutor filed a submission in compliance with the Order of 21 October 2011 concerning the witness statements that were to be disclosed to the Applicant in accordance with the Decision of 12 May 2011 (the “Submission of 30 December 2011”).³⁵ The present order shall refer to that Submission.

²⁹ STL, Case No. CH/PTJ/2011/19, Prosecution’s Report Following the Pre-Trial Judge’s Decision Relating to Mr El Sayed’s Observations of 17 August 2011 Concerning the Enforcement of the Decision of 12 May 2011, 11 November 2011.

³⁰ STL, Case No. CH/PTJ/2011/17, Prosecution’s Submissions Following the Pre-Trial Judge’s Order for Enforcement of the Appeals Chamber Decision of 19 July 2011, 15 November 2011.

³¹ STL, Case No. CH/PTJ/2011/08, Prosecution’s Further Submission of Translated Documents Following the Pre-Trial Judge’s 12 May 2011 Decision, 28 November 2011.

³² STL, Case No. CH/PTJ/2011/08, Prosecution’s Submission of a Document Following the Pre-Trial Judge’s 12 May 2011 Decision, 12 December 2011.

³³ STL, Case No. CH/PTJ/2011/18, Prosecution’s Request to Alter the 21 October 2011 “Scheduling Order for Enforcement of the Appeals Chamber Decision of 7 October 2011”, 9 December 2011.

³⁴ STL, Case No. CH/PTJ/2011/20, *Ordonnance modifiant en partie l’Ordonnance portant calendrier du 21 octobre 2011 en exécution de la Décision de la Chambre d’appel du 7 octobre 2011*, 19 December 2011.

³⁵ STL, Case No. CH/PTJ/2011/18, Prosecution’s Submission in Compliance with the Pre-Trial Judge’s Scheduling Order of 21 October 2011, confidential and *ex parte*, 30 December 2011. The Prosecutor also filed a public redacted version of this submission on the same day.

31. On 11 January 2012, the Applicant filed observations relating to the requests made by the Prosecutor on 30 December 2011 (the "Applicant's Observations of 11 January 2012").³⁶ The present order shall refer to those Observations.

32. On 15 February 2012, the Prosecutor filed submissions in execution of the Decision of 1 November 2011 concerning documents 21, 31, 34, 43 and 206 (the "Prosecutor's Submissions of 15 February 2012").³⁷ The present order shall refer to those Submissions.

III. The Submissions of the Prosecutor and the Observations of the Applicant

a. The Submissions of 8 November 2011

33. In response to the Decision of 1 November 2011, the Prosecutor makes the following points:³⁸

i. Document 437

34. With regard to the requirement of the Pre-Trial Judge to justify the redactions of the names of the Lebanese officials involved in the investigation and mentioned in document 437, the Prosecutor submits that these names have always been redacted, as moreover was authorised by the Decision of 6 July 2011.³⁹

ii. Documents 433 and 206

35. The Prosecutor points out that document 433 is a duplicate of document 206 which includes, in addition, the contents of document 184 which has already been disclosed to the Applicant.⁴⁰ Regarding the remainder of the contents of document 206 which has not yet been disclosed, the Prosecutor has filed suggested redactions before the Pre-Trial Judge.

³⁶ STL, Case No. CH/PTJ/2012/01, *Observations intérimaires du Général El Sayed à "Prosecution's Submission in Compliance with the Pre-Trial Judge's Scheduling Order of 21 October 2011"*, 11 January 2012.

³⁷ STL, Case No. OTP/PTJ/2012/01, *Prosecution's Submission of Documents Following the Pre-Trial Judge's Decision of 1 November 2011*, 15 February 2012.

³⁸ The present order will not analyse each point developed by the Prosecutor in response to the Decision of 1 November 2011. Indeed, a number of explanations provided by the Prosecutor, which have not been contested by the Applicant, do not require the intervention of the Pre-Trial Judge; see, in this respect, paragraphs 4 and 44 to 67 of the Prosecutor's Submissions of 8 November 2011.

³⁹ Prosecutor's Submissions of 8 November 2011, para. 10.

⁴⁰ Prosecutor's Submissions of 8 November 2011, para. 11.

iii. Document 237

36. The Prosecutor points out that two pages of document 237 still have to be translated before being filed before the Pre-Trial Judge after redaction where necessary.⁴¹ Should they not need to be redacted, he shall disclose them to the Applicant by way of the Registry.

iv. Document 36

37. The Prosecutor maintains that the Pre-Trial Judge did not order the disclosure of document 36 in the Decision of 6 July 2011. No risk assessment has therefore been conducted with respect to the disclosure of this document, which is necessary before any witness statement is disclosed to the Applicant.⁴²

v. Document 21

38. The Prosecutor points out that, contrary to what is mentioned in the Prosecutor's spreadsheet annexed to his Submissions, document 21 is not a witness statement; it consists of five different documents, some of which contain information relating to a number of witnesses. He states that he is not the author of these documents and is not in a position to provide further information in response to the questions the Pre-Trial Judge raised in the Decision of 1 November 2011.⁴³

vi. Document 31

39. The Prosecutor points out that document 31 is made up of 17 different documents, including five witness statements and documents containing information relating to a witness. He states that he is not the author of these documents and is not in a position to provide any further information in response to the questions the Pre-Trial Judge raised in the Decision of 1 November 2011.⁴⁴

vii. Document 34

40. The Prosecutor points out that document 34 consists of several witness statements taken at different dates. Following the question raised by the Pre-Trial Judge in the Decision

⁴¹ Prosecution's Submissions of 8 November 2011, para. 38.

⁴² Prosecution's Submissions of 8 November 2011, paras 41, 42.

⁴³ Prosecution's Submissions of 8 November 2011, paras 69 to 78.

⁴⁴ Prosecution's Submissions of 8 November 2011, paras 79 to 84.

of 1 November 2011, the Prosecutor has undertaken to adjust the suggested redactions in the first statement.⁴⁵

viii. Document 43

41. With regard to a number of suggested redactions relating to document 43 for which the Pre-Trial Judge required further explanation, the Prosecutor has undertaken to consult with the VWU within the framework of reviewing all of the witness statements.⁴⁶

ix. The length of the Submissions of 8 November 2011

42. Finally, the Prosecutor seeks leave from the Pre-Trial Judge to file submissions that exceed the limit of 6000 words set out in Article 5 (1) (a) of the Practice Direction on the Filing of Documents Before the Special Tribunal for Lebanon (the "Direction").⁴⁷

b. The Submissions of 15 November 2011

43. The Submissions of 15 November 2011 follow the Order of the Pre-Trial Judge of 17 October 2011 for enforcement of the Appeals Chamber Decision of 19 July 2011.

44. The Prosecutor points out that he interpreted the Appeals Chamber Decision of 19 July 2011 as not implying that some internal documents that might contain information to be disclosed to the Applicant would necessarily fit into another category of documents when they are classified in the category "reports, memoranda or other internal documents" referred to in Rule 111 of the Rules.⁴⁸

45. The Prosecutor has reviewed the documents belonging to categories (1), (2) , and (3) in order to determine to what extent those documents might contain information that should be handed over to the Applicant, in accordance with the Appeals Chamber Decision of 19 July 2011.⁴⁹ He has also reviewed the documents from the aforementioned categories (1), (2) and (3) which had not yet been made available but which were to be disclosed to Mr El Sayed, after being redacted, in order to determine to what extent those documents might contain other information that should be disclosed to him.⁵⁰ By means of this review process,

⁴⁵ Prosecution's Submissions of 8 November 2011, paras 85 to 87.

⁴⁶ Prosecution's Submissions of 8 November 2011, paras 88 to 90.

⁴⁷ Prosecution's Submissions of 8 November 2011, para. 91.

⁴⁸ Prosecution's Submissions of 15 November 2011, para. 4.

⁴⁹ Prosecution's Submissions of 15 November 2011, para. 5.

⁵⁰ Prosecution's Submissions of 15 November 2011, documents 145, 159 and 264, para. 6.

the Prosecutor identified 40 documents which contain information that could be disclosed to the Applicant.⁵¹

46. The Prosecutor also adds that after reviewing the documents from other categories than those referred to in the preceding paragraph that met the following two conditions: 1) they contain suggested redactions since they were included in the category of internal documents or investigator's notes; and 2) they have not yet been disclosed to the Applicant.⁵²

47. The Prosecutor identified 27 documents possibly falling under the aforementioned Categories (2) and (3) which contain information relating to a number of witnesses which, out of concern for consistency, should be reviewed at the same time as the other documents referred to in the Appeals Chamber Decision of 7 October 2011 and the Order of 21 October 2011.⁵³ He also identified: 1) six "operative" documents in the sense described by the Appeals Chamber in its Decision of 19 July 2011;⁵⁴ 2) three documents that should be considered to be "admissions of fact" in the same sense;⁵⁵ and 3) three documents that were previously deemed irrelevant but which contain information that should be disclosed to the Applicant.⁵⁶

48. Of the 28 documents that have not yet been disclosed to the Applicant, but which should be redacted because they consist of internal reports, memoranda and notes,⁵⁷ the Prosecutor states that document 466 does not contain any information that is liable to disclosure to the Applicant. Documents 145, 159 and 532, as well as the rest of these documents, contain information relating to a witness which, out of concern for consistency, should be reviewed at the same time as the other documents referred to in the Appeals Chamber Decision of 7 October 2011 and the Order of 21 October 2011.⁵⁸

⁵¹ Prosecution's Submissions of 15 November 2011, para. 6.

⁵² Prosecution's Submissions of 15 November 2011, para. 7.

⁵³ Prosecution's Submissions of 15 November 2011, paras 8 and 9.

⁵⁴ Prosecution's Submissions of 15 November 2011, documents 62, 63, 64, 68, 73 and 74, para. 10.

⁵⁵ Prosecution's Submissions of 15 November 2011, documents 82, 86 and 90, para. 11.

⁵⁶ Prosecution's Submissions of 15 November 2011, documents 100, 103 and 264, para. 12.

⁵⁷ Prosecution's Submissions of 15 November 2011, para. 13.

⁵⁸ Prosecution's Submissions of 15 November 2011, paras 13 and 15.

c. The Submissions of 28 November and 12 December 2011

49. Pursuant to the Decision of 12 May 2011, according to which the Pre-Trial Judge ordered the translation by the Language Services Section of the Tribunal of a number of documents constituting part of the criminal file of the Applicant, on 28 November 2011, the Prosecutor filed documents 12, 35 and 443, with suggested redactions, and, on 12 December 2011, document 437 containing 993 pages, with suggested redactions.

d. The Submission of 30 December 2011

50. The Prosecutor recalls that, in accordance with the Orders of the Pre-Trial Judge of 17 and 21 October 2011 implementing the Appeals Chamber Decision of 7 October 2011, he requested the views of the VWU on the methodology used to assess the risks relating to the witnesses whose statements should be disclosed to the Applicant. In its report of 21 November 2011, the VWU, on the one hand, recommended that a number of amendments be made to the methodology used to carry out the risk assessment put in place by the Prosecutor and, on the other hand, endorsed the Prosecutor's methodology relating to the redactions made to the witness statements.⁵⁹ On 22 December 2011, the Prosecutor finalised the risk assessment for the witnesses according to the methodology recommended by the VWU.⁶⁰

51. Following this assessment, where a risk with regard to a witness is described as "high" or "very high" (according to the terminology used in the English version of the document), the Prosecutor seeks that the statements made by this witness not be disclosed to the Applicant and to his counsel.⁶¹ He invokes the need to protect the witnesses, while at the same time making it clear that the Applicant's liberty is not at stake and that he does not have to answer the allegations made by these witnesses. Finally, he states that the VWU supports this approach.⁶² Should the Pre-Trial Judge not be convinced by this approach, the Prosecutor would like only the information contained in the witness statements that directly implicates the Applicant to be subject to disclosure, with the exception of all other information, which

⁵⁹ Prosecution's Submission of 30 December 2011, paras 1 to 7.

⁶⁰ Prosecution's Submission of 30 December 2011, para. 9.

⁶¹ Prosecution's Submission of 30 December 2011, para. 14.

⁶² Prosecution's Submission of 30 December 2011, para. 15.

should be redacted. In that event, the Prosecutor seeks leave to propose further redactions of the documents concerned.⁶³

52. While reviewing the documents, the Prosecutor identified a number of statements which, according to him, should not be disclosed because the information contained therein is repetitive or has no connection with the Applicant or with the attack against Mr Hariri and should not therefore be considered to form part of the Applicant's criminal file.⁶⁴

53. In addition, where the risks are described as "very low", "low" and "medium", according to the terminology used in the English version of the Prosecutor's Submission, and the witness statement does not refer to the Applicant or the attack against Mr Hariri, the Prosecutor proposes to redact them completely.⁶⁵

54. Finally, the Prosecutor mentions becoming aware of a number of witness statements that were new and consequently not referred to in the Decision of 6 July 2011. As regards those that have been translated, the Prosecutor has submitted them to the Pre-Trial Judge with suggested redactions.⁶⁶ As regards the statement that for the moment only exists in Arabic, the Prosecutor has undertaken to submit it to the Pre-Trial Judge after it has been translated.⁶⁷ Further new documents not mentioned in the Annex to the Decision of 6 July 2011 have been submitted for consideration by the Pre-Trial Judge. These are documents falling under Categories (2) and (3) (internal memoranda and investigators' notes), which were subject to review by the Prosecutor, in accordance with the Appeals Chamber Decision of 19 July 2011.⁶⁸

55. With respect to the suggested redactions, the Prosecutor recalls that a number of them were already approved by the Pre-Trial Judge in the Decision of 6 July 2011.⁶⁹ The Prosecutor adds that, as a consequence, the Submission only mentions the reasons for the new suggested redactions and not those for the redactions which, in his opinion, have already been approved by the aforementioned Decision.⁷⁰ As a general rule, the names of personnel from

⁶³ Prosecution's Submission of 30 December 2011, para. 16.

⁶⁴ Prosecution's Submission of 30 December 2011, para. 18.

⁶⁵ Prosecution's Submission of 30 December 2011, para. 19.

⁶⁶ Prosecution's Submission of 30 December 2011, para. 20.

⁶⁷ Prosecution's Submission of 30 December 2011, para. 21.

⁶⁸ Prosecution's Submission of 30 December 2011, para. 23.

⁶⁹ Prosecution's Submission of 30 December 2011, para. 22.

⁷⁰ Prosecution's Submission of 30 December 2011, para. 26.

the Investigation Commission, with the exception of those of the Commissioners and the Chief Investigator, have been redacted.⁷¹ In some documents, one person's name has been redacted in certain places and not in others according to whether the person referred to is an information source or has been implicated by the witness in the attack against Mr Hariri.⁷²

e. The Observations of the Applicant of 11 January 2012

56. The Applicant maintains that, through his requests, the Prosecutor is trying to oppose the exercise of his right to remedy, even though it has been recognised, by delaying its enforcement.⁷³ He refers to the Decisions of the Pre-Trial Judge and of the Appeals Chamber which recognised the right to obtain the documents from his criminal file. He maintains that the Prosecutor has adopted delaying tactics since the Decision of 12 May 2011 and that those tactics have resulted in the enforcement of the decisions of the Tribunal being set back by an additional eight months.⁷⁴ To date, the Applicant has received 340 documents, none of them allowing justification of his detention.⁷⁵

57. The Applicant opposes the Prosecutor's proposal to redact a number of statements in their entirety "[TRANSLATION] under the pretext of the safeguarding of the physical integrity of their authors and their accomplices"⁷⁶ while he has never been accused of having threatened the safety of persons who contributed to his detention. In addition, the Applicant finds himself unable to demonstrate the lack of accuracy of the threats imputed to him on account of the proceedings being conducted *ex parte*.⁷⁷

f. The Submission of the Prosecutor of 15 February 2012

58. After having reviewed documents 21, 31, 34, 43 and 206 which were to be filed on 30 December 2011 at the latest, the Prosecutor requests the Pre-Trial Judge to approve a number of redactions, as well as the late filing of that Submission.⁷⁸

⁷¹ Prosecution's Submission of 30 December 2011, para. 28.

⁷² Prosecution's Submission of 30 December 2011, para. 29.

⁷³ Applicant's Observations of 11 January 2012, paras 2 and 3.

⁷⁴ Applicant's Observations of 11 January 2012, para. 14.

⁷⁵ Applicant's Observations of 11 January 2012, para. 23.

⁷⁶ Applicant's Observations of 11 January 2012, para. 17.

⁷⁷ Applicant's Observations of 11 January 2012, para. 18.

⁷⁸ Prosecution's Submission of 15 February 2012, paras 3, 4 and 5.

59. With respect to document 206, the Prosecutor points out that it contains, in addition to a witness statement, documents relating to the investigation which should not be disclosed. He states that the suggested redactions shall be filed before the Pre-Trial Judge after a risk assessment has been carried out.⁷⁹

IV. Statement of reasons

a. With respect to implementing the Decision of the Appeals Chamber of 19 July 2011 (Prosecutor's Submission of 15 November 2011)

60. The Pre-Trial Judge deems the Prosecutor's interpretation to be justified, according to which the internal documents which allegedly contain information which should be disclosed to the Applicant do not fall in a new category of documents but form part of the "reports, memoranda or other internal documents" referred to in Rule 111 of the Rules.

61. As recommended by the Prosecutor, the Pre-Trial Judge considers that, out of concern for consistency and the proper administration of justice, the 27 documents falling under the aforementioned Categories (2) and (3), together with document 532, must be reviewed at the same time as the other documents reviewed in light of the Appeals Chamber Decision of 7 October 2011 and the Order of 21 October 2011.

b. With respect to the request for redaction of the names of the Lebanese officials (Prosecutor's Submissions of 8 November, 30 December 2011 and of 15 February 2012)

62. With respect to the general question of the redaction of the names of Lebanese officials in several documents to be disclosed to the Applicant, and notably in document 437 containing 993 pages, the Pre-Trial Judge reiterates paragraph 66 of the Decision of 1 November 2011:

The proposed redactions concern the names and titles of Lebanese officials and the names of third parties with the aim of protecting their security. In the context of decisions issued by organs of justice, the Pre-Trial Judge does not *a priori* consider well-founded the requests for redaction of the names and titles of the Lebanese judges who received those requests or who signed judicial decisions. Indeed, on the one hand, any litigant must be able *a priori* to know who his judges are and on the other, the proposed redactions do not seem to be sufficient to conceal the identity of the

⁷⁹ Prosecution's Submission of 15 February 2012, para. 4.

persons concerned. Consequently, the Prosecutor is invited to specify, in light of those considerations, the reasons that would justify those redactions. Failing this, the Prosecutor must file the relevant extracts of document 437, restricting the proposed redactions to the need for protecting, in particular, the interests of witnesses and third parties.⁸⁰

63. In the Submissions of 8 November 2011, the Prosecutor states that the very *raison d'être* of the redaction process is to protect information, including the identity of individuals such as Lebanese officials who might be at risk were their identity to be disclosed, and that this practice was approved by the Pre-Trial Judge in the Decision of 6 July 2011.⁸¹ With respect to the redactions supposedly approved by the aforementioned Decision, the Pre-Trial Judge notes that, on the one hand, the names of the Lebanese officials have not been systematically redacted by the Prosecutor⁸² and, that on the other hand, and primarily, the Appeals Chamber Decision of 7 October 2011 called into question the whole process of protection and redaction. Indeed, the Appeals Chamber reminded the Prosecutor that he should ensure the redactions were neither inconsistent, nor incomplete and should review the redaction process in collaboration with the VWU.⁸³ As a consequence, the Pre-Trial Judge considers that all the redactions approved prior to the review by the VWU of the methodologies used for risk assessment and its application of the Prosecutor's redactions are subject to revision following the Appeals Chamber Decision of 7 October 2011.

64. With respect to the consultation between the Prosecutor and the VWU, the Pre-Trial Judge notes that, in the Submissions of 30 December 2011, the Prosecutor states that the VWU endorsed his redaction method.⁸⁴ In this regard, the Pre-Trial Judge notes that the method does in fact comprise general principles for the redactions of documents, one of which mentions, without explanation, that the names of the Lebanese officials implicated in the investigation are to be redacted.⁸⁵ The Prosecutor points out that the redactions of the names of third parties and of information enabling them to be identified were proposed in connection with the statements from witnesses, whether or not those witnesses were the subject of a risk assessment.⁸⁶ However, as stated by the VWU in the memorandum of 21 November 2011, the methodology employed by the Prosecutor in order to determine the

⁸⁰ Decision of 1 November 2011, para. 66, footnote omitted.

⁸¹ Prosecution's Submissions of 8 November 2011, paras 9 and 10.

⁸² See documents 5, 6, 9, 13, 45 and 56 referred to in the Decision of 6 July 2011.

⁸³ Decision of the Appeals Chamber of 7 October 2011, paras 27, 29 and 30.

⁸⁴ Prosecution's Submission of 30 December 2011, para. 7.

⁸⁵ Prosecution's Submission of 30 December 2011, Annex B, para. 9.

⁸⁶ Prosecution's Submission of 30 December 2011, Annex B, para. 8.

level of redaction required must be based on an assessment of the risks.⁸⁷ As a consequence, the VWU states that it can only comment on the redaction methodology insofar as it relates to the witnesses and victims for which such an assessment has been made. It states:

The VWU points out that redactions to information absent any security concerns, such as the removal of information relative to the Prosecution's investigations or evidence, are outside of the VWU remit, and accordingly did not form part of this mandate.⁸⁸

65. The Pre-Trial Judge notes that the redaction of the names and other information allowing Lebanese officials implicated in the investigation, personnel from the Commission or third parties to be identified does not appear to be justified by the result of a risk evaluation apparently carried out with respect to those persons, contrary to the method employed with respect to the assessment of the risks incurred by the witnesses. In addition, the category "Lebanese officials implicated in the investigation" is vague and encompasses a wide range of personnel: investigator, investigating judge, Public Prosecutor, etc. The Pre-Trial Judge therefore directs the Prosecutor to consult the VWU with regard to the specific matter of redacting the names of third parties in general and of Lebanese officials in particular and to specifically justify his suggested redactions with respect to the Lebanese officials, it being understood that any measure for the protection of information must be the consequence of a risk assessment, the result of which will have been approved by the VWU.

66. After this further review, the Prosecutor shall seize the Pre-Trial Judge with the result of those consultations and file all the documents to be disclosed to the Applicant once again, with the revised suggested redactions as appropriate, together with the report from the VWU.

c. With respect to the Prosecutor's request for non-disclosure of the statements from witnesses incurring risks described as "high" or "very high" (Prosecutor's Submissions of 30 December 2011 and 15 February 2012)

67. With respect to the Prosecutor's request for non-disclosure of the statements from nine witnesses incurring risks described as "high" or "very high", the Pre-Trial Judge notes that the Prosecutor maintains that the VWU agrees with his request. However, it appears that the VWU has not given its views directly on this proposal, but has restricted its comments to

⁸⁷ Prosecution's Submission of 30 December 2011, Annex A, para. 16.

⁸⁸ Prosecution's Submission of 30 December 2011, Annex A, para. 21.

the redaction measures proposed in light of the risks, without providing its views as to the existence of such risks.⁸⁹

68. The Pre-Trial Judge points out that, by way of the Decision of 7 October 2011, the Appeals Chamber made it clear that the Prosecutor should demonstrate that the VWU expressed its agreement as to his assessment of the risks incurred by the witnesses.⁹⁰ Such a demonstration has not been evidenced here, however. The Pre-Trial Judge notes that the wording of the VWU's mandate seems to have evolved since, on 21 November 2011, the VWU indicates its remit was not to examine whether the risk assessment carried out by the Prosecutor was correct,⁹¹ whereas, on 31 October 2011, the VWU stated that its role was to assess the risk assessment methodology and its results, if appropriate.⁹²

69. Consequently, the Pre-Trial Judge considers that the Prosecutor must be able to demonstrate that the VWU is satisfied with the result of the risk assessment for each witness referred to in Annex D of his Submission of 30 December 2011. In addition, the VWU is invited to give its views specifically as to the measure for non-disclosure of the documents proposed by the Prosecutor in relation to the witnesses for whom the risk incurred is deemed to be "high" or "very high".

d. With respect to the Prosecutor's request for non-disclosure of certain statements or for the redaction of information from them that is repetitive or has no connection with the Applicant or with the attack against Mr Hariri (Prosecutor's Submissions of 30 December 2011 and 15 February 2012)

70. With respect to applying the relevance criterion to restrict the Applicant's right of access to his criminal file, invoked once again by the Prosecutor, the Pre-Trial Judge reiterates paragraph 41 of his Decision of 12 May 2011:

The Pre-Trial Judge recalls that the issue of applying a relevance criterion was debated during the hearing of 19 April 2011. In order to ensure that the Applicant's right to have access to his criminal file is respected, as recognised in the Order of 17 September 2010, the Pre-Trial Judge considers, based on the examples put forward during that hearing, that according to that criterion, the Applicant should, in principle, have access to all the witness statements which were produced in the context of the examination of his file and on which his detention was based. Consequently,

⁸⁹ Prosecution's Submission of 30 December 2011, Annex A, paras 19 to 21.

⁹⁰ Decision of 7 October 2011, para. 34.

⁹¹ Prosecution's Submission of 30 December 2011, Annex A, para. 23.

⁹² Registry Submission, 31 October 2011, para. 6.

among the witness statements the Prosecutor has in his possession, the documents relating to Mr El Sayed's request cannot be limited to the statements made by witnesses or suspects which it would appear directly implicate him in the Hariri case. The result is therefore, first and foremost, that the statements from all the 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 in paragraph 27 above.⁹³

Within the specific context of the witness statements, the Pre-Trial Judge had directed the Prosecutor to “indicate clearly in his suggested redactions the reasons behind them, except for that of their alleged relevance.”⁹⁴

71. The Pre-Trial Judge considers that, since he has ruled on the matter, nothing justifies the Prosecutor seeking once again to redact from a number of witness statements information he describes, according to his own assessment and unilaterally, as “repetitive” or having no connection with the Applicant or the attack against Mr Hariri. If, apart from the redaction of information to be protected, the documents to disclose to the Applicant were also redacted of information described as “repetitive” or irrelevant by the Prosecutor, the Applicant’s right of access to the documents comprising his criminal file would as a result be altered without valid justification. The Pre-Trial Judge recalls that the redaction process was approved with the sole purpose of protecting information relating to the ongoing investigation, the safety of the witnesses and the interests of national and international security.

72. Consequently, the request for the redaction of superfluous or irrelevant information from a number of witness statements violates the Decision of 12 May 2011 and must be dismissed. The Prosecutor must therefore look again at the statements he proposes for non-disclosure or for redaction on the basis of these criteria and disclose them to the Applicant.

e. Selective redactions (Prosecutor’s Submission of 30 December 2011)

73. The Pre-Trial Judge is not convinced by the Prosecutor’s explanations regarding the redaction of the name of one person in a number of passages of a witness statement and not in others, according to the context in which the name of the person is used – whether this person is an information source or implicated in the assassination of Mr Hariri.⁹⁵ The Pre-Trial Judge once again reiterates that the Appeals Chamber had directed the Prosecutor to be consistent in

⁹³ Decision of 12 May 2011, para. 41.

⁹⁴ Decision of 12 May 2011, para. 42.

⁹⁵ For example, Prosecution’s Submission of 30 December 2011, documents 29 and 54, para. 29.

the redaction process and notes that this selective method of redaction is not included in the methodology reviewed and approved by the VWU.

74. Consequently, the Pre-Trial Judge directs the Prosecutor to consult the VWU with regard to this methodology and to look again, as appropriate, at his suggested redactions in light of the comments that the VWU might make in this respect.

f. With respect to the length of the Submissions of 8 November 2011 and the late filing of the Submission of 15 February 2012

75. Pursuant to Article 5 (1) of the Direction, the Pre-Trial Judge has examined the Prosecutor's request to file the Submissions of 8 November 2011 containing over 6,000 words. He notes that this request is not a reasoned one, although it is in the interests of a proper administration of justice for any request of the sort to be so. Nevertheless, the Pre-Trial Judge notes that those Submissions responded point by point to the Decision of 1 November 2011 which included many detailed questions to the extent that it was difficult to comply with the prescription of the Direction. Consequently, and under these circumstances, the Pre-Trial Judge allows the filing of the Submissions of 8 November 2011, even though it exceeds 6,000 words.

76. The Pre-Trial Judge authorises the late filing of the Submission of 15 February 2012 in the interests of justice, noting all the same that no justification for it has been put forward by the Prosecutor, although in principle for any application of this kind, this should be done.

g. Conclusions

77. Recalling that the purpose of the ongoing proceedings is "both disclosure to Mr El Sayed of his entitlement and protection of individuals where that is justified",⁹⁶ the Pre-Trial Judge does not find himself sufficiently enlightened by the result of the Prosecutor's consultation with the VWU.

78. In particular, the Pre-Trial Judge considers that it is incumbent on the Prosecutor to specifically consult the VWU on the following matters: 1) the approval by the VWU of the method for assessing the risks to the witnesses and other persons conducted by the

⁹⁶ Appeals Chamber Decision of 7 October 2011, para. 34.

Prosecutor, and 2) the residual questions relating to the methodology for the redaction of documents, whether these be witness statements or other documents (redaction of the names of third parties including the Lebanese officials and the personnel from the Commission and “selective” redactions), and 3) the implications of the assessed risk to which the witness is exposed (“negligible, very low, low, medium, high, very high, etc.”) on the obligation to disclose his statements.

79. In addition, the Pre-Trial Judge points out that the Prosecutor does not have leave to propose the redaction of the information that he describes as repetitive or irrelevant.

80. Insofar as one or the other document filed since the Submissions of 8 November 2011 until the Submission of 15 February 2012 may be concerned by the amendments to be made after the VWU has been further consulted and in accordance with the principles set down in the Decision of 12 May 2011 as referred to above, the Pre-Trial Judge orders the Prosecutor to file all of these documents again.

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

ORDERS the Prosecutor to file again, within 30 days, all of the documents referred to in the Submissions of 8, 15, 28 November 2011, 12 and 30 December 2011, and 15 February 2012 after having consulted the VWU in accordance with the present decision and the principles set down in the Decision of 12 May 2011 as set out above; and

ORDERS the Prosecutor to disclose to the Applicant the statements which he proposed not to disclose or proposed to redact on the basis of relevance and repetition criteria.

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

Leidschendam, 20 February 2012

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[signature]

Daniel Fransen
Pre-Trial Judge

