

**THE PRE-TRIAL JUDGE**

Case No: CH/PTJ/2012/03
The Pre-Trial Judge: Mr Daniel Fransen
The Registrar: Mr Herman von Hebel
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**DECISION SETTING A DEADLINE FOR THE VICTIMS AND WITNESSES UNIT
TO DECIDE ON THE RISK ASSESSMENTS FOR THE WITNESSES
MENTIONED IN THE ORDER OF 21 MAY 2012**

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Office of the Prosecutor:
Mr Norman Farrell

Defence Office:
Mr François Roux





I. Subject of the decision

1. In this Decision, the Pre-Trial Judge sets a deadline for the Victims and Witnesses Unit (the “VWU”) to decide on the risk assessments for the witnesses mentioned in the Order of 21 May 2012.¹

II. Procedural background

2. On 21 May 2012, the Pre-Trial Judge ordered the VWU to decide, without delay, on the risk assessments for the witnesses listed in Annex D to the Prosecution’s Submissions of 30 December 2011,² in accordance with the methodology it will have adopted in order to fulfil the task it had been assigned.

3. On 20 June 2012,³ Mr El Sayed (the “Applicant”) petitioned the Pre-Trial Judge to set a deadline for the VWU to decide on the results of the risk assessments for the witnesses mentioned in the Order of 21 May 2012.

4. On 22 June 2012, pursuant to Rule 8 of the Rules of Procedure and Evidence (the “Rules”), the Pre-Trial Judge invited the Prosecutor and the VWU to respond to that Request by 28 June 2012 at the latest,⁴ which they did.⁵

¹ STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/02, *Ordonnance relative au mémoire du Procureur déposé le 27 mars 2012*, 21 May 2012 (the “Order of 21 May 2012”).

² STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/18, 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 “Prosecution’s Submission of 30 December 2011”).

³ STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/02, *Demande urgente d’impartir un délai à la SAVT et de remise de documents exclus de la procédure ex parte*, 20 juin 2012 (the “Request of 20 June 2012”).

⁴ STL, Confidential memorandum, 22 June 2012.

⁵ STL, *In the Matter of El Sayed*, Case No. REG/PTJ/2012/02, Submission by the Victims and Witnesses Unit Pursuant to Rule 50 (D) and in Response to Mr El Sayed’s *Demande urgent d’impartir un délai à la SAVT et de remise de documents exclus de la procédure ex parte*, 28 June 2012 (the “VWU Submission of 28 June 2012”). On 4 July 2012, the VWU filed a corrigendum and a corrected version of this Submission: STL, *In the Matter of El Sayed*, Case No. REG/PTJ/2012/03, Corrigendum to the Submission by the Victims and Witnesses Unit Pursuant to Rule 50 (D) and in Response to Mr El Sayed’s *Demande urgente d’impartir un délai à la SAVT et de remise de documents exclus de la procédure ex parte*, 4 July 2012 (the “Corrigendum”); STL, *In the Matter of El Sayed*, Case No. REG/PTJ/2012/03, Submission by the Victims and Witnesses Unit Pursuant to Rule 50 (D) and in Response to Mr El Sayed’s *Demande urgente d’impartir un délai à la SAVT et de remise de documents exclus de la procédure ex parte*, 4 July 2012 (the “VWU Submission of 4 July 2012”); STL, *In the Matter of El Sayed*, Case No. OTP/PTJ/2012/03, Prosecution’s Submissions Informing the Pre-Trial Judge of its Intention Case No.: CH/PTJ/2012/03



III. The Applicant's Request

5. In his Request, the Applicant presents the following facts and arguments. On 3 December 2010, he submitted a non-exhaustive inventory of the documents and materials that he deems necessary to support his claims against those he considers responsible for "his arbitrary detention" before the competent Lebanese courts.⁶

6. He states that those proceedings have lasted for over 27 months and that the Pre-Trial Judge, as well as the Appeals Chamber of the Tribunal had ruled in favour of the disclosure of the above-mentioned documents and materials to the Applicant. However, the Prosecutor has still not disclosed the relevant documents to the Applicant.⁷

7. The Applicant recalls that, by way of the Order of 21 May 2012, the Pre-Trial Judge ordered the VWU to decide, without delay, on the risk assessments for the witnesses mentioned in Annex D to the Prosecution's Submission of 30 December 2011, without however setting a deadline for the Prosecution to disclose the materials referred to in the decision relating to the disclosure of materials from the Applicant's criminal file of 12 May 2011.⁸ Contrary to previous decisions, the Prosecution is therefore no longer bound by a deadline set by the Pre-Trial Judge. It is dependent solely on the diligence of the VWU, which gives rise to an open time limit which is prejudicial to the interests of the Applicant.⁹

8. Furthermore, the Applicant identified two categories of documents which are not subject to the *ex parte* proceedings.¹⁰ He considers that those documents should be immediately disclosed to him in execution of the decision of 12 May 2011. These are:

- a. the statements of witnesses whose identities were disclosed in the first two reports of the International Independent Investigation Commission (the

to Disclose Materials to Mr El Sayed and in Response to Mr. El Sayed's "Urgent request to set a time-limit for the VWU and for the submission of documents excluded from the *ex parte* proceedings", 28 June 2012 (the "Prosecution's Submissions of 28 June 2012").

⁶ Request of 20 June 2012, para. 6.

⁷ *Id.*, paras 5 and 7.

⁸ STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2011/08, Decision on the Disclosure of Materials from the Criminal File of Mr El Sayed, 12 May 2011 (the "Decision of 12 May 2011").

⁹ Request of 20 June 2012, paras 8-9.

¹⁰ *Id.*, para. 13.



“Commission”) or who voluntarily disclosed their identities and used the media to implicate the Applicant in the assassination of Rafic Hariri,¹¹ and

- b. administrative elements of the investigation case file, such as the investigation records, kept by the two investigating judges who were responsible for the case between 2005 and 2009.¹²

9. The Applicant emphasises the importance of those disclosures for the purposes of the petition he has filed before the “Lebanese Plenary Assembly”. Indeed, in his opinion, he is unable to prove his claims if he is not in possession of the following documents:¹³

- a. the initiation of proceedings against the Applicant by the Lebanese Prosecutor Mr Said Mirza on 30 August 2005 and successive challenges to the Applicant’s applications for release;
- b. the warrant of arrest issued against the Applicant by the investigating judge Mr Elias Eid on 3 September 2005; and
- c. successive decisions dismissing applications for release (or the absence of a response to such applications) rendered by Judges Elias Eid and Sakr Sakr between 3 September 2005 and 29 April 2009.

10. To ensure that his current application is successful and to preserve his right to file additional applications, the Applicant submits that the remaining 491 documents cannot be withheld by the Prosecution. He requests that the Pre-Trial Judge order the Prosecutor to disclose all documents still in his possession which fall outside the scope of the *ex parte* proceedings and, in particular, those mentioned in Numbers 8 to 28 of the inventory, with the exception of No. 27.¹⁴

¹¹ *Id.*, paras 14-16.

¹² *Id.*, paras 17-19.

¹³ *Id.*, paras 21-22.

¹⁴ *Id.*, para. 27 and provisions of para. 2.



IV. Observations of the Victims and Witnesses Unit

11. On 28 June 2012,¹⁵ the VWU filed its observations and informed the Pre-Trial Judge of the disclosure by the Prosecution on 20 June 2012 of the following documents:

- a. an internal memorandum in which the Prosecution outlined the manner in which it intended to disclose certain documents to the Applicant; and
- b. updated general principles for the redactions of documents in the El Sayed Matter.¹⁶

12. The VWU states that, at the Prosecution's request, it undertook to provide feedback on those two documents by 29 June 2012. It intends thereby to provide the Prosecutor with its views regarding the impact of the Prosecutor's new approach on the potential risks faced by the witnesses mentioned therein.¹⁷

13. The VWU recalls that its work, and particularly the time needed to accomplish it, depends principally on the quantity and nature of the documents that will be provided by the Prosecution. It emphasises that since it is not yet in possession of the relevant documents, it is unable, at this stage, to provide an indication of the time needed to assess the risks.¹⁸

14. The VWU invites the Pre-Trial Judge to consider, when setting the deadline for it to assess the risks for witnesses, the time needed for each of the four methods¹⁹ proposed and enumerated in the Registry's Submission of 17 May 2012.²⁰

¹⁵ VWU Submission of 28 June 2012 and VWU Submission of 4 July 2012.

¹⁶ Prosecution's Submission of 28 June 2012, Annex A, Further Updated General Principles for the Redactions of Documents in the El Sayed Matter, 28 June 2012, confidential and *ex parte*.

¹⁷ VWU Submission of 4 July 2012, para. 4.

¹⁸ *Id.*, para. 7.

¹⁹ *Id.*, para. 8.

²⁰ STL, *In the Matter of El Sayed*, Case No. REG/PTJ/2012/01, Registry Submission pursuant to Rule 48 (C) and further to the Pre-Trial Judge's Order of 20 February 2012, 17 May 2012, confidential and *ex parte*.



V. The Prosecution's responses

15. On 28 June 2012, the Prosecution responded to the Request of 20 June 2012 and informed the Pre-Trial Judge of its intention to disclose a certain number of documents requested by the Applicant.²¹

16. According to the Prosecution, all the documents – and in particular statements from publicly known witnesses and administrative documents related to the investigation as set forth at paragraph 8 of this decision – will be reviewed according to the updated general principles for the redaction of documents in the El Sayed Matter and submitted to VWU for its observations prior to their disclosure, which will start on 9 July 2012.²²

17. On 6 July 2012, the Prosecution filed a submission before the Pre-Trial Judge reiterating its intention to disclose a certain number of documents to Mr Sayed and seeking leave to continue with its intended line of conduct.²³

18. Hence, in order to facilitate and expedite the disclosure process, the Prosecution proposes the following working method. It proposes the disclosure of documents relating to witnesses facing a “very low”, “low” and “average” risk, as well as other documents dating as from 9 July 2012 with the approval of the Pre-Trial Judge, but without going through the VWU.²⁴

19. The Prosecution further seeks the non-disclosure of documents related to witnesses who face a “high” and “very high” risk. These documents concern nine of the 23 witnesses for whom risk assessments have already been conducted.²⁵

20. The Prosecution states that at its request, the VWU provided its observations to it on 29 June 2012 in a confidential internal memorandum.²⁶ According to the Prosecution, the VWU suggests a completely different approach from the one it had intended to adopt. It

²¹ Prosecution's Submissions of 28 June 2012. Two confidential *ex parte* Annexes were attached to these submissions.

²² *Id.*, paras 2-5.

²³ STL, *In the Matter of El Sayed*, Case No. OTP/PTJ/2012/04, Prosecution's Submissions Reiterating its Intention to Disclose Materials to Mr El Sayed, 6 July 2012 (the “Prosecution's Submissions of 6 July 2012”).

²⁴ *Id.*, paras 2, 16, 18 and 20.

²⁵ *Id.*, paras 19 and 21.

²⁶ *Id.*, Annex A, Internal Memorandum from the Registry to the Office of the Prosecutor dated 29 June 2012, 6 July 2012, confidential and *ex parte* (“Annexe A of 6 July 2012”).



would entail an independent review of the risk and threat assessments for the persons concerned. It would however prolong considerably the ongoing proceedings.²⁷

21. In the event that the Pre-Trial Judge does not endorse the Prosecution's suggested approach, then the Prosecution will immediately provide the VWU with the documents it has requested in order that it can conduct its own review of the risk and threat assessments for the witnesses.²⁸

VI. The Applicant's Reply

22. Without previously seeking leave from the Pre-Trial Judge, the Applicant filed a reply before the Pre-Trial Judge on 10 July 2012 in response to the Prosecution's Submissions of 6 July 2012.²⁹

VII. Statement of reasons

23. With regard firstly to the Applicant's Reply of 10 July 2012, it is inadmissible, since it was filed without seeking leave from the Pre-Trial Judge, in violation of Rule 8 of the Rules.

24. With regard to documents relating to "publicly known" witnesses and the administrative elements of the Lebanese investigation case file, the Pre-Trial Judge considers that it is for the Prosecutor to evaluate the materials for which he intends to seek protective measures, after consultation with the VWU, where appropriate. In this respect, the Pre-Trial Judge notes that the Prosecution considers that the above-mentioned documents must be subject to such a measure and that they will be disclosed according to the methodology applied to the other documents. The Applicant's request for immediate disclosure of these documents by the Prosecution is without basis.

25. With respect to the role of the VWU, the Pre-Trial Judge recalls that, according to his Order of 20 February 2012,³⁰ pursuant to the order of the Appeals Chamber of 7 October

²⁷ Prosecution's Submissions of 6 July 2012, paras 15 and 16.

²⁸ *Id.*, paras 2 and 17.

²⁹ STL, *In the Matter of El Sayed*, Case No. OTP/PTJ/2012/05, *Réplique à "Prosecution's Submissions Reiterating its Intention to Disclose Materials to Mr El Sayed"* of 6 July 2012, 10 July 2012 ("the Applicant's Reply of 10 July 2012").



2011, it is incumbent on that Unit to approve the risk assessments of witnesses made by the Prosecutor, in accordance with the methodology it will have adopted in order to fulfil the task it had been assigned.³¹

26. In this regard, the VWU has submitted that fulfilling its task requires that it conduct its own assessment of the risks and threats faced by all the witnesses and that, to that end, the Prosecutor must provide it with all the required documents.³²

27. The Pre-Trial Judge notes that the VWU deems it necessary to conduct its own assessment for all the witnesses concerned, regardless of the risk category³³ under which the Prosecutor has classified them. Accordingly, to enable the VWU to fulfil its task, it is appropriate for the Prosecutor to disclose to the VWU all the necessary documents to this end.

28. Furthermore, the Pre-Trial Judge considers that it is in the interests of justice and the expeditiousness of the proceedings to set a deadline for the VWU to decide on the risk assessments for the witnesses mentioned in the Order of 21 May 2012, and grants the Applicant's Request in that connection.

29. In setting this deadline, the Pre-Trial Judge took several criteria into consideration. Firstly, he considered the Registry's Submission of 17 May 2012, as well as the workload of the VWU, which stems notably from the number of witnesses and the fact that while part of the risk assessment is individual, the other part is general and applies to all witnesses. Secondly, he considered the importance attached to the protection of the Applicant's interests and the duration of the proceedings. For these reasons, the Pre-Trial Judge deems it reasonable and fair to set 17 September 2012 as the latest date by which the VWU should decide on that assessment.

³⁰ STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2012/01, 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, 20 February 2012 (the "Order of 20 February 2012").

³¹ STL, *In the Matter of El Sayed*, Case No. CH/AC/2011/02, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents, 7 October 2011 (the "Order of 7 October 2011").

³² Annex A of 6 July 2012, para. 7.

³³ Very low, low, average, high and very high.

**FOR THESE REASONS,**

Pursuant to Rule 77 of the Rules,

THE PRE-TRIAL JUDGE,

NOTES that documents relating to “publicly known” witnesses and to the administrative elements of the Lebanese investigation case file will be reviewed according to the general principles for the redactions of documents in the El Sayed Matter and disclosed following the same methodology as that applied to other documents;

ORDERS the Prosecutor to disclose to the VWU all documents necessary for the fulfilment of its task, by 7 August 2012 at the latest;

ORDERS the VWU to decide on the risk assessments for the witnesses mentioned in the Order of 21 May 2012, by 17 September 2012 at the latest; and

DECLARES the Applicant’s Reply of 10 July 2012 inadmissible.

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

Leidschendam, 26 July 2012

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[signature]

Daniel Fransen
Pre-Trial Judge

