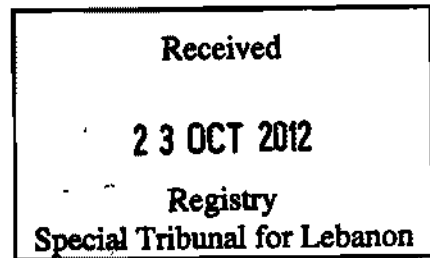




THE PRE-TRIAL JUDGE

Case No.: CH/PTJ/2012/04
The Pre-Trial Judge: Judge Daniel Franssen
The Registrar: Mr Herman von Hebel
Date: 8 October 2012
Original language: French
Classification: Public



**DECISION SETTING A DEADLINE FOR THE PROSECUTOR TO
DISCLOSE TO MR EL SAYED THE DOCUMENTS MENTIONED IN THE
PRE-TRIAL JUDGE'S ORDER OF 21 MAY 2011**

Counsel:
Mr Akram Azoury

Office of the Prosecutor:
Mr Norman Farrell



I. Subject of the decision

1. By the present decision, the Pre-Trial Judge rules, firstly, on the result of the risk assessment for the witnesses mentioned in the “Order Relating to the Prosecution Submissions filed on 27 March 2012” carried out by the Victims and Witnesses Unit (respectively the “Order of 21 May 2012”¹ and the “VWU”) and, secondly, on the Request of 19 September 2012 of Mr El Sayed (the “Applicant”) “for Specification of a Time Limit for the Prosecution to Disclose the Documents Referred to in the Pre-Trial Judge’s Order of 12 May 2011”² (respectively the “Request”³ and the “Order of 12 May 2011”).

II. Procedural background

2. By way of an Application dated 17 March 2010, the Applicant has sought from the Pre-Trial Judge that he order the Prosecutor to disclose materials to him, including witness statements, which relate to the arbitrary detention of which he considers himself to be a victim.⁴

3. On 12 May 2011, the Pre-Trial Judge issued an Order directing the Prosecutor to transmit to the Applicant some of these materials and inviting him, if appropriate, to seize him with any reasoned proposal for redaction concerning them.

4. Following a series of requests and interlocutory decisions,⁵ on 21 May 2012, the Pre-Trial Judge ordered the VWU to decide, without delay, on the risk assessments carried out by the Prosecution for certain witnesses mentioned in the aforementioned documents.

5. On 26 July 2012, the Pre-Trial Judge ordered the Prosecutor to disclose to the VWU all documents necessary for the fulfilment of its task and the VWU to decide on the risk

¹ STL, *In re El Sayed*, Case no. CH/PTJ/2012/02, Order Relating to the Prosecution Submissions filed on 27 March 2012, 21 May 2012.

² STL, *In re 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.

³ STL, *In re El Sayed*, Case no. CH/PTJ/2012/05, Urgent Request for Specification of a Time Limit for the Prosecution to Disclose the Documents Referred to in the Pre-Trial Judge’s Order of 12 May 2011, 19 September 2012.

⁴ STL, *In re El Sayed*, Case no. CH/PTJ/2010/01, Public Redacted Version of Memo Number 112. Application: Request for release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention, 17 March 2010.

⁵ For a detailed description of all the stages of the proceedings, the Pre-Trial Judge refers to the background to the proceedings included in the following Order: STL, 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.

assessments prepared by the Prosecutor for the witnesses concerned by 17 September 2012 at the latest (the "Decision of 26 July 2012").⁶

6. In that same decision, the Pre-Trial Judge also ruled on the process of disclosure to the Applicant, notably of the documents relating to "publicly known" witnesses and to the administrative elements of the Lebanese investigation case file mentioned in the Order of 12 May 2011. The Pre-Trial Judge also stated that it was for the Prosecutor to evaluate the materials for which he intended to seek protective measures "according to the general principles for the redactions of documents in the El Sayed Matter" and to disclose them "following the same methodology as that applied to other documents".⁷

7. In accordance with the Decision of 26 July 2012, on 17 September 2012 the VWU filed a submission with the Pre-Trial Judge (the "Submission by the VWU"⁸) informing him that it accepted the further updated principles relating to the redaction of documents submitted by the Prosecutor on 28 June 2012 (the "Further Updated Principles").⁹ The VWU also filed the results of the risk assessments for the witnesses in the confidential and *ex parte* Annex A to that Submission ("Annex A to the Submission by the VWU").¹⁰

8. On 19 September 2012, the Applicant sought the specification of a deadline for the disclosure of the documents mentioned in the Order of 12 May 2011. He also requested the Pre-Trial Judge to note the fact that the Prosecutor failed to disclose those documents, contrary to his undertaking of 6 July 2012.¹¹ He also noted that "no technical obstacle prevented setting a short and final deadline for the Prosecution". Lastly, he requested the Pre-

⁶ STL, *In re El Sayed*, Case no. CH/PTJ/2012/03, 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, 26 July 2012.

⁷ Decision of 26 July 2012, paras. 7, 24 and disposition p. 9.

⁸ STL, *In re El Sayed*, Case no. REG/PTJ/2012/04, Submission by the Victims and Witnesses Unit Pursuant to Rule 50 (D) and in Compliance with the Pre-Trial Judge's Decision of 26 July 2012, 17 September 2012.

⁹ STL, *In re El Sayed*, Case no. OTP/PTJ/2012/03, Prosecution's Submissions Informing the Pre-Trial Judge of its Intention 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", Annex A, Further Updated General Principles for the Redactions of Documents in the El Sayed Matter, confidential and *ex parte*, 28 June 2012.

¹⁰ STL, *In re El Sayed*, Case no. REG/PTJ/2012/04, Annex A Results of VWU's Individual Risk Assessment for Witnesses Mentioned in the Pre-Trial Judge's Order of 21 May 2012, confidential and *ex parte*, 17 September 2012

¹¹ Request, para. 7.

Trial Judge to extinguish a deadline which remains open and to set a time limit for the Prosecutor to disclose the aforementioned documents.¹²

9. On 24 September 2012, the Prosecution replied to the Request (the "Response").¹³ It pointed out that it had not disclosed the documents since the Decision of 21 May 2012 due to interlocutory decisions rendered by the Pre-Trial Judge and the Appeals Chamber. Furthermore, the Prosecution stated that it had filed in a confidential and *ex parte* annex the risk assessments for the witnesses as reviewed by the VWU ("Annex A of the Response").¹⁴ It also notified the Pre-Trial Judge of its intention to finalise the redaction of the aforementioned documents with a view to their disclosure following validation by the VWU of the Further Updated Principles.¹⁵ With regard to the witnesses exposed to "high" or "very high" risks, the Prosecution reiterated its position not to disclose to the Applicant the documents related to those two categories of witnesses and stated that the VWU had endorsed that approach. Lastly, it stressed that, were the Pre-Trial Judge to share that position, it felt it would be able to complete the disclosure of the documents related to witnesses exposed to "very low", "low" and "average" risks between now and 25 October 2012.¹⁶

III. Statement of reasons

10. The Pre-Trial Judge recalls that he considered that, following the Order of 20 February 2012 and pursuant to the Order of the Appeals Chamber of 7 October 2011,¹⁷ it falls to the VWU to approve the risk assessments for the witnesses conducted by the Prosecution, and this according to the methodology it should determine it should use in order to fully discharge that task.¹⁸

11. The Pre-Trial Judge notes that, following the Decision of 26 July 2012, the Prosecution has provided the documents necessary for the VWU to fulfil its task of

¹² *Ibid.*

¹³ STL, *In re El Sayed*, Case no. OTP/PTJ/2012/05, Prosecution's Submissions in Response to Mr. El Sayed's "Urgent Request", confidential and *ex parte*, 24 September 2012. A public redacted version of the Submissions was filed the same day.

¹⁴ Response, Annex A Prosecution's Submissions in Response to Mr. El Sayed's "Urgent Request", confidential and *ex parte*, 24 September 2012.

¹⁵ Response, para. 7.

¹⁶ Response, paras. 8-9.

¹⁷ STL, *In re 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 ("Order of the Appeals Chamber of 7 October 2011").

¹⁸ Order of 21 May 2012, para. 10.

conducting its own risk assessment for the witnesses.¹⁹ The result of that assessment is included in Annex A of the Submission by the VWU: of the 22 individual risk assessments carried out by the VWU, 17 confirm the results of the assessments conducted by the Prosecution.²⁰

12. The Pre-Trial Judge also observes that following the filing by the Prosecution of the Further Updated Principles, the VWU indicated that it was satisfied and in agreement with those Principles²¹ and that it confirmed its support of the Prosecution's proposal for non-disclosure to the Applicant of statements or other documents relating to nine witnesses whose risk is assessed as "high" or "very high".²²

13. The Pre-Trial Judge notes that the VWU approved, on the one hand, the Prosecution's risk assessment process by way of an independent risk assessment for the witnesses mentioned in the Order of 21 May 2012 and, on the other hand, the general principles for the redaction of information, in accordance with the Order of the Appeals Chamber of 7 October 2011. As a consequence, the Pre-Trial Judge considers that the documents mentioned in the Order of 21 May 2012 – statements and other documents relating to the witnesses as well as the administrative elements of the Lebanese investigation case file – must be disclosed to the Applicant without delay pursuant to the principles of protection and disclosure validated by the VWU, with the exception of those relating to the nine witnesses exposed to "high" and "very high" risks.

14. Indeed, with regard to those witnesses, the Pre-Trial Judge takes note of the respective positions of the VWU and of the Prosecution²³ according to which the documents relating to those persons should not be disclosed to the Applicant. As a consequence, in the case at hand, in light of the evidence submitted for his consideration, the Pre-Trial Judge authorises the Prosecution not to disclose those documents to the Applicant.

15. Nevertheless, in the interests of justice, the Pre-Trial Judge deems that the risks and threats justifying the non-disclosure to the Applicant of the materials relating to those witnesses should be reassessed on a regular basis. The Prosecution should consequently review, at least every six months, the status of the witnesses exposed to "high" and "very

¹⁹ Submission by the VWU, para. 6.

²⁰ Annex A of the Response.

²¹ Submission by the VWU, para. 8.

²² Order of 21 May 2012, para. 12.

²³ Submission by the VWU, para. 8; Response, para. 8.

high” risks in order to determine whether the materials relating to them may, thus, be disclosed to the Applicant. This new assessment should be submitted to the VWU for verification.

16. In light of the foregoing, the Pre-Trial Judge considers that the Prosecution has not failed in its obligations to disclose documents since 21 May 2012. Indeed, the VWU risk assessment process, on which that disclosure by the Prosecution depended, was still ongoing.

FOR THESE REASONS,

Pursuant to Rule 77 of the Rules,

THE PRE-TRIAL JUDGE,

DECLARES the Request well-founded in part;

ORDERS the Prosecutor to forward to the Applicant the documents mentioned in the Order of 21 May 2012 by 25 October 2012 at the latest with the exception of the documents relating to the nine witnesses exposed to “high” and “very high” risks;

ORDERS the Prosecution to carry out, at least every six months, a new assessment of the risks and threats for the witnesses classified in the “high” and “very high” risk categories and to submit its conclusions to the VWU for verification;

ORDERS the Prosecution to inform the Pre-Trial Judge of the completion of this process and of its results; and

DECLARES the Request ill-founded for the rest.

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

Leidschendam, 8 October 2012

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[signature]

Daniel Fransen
Pre-Trial Judge

