



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/2010/006
Before: Judge Daniel Fransen
Acting Registrar: Mr Herman von Hebel
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SCHEDULING ORDER

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STL Official Translation



I. – Background to the Proceedings:

1. On 17 March 2010, Mr Jamil El Sayed (the “Applicant”), represented by his counsel, Mr Akram Azoury, submitted an application before the President of the Special Tribunal for Lebanon (the “President” and the “Tribunal”, respectively) requesting the “release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention” (the “Application”).
2. On 15 April 2010, the President issued an order assigning the matter to the Pre-Trial Judge.¹
3. On 21 April 2010, the Pre-Trial Judge issued an order inviting the Applicant and the Prosecution to put forward their respective arguments on the matters relating to the jurisdiction of the Tribunal and the standing of the Applicant.²
4. At the public hearing of 13 July 2010, the Applicant and the Prosecutor presented their views and the Head of Defence Office also provided his observations.
5. On 17 September 2010, the Pre-Trial Judge issued an order admitting the jurisdiction of the Tribunal to rule on the Application of 17 March 2010 and recognising the Applicant’s right of access in principle to the criminal file concerning him and his standing before the Tribunal to exercise that right³ (the “Order of 17 September 2010”). Before pronouncing further on the substance of the Application, the Pre-Trial Judge invited the Prosecutor and the Applicant to submit their observations and arguments concerning the possible restrictions that might apply to the exercise of that right at the present stage in the investigation.⁴
6. On 28 September 2010, the Prosecutor filed an appeal of the Order of 17 September 2010 and a request for its suspensive effect.

¹ Order of the President, 15 April 2010, para. 39.

² Scheduling Order of the Pre-Trial Judge for Determination of the Application of Mr Jamil El Sayed dated 17 March 2010, 21 April 2010, pp. 3 and 4.

³ 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.

⁴ *Idem*, para. 57.

7. On 30 September 2010, the Applicant replied to the questions raised by the Pre-Trial Judge in the Order of 17 September 2010.

8. On 1 October 2010, the President of the Tribunal issued a Scheduling Order whereby he stayed the Order of 17 September 2010⁵ and called upon the United Nations to file an *amicus curiae* brief on the matters raised in the Order of 17 September 2010 in view of the fact that some of the material currently in the custody of the Tribunal would appear to have been transferred by the United Nations International Independent Investigation Commission (the “Investigation Commission”), an organ that is distinct from the Tribunal.

9. On 1 October 2010, the United Nations submitted its brief entitled “*Amicus curiae* Brief on the Inviolability of United Nations Documents” (the “United Nations Brief”).

10. On 8 November 2010, the Appeals Chamber determined that the Order of the President of 1 October 2010, that had stayed the Order of 17 September 2010 and had called upon the United Nations to file an *amicus curiae* brief, be set aside on the grounds that the decision was not taken by a duly convened Appeals Chamber. In the same decision, the Appeals Chamber considered the United Nations Brief to be extraneous to the file pending the decision of the Appeals Chamber on the merits of the appeal.⁶ It also suspended the enforcement of the Order of 17 September 2010 pending the ruling of the Appeals Chamber.

11. On 10 November 2010, the Appeals Chamber rejected the Prosecutor’s Appeal against the Order of 17 September 2010. It affirmed the Tribunal’s jurisdiction to rule on the Application and the Applicant’s standing to request documents that may be contained in his criminal file without, however, deciding whether he has a right to obtain such documents. The Appeals Chamber also referred to the Pre-Trial Judge for assessment of the United Nations

⁵ Scheduling Order, 1 October 2010.

⁶ Decision on the Application to Challenge the Order of the President of the Appeals Chamber to stay the Order of the Pre-Trial Judge and to call upon *amicus curiae*, 8 November 2010.

Brief and the submissions and briefs relating thereto filed by the Applicant, the Defence Office and the Prosecutor.⁷

12. On 16 November 2010, Mr El Sayed filed a “Motion for a Ruling on the Application [...] as the case stands” (“Mr El Sayed’s Application of 16 November 2010”) arguing that the Prosecutor was out of time to put forward his observations.

II. – Statement of reasons:

13. At this stage of the proceedings, recalling that the matters of the Tribunal’s jurisdiction and of standing before the Tribunal have been adjudicated, the Pre-Trial Judge considers it appropriate to determine whether, in the case in hand, at this juncture in the proceedings, the Applicant can exercise his right of access to the criminal file or whether the limitations and restrictions referred to in the Order of 17 September 2010, or any other restrictions, should be applied.⁸

14. As a preliminary observation, in respect of Mr El Sayed’s Application of 16 November 2010, the Pre-Trial Judge recalls that the Appeals Chamber issued an order on 8 November 2010 staying the enforcement of the Order of 17 September 2010 pending the ruling of the Appeals Chamber. As a result, the time limits set out in the Order of 17 September 2010 were stayed and the dates mentioned therein are no longer applicable. As such, it is the Pre-Trial Judge’s task to set new dates, particularly since the Order specified a date for filing submissions (1 October 2010). Consequently, Mr El Sayed’s Application of 16 November 2010 is ill-founded.

15. Against this background, the Pre-Trial Judge invites the Prosecutor, as he had previously in the Order of 17 September 2010, to reply in particular to the questions posed in paragraph 57 of that Order.

16. As the Applicant had already responded to the Order of 17 September 2010 before it was stayed, the Pre-Trial Judge decides to consider the Applicant’s submissions and invites

⁷ Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010.

⁸ Order of 17 September 2010, para. 55.

him, if appropriate, to file any additional observations to those already contained in the submissions he filed on 30 September 2010.

17. Concerning the United Nations Brief, the Pre-Trial Judge will consider it in conjunction with the submissions relating thereto filed by the Applicant, the Defence Office and the Prosecutor. On this subject, the Pre-Trial Judge notes that in paragraph 10 of his observations dated 5 November 2010, the Prosecutor states that the United Nations would not object to the Prosecution providing the Applicant with copies of the documents requested in the Application that are both identifiable and in the Prosecution's possession if ordered to do so by a Chamber. On this matter, it would be appropriate for the Prosecutor to provide a more thorough explanation and possibly documents to support those observations.

18. The United Nations is also invited, if it so wishes, to supplement its remarks concerning the status of the material in the Tribunal's possession, in particular in view of the fact that some or all of the documents requested are liable to be part of "the results of the investigation and a copy of the court's records" transferred to the Tribunal pursuant to Article 4, paragraph 2, of the Statute. Specifically, in this respect, the question arises of understanding to what extent the documents that may have originally been gathered by the Investigation Commission benefit from the immunity granted thereto under Article 2 of the Convention on the Privileges and Immunities of the United Nations. Furthermore, if such were the case, has this immunity not already been waived by the United Nations when the Investigation Commission handed over the said documents to the Lebanese judicial authorities and, if so, was this done subject to any conditions?

III. – Disposition:

FOR THESE REASONS,

IN APPLICATION of Articles 1, 4 (paragraph 2), and 16 of the Statute,

THE PRE-TRIAL JUDGE,

DETERMINES that Mr El Sayed's Application of 16 November 2010 is ill-founded;

ORDERS, before pronouncing further on the merits of the Application, the Prosecutor to file written submissions, in particular, in reply to the questions raised in the Order of 17 September 2010, namely:

At the current stage in the investigation:

- (i) Are all the documents requested by the Applicant part of the criminal file relating to him and are they in the possession of the Prosecutor?
- (ii) Do the limitations or restrictions mentioned above in paragraphs 53 and 54 of the Order of 17 September 2010 apply to the case in hand?
- (iii) Are any other limitations or restrictions applicable?
- (iv) Where appropriate, are these limitations or restrictions applicable to all the documents requested by the Applicant or only to some of them, and if only to some of them, to which ones?
- (v) If appropriate, what form should access to the file take? In other words, must the documents or copies of them necessarily be provided to the Applicant or simply made available for consultation by him? Should this consultation be limited to the Applicant's Counsel alone?
- (vi) Are any international judicial assistance mechanisms applicable and, if so, what consequences do they have for the Applicant's request?

ORDERS the Prosecutor to provide comprehensive explanations and, where applicable, documents in support of paragraph 10 of his observations dated 5 November 2010 concerning the position of the United Nations with respect to disclosure by the Prosecutor to the Applicant of copies of the documents requested in the Application which are identifiable and in his possession;

INVITES the Applicant to supplement, if appropriate, his answers to the questions referred to hereinabove;

CALLS UPON the United Nations to file, if appropriate, additional observations on the conditions that might apply to the disclosure of material held by the Prosecutor and produced by the Investigation Commission, in particular in light of the observations made in paragraph 18 of this Order;

ORDERS that all briefs and observations be filed with the Registrar of the Tribunal on 3 December 2010 at the latest and simultaneously disclosed to the Applicant and to the Prosecutor following translation into French by the Registry of the Prosecutor's brief and, if applicable, of the United Nations' observations;

ORDERS that the Applicant and the Prosecutor file their replies, if any, with the Registrar of the Tribunal within five days of the simultaneous disclosure of the briefs and observations, together with the Registry's translation into French of the Prosecutor's reply.

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

Leidschendam, 16 November 2010.

[signature]

Daniel Fransen
Pre-Trial Judge

