



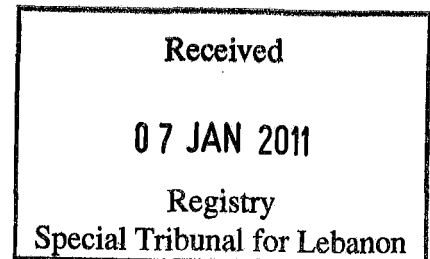
The Pre-Trial Judge

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/2011/01  
Before: Judge Daniel Fransen  
Registrar: Mr Herman von Hebel  
Date: 7 January 2011  
Original language: English  
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**ORDER ON MR EL SAYED'S REQUEST FOR AUTORISATION TO FILE A  
REJOINDER TO THE PROSECUTION'S REPLY AND FOR THE CONVENING OF  
A HEARING**

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Mr Akram Azoury

**Office of the Prosecutor:**

Mr Daniel Bellemare, MSM, QC

**Defence Office:**

Mr François Roux

**United Nations Office of Legal Affairs:**

Ms Patricia O'Brien  
Under-Secretary-General for Legal Affairs  
The Legal Counsel



## I. Background to the Proceedings:

1. On 17 September 2010, the Pre-Trial Judge issued an “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” (hereinafter “Order of 17 September 2010”), in which he affirmed that: (i) the Special Tribunal for Lebanon (hereinafter “Tribunal”) has jurisdiction to rule on the application by Mr El Sayed (hereinafter the “Applicant”); (ii) the Applicant has standing before the Tribunal; and (iii) the Applicant’s right of access to his criminal file should in principle be available to him as part of his basic rights of defence, even though such a right is not absolute.<sup>1</sup> In the Order of 17 September 2010, the Pre-Trial judge further presented the Applicant and the Prosecution with a list of questions, the replies to which would assist him to identify the possible limitations or restrictions, if any, that might affect the right of the Applicant to access documents in his case file.<sup>2</sup>
2. Following an appeal by the Prosecution,<sup>3</sup> the Appeals Chamber, in its Decision of 10 November 2010 reaffirmed the jurisdiction of the Tribunal to hear the Applicant, as well as the Applicant’s standing before the Tribunal, and remanded the Application to the Pre-Trial Judge to consider its merits.<sup>4</sup>

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<sup>1</sup> 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, CH/PTJ/2010/005, 17 September 2010, paras. 45-53.

<sup>2</sup> Order of 17 September, para. 57:

(i) Are all 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] 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?

(v) Are there any international judicial assistance mechanisms applicable, and if so, what consequences do they have for the Applicant’s request?”

<sup>3</sup> Appeal of the “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” and Urgent Request for Suspensive Effect, OTP/AC/2010/01, 28 September 2010.

<sup>4</sup> Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, pp. 29-30.

3. On 30 September 2010, the Applicant filed his replies to the questions of the Pre-Trial Judge raised in the Order of 17 September,<sup>5</sup> and on 16 November 2010, the Pre-Trial Judge issued a Scheduling Order,<sup>6</sup> in which he ordered the Prosecution to also reply to the questions posed in the said order. The Pre-Trial Judge further invited the Applicant to supplement, if appropriate, his answers to the abovementioned questions, and decided that he would consider the United Nations brief<sup>7</sup> in conjunction with the submissions filed in respect thereof by the Applicant, the Defense Office, and the Prosecution.<sup>8</sup> The United Nations were invited to further supplement their observations of 1 October 2010 if they so wished.
4. Following the Scheduling Order, the Applicant and the Prosecution filed their respective submissions<sup>9</sup> and replies.<sup>10</sup>
5. On 17 December 2010, the Applicant filed a request for a rejoinder to the Prosecution's Reply (hereinafter "Request for Rejoinder"), in which he also expressed a demand for a public hearing.<sup>11</sup>
6. On 23 December 2010, the Pre-Trial Judge informed the Registrar of his intention to convene a public hearing on 14 January 2011 in order to allow the Applicant and the Prosecution to

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<sup>5</sup> Submissions in Response to the Order of the Pre-Trial Judge of 17 September 2010, CH/PTJ/2010/01, 30 September 2010.

<sup>6</sup> Scheduling Order, CH/PTJ/2010/006, 16 November 2010.

<sup>7</sup> *Amicus Curiae* Brief on the Inviolability of United Nations Documents, 1 October 2010.

<sup>8</sup> Scheduling Order, p. 6.

<sup>9</sup> From the Applicant: Non-exhaustive Inventory of the Documents and Materials General El Sayed Requests from the Prosecutor, CH/PTJ/2010/01, 3 December 2010; Redacted Public Version of the Non-exhaustive Inventory of the Documents and Materials General El Sayed Requests from the Prosecutor, CH/PTJ/2010/01, 14 December 2010 (hereinafter "Non-Exhaustive Inventory"). From the Prosecution: Submissions on the Questions Asked by the Pre-Trial Judge in his 17 September 2010 Order, CH/PTJ/006, 3 December 2010 (hereinafter "Prosecution's Submissions").

<sup>10</sup> From the Applicant : *Réplique du Général El Sayed aux observations du Procureur sur les questions posées par le Juge de la mise en état dans son Ordonnance du 17 septembre 2010*, CH/PTJ/2010/0, 17 December 2010. From the Prosecution: Prosecution's Reply to "Non-Exhaustive Inventory of the Documents and Materials General El Sayed Requests from the Prosecutor, CH/PTJ/006, 17 December 2010 (hereinafter "Prosecution's Reply").

<sup>11</sup> *Demande d'autorisation de déposer une Duplique à la Réplique de fixation d'audience pour entendre les plaidoiries des parties*, CH/PTJ/2010/01, 21 December 2010 [Corrected Version Request for Authorization to File a Rejoinder to the Prosecution's Reply and for the Convening of a Hearing for the Parties to Present their Submission, CH/PTJ/2010/01, 30 December 2010].

present their arguments orally, and the Registrar thereby informed the Applicant and the Prosecution of the intended date.

7. On 29 December 2010, the Pre-Trial Judge was informed by the Registrar of the need to reschedule the intended hearing from 14 January 2001 to 25 January 2011 due to logistical reasons.
8. On 29 December 2010, Counsel for the Applicant filed a request for withdrawal of the request for a public hearing, due to the change of dates.<sup>12</sup> The Applicant nevertheless maintained his demand to file a rejoinder.
9. On 4 January 2011, the Prosecution filed its response to the Applicant's withdrawal,<sup>13</sup> calling for the Request for Rejoinder by the Applicant to be dismissed on the grounds that no new points of law or fact had been raised in the Prosecution's Reply.
10. On 5 January 2011, the Registry brought to the attention of the Pre-Trial Judge the Applicant's willingness to nevertheless participate in a public hearing, were one to be held before 17 January 2011, and that the date of 25 January 2011 had been seen as problematic for reasons of personal commitments of Counsel for the Applicant.

## II. Statement of reasons:

11. As articulated previously in the Pre-Trial Judge's Scheduling Order of 25 June 2010, the right of an individual to a public hearing is not an unlimited one.<sup>14</sup> Although it is "one of the means whereby confidence [...] can be maintained" in the Tribunal, this right is to be assessed in light of the particular circumstances of the case.<sup>15</sup> The Pre-Trial Judge notes in

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<sup>12</sup> *Retrait de la demande de fixation d'audience pour entendre les plaidoiries des parties*, CH/PTJ/2010/01, 29 December 2010 [Withdrawal of the Request for the Convening of a Hearing for the Parties to Present Their Submissions, CH/PTJ/2010/01, 5 January 2011].

<sup>13</sup> Response to "*Retrait de la demande de fixation d'audience pour entendre des plaidoiries des parties*", CH/PTJ/2011, 4 January 2011.

<sup>14</sup> Scheduling Order for a Hearing, CH/PTJ/2010/003, 25 June 2010, para. 7.

<sup>15</sup> *Ibid.*

this regard that the Applicant and the Prosecution have had ample opportunity to present both their oral and written submissions. Nevertheless, taking into account the special circumstances of the Applicant's case and the importance of the matters it raises, the Pre-Trial Judge considers that it is in the interests of justice to allow the Applicant and the Prosecution to present orally their final arguments and address a number of questions. Accordingly, the Pre-Trial Judge upholds his decision of 23 December 2010 to schedule a public hearing.

12. Furthermore, the Pre-Trial Judge considers that, since the Applicant will be given the opportunity to respond to any alleged new points of law or fact raised in the Prosecution's Reply, further written filings on the matter are unnecessary.

### **III. Disposition:**

#### **FOR THESE REASONS**

#### **THE PRE-TRIAL JUDGE,**

**DISMISSES** the Applicant's request for filing a rejoinder.

**ORDERS** the scheduling of a hearing at the courtroom of the Tribunal on 14 January 2011 at 14:00 hours, under the following conditions:

- (i) The Applicant and the Prosecution will have 20 minutes each to present their arguments;
- (ii) The Applicant and the Prosecution shall prepare in advance their responses to the following list of questions, which shall be given orally in order to assist the Pre-Trial Judge in determining the extent to which the Applicant's right of access to his case file is subject to limitations and restrictions at this stage of proceedings:

**a. To the Prosecution:**

- i. The Prosecution should indicate precisely how the limitations and restrictions mentioned in the “Prosecution’s Submissions” of 3 December 2010 apply with regards to the individual materials requested by the Applicant in his “Non-Exhaustive Inventory”, and that the Prosecution identifies as being in his possession?<sup>16</sup> This should be done with a view to putting the Pre-Trial Judge in a position to determine the extent to which the importance of non-disclosure of certain documents would outweigh the necessity to ensure the Applicant’s exercise of his rights.
- ii. Can the Prosecution clarify the meaning of the phrase “safeguards deemed necessary by the Office of the Prosecutor”<sup>17</sup> in relation to the possible provision by the Prosecution, on a case-by-case basis, of documents to any national court in the event that it requests the release of documents through international assistance mechanisms?
- iii. To what extent do any protective measures other than disclosure of United Nations documents apply to documents and testimony in the case at hand?

**b. To the Applicant :**

- i. With regards to the documents requested in Section I of the “Non-Exhaustive Inventory”,<sup>18</sup> and in light of the difficulties the Applicant has allegedly faced thus far in bringing his case before Lebanese and Syrian courts, the Applicant shall articulate concretely how the requested materials will eventually support his actions before national jurisdictions. In answering this question, the Applicant should provide information on the most recent steps he has undertaken to bring his claim before any national jurisdictions. In the event that such steps have been undertaken, the Applicant is to advise the Pre-Trial Judge as to the particular disclosure regimes that would apply before such courts, were materials from the Tribunal to be provided to them.

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<sup>16</sup> See in particular, Non-exhaustive Inventory, paras. 7-12.

<sup>17</sup> See Prosecution’s Submissions, para.19.

<sup>18</sup> See Non-exhaustive Inventory, paras. 4-36.

ii. With regards to the documents requested in Section II of the “Non-exhaustive Inventory”,<sup>19</sup> the Applicant should give indications as to how to determine which remaining documents unknown to the Applicant and arguably relevant to the question of the lawfulness of his detention,<sup>20</sup> shall be made available to him. This should be done with a view to assisting the Prosecution to identify potentially relevant additional material in its possession, as well as to assisting the Pre-Trial Judge in making a determination on the extent to which such access to documents is justified.

**c. To both the Applicant and the Prosecution:**

i. What are the views of the Applicant and the Prosecution with regards to a possible *ex parte* and confidential hearing presided over by the Pre-Trial Judge and in the presence of the Prosecution, whereby a number of documents could be identified for disclosure to the Applicant or his Counsel?

(iii) The Pre-Trial Judge may then pose any questions to the Applicant and the Prosecution that he deems useful regarding their submissions.

**INVITES** the Registrar of the Tribunal to take all necessary measures to this effect, including to inform the United Nations Organization of the date and place of the oral proceedings.

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

Leidschendam, 7 January 2011.



Daniel Fransen  
Pre-Trial Judge

<sup>19</sup> See in particular, Non-exhaustive Inventory, para. 37.

<sup>20</sup> See in particular, Non-exhaustive Inventory, para. 3.

