



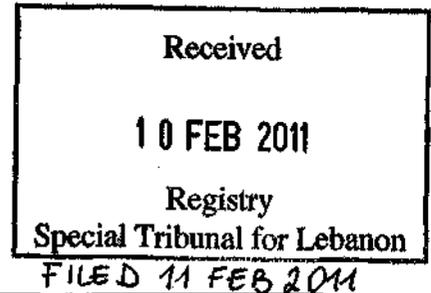
The Pre-Trial Judge

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/2011/03
Pre-Trial Judge: Judge Daniel Fransen
Registrar: Mr Herman von Hebel
Date: 7 February 2011
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**ORDER INVITING THE PROSECUTOR TO FILE AN APPLICATION
CONTAINING GROUNDS RELATING TO THE NON-DISCLOSURE OF
MATERIALS IN HIS POSSESSION CONCERNING THE DETENTION OF MR EL
SAYED**

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Defence Office:
Mr François Roux



I. Background proceedings:

1. On 17 September 2010, the Pre-Trial Judge of the Special Tribunal for Lebanon (the "Pre-Trial Judge" and the "Tribunal" respectively) issued an order stating that the Tribunal had jurisdiction to rule on the application of Mr El Sayed dated 17 March 2010 (the "Application" and the "Applicant" respectively) and recognised the right of the Applicant to have, in principle, access to the materials relating to him in his criminal file and recognised in addition that the Applicant had standing before the Tribunal to exercise this right (the "Order of 17 September 2010").¹ The Pre-Trial Judge also invited the Prosecutor of the Tribunal (the "Prosecutor") and the Applicant to present their observations and submissions with regard to the possible application of restrictions in exercising this right at the current stage of the investigation.²
2. On 28 September 2010, the Prosecutor filed a submission for the appeal and suspension of the Order of 17 September 2010.³
3. On 30 September 2010, the Applicant replied to the questions raised by the Pre-Trial Judge in the Order of 17 September 2010.⁴
4. On 10 November 2010, the Appeals Chamber of the Tribunal (the "Appeals Chamber") rejected the Prosecutor's Appeal of the Order of 17 September 2010.⁵ It likewise confirmed the jurisdiction of the Tribunal to rule on the Application as well as on the standing of the Applicant with regard to requesting the materials

¹ 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 36 and 42.

² *Ibid.*, para. 57.

³ 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.

⁴ Submissions in Response to the Order of the Pre-Trial Judge of 17 September 2010, CH/PTJ/2010/01, 30 September 2010.

⁵ Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, paras 57 and 65.

relating to him contained in his criminal file. It did not however rule on the issue of the right of the Applicant to obtain these materials.⁶

5. On 7 January 2011, the Pre-Trial Judge issued an order convening a public hearing on 14 January 2011 and inviting the Applicant and the Prosecution to reply, during this hearing, to several questions relating in particular to the limitations and restrictions that might be applied with regard to the disclosure of materials contained in the file at this stage of the proceedings.⁷ The Pre-Trial Judge also invited the Applicant and the Prosecution to express their views with regard to holding an *ex parte* hearing in closed session which the Prosecution alone would attend and during which the Prosecution would be asked to explain the grounds that would justify non-disclosure of one or other of the documents.
6. On 14 January 2011, the Applicant and the Prosecution presented their respective submissions during the public hearing.

II. Statement of reasons:

7. In the Order of 17 September 2010, the Pre-Trial Judge found that the Applicant had standing to seize the Tribunal of the issues relating to the deprivation of liberty to which he was subjected and that the right of access to the materials relating to him in his criminal file should in principle be available to him.⁸ He noted however that this right of access was not an absolute one and, therefore, invited the Applicant and the Prosecutor to present their submissions with regard to the limitations and restrictions which might be applied in this case.⁹

⁶ The Appeals Chamber noted in this respect that it is for the Pre-Trial Judge "to decide on the merits of the Application, namely the existence and scope of the Applicant's right of access to documents from his criminal file that are in possession of the Prosecutor. It is for the Pre-Trial Judge to consider this question in the first instance" (*Ibid.*, para. 66).

⁷ Order on Mr El Sayed's Request for Authorisation to File a Rejoinder to the Prosecution's Reply and for the Convening of a Hearing CH/PTJ/2011/01, 7 January 2011, pp. 5-6.

⁸ Order of 17 September 2010, paras 42 and 52.

⁹ *Ibid.*, paras 53-54 and para. 57.

8. During the hearing of 14 January 2011, the Prosecution claimed that the materials mentioned in the Application referred in particular to statements, official records and recordings of witness interviews, letters exchanged between the Heads of the United Nations International Independent Investigation Commission and internal memoranda originating from this Commission.¹⁰
9. The Pre-Trial Judge notes that the Applicant has a fundamental right to have access to the materials in the criminal file relating to him so as to guarantee the effective exercise of the rights of the defence, especially when contesting the lawfulness or indeed the arbitrary nature of his detention.¹¹ According to the Order of 17 September 2010, the “right of access to the criminal file [...] does not cease to exist upon the release of the individual. Indeed, the basic right to be able, if appropriate, to obtain compensation for prejudice suffered by way of an unlawful detention [...] must have as a consequence the right of access to the documents in the case file, at the risk of that right being ignored, since it would not otherwise be possible to prove the unlawful nature of the detention”.¹²
10. The Pre-Trial Judge observes nevertheless that, as has emerged from legislations and both national and international case law, this right may be restricted when the disclosure of these materials might in particular: i) prejudice ongoing or future investigations;¹³ ii) undermine fundamental interests – such as the physical well-

¹⁰ Transcript of the public hearing of 14 January 2011, p. 27.

¹¹ Order of 17 September 2010, para. 44.

¹² Order of 17 September 2010, para. 51.

¹³ Rule 116 of the Rules of Procedure and Evidence of the Tribunal (the “Rules”) provides, for example, the possibility of restricting the disclosure of some materials when it: i) may prejudice ongoing or future investigations; ii) may cause grave risk to the security of a witness or his family; or iii) for any other reasons may be contrary to the public interest”. In this respect, the ECHR, for example, found in the case of *García Alva v. Germany* of 13 February 2001, that: “The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect’s lawyer” (para. 42).

being of persons concerned by those documents – or the inviolability of documents belonging to or held by the United Nations;¹⁴ and iii) affect national or international security.¹⁵ It is also appropriate to bear in mind the fact that terrorist investigations are particularly sensitive.¹⁶ Finally, it is worth noting that the Applicant is no longer in detention at the present time as part of the proceedings.

11. So as to guarantee the fundamental right of the Applicant to be able to access the materials in the file relating to his detention, the Pre-Trial Judge finds that the general nature of the reasons put forward by the Prosecution in its written submissions and at the hearing do not allow him to make a proper assessment as to whether it is necessary to refuse disclosure of all these materials. It is appropriate therefore that the Prosecutor provide for each document concerned, or for at least each category of similar documents, the specific grounds that would justify non-disclosure to the Applicant at this stage of the proceedings or disclosure in redacted form, in light of the restrictions referred to in the previous paragraph. The Prosecutor should likewise specify in relation to all the documents to which, in his opinion, these restrictions would not apply, whether he maintains that a copy could be given to the Applicant or otherwise solely consulted by him or his counsel.
12. In order to facilitate the course of the proceedings whilst at the same time guaranteeing the confidentiality of the exchanges between the Prosecutor and the Pre-Trial Judge, the Pre-Trial Judge considers that a specific procedure must be put in place. It takes its inspiration in particular from the procedure which allows the

¹⁴ *Amicus Curiae* Brief on the Inviolability of United Nations Documents, 13 October 2010, paras 4 and 14; United Nations *Amicus Curiae* Filing in Response to the Scheduling Order of 16 November 2010, 23 November 2010, para. 4.

¹⁵ Rules 116 and 118 of the Rules.

¹⁶ In this respect, the ECHR confirmed for example in the case of *Fox Campbell and Hartley v. The United Kingdom* of 30 August 1990 that: "Certainly Article 5 § 1 (c) (art. 5-1-c) [of the Convention] should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism (see, *mutatis mutandis*, the *Klass and Others* Judgment of 6 September 1978, Series A no. 28, pp. 27 and 30-31, §§ 58 and 68). It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity" (para. 34).

Pre-Trial Judge, in accordance with Rules 116 and 118 of the Rules, to hold *ex parte* hearings in closed session in order to guarantee the security of States and international entities whilst protecting the rights of the accused with regard to the disclosure of evidence.

13. This procedure will take place in two stages:

- first, after having obtained the agreement of the United Nations, if so required, the Prosecutor will submit to the Pre-Trial Judge a confidential and *ex parte* written application: i) comprising an inventory of the materials in his possession which are connected to the detention of the Applicant in the *Hariri* case; and ii) outlining the specific grounds that would justify, for each document or category of similar documents, non-disclosure to the Applicant at this stage of the proceedings, or disclosure in redacted form; and
- subsequently, if need be, the Prosecutor will be invited to reply to any questions or clarifications relating to the grounds mentioned in the above-mentioned application at an *ex parte* hearing held in closed session.

III. The disposition:

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

ORDERS the Prosecutor, after having obtained the agreement of the United Nations, if so required, to submit to him a confidential and *ex parte* written application before 11 March 2011:

- i) comprising of an inventory of the materials in his possession, including materials on electronic files, relating to the detention of the Applicant in connection with the *Hariri* case;

- ii) indicating the specific grounds for each document or category of similar documents, that would justify non-disclosure to the Applicant at this stage of the proceedings, or disclosure in redacted form; and
- iii) specifying in relation to all the documents to which, in his opinion, these restrictions would not apply, whether he maintains that a copy could be given to the Applicant or otherwise solely consulted by him or his counsel.

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

Leidschendam, 7 February 2011.

[signature]

Daniel Fransen
The Pre-Trial Judge

