



المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

BEFORE THE PRE-TRIAL JUDGE

Special Tribunal for Lebanon

Case number: **CH/PTJ/2010/01**
Filed to: **Pre-Trial Judge**
Date of document: **23 June 2010**
Party filing: **The Prosecutor**
Original language: **ENGLISH**
Type of document: **Public**

Prosecution's Rejoinder to "Réplique à la réponse du Procureur" dated 17 June 2010

Filed by:

The Prosecutor
D. A. Bellemare, MSM, Q.C.

Daryl A. Mundis
Ekkehard Withopf
Marie-Sophie Poulin

Distribution to:

Counsel for Jamil El Sayed
Mr. Akram Azoury

Acting Registrar
Mr. Herman von Hebel

1. In respect of the procedural history, the Prosecution refers to pages 1-2 of Annex A to its Response.¹ Jamil El Sayed² filed his Reply on 17 June 2010.³ The Prosecution hereby files its Rejoinder.

I. ISSUES BEFORE THE PRE-TRIAL JUDGE

2. The Order and the Scheduling Order limit the two issues to be addressed before the Pre-Trial Judge. They remain:

(1) whether the Special Tribunal for Lebanon⁴ has jurisdiction to order the Prosecutor to disclose documents to the Applicant that may assist actual or potential suits filed by the Applicant in national courts; and

(2) whether the Applicant has standing to raise the issue.

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION

3. The Prosecution's arguments regarding the Tribunal's lack of jurisdiction over the Application are set out exhaustively at paragraphs 6-24 of its Response. To the limited extent that the Applicant's submissions require further comments, the Prosecution notes the following:

4. The Applicant argues at paragraphs 16-17⁵ that the Application constitutes a "voluntary proceeding."⁶ Whilst this argument is not further elaborated in the Reply, the Prosecution submits that irrespective of that qualification, for which no authority was provided, the general rules on jurisdiction apply.

5. At paragraph 28, the Applicant cites Article 85 of the Rome Statute of the International Criminal Court for the proposition that the victim of an illegal arrest or

¹ Prosecution's Response with Annexes A and B to "Submissions on the jurisdiction of the Pre-Trial Judge to rule on the application dated 17 March 2010 and whether General Jamil El SAYED has standing before the Special Tribunal for Lebanon" Filed by Jamil El Sayed on 12 May 2010, CH/PTJ/2010/01, 02 June 2010 ("Response").

² The "Applicant."

³ Réplique à la réponse du Procureur, CH/PTJ/2010/01, 17 June 2010 ("Reply").

⁴ The "Tribunal."

⁵ Unless stated otherwise, the following references refer to the paragraphs of the Applicant's Reply.

⁶ "La procédure ... est de **nature essentiellement gracieuse**" Reply, para. 10 [Emphasis in original].

detention has the right to seize the ICC to claim compensation. Article 85 applies to “a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason,” a situation that does not apply to the Applicant. Compensation under Article 85 is a discretionary matter, granted “in exceptional circumstances” following a judicial finding of a “grave and manifest miscarriage of justice.”

6. The Rome Statute does not apply to the Tribunal. The Application requests materials to initiate proceedings before courts other than the Tribunal; it is not about claiming compensation before the Tribunal.

III. THE APPLICANT DOES NOT HAVE STANDING

7. The Prosecution’s arguments regarding the Applicant’s lack of standing before the Tribunal are set out exhaustively at paragraphs 25-42 of its Response. There is no need to repeat them.

8. The Applicant confuses the issues of access to justice, jurisdiction, and standing.⁷ They are separate, distinct issues.

- (i) Access to justice was granted to the Applicant by the Order. This principle has been fulfilled. The Applicant is enjoying access to justice through the submission of his written pleadings.
- (ii) As a question of law, jurisdiction must be established before any other issue can be examined by the Pre-Trial Judge. The Tribunal’s jurisdiction is limited to prosecuting terrorists. The Application does not fall within that jurisdiction.
- (iii) Standing does not flow from the existence of jurisdiction,⁸ nor does it flow from the existence of a right of action before a court.⁹ Standing “focuses on the party ... and not on the issues he wishes to have adjudicated.”¹⁰

⁷ Reply, paras. 48-49.

⁸ “Si le TSL se déclare compétent pour statuer sur la demande du Requéant, il en résultera que ce dernier aura nécessairement Qualité pour présenter cette demande qui le concerne directement” Reply, para. 48.

⁹ “[La Qualité] découle du droit de faire valoir un droit devant un tribunal, à l’instar de la Compétence” Reply, para. 49.

¹⁰ Response, para. 26, citing *Flast v. Cohen*, 392 U.S. 83, 101 (1968) at 101.

9. As for the Applicant's contention that the Prosecutor does not have standing in these proceedings,¹¹ it is a surprising assertion. It is contradictory to argue that on the one hand the Prosecutor does not have standing, while on the other hand request materials in the Prosecutor's possession.

IV. THE REQUEST FOR A HEARING

10. The Applicant expressly requests a hearing.¹² The Scheduling Order provides that following the exchange of submissions between the Applicant and the Prosecutor, the Pre-Trial Judge shall, "*should he deem it appropriate ... at the express and reasoned request of Mr Jamil El Sayed ... order that a public hearing be held ...*"¹³

11. An oral hearing is not appropriate based on the Applicant's request. It would not enlighten the Pre-Trial Judge's understanding of the Applicant's submissions.

12. While an oral hearing might be necessary to deal with factual issues, the issues to be decided by the Pre-Trial Judge are strictly legal issues, namely jurisdiction and standing. All arguments have been made and the Applicant had ample opportunity to present his views throughout the extensive public process set out by the Pre-Trial Judge.¹⁴ The Pre-Trial Judge

¹¹ Reply, paras. 53-55.

¹² Reply, para. 56. The Applicant cites three decisions from the European Court of Human Rights ("ECHR"). They are: *Case of Fischer v. Austria*, Application no. 16922/90, 26 April 1995 ("*Fischer*"), where the ECHR found that the plaintiff's right to a *public* hearing pursuant to the European Convention on Human Rights included a right to an *oral* hearing. In finding so, the ECHR considered, *inter alia*, the important factual issues that needed to be reviewed; *Case of Axen v. Germany*, Application no. 8273/78, 8 December 1983, where the ECHR writes at paragraph 25 that "[t]he *public character of proceedings* before the judicial bodies ... protects litigants ..." [Emphasis added]; and *Case of Fredin v. Sweden (No. 2)*, Application no. 18928/91, 23 February 1994, where the ECHR found a violation of the plaintiff's right to a public hearing, partly based on the factual issues that needed to be addressed in the oral hearing that was requested by the plaintiff and subsequently denied. The ECHR noted that the right to a public hearing "*may entail ... an 'oral hearing'*" (para. 21): "[t]he Court is of the view that, *in such circumstances at least*, Article 6 para. 1 ... guarantees a right to an oral hearing" (para. 22) [Emphasis added].

¹³ Scheduling Order for Determination of the Application of Mr Jamil El Sayed dated 17 March 2010, CH/PTJ/2010/01, 21 April 2010, para. IV (v). Emphasis added.

¹⁴ The Applicant submitted written arguments on 12 May 2010. These arguments were 16 pages long with 193 pages of annex. The Prosecution responded on 2 June 2010. The Applicant replied on 17 June 2010 in 21 pages with 174 pages of annex. The Reply was one page over the page limit and 621 words over the word limit, contrary to Article 5(1)(a) of the Practice Direction on the Filing of Documents Before the Special Tribunal for Lebanon, Doc. STL-PD-2010-01, 15 January 2010.

is fully briefed, based on the exhaustive written submissions he received, to pronounce on the issues.

13. As acknowledged by the Applicant, the purpose of an oral hearing would be for him to repeat his arguments *viva voce* before the Pre-Trial Judge.¹⁵ Such an exercise does not favour judicial economy.

14. To this end, the Prosecution notes the concurring reasons of Matscher J. in *Fischer*, cited by the Applicant, where he underlined the value of an oral hearing “in so far as this amounts to a procedural safeguard.”¹⁶ He gave examples of unnecessary oral proceedings such as “exploiting the fact of proceedings being oral and public to proclaim to the general public political or other ideas ... turning the hearing before the court into a forum for an ideological debate,” and relying on the absence of an oral hearing to secure a finding of breach in a case which discloses no other failure.¹⁷

15. In the language used by the President, the Applicant had “an opportunity to make his representations before the Tribunal in order to show that the Tribunal has jurisdiction over the whole or part of his claims.”¹⁸ A hearing would not assist in clarifying the issues nor would it act as a procedural safeguard for the Applicant.

V. RELIEF SOUGHT

16. The Applicant’s request for a hearing should be denied.

17. The Prosecution reiterates the relief sought at paragraphs 43-44 of its Response.

Original signed

D.A. Bellemare, MSM, Q.C.

The Prosecutor

¹⁵ “Dénier ce droit au Requérent serait le priver d’une garantie du procès équitable par la privation de son droit à « pouvoir exposer sa thèse de vive voix devant un tribunal »” Reply, para. 56.

¹⁶ *Fischer*, concurring opinion of Judge Matscher para. 1.

¹⁷ *Ibid.*

¹⁸ Order, para. 38.

Dated this 23rd day of June, 2010

Leidschendam

The Netherlands

1449

Word count

23 June 2010	D.A. Bellemare, MSM, Q.C.	Leidschendam The Netherlands	
Date	Name	Place	Signature