



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**
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**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**

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I. INTRODUCTION¹

1. Jamil El Sayed² intends to seek access to legal process in national courts in order to pursue substantive legal remedies arising out of his detention in Lebanon.³ However, this issue is not before the Special Tribunal for Lebanon⁴. The issues before the Pre-Trial Judge are procedural in nature and the Prosecution's Response focuses only on the questions posed by the President in assigning this matter to the Pre-Trial Judge. These are:

(1) whether the Tribunal 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.

2. The right of access to a court is fundamental in the protection of the rights and freedoms of individuals under the rule of law. This principle is recognized by the President in his Order,⁵ where he notes that "every individual has the right to bring his or her claims before a court of law and to have them adjudicated by a competent judge."⁶ This right is not absolute, however.⁷

3. The Prosecutor agrees with the President regarding the importance of human rights, as noted in paragraph 13 of the Order.⁸ As a "minister of justice,"⁹ the Prosecutor's

¹ A procedural history is set forth in Annex A to this Response.

² Hereinafter, "Applicant."

³ The Applicant alleges that his detention in Lebanon between 2005-2009 was at least partially the result of false statements made by certain individuals to the Lebanese authorities and the United Nations International Independent Investigation Commission ("UNIIC").

⁴ Hereinafter "Tribunal".

⁵ Order Assigning Matter to Pre-Trial Judge, Case No. CH/PRES/2010/01, 15 April 2010 ("Order"). This principle is recognized throughout the President's Order, but more specifically at para. 25, citing *Goldor v. United Kingdom*, Series A, No. 18, 21 February 1975.

⁶ Order, para. 36.

⁷ *Stegarescu and Bahrin v. Portugal*, application no. 46194/06, para. 46 (European Court of Human Rights).

⁸ The President writes: ¶13. ... Respect for human rights is the very foundation, and indeed, the bedrock principle of the Tribunal: this institution was established in order to prosecute and punish the perpetrators of egregious violations of human rights taking the form of terrorist acts, and thus to do

quasi-judicial function is “a matter of public duty.”¹⁰ This duty involves ensuring the “justness of judicial proceedings”¹¹ and the respect for the rule of law. The Special Tribunal for Lebanon’s Rules of Procedure and Evidence¹² reflect the role and responsibility of the Prosecutor to uphold human rights:

Rule 55(C): In performing his functions, the Prosecutor shall assist the Tribunal in establishing the truth and protect the interests of the victims and witnesses. He shall also respect the fundamental rights of suspects and accused. [Emphasis added.]

4. The rule of law plays a crucial role in ensuring that human rights are not encroached upon. To that end, the rule of law requires the application of statutory and regulatory provisions, as well as legal principles. All those must be carefully applied. To do otherwise would erode the rule of law.
5. Under the guise of arguing jurisdiction and standing, the Applicant argues the merits of his Application¹³ throughout his Mémoire.¹⁴ Notwithstanding, the Prosecution’s Response is limited to the issues set out by the Order and confirmed in the Scheduling Order. Consequently, the Prosecutor will not address in his Response the merits as to whether or not the Applicant is entitled to receive the material sought.

justice to the victims of those horrific acts. The Tribunal is also anchored to its obligation to fully respect the rights of the suspects and accused. In short, this Tribunal, like any other international criminal court, finds its *raison d’être* in the incisive and efficacious realization of the fundamental human rights of a wide range of persons. It is in the light of these considerations that I will deal with the Application.

⁹ See *Boucher v. The Queen*, [1955] S.C.R. 16 at 26 (Supreme Court of Canada). In his Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack Against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, 29 April 2009, the Pre-Trial Judge refers to the Prosecutor as “an agent of Justice, representing and safeguarding the public interest,” para. 25.

¹⁰ *Ibid.* *Boucher* at 24.

¹¹ *Ibid.*

¹² Special Tribunal for Lebanon Rules of Procedure and Evidence, 30 October 2009, STL/BD/2009/01Rev.2 (“Rules”).

¹³ In “MEMO numéro-112-REQUETE” dated 17 March 2010 (“Application”), the Applicant requests, *inter alia*, documents and information in the possession of the Office of the Prosecutor; specifically, statements made by persons that he alleges have been interviewed by UNIIC, as well as information about communications made during confidential meetings between UN Commissioners/the Prosecutor and officials of the Lebanese government.

¹⁴ Pursuant to the Pre-Trial Judge’s Scheduling Order for Determination of the Application of Mr Jamil El Sayed dated 17 March 2010, CH/PTJ/2010/01, 21 April 2010 (“Scheduling Order”), the Applicant filed : Mémoire sur la compétence du Juge de la mise en état pour statuer sur la requête du 17 mars 2010 et la qualité du Général Jamil El SAYED à ester auprès du Tribunal Spécial pour le Liban, CH/PTJ/2010/01, 12 mai 2010.

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION

6. Does the Tribunal have jurisdiction to order the Prosecutor to disclose the material requested by the Applicant?
7. As the President held in 1995 in the ICTY case of *Tadić*, jurisdiction is the ambit within which a court's power can be exercised. Jurisdiction is also "a legal power, hence necessarily a legitimate power, 'to state the law' (*dire le droit*) within this ambit, in an authoritative and final manner."¹⁵
8. The President's Order is clear: jurisdiction is a threshold issue¹⁶ to be determined by the Pre-Trial Judge. As a legal concept relating to courts and tribunals, jurisdiction "functions as an on-off switch."¹⁷ The United States Supreme Court stated:

"[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."¹⁸

"... the first and fundamental question is that of jurisdiction, first, of this court, This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."¹⁹
9. A court of competent jurisdiction is a court that has jurisdiction over the person, the subject matter,²⁰ and the remedy sought.²¹ All three elements must be established for jurisdiction to be properly exercised. None of these elements have been established by the Applicant.

¹⁵ *Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 10 (ICTY).

¹⁶ Order, paras. 28, 33, 36.

¹⁷ Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev., 2029, 2049 (2007).

¹⁸ *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (United States Supreme Court).

¹⁹ *Ibid.* The Court further added: "The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."

²⁰ *Kanyabashi*, Case No. ICTR-96-15-A, Dissenting Opinion of Judge Shahabuddeen, 3 June 1999, at 2.

²¹ *Mills v. The Queen*, [1986] 1 S.C.R. 863, para. 52, Lamer J. dissenting (Supreme Court of Canada).

10. Neither the Statute of the Special Tribunal for Lebanon²² nor the Rules contain provisions granting jurisdiction over the Applicant or his Application.

A. Interpretation of the Statute

11. Pursuant to Rule 3, this inquiry must be guided by the general principles of interpretation as codified in Article 31 of the *Vienna Convention on the Law of Treaties*.

12. It is a fundamental component of the rule of law that jurisdiction can only be conferred by statute and that a court's jurisdiction must be strictly interpreted. This is particularly important with respect to international courts and tribunals which possess narrow jurisdictional limits. Judges may not legitimately extend the Tribunal's jurisdiction beyond the restricted bases set forth in the Statute.

13. Article 1 of the Statute provides that the Tribunal's jurisdiction is limited to adjudicating the criminal responsibility of individuals responsible for the attack against Rafiq Hariri and connected attacks. The crimes that can be charged in respect of those individuals are spelled out exhaustively in Article 2.²³

14. The Tribunal's jurisdiction over the crimes referred to in Article 1 is grounded in the preamble of the Statute which expresses its object and purpose. It states that the Tribunal was established to "try all those who are found responsible for the terrorist crime which killed ... Rafiq Hariri and others."²⁴ The Tribunal is a *criminal* court with a limited jurisdictional mandate. Simply put, this mandate is to bring terrorists to justice.

15. It is axiomatic that the Tribunal must respect the rights of suspects and Accused as well as the dignity of victims and witnesses. However, this Tribunal is *not* a human rights court and the fact that the Applicant was within the Tribunal's custody between

²² Statute of the Special Tribunal for Lebanon, S/RES/1757 (2007) ("Statute").

²³ Pursuant to Rule 134, the Tribunal also has jurisdiction to adjudicate contempt of court as defined by the Rules.

²⁴ The Tribunal cannot seize itself of matters falling outside of its jurisdiction, but must only adjudicate the crimes for which it was created: *Blaškić*, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, 18 July 1997, para. 43 (ICTY).

10 to 29 April 2009, does not provide any legal basis for extending the Tribunal's jurisdiction.

16. If the President's reasoning in the Order were to be adopted, any actions of the Tribunal affecting an individual, such as the release of the Applicant, would necessarily result in granting the Tribunal jurisdiction to adjudicate that individual's claim. With deference, this cannot be.
17. Once the Applicant was released, the Tribunal became *functus officio* over the Applicant. Nevertheless, the President granted the Applicant standing to submit filings to the Tribunal in the interests of justice, based on an individual's right to have access to a court.
18. The provisions of the Statute are unambiguous with respect to the Tribunal's jurisdiction. In short, there is no legal basis for the Applicant to bring his complaint before this Tribunal. The Application constitutes a proceeding *sui generis* which falls beyond the jurisdiction of the Tribunal as defined in Article 1. It therefore cannot be entertained by the Pre-Trial Judge as a matter of law and must be dismissed.

B. Lack of jurisdiction to grant relief under the Statute and the Rules

19. The absence of provisions in the Statute and the Rules providing for the relief sought in the Application confirms the Tribunal's express lack of jurisdiction to adjudicate the Application.²⁵

²⁵

In *Tadić*, *supra* note 15, the ICTY Appeals Chamber reversed the Trial Chamber's finding that it did not have jurisdiction to rule on its own jurisdiction. Here, however, the Applicant does not raise the issue of the legality of the Tribunal. In *Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, confirmed in Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, the acquitted Accused sought financial compensation for human rights violations that occurred during his trial. The ICTR Trial Chamber III found that although there were no explicit provisions in the Statute or Rules providing for an effective remedy, it had "the inherent power to provide an accused or former accused with an effective remedy for violations of his or her human rights while being prosecuted or tried before this Tribunal," para. 49. *Rwamakuba* can be distinguished from this case in that: (1) *Rwamakuba* dealt with the sacrosanct rights of an Accused, whereas the Applicant does not stand accused; (2) there has been no judicial determination of a violation of human rights; and (3) financial compensation in *Rwamakuba* was granted to right a wrong caused by the ICTR Rules. The Applicant does not allege a wrong caused by the Tribunal. It appears that instead of its "inherent power," the Trial Chamber III used its own general jurisdiction under the Statute and Rules to address issues arising from its own trial process.

20. The Prosecutor's disclosure obligations under the Rules will only extend to the Applicant in the event that he stands accused before the Tribunal or that he qualifies as a victim participating in the proceedings, once an indictment has been filed.²⁶
21. Where a court does not have the power to grant the relief requested, the appropriate action is to dismiss the request *in limine*, without proceeding to an adjudication of the merits.²⁷
22. As stated by the President, to adjudicate a claim on the merits, a judge must be competent.²⁸ "Competence" in this sense refers to the jurisdiction of a court to adjudicate matters. In this case, the Pre-Trial Judge is not a "competent judge" in the sense used by the President at paragraph 36 of his Order. The Application must be dismissed on the ground that the Tribunal lacks jurisdiction to adjudicate the Application.
23. The jurisdiction threshold is not satisfied. The Tribunal does not have subject matter jurisdiction over the Application. The Tribunal does not have jurisdiction over the Applicant as a litigant. Consequently, the Tribunal does not have jurisdiction to order disclosure of evidentiary and other material to a litigant in the course of an ongoing investigation, which is the remedy sought by the Applicant.
24. Accordingly, the Prosecution requests that the Pre-Trial Judge dismiss the Application on the ground that the Tribunal lacks jurisdiction.

²⁶ Rule 110(A)(i), Rule 87(A).

²⁷ *Kony et al.*, No. ICC-02/04-01/05/129, Decision on Prosecutor's Application dated 2 November 2006, 17 November 2006; *Krajišnik & Plavšić*, Case No. IT-00-39, Decision on Motion from Biljana Plavšić to Dismiss or for Alternative Relief, 23 May 2001 (ICTY).

²⁸ Order, para. 36.

III. THE APPLICANT DOES NOT HAVE STANDING

25. Alternatively, should the Pre-Trial Judge hold that the Application falls within the province of the Tribunal, the Prosecution submits that the Applicant lacks standing to raise the issue put forward in his Application.
26. The doctrine of standing is concerned with *who* is entitled to raise a specific claim for relief. It “focuses on the party ... and not on the issues he wishes to have adjudicated.”²⁹ As stated by the United States Supreme Court, “[i]n essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”³⁰
27. The Applicant bears the burden to establish he has standing.³¹ Does he have standing?
28. The Tribunal is pursuing its mandate in the investigation of the persons responsible for the attack of 14 February 2005 and connected attacks.³² At this point, there is no indictment, there is no Accused, and the victims are not yet participating in the proceedings. Therefore, except for the Prosecutor, no one has standing until an indictment is confirmed.³³
29. Standing is only conferred on other participants *post* confirmation of an indictment. Once there is an indictment confirmed, standing will be limited to the participants. With the exception of the Prosecutor and the Accused, a person claiming to be a

²⁹ *Flast v. Cohen*, 392 U.S. 83, 101 (1968) “[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable” (United States Supreme Court).

³⁰ *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (United States Supreme Court).

³¹ Andrew Beck, *Locus Standi In Judicio Or Ubi Ibi Remedium*, 100 S. African L.J. 278, 279 (1983).

³² Article 1 of the Statute.

³³ In a context addressing similar legal matters, the ICC’s Pre-Trial Chamber I rejected the preliminary remarks of *ad hoc* counsel for the Defence on the jurisdiction of the court: “the *Ad hoc* Counsel for the Defence has no procedural standing to make a challenge under article 19(2)(a) of the Statute,” *Situation in Democratic Republic of Congo*, No. ICC-01/04, Decision following the Consultation held on 11 October 2005 and the Prosecution’s Submission on Jurisdiction and Admissibility filed on 31 October 2005, 9 November 2005.

victim of a crime within the Tribunal's jurisdiction will need to apply to the Pre-Trial Judge to participate in the proceedings.

A. Jurisprudence of Other International Tribunals on Standing

30. The Statutes and the Rules of other international court and tribunals such as the ICC, the ICTY and the ICTR do not define "standing." However, they provide for participation rights in court proceedings.³⁴ The jurisprudence flowing from their decisions on the issue of standing limits party status to the prosecution and the defence.
31. Detainee Dragan Opačić, a witness in the *Tadić* case, sought to appeal the Trial Chamber's decision ordering that he be remanded to the Republic of Bosnia and Herzegovina's authorities. The ICTY Appeals Chamber held that he lacked standing to invoke Rule 72 of the ICTY's Rules, which applies to preliminary motions filed by "either party", defined as the Prosecutor or the Accused.³⁵
32. In *Ntabakuze*,³⁶ the applicant sought reconsideration of a decision on interlocutory appeal in *Karemera*,³⁷ a case to which he was not a party, on the basis that it would affect his own defence. He acknowledged that neither the ICTR Statute nor the Rules prescribed who had standing to seek reconsideration. He argued that any party to a pending case before the ICTR who is prejudiced by its decisions in other cases has standing to seek redress. The Appeals Chamber rejected "the assertion that any person who alleges some form of prejudice as a consequence of a particular decision has the requisite standing to seek its reconsideration."³⁸

³⁴ For example, the Rome Statute of the International Criminal Court in Article 19(2).

³⁵ *In the case of Dragan Opačić Decision on Application for Leave to Appeal*, 1997 WL 33774592 (UN ICT (App) (Yug)), 3 June 1997 (ICTY). In doing so the ICTY Appeals Chamber noted that "[i]f this view of the matter appears overly legalistic, any other ruling would open up the Tribunal's appeals procedures to non-parties - witnesses, counsel, *amicus curiae*, even members of the public who might nurse a grievance against a Decision of the Trial Chamber. This could not be. The Tribunal has a limited appellate jurisdiction which categorically cannot be invoked by non-parties".

³⁶ *Ntabakuze*, Case No. ICTR-98-41-AR73, Decision on Motion for Reconsideration, 4 October 2006.

³⁷ *Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006.

³⁸ *Ntabakuze*, *supra* note 36, para. 14. See also *Barayagwiza, et al.*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Motion for Clarification and Guidance following the Decision of the Appeals Chamber dated 16 June 2006 in *Karemera et al.* case and Prosecutor's Motion to Object to the Late Filing of Jean-Bosco Barayagwiza's Reply, 8 December 2006; *Milošević*, Case No. IT-02-54-

33. The right to participate in proceedings has been decided based on a plain reading of other tribunals and court's respective rules.³⁹
34. In that regard, the language of Rule 131 is similar to the rules of other international tribunals and courts, although it refers specifically to "third parties and *amicus curiae*." The Applicant is neither a third party nor an *amicus curiae*.
35. Rightly, the notions of interest, access and potential prejudice were not entertained in the cases discussed above. Rather, the decisions to deny standing were based on the absence of prescription for standing in the Statute and the Rules.
36. This interpretation of participation rights favours judicial economy and enables the achievement of the Tribunal's jurisdiction under the Statute in a manner that is respectful of the rights of all entitled participants. The Applicant has no such rights.

Misc.1, Decision on "Assigned Counsel Appeal Against the 'Decision on Submission of Former Court-Assigned Counsel' filed on 6 April 2006 and Confidential Annex 1", 12 May 2006 (ICTY); *Dorđević*, Case No. IT-05-87/1-T, Order Regarding the Defence Motion for Access to Transcripts, Exhibits and Documents in the *Dorđević* Case, 29 April 2009 (ICTY).

³⁹ ICTY Rule 74 provides: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber." ICTR Rule 74 is identical except for "... grant leave to *any* State". ICC Rule 103(1) reads: "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate." For instance, applications have been denied when they were "not desirable for the proper determination of the case". See for example: *Prlić et al.*, Decision on Request by the Government of the Republic of Croatia for Leave to Appear as *Amicus Curiae*, Case No. IT-04-74-T, 11 October 2006 (ICTY); *Gotovina*, Decision on Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as *Amicus Curiae*, Case No. IT-06-90-T, 9 June 2009 (ICTY); *Kanyabashi et al.*, Decision on the Motion of Tharcisse Muvunyi for Leave to Make Submissions as *Amicus Curiae* in the Butare Trial, Case No. ICTR-98-42-T, 8 June 2001; *Bagosora et al.*, Decision on *Amicus Curiae* Request by the Rwandan Government, Case No. ICTR-98-41-T, 13 October 2004; *Bemba*, Decision on the application of 14 September 2009 for participation as an *amicus curiae*, No. ICC-01/05-01/08 OA 2, 9 November 2009.

B. Participation rights under the Tribunal's Statute and Rules

37. The provisions of the Statute and Rules provide for participation rights before the Tribunal. The participants are exclusively listed:

- (1) the parties, being the Prosecutor and the Accused and/or his counsel;⁴⁰
- (2) victims participating in the proceedings,⁴¹ *after* an indictment has been confirmed and as determined by the Pre-Trial Judge or Trial Chamber;⁴² and
- (3) third parties and *amicus curiae*, when invited by the Trial Chamber who has heard the Parties, to make submissions that contribute to the proper determination of a case.⁴³

38. The investigation is still ongoing. The Prosecutor has not filed an indictment. Without an indictment there is no Accused. As a result, the parties having not been heard by the Trial Chamber, there is no case to be determined. *A fortiori*, the Applicant is not covered by any of the provisions providing for standing in the Statute and the Rules. Consequently, he has no legal basis to claim standing to have his Application adjudicated before this court.

39. Pursuant to the President's Order, the Applicant was granted very limited standing: "to submit filings in this matter."⁴⁴ The Applicant's status as a "Participant" pursuant to Article 2 of the Practice Direction⁴⁵ is therefore limited to submitting filings in this matter; it does not extend to granting the Applicant standing for any other matters before the Tribunal.

40. The President correctly distinguishes between the right of access to justice and the right to a remedy and the fact that the Application has been referred to the Pre-Trial

⁴⁰ Rule 2.

⁴¹ Article 17.

⁴² Rules 2, 86.

⁴³ Rule 131.

⁴⁴ Order, para. 17.

⁴⁵ Practice Direction on the Filing of Documents Before the Special Tribunal for Lebanon, Doc. STL-PD-2010-01, 15 January 2010.

Judge does *not* mean that the Applicant is entitled to the relief sought, as recognized by the President in his Order.⁴⁶

¶28. It is important to emphasize at this juncture that the right of access of justice must be distinguished from the right to a remedy. The former right entails that individuals – subject to certain restrictions – are entitled to go before an independent and impartial judge and to have their claims duly considered by such judge. But the existence of this right does not automatically entitle individuals to *obtain* a judicial remedy. For instance, a judge may patently lack jurisdiction to rule on the merits of a claim; in this case the individual, although enjoying the right to access the judge, will not be able to obtain a remedy for his or her claim.

¶36. ... Of course, the existence of this right does not automatically entitle individuals to *obtain a substantive* judicial remedy. ...

41. Where an applicant seeking relief lacks standing before the court, the application must be dismissed *in limine*, without proceeding to an adjudication of the merits.⁴⁷

42. The Applicant has failed to establish his standing before the Tribunal. He is not a participant expressly referred to in the Statute or the Rules.⁴⁸ Therefore, he is not legally entitled to initiate proceedings. To find otherwise would infringe upon the rule of law. Consequently, the Prosecution requests that the Pre-Trial Judge dismiss the Application on this ground.

⁴⁶ Order, paras. 28, 36.

⁴⁷ *Miscellaneous–Kabuga Family-01-A*, Decision (Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal), Case No. ICTR-98-44, 22 November 2002: the Court Management Section, on instruction from the President of the Tribunal, informed the appellant that his request to the President could not be considered as he had no standing in the case. The appellant also appealed the Prosecutor’s decision declining the appellant’s request to lift provisional measures. The Appeals Chamber dismissed the appeal and held that the appellant could request a judicial review of the Prosecutor’s decision by a Trial Chamber.

⁴⁸ As stated in paragraph 37, *supra*.

IV. RELIEF SOUGHT

43. The Application should be dismissed on the ground that the Tribunal lacks jurisdiction to adjudicate the Application.

44. Alternatively, the Application should be dismissed on the ground that the Applicant lacks standing.

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

The Prosecutor

Dated this 2nd day of June, 2010

Leidschendam

The Netherlands

4306

Word count

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

ANNEX A

PROCEDURAL HISTORY

1. Jamil El Sayed¹ was arrested on 30 August 2005.² He was subsequently detained from 3 September 2005 to 29 April 2009.
2. On 1 March 2009, the Special Tribunal for Lebanon (“the Tribunal”) was established.³ On 27 March 2009, the Pre-Trial Judge issued an order directing the Lebanese judicial authorities to defer the Applicant’s case to the Tribunal’s competence.⁴
3. On 29 April 2009, the Applicant was released by the Lebanese authorities pursuant to an order of the Pre-Trial Judge.⁵
4. On 17 March 2010, Counsel for the Applicant submitted a document entitled “Mémo numéro-112-REQUETE” to the President of the Tribunal.⁶ The Applicant seeks both evidentiary and other materials generated by the Lebanese authorities and UNIIC.
5. On 15 April 2010, the President assigned the matter to the Pre-Trial Judge requesting he decide whether (1) the Tribunal has jurisdiction over the issue and (2) whether the Applicant has standing before the Tribunal.⁷

¹ Hereinafter, the “Applicant”.

² Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005), 19 October 2005, para. 174.

³ Order Regarding the Detention of Persons Detained in Lebanon in Connection with the case of the Attack against Prime Minister Rafiq Hariri and Others, Case No.: CH/PTJ/2009/06, 29 April 2009, (“Detention Order”), para. 1.

⁴ Order Directing the Lebanese Judicial Authority Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No.: CH/PTJ/2009/01, 27 March 2009, at 7-8.

⁵ Detention Order, *supra* note 3 at 14.

⁶ Mémo numéro-112-REQUETE, addressed to the President of the Special Tribunal for Lebanon, submitted by Akram Azoury on behalf of Général Jamil El Sayed, 17 March 2010.

⁷ Order Assigning Matter to Pre-Trial Judge, CH/PRES/2010/01, 15 April 2010, at 18.

6. On 21 April 2010, the Pre-Trial Judge set out the briefing schedule for the written pleadings.⁸
 7. On 26 April 2010, the Head of Defence Office appointed Akram Azoury as Counsel for the Applicant.⁹
 8. On 12 May 2010, Mr. Azoury filed his Mémoire sur la compétence du Juge de la mise en état pour statuer sur la requête du 17 mars 2010 et la qualité du Général Jamil El SAYED à ester auprès du Tribunal Spécial pour le Liban.¹⁰
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⁸ Scheduling Order for Determination of the Application of Mr Jamil El Sayed dated 17 March 2010, CH/PTJ/2010/01, 21 April 2010, at 3-4.

⁹ Appointment of Defence Counsel Rule 58 of the Rules of Procedure and Evidence, CH/PTJ/2010/01, 26 April 2010.

¹⁰ Mémoire sur la compétence du Juge de la mise en état pour statuer sur la requête du 17 mars 2010 et la qualité du Général Jamil El SAYED à ester auprès du Tribunal Spécial pour le Liban, CH/PTJ/2010/01, 12 May 2010.

ANNEX B

AUTHORITIES

STATUTES:

International Criminal Court, Rules of Procedure and Evidence Adopted by the Assembly of States Parties, First Session, ICC-ASP/1/3, September 2002.

International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, 14 March 2008.

International Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev. 44, 10 December 2009.

DECISIONS AND CASES:

Bagosora et al., Decision on *Amicus Curiae* Request by the Rwandan Government, Case No. ICTR-98-41-T, 13 October 2004.

Barayagwiza, et al., Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Motion for Clarification and Guidance following the Decision of the Appeals Chamber dated 16 June 2006 in *Prosecutor v. Karemera et al.* case and Prosecutor's Motion to Object to the Late Filing of Jean-Bosco Barayagwiza's Reply, 8 December 2006.

Bemba, Decision on the application of 14 September 2009 for participation as an *amicus curiae*, No.: ICC 01/05-01/08 OA 2, 9 November 2009.

Blaškić, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, 18 July 1997 (ICTY).

Boucher v. The Queen, [1955] S.C.R. 16 (Supreme Court of Canada).

Dorđević, Case No. IT-05-87/1-T, Order Regarding the Defence Motion for Access to Transcripts, Exhibits and Documents in the *Dorđević* Case, 29 April 2009 (ICTY).

Flast v. Cohen, 392 U.S. 83 (1968) (United States Supreme Court).

Gotovina et al., Decision on Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as *Amicus Curiae*, Case No. IT-06-90-T, 9 June 2009 (ICTY).

In the case of Dragan Opačić Decision on Application for Leave to Appeal, 1997 WL 33774592 (UN ICT (App) (Yug)), 3 June 1997 (ICTY).

Kanyabashi, Case No. ICTR-96-15-A, Dissenting Opinion of Judge Shahabuddeen, 3 June 1999.

Kanyabashi et al., Decision on the Motion of Tharcisse Muvunyi for Leave to Make Submissions as Amicus Curiae in the Butare Trial, Case No. ICTR-98-42-T, 8 June 2001.

Karemera et al., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006.

Kony et al., No. ICC-02/04-01/05/129, Decision on Prosecutor's Application dated 2 November 2006, 17 November 2006.

Krajišnik & Plavšić, Case No. IT-00-39, Decision on Motion from Biljana Plavšić to Dismiss or for Alternative Relief, 23 May 2001 (ICTY).

Mills v. The Queen, [1986] 1 S.C.R. 863 (Supreme Court of Canada).

Milošević, Case No. IT-02-54-Misc.1, Decision on "Assigned Counsel Appeal Against the 'Decision on Submission of Former Court-Assigned Counsel' filed on 6 April 2006 and Confidential Annex 1," 12 May 2006 (ICTY).

Miscellaneous–Kabuga Family-01-A, Decision (Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal), Case No. ICTR-98-44, 22 November 2002.

Ntabakuze, Case No. ICTR-98-41-AR73, Decision on Motion for Reconsideration, 4 October 2006.

Prlić et al., Decision on Request by the Government of the Republic of Croatia for Leave to Appear as *Amicus Curiae*, Case No. IT-04-74-T, 11 October 2006 (ICTY).

Rwamakuba, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007.

Rwamakuba, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007.

Situation in Democratic Republic of Congo, No. ICC-01/04, Decision following the Consultation held on 11 October 2005 and the Prosecution's Submission on Jurisdiction and Admissibility filed on 31 October 2005, 9 November 2005

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) (United States Supreme Court).

Stegarescu and Bahrin v. Portugal, application no. 46194/06, (European Court of Human Rights).

Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (ICTY).

Warth v. Seldin, 422 U.S. 490 (1975) (United States Supreme Court).

LAW REVIEWS AND SCHOLARLY ARTICLES:

Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029 (2007).

Andrew Beck, *Locus Standi In Judicio Or Ubi Ibi Remedium*, 100 S. African L.J. 278 (1983).