



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

**BEFORE THE PRE-TRIAL JUDGE
Special Tribunal for Lebanon**

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**PUBLIC REDACTED VERSION
PROSECUTION'S SUBMISSIONS ON THE QUESTIONS ASKED BY THE
PRE-TRIAL JUDGE IN HIS 17 SEPTEMBER 2010 ORDER**

Filed by:

The Prosecutor

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- e. Any other piece of evidence that may be in your possession and which is necessary for prosecution of the offences.⁵
4. The Prosecution has reviewed its evidentiary holdings. As a result of that review the Prosecution can advise the Pre-Trial Judge as follows:
- (a) The Prosecution understands that the Applicant requests the complaints that he or his Counsel filed with the Lebanese authorities and that were subsequently forwarded to the Special Tribunal for Lebanon⁶ *via* the deferral proceedings. The Prosecution is in possession of various lists, requests, and memoranda in Arabic, filed by the Applicant or his counsel, with the Lebanese authorities, from 2005 to 2009, dealing with issues related to the legality of his arrest or detention.
- (b) The Prosecution is in possession of witness statements of the following thirteen individuals: [REDACTED],⁷ [REDACTED], [REDACTED] and [REDACTED]. The Prosecution is not in possession of statements of the following three individuals: [REDACTED], [REDACTED], and [REDACTED]. The following witnesses explicitly insisted on the confidentiality of the information they provided to UNIIC,⁸ and/or indicated that they had concerns for their or their family's safety: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].
- (c) In respect of reports provided by then-Commissioner Serge Brammertz to the Lebanese Prosecutor General regarding the assessment of witnesses implicating the Applicant, the Prosecution is in possession of two such reports. Both reports are undated, however it appears that they were accompanied by

⁵ MEMO number 112 APPLICATION, 17 March 2010.

⁶ "Tribunal."

⁷ For ease of reference, the names of the witnesses concerned are spelled in line with the "MEMO number 112 APPLICATION" of 17 March 2010. The Prosecution notifies the Pre-Trial Judge and the Applicant that the names of those witnesses are repeatedly spelled differently in the statements.

⁸ United Nations International Independent Investigation Commission "UNIIC."

letters dated 8 December 2006 and 3 July 2007, dealing with witnesses [REDACTED] and [REDACTED], respectively.

- (d) With respect to the views of the Prosecutor regarding the detention of the Applicant, the Prosecution notes that the Applicant refers to “views” mentioned, on one hand, in paragraph 48 of the 11th Report of the International Independent Investigation Commission,⁹ dated December 2008, with an introductory letter dated 2 December 2008, signed by the Secretary-General:

¶48. As the investigation progresses, the Commission continues to share with the competent Lebanese authorities the substance of all relevant information obtained. The Commission recognises that it is within the exclusive jurisdiction of the Lebanese authorities to detain or release individuals in Lebanon. In that regard, the Commission has continued to provide to the Lebanese authorities all the information that they need to make an independent determination on detention issues without resort to the Commission. The Commission has also provided its views on these issues to the Prosecutor General. [Emphasis added.]

Then-Commissioner Daniel Bellemare, in an address to the United Nations Security Council on 17 December 2008, reiterated that he expressed his “views” to the Lebanese judicial authorities with respect to the status of the detainees without elaborating on those views.

In a 17 December 2008 press conference following his address to the United Nations Security Council, then-Commissioner Daniel Bellemare stated that he orally conveyed his views to the Lebanese Prosecutor General:

... my primary contact in the Lebanese judiciary is the Prosecutor General who is the highest judiciary authority in Lebanon. My relationship with him has to be based on trust and confidence and this has to rest on the confidentiality of the discussions that we have. ... I will not comment publicly on what I might have told him, or what I might have not told him. It is not for me to second guess what the Lebanese authorities are doing. ... What I said is that the Lebanese authorities have exclusive jurisdiction over them [the detainees] up to the moment that the file is transferred to the Tribunal. ... What I told you at the outset, is that my relationship with Mr. Mirza is based on confidentiality. ... any views that I have, any issues that I have, I raise them with Mr. Mirza in a confidential relationship. So, what Mr. Mirza does with them, that's not for me to answer; I think that question should be asked to Mr. Mirza. ... I shared my views with Mr. Mirza.

⁹ “11th Report.”

The Prosecution is in possession of information confirming the oral views expressed confidentially by the Prosecutor to the Lebanese Prosecutor General regarding the independence of the Lebanese judiciary, in particular with respect to the Applicant's detention.

- (e) The Prosecution submits that the Applicant's request for "other evidentiary material in the possession of the Tribunal necessary for pursuing the above-mentioned breaches of law"¹⁰ is overly broad, and amounts to a "fishing expedition."

Question (ii): Do the limitations or restrictions mentioned in paragraphs 53 and 54 apply to the case at hand?

5. The Pre-Trial Judge rightly points out in his 17 September 2010 Order that the right of access to a criminal file is not absolute. In paragraphs 53 and 54, the Pre-Trial Judge sets out a number of potential limitations and restrictions to the right of access to a criminal file. They are: (1) the possibility to compromise an ongoing or future investigation; (2) the safety and security of witnesses or third party; (3) the impact on national or international security; and (4) the difficulties arising from the nature of terrorist investigations. To the extent that the requested materials do not fall within the parameters of Rule 111 and are therefore subject to disclosure, the limitations and restrictions identified by the Pre-Trial Judge apply.
6. The limitations and restrictions set out by the Pre-Trial Judge do apply. They become even more necessary given the lack of information on the intended use of the requested materials by the Applicant. Despite the Applicant's stated intentions to use the requested materials in civil and/or criminal suits, the courts, the specific jurisdictions in which those suits might take place and the disclosure regimes that might apply, remain entirely unclear. Also unclear, is whether such proceedings might be public, and the number and identities of individuals who might have access to the materials. Given the subsequent lack of control of the access to the requested materials, neither the Prosecution, nor the Applicant will be in a position to ensure confidentiality of the requested materials, which are confidential in nature. Further:

¹⁰ This translation is as per the President's Order Assigning Matter to Pre-Trial Judge, CH/PRES/2010/01, 15 April 2010, para. 10 (e).

- (1) The first limitation set out by the Pre-Trial Judge is the possibility to compromise an ongoing or future investigation. The investigation into the 14 February 2005 attack is ongoing. Documents related to the investigation, such as the ones requested by the Applicant, are by their very nature highly sensitive. Therefore, disclosure of the requested materials could compromise the ongoing investigation into the 14 February 2005 attack and any other connected crime that falls within the Tribunal's jurisdiction. Moreover, as emphasized by the then-Commissioner Daniel Bellemare, on 17 December 2008 in his address to the United Nations Security Council, the ongoing and future investigation fully depends on the continued mutual trust and confidence between the Lebanese Prosecutor General and the Prosecutor.
- (2) The second limitation is the safety and security of witnesses and third parties, which can only be achieved by meeting the witnesses' well justified expectations of confidentiality. These confidentiality issues carry with them risks to the physical and psychological wellbeing of the witnesses concerned with this aspect of the investigation, and their families'. These issues are substantially aggravated in relation to third parties and their families whose alleged roles are described in some of the requested documents and are not in any way related to the Applicant's claim. In essence, once the documents are disclosed and used for the purpose intended by the Applicant, there is no mechanism in place, nor can a mechanism be envisioned, that would safeguard the legitimate interests of the witnesses and third parties.
- (3) The third limitation is the impact on national or international security. The exchange of views between then-Commissioner Daniel Bellemare and the Lebanese Prosecutor General was confidential in order to safeguard ongoing Lebanese security interests.
- (4) The fourth limitation is the difficulties arising from the nature of terrorist investigations. This fourth limitation cannot be overstated against the background of the particularities of this case. The investigation into a

terrorist attack demands the assurance of confidentiality on all parts, and in particular, between the Lebanese Prosecutor General and the Prosecutor.

Therefore, the Prosecution submits that only non-disclosure of the requested materials would meaningfully accommodate the limitations and restrictions identified by the Pre-Trial Judge.

Question (iii): Are any other limitations or restrictions applicable?

7. In principle, limitations and restrictions are applicable. The Office of the Prosecutor's evidentiary holdings contain UNIIIC materials that are covered by the principle of inviolability under Article II of the *Convention on the Privileges and Immunities of the United Nations*,¹¹ which, at Section 4, reads: "[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located." This principle of inviolability applies to both the documents themselves, and to their contents.
8. Accordingly, all materials requested by the Applicant enjoy inviolability under the General Convention.
9. The Prosecution reiterates the United Nations' position, as provided to the Appeals Chamber in paragraph 10 of its *Amicus Curiae* Brief.¹² The United Nations do not object to the Prosecution providing the Applicant with copies of the requested documents, that are both identifiable and in the Prosecution's possession, if ordered to do so by a Chamber.
10. In support of its position, the Prosecution attaches to these Submissions the Assistant Secretary-General for Legal Affairs in charge of the Office of Legal Affairs' letter to the Office of the Prosecutor dated 22 November 2010.¹³ In addition, it refers to the filing of the *Amicus Curiae* of 1 December 2010.¹⁴

¹¹ "General Convention."

¹² Prosecution's Observations on the United Nations *Amicus Curiae* Brief on the Inviolability of United Nations Documents, OTP/AC/2010/04, 5 November 2010 "*Amicus Curiae* Brief."

¹³ Attached as Annex A.

¹⁴ Letter of the Assistant Secretary-General in charge of the Office of Legal Affairs dated 23 November 2010 to the Pre-Trial Judge.

Question (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?

11. Due to the nature of the limitations and restrictions detailed in paragraphs 5-6, above, they apply to all the requested materials with the exception of the documents referred to in sub-paragraphs 4 (a).
12. In addition, the documents requested in sub-paragraphs 4 (c) and (d) are sensitive and confidential in nature as they constitute internal or inter-office communications. Further, they bear no evidentiary value.

Question (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?

13. Principally, if ordered by the Pre-Trial Judge to provide for the requested materials, the Prosecution would seek to have them made available to Counsel only, for consultation. An Order relating to duties of confidentiality of such a consultation, in addition to the applicable Code of Conduct regulating Counsel's obligations, might minimize the already existing risks to witnesses and third parties, as set out in sub-paragraph 6(2), and might avoid inappropriate use of the requested documents.¹⁵

¹⁵ It is for the United Nations, not the Office of the Prosecutor, to address the issue of whether the "inviolability principle" of United Nations documents continues to apply to those requested by the Applicant in the event that the Prosecution was ordered to provide them to the Applicant.

Question (vi): Are any international judicial assistance mechanisms applicable and, if so, what consequences do they have for the Applicant's request?

14. There are no applicable international judicial assistance mechanisms specifically set out in the Statute of the Tribunal, Rules of Procedure and Evidence, or in any other documents that applies to the Tribunal, such as the Agreement Between the United Nations and Lebanon,¹⁶ and the Memorandum of Understanding Regarding the Modalities of Cooperation between Lebanon and the Office of the Prosecutor,¹⁷ that would impose a legal duty on the Prosecutor or the Tribunal as a whole to cooperate with States, be it Lebanon or third States.
15. The Agreement and the Rules provide that the Government of Lebanon shall cooperate with the Tribunal,¹⁸ but do not provide any mechanism for Lebanon or any other State to *request* the cooperation of the Tribunal, *let alone* require the Tribunal to cooperate if presented with such a request from Lebanon or any other State.
16. The 17 September 2010 Order refers to traditional mechanisms for mutual assistance and international cooperation among States, but no mechanism in existence would assist the Applicant with his request. The international conventions on mutual assistance in criminal matters, such as the *UN Model Treaty on Mutual Assistance in Criminal Matters*, the *Inter-American Convention on Mutual Assistance in Criminal Matters* and the *European Convention on Mutual Assistance in Criminal Matters*, provide for cooperation among State parties, and they relate to cooperation in criminal matters. Even if one interprets such instruments to envisage a regime of cooperation of which the Applicant could avail himself, these instruments include provisions that encapsulate internationally accepted exceptions to the duty to cooperate. These exceptions include the protection of basic public interests and the postponement of the

¹⁶ Agreement Between the United Nations and Lebanon, 10 June 2007.

¹⁷ Memorandum of Understanding between the Government of the Republic of Lebanon and the Office of the Prosecutor of the Special Tribunal for Lebanon regarding the Modalities of Cooperation between them, 5 June 2009.

¹⁸ See Article 15 of the Agreement Between the United Nations and Lebanon; see Rules 16 and 17.

execution of a request if its immediate execution would interfere with an ongoing investigation or prosecution.¹⁹

17. International assistance refers to cooperation between State authorities, as opposed to cooperation sought by individuals, whether victims, accused, or suspects. As a matter of principle, individuals, in whatever capacity they act, have no standing in requesting such assistance. Such requests are admissible if channeled and presented through State or judicial authorities only.
18. In the specific context of the Tribunal, in the event that suspects or accused require such cooperation, Rule 15 requires that such a request be made by the Head of Defence Office. Suspects and accused cannot make such requests on their own.
19. In case the Prosecution is presented with a court order requesting the release of documents, from a jurisdiction where the Applicant initiates proceedings, the Prosecution would nevertheless consider on a case-by-case basis, whether to provide the documents to the court, provided that the safeguards deemed necessary by the Office of the Prosecutor are in place.

¹⁹ See, e.g., Article 4 (1)(a), (c) and (d) and Article 4(3) of the *United Nations Model Treaty on Mutual Assistance in Criminal Matters*; Article 9 of the *Inter-American Convention on Mutual Assistance*; Article 2(b) of the *European Convention on Mutual Assistance*; Article 9 of the *Treaty on Cooperation Among the States Members of the Commonwealth of Independent States in Combating Terrorism*.

III. CONFIDENTIAL FILING

20. The Prosecution files these submissions as a confidential filing, because paragraphs 3 and 4 detail the names of the witnesses to whose statements the Applicant requests access.

21. The Prosecution will simultaneously file a public, redacted version which will also be distributed to the Head of Defence Office and to the *Amicus Curiae* United Nations Office of Legal Affairs.

Original signed

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

The Prosecutor

Dated this 3rd day of December, 2010

Leidschendam, The Netherlands

3046

Word count



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ANNEX A

United Nations  Nations Unies

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22 November 2010

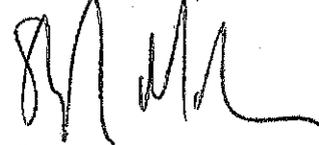
Dear Mr. Bellemare,

Further to the Scheduling Order of Judge Fransen dated 16 November 2010, and the discussions between members of your Office and the Office of Legal Counsel, I am pleased to set out the information below.

Judge Fransen has asked in paragraph 17 of his Scheduling Order that the Prosecutor provides further information regarding the United Nations position on the documents requested by Mr. Jamil El Sayed. Pursuant to that Order, your Office sent us a list of the requested documents, to the extent that they could be identified and are in the possession of your Office. Having studied that list, I am pleased to confirm our previous oral communication to your Office that none of the documents falls within a category which would raise concerns in terms of the three criteria consistently applied by the United Nations in deciding upon the voluntary disclosure of documents enjoying inviolability. The United Nations does not therefore need to inspect any of these documents and makes them voluntarily available for the purpose of the proceedings brought by Mr. El Sayed before the Special Tribunal.

I trust that this will assist your Office in responding to Judge Fransen's Scheduling Order.

Yours sincerely,



Stephen Mathias

Assistant Secretary-General for Legal Affairs
in charge of the Office of Legal Affairs

Mr. Daniel Bellemare
Prosecutor
Special Tribunal for Lebanon
Leidschendam