

BEFORE THE PRE-TRIAL JUDGE
SPECIAL TRIBUNAL FOR LEBANON

Case No: **STL-El Hajj/PTJ**

Before: **Judge Daniel Fransen**

Registrar: **Mr. Daryl Mundis**

Date: **26 March 2015**

Filing Party: **Prosecutor**

Original language: **English**

Classification: **Confidential**

IN THE MATTER OF EL HAJJ

**Prosecutor's Response to the Submissions of Mr. El Hajj in accordance with the Scheduling
Order of 3 February 2015**

Office of the Prosecutor:
Mr. Norman Farrell

Counsel for Mr. Ali Salah-el-Din El Hajj:
Mr. Maan Al-Assaad



I. INTRODUCTION

1. In accordance with the Pre-Trial Judge's Scheduling Order of 3 February 2015,¹ the Office of the Prosecutor (OTP) submits its response to the filing by Mr. Ali El Hajj (the Applicant) signed 2 March 2015.² In the Scheduling Order, the Pre-Trial Judge invited the Applicant to submit written legal and factual arguments, as well as supporting documents and materials, "regarding the jurisdiction of the Tribunal to rule on the Request, the standing of the applicant before the Tribunal, the basis for the Request and the confidential nature thereof".³
2. Despite the specificity of the Scheduling Order, the Applicant has not addressed either the jurisdiction of the Tribunal to rule on his Request or his standing to bring that Request before the Tribunal. The Pre-Trial Judge may dismiss his Request and Submissions on this basis alone.
3. In any event, given the nature of his Request, the Applicant should not be granted standing to bring it before the Tribunal. In his Submissions, the Applicant relies on the Pre-Trial Judge's 29 April 2009 Order that he be released from detention in Lebanon. Contrary to the Applicant's understanding of this Order, the Pre-Trial Judge did not order that the Applicant was under the protection of the Tribunal. This order does not provide a basis for the Applicant's Request for documents, or for preventing witnesses from mentioning him in their evidence before the Tribunal.
4. According to the jurisprudence of the Appeals Chamber in the *El Sayed Matter*, the issue of standing turns on the presence of several factors, including (i) the existence of conduct with a nexus to the Tribunal that (ii) has or is likely to substantially injure the Applicant, (iii) a determination that the Applicant has a right to seek redress for this harm, and (iv) the Tribunal's ability and authority to redress this harm by resolving the Applicant's Request. It follows from the Appeals Chamber's jurisprudence that the issue is whether the Applicant has standing to bring his specific Request before

¹ STL, Scheduling Order of the Pre-Trial Judge, 3 February 2015 (Scheduling Order).

² STL, Response to the submissions, documents and statements of "witness" Salim Diab before your esteemed Tribunal, 2 March 2015 (English translation circulated on 6 March 2015) (Submissions).

³ Scheduling Order, disposition on page 3. The Applicant submitted the original request (Request) to the Registry of the Tribunal on 23 October 2014. All references to the Request are references to the STL Unofficial English Translation.

this Tribunal, not whether the Applicant has standing to bring any possible request for relief before the Tribunal.

5. Therefore, although the Applicant, like Mr. El Sayed, was detained by the Lebanese authorities in relation to the Hariri attack, the determination of whether the Applicant has standing turns on the nature of the Applicant's Request. The Applicant cannot be granted standing to pursue his Request on the basis that Mr. El Sayed was granted standing to pursue a very different request. Moreover, the Applicant's Request should be considered on its own merit; the Applicant should not be granted standing to pursue Mr. El Sayed's Request.
6. Mr. El Sayed was granted standing to seek access to documents related to his detention, his criminal case file, in order to pursue justice against those he believes to be responsible for that detention. The alleged wrong, or harm, to be redressed by the Tribunal—the denial of access to Mr. El Sayed's criminal case file—was not in dispute, and was capable of being redressed by the Tribunal. Before granting standing, the Appeals Chamber determined that there was a general right to access one's criminal case file.
7. The Applicant's Request differs significantly from Mr. El Sayed's request. The Applicant does not seek to redress wrongs arising from his detention. The focus of the Applicant's Request is the on-going *Ayyash et al.* proceedings. Indeed, the only specific examples he provides are of witness testimony before the Trial Chamber. Further, he seeks access to documents that post-date and therefore cannot possibly bear any relationship to his detention.
8. Specifically, the Applicant seeks access to all documents in the possession of the Tribunal that mention his name, and in which he may be the subject of "slander", "false testimony", or "incitement", so that he may exercise his unspecified "legitimate rights". Yet he has not demonstrated the existence of any such rights. The Applicant has not (i) assisted the Tribunal with reference to any legal provisions governing "slander", "false testimony", or "incitement" on which he relies; (ii) demonstrated that witness testimony in a criminal proceeding can fall afoul of any such laws; or (iii) shown that he has a right to access documents related to on-going criminal proceedings in order to pursue private remedies.

9. Even if the Applicant had demonstrated any legitimate rights, the Applicant has not demonstrated that any witness testimony in the *Ayyash et al.* proceedings or witness statements in the possession of the OTP have caused or may cause him a substantial injury. Therefore, he has not shown the existence of any wrong, or harm, *related to his Request* that requires redress.
10. Thus, consideration of the factors relevant to standing identified by the Appeals Chamber in the *El Sayed Matter* shows that the Applicant should not be granted standing to bring his Request before the Tribunal.

II. SUBMISSIONS

11. As a preliminary matter, the OTP notes that the Applicant does not make express submissions regarding the jurisdiction of the Tribunal to rule on his Request. The Prosecution submits that it is open to the Pre-Trial Judge to dismiss his Request and Submissions on this basis alone.
12. Nor has the Applicant expressly addressed the issue of whether he has standing to bring his Request before the Tribunal. The Pre-Trial Judge may also dismiss the Request and Submissions on this basis.
13. The OTP will address the Applicant's submissions regarding the 29 April 2009 Order of the Pre-Trial Judge,⁴ which does not provide a legal basis for the Request. The OTP will also demonstrate that the *El Sayed Matter* does not provide a basis for granting the Applicant standing to pursue his Request. Therefore, the Applicant should not be granted standing to pursue his Request before the Tribunal, and his Request and Submissions should be dismissed.
14. The OTP submits that the issue of standing should be resolved before turning to the merits of the Applicant's Request, and reserves its right to address the merits of the Request and Submission if deemed necessary by the Pre-Trial Judge.

⁴ STL, Case No. CH/PTJ/2009/06, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, 29 April 2009 (Release Order).

A. The 29 April 2009 Order of the Pre-Trial Judge does not provide a legal basis for the Applicant's Request

15. It appears from the Submissions⁵ that, as a legal basis for his Request, the Applicant relies on the Release Order, in which the Pre-Trial Judge ordered the Lebanese authorities to release the Applicant and others from detention. The Applicant suggests that his Request is a matter of compliance with or respect for the Release Order.⁶
16. The Release Order did not grant the Applicant the “protection” of the Tribunal, or any specific protective measures.⁷ Nor did the Release Order prohibit witnesses before the Tribunal from mentioning the Applicant's name, whether in witness statements or in their *viva voce* testimony before the Tribunal.⁸ Moreover, the Applicant has not demonstrated that any aspect of the Release Order has not been complied with or remains to be enforced. In these circumstances, the Applicant has not demonstrated that the Release Order provides the Applicant with standing to bring his request for access to documents before the Tribunal.

B. The El Sayed Matter does not provide a legal basis for the Applicant to pursue his Request

17. In his *Order Assigning Matter to Pre-Trial Judge*, the then President of the Tribunal noted that similar considerations may apply to the Applicant's Request as applied to an earlier request filed by Mr. Jamil El Sayed.⁹ The *El Sayed Matter* does not provide a legal basis to grant standing to the Applicant to pursue his Request. Indeed, the Applicant himself does not refer to the *El Sayed Matter* in support of either his Request or his Submissions. This is understandable, as the two requests are quite different.
18. In the *El Sayed Matter*, the Appeals Chamber stated that the notion of standing “relates to the right of a person allegedly aggrieved by the violation of a legal rule to

⁵ Submissions, pp. 6-7.

⁶ Submissions, pp. 6-7.

⁷ *Contra* Submissions, pp. 6-7.

⁸ See Submissions, p. 7.

⁹ STL, *Order Assigning Matter to Pre-Trial Judge*, 30 January 2015, paras. 2-4.

seek relief for any damage he may have suffered.”¹⁰ The Appeals Chamber determined that the question “of an individual’s standing require at least a *prima facie* determination of what an applicant is requesting of the court, including whether he has a right to seek relief *for that wrong*.”¹¹

19. Thus, the Appeals Chamber determined that issue of standing is inextricable from the relief requested by the Applicant, and cannot be “based merely on the legal position of the Applicant vis-à-vis the Tribunal”.¹² The issue is whether the Applicant has standing to bring his specific Request before this Tribunal, not whether the Applicant has standing to bring any possible request for relief before the Tribunal. It follows that the Applicant should not be granted standing to pursue his Request simply because he, like Mr. El Sayed, had been detained by the Lebanese authorities in relation to the Hariri attack. Mr. El Sayed was granted standing to pursue a specific request for documents, not simply because he had been detained. The issue is whether the Applicant has standing to pursue his Request, not whether he has standing to pursue a request like Mr. El Sayed’s.

20. The Appeals Chamber identified additional factors relevant to determining whether an applicant has standing to seek a remedy before an international court of limited jurisdiction like the Tribunal, which included: (i) that the applicant has suffered or may suffer “substantial injury or damage” as a result of “the conduct of another person or organ”; (ii) that the conduct which allegedly caused the harm “is incidental to the court’s proceedings, or otherwise directly related to the court’s primary mandate”; and (iii) that the court to which the request is addressed is empowered to determine the issue by virtue of its jurisdictional authority and thereby vindicate the rule of law by redressing the alleged wrong”.¹³

¹⁰ STL, *In the Matter of El Sayed*, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010 (Appeals Chamber Decision of 10 November 2010), para. 60.

¹¹ *Ibid.*, para. 59.

¹² Appeals Chamber Decision of 10 November 2010, para. 59.

¹³ *Ibid.*, para. 60.

21. Mr. El Sayed complained that his rights to access his criminal case file and to have access to a judge to rule on the legality of his detention were violated throughout his detention.¹⁴ Thus, the “substantial injuries or damages” that Mr. El Sayed complained of may be understood as (i) the denial of access to his criminal file, which prevented him from (ii) obtaining access to justice to challenge his (iii) detention. There was no dispute before the Tribunal as to whether Mr. El Sayed had been denied access to his criminal file while detained, whether this had denied him the ability to challenge his detention, or whether he had been detained.
22. The Appeals Chamber also noted that (i) Mr El Sayed had been detained in relation to a crime falling within the primary jurisdiction of the Tribunal, (ii) that his detention had briefly been under the authority of the Tribunal, (iii) that he was released from detention by order of the Tribunal’s Pre-Trial Judge, and (iv) that the documents to which he sought access—his Lebanese criminal case file—were, at the time of Mr. El Sayed’s application, in the possession of the OTP and under the jurisdiction of the Tribunal.¹⁵ These facts demonstrated a nexus between Mr. El Sayed’s claim and the primary mandate of the Tribunal.
23. The determination that Mr. El Sayed had standing turned on the “alleged wrong”, or injury, Mr. El Sayed asked the Tribunal to redress. A proper understanding of this aspect of the Appeals Chamber’s ruling on standing in the *El Sayed Matter* requires consideration of what Mr. El Sayed sought from the Tribunal, and what he did not seek from the Tribunal. The “alleged wrong” for which Mr. El Sayed sought redress from the Tribunal was the alleged violation of his right to access his criminal case file. He did not ask the Tribunal to rule on the legality of his detention, or seek any other redress before the Tribunal against those he believed to be responsible for his detention.

¹⁴ STL, *In the Matter of El Sayed*, Case No. CH/PTJ/2010/005, 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, 17 September 2010 (Pre-Trial Judge’s Decision of 17 September 2010), para. 9.

¹⁵ Appeals Chamber Decision of 10 November 2010, paras. 61-62.

24. So, whether Mr. El Sayed had standing turned on whether he had a right to access his criminal case file. When considering standing, the Appeals Chamber agreed with the Pre-Trial Judge “that there is in general terms such a right”.¹⁶ It followed from this general right of access that Mr. El Sayed had standing to apply to the Tribunal to obtain his criminal file.¹⁷
25. Consideration of these factors demonstrates that the Applicant should not be granted standing to pursue his Request. According to the Appeals Chamber, the standing enquiry begins with consideration of the relief requested from the Tribunal, including the issue of whether the Applicant has a right to seek that relief from the Tribunal. A broad reading of his Request and Submissions suggests that the Applicant seeks all witness statements in the possession of the OTP that mention his name. The Applicant has not demonstrated that he has a right to such sweeping access to the OTP’s files, or that the mere mention of his name causes him any harm.
26. A narrower reading would limit the access sought to those witness statements in the OTP’s possession that “slander” the Applicant, provide “false testimony” against him, or “directly or indirectly incite” against him. Yet the Applicant has not assisted the Tribunal by reference to any specific laws governing “slander”, “false testimony”, or “incitement” on which he relies. Moreover, regardless of the legal definition, the Applicant has not demonstrated that he has a right to seek access to any witness statements or testimonies in the OTP’s possession, including Lebanese and UNIIC files, that allegedly “slander” him, provide “false testimony” against him, or “incite” against him. The OTP’s files relate to on-going criminal proceedings before the Tribunal in which the Applicant is not a party.
27. In effect, the Applicant’s Request turns on the existence of an individual right to access confidential evidence gathered in a criminal investigation or heard in a

¹⁶ Appeals Chamber Decision of 10 November 2010, para. 64. In a subsequent ruling, the Appeals Chamber noted that Mr. El Sayed may not have been entitled to access the whole of his criminal file in Lebanon while he was detained, but determined that he still did have a right to access the file for the specific limited purpose of bringing claims against those responsible for his detention. The Appeals Chamber did not revisit the bases for which standing had been granted to Mr. El Sayed in that subsequent decision. STL, *In the Matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011 (Appeals Chamber Decision of 19 July 2011), paras. 57, 62-68.

¹⁷ Appeals Chamber Decision of 10 November 2010, para. 65.

criminal trial simply on the basis that he challenges the truth of that evidence and alleges that it has injured him. The Applicant has not demonstrated the existence of such a right, and he should be denied standing on this basis.

28. Even if such a right did exist, standing also requires that the Applicant has or may suffer a substantial injury as a result of conduct with a nexus to the Tribunal. Before turning to the specific harm alleged by the Applicant, it is important to note that the Applicant does not allege the same injury as Mr. El Sayed. The Applicant does not claim that he was denied access to his criminal case file. He makes no mention of his criminal case file in either the Request or his Submissions. Moreover, consideration of the category of documents sought demonstrates that he does not seek access to his criminal case file. Whether the Applicant's Request is given its most broad reading or a slightly narrower reading, the set of documents sought, which would necessarily include documents that post-date his detention, cannot be defined as the Applicant's criminal case file.
29. Furthermore, while the Applicant was also detained by the Lebanese authorities, the injury that the Applicant seeks to redress does not arise from his detention. The Applicant does not indicate that he seeks the documents to assist him in any matters related to his detention. Indeed, he does not refer to his detention at all in his original Request. The only references to his detention in his Submissions are a single sentence reminding the Tribunal that the Applicant was detained, and a complaint that the Applicant has not received financial compensation for his detention from the Lebanese authorities.¹⁸
30. Rather, the injury, damage or alleged wrong that the Applicant raises to be redressed by the Tribunal is the general claim of alleged "slander", "false testimony", or "incitement" against him by witnesses who provided statements to the UNIIC and the OTP or who have testified in the *Ayyash et al.* proceedings. He does not link this alleged injury to his detention. Indeed, the fact that he seeks access to witness testimonies and statements that post-date his release from detention show that his Request is not linked to his detention.

¹⁸ Submissions, pp. 6-7.

31. Furthermore, the specific examples relied upon by the Applicant demonstrate that the focus of his Request is on the *Ayyash et al.* proceedings. Indeed, the only specific conduct that the Applicant refers to in his Request is the testimony of two witnesses in the *Ayyash et al.* trial.¹⁹ The Applicant has not shown that he has been or may be substantially injured by these testimonies. Furthermore, the Applicant has not demonstrated the existence of any witness statements or testimonies in the possession of the OTP that “slander” him, provide “false testimony” against him, or constitute “incitement” against him.
32. The Applicant has not shown that he has a right to seek access to the broad set of documents he requests. Nor has the Applicant shown the existence of the substantial injury, or wrong, for which he seeks redress. This is very different from the *El Sayed Matter*, where the alleged wrong to be redressed by the Tribunal—the denial of access to Mr. El Sayed’s criminal case file—was not in dispute, was capable of being redressed by the Tribunal, and where the Appeals Chamber determined that there was a general right to access one’s case file.
33. Given that the Applicant’s Request is not related to his criminal case file or his detention, granting the Applicant standing would constitute a significant expansion of the specific and limited right to seek access to documents in the possession of the OTP recognized in the *El Sayed Matter*. Indeed, if the Applicant is granted standing to pursue his Request, this could conceivably lead to a right of standing to seek disclosure of OTP documents for anyone who disputes the testimony of a witness and claims some interest in that testimony. The Prosecution submits that the Pre-Trial Judge should send a clear message that the Tribunal is not a forum for the airing of such grievances.

C. Confidentiality of Filings

34. The Prosecution submits that the Applicant’s original Request should remain classified as “confidential”, since it refers to the name of protected Witness PRH566. Furthermore, given that the Applicant’s Submissions reveals information regarding

¹⁹ Request, pp. 2-3.

his relationship with Witness PRH566 that could reveal his identity, the Applicant's Submissions should also remain classified as "confidential".

35. Given that the Applicant's Request and Submissions are "confidential", this Response is also classified as "confidential" pursuant to Article 6(1) of the Practice Direction on Filing of Documents before the Special Tribunal for Lebanon. Considering, however, that this Response does not refer to confidential information, the Prosecution submits that the Pre-Trial Judge can order that it be reclassified from "confidential" to "public".

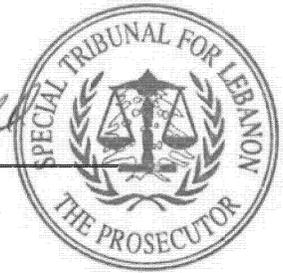
III. RELIEF REQUESTED

36. For the reasons above, the Prosecution submits that the Pre-Trial Judge should dismiss the Applicant's Request and Submissions.

Respectfully submitted,

N. Farrell

Norman Farrell
Prosecutor



Dated this 26th day of March 2015
Leidschendam, The Netherlands

Word Count: 3507

