



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case: **STL-El Hajj/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr Daryl Mundis**

Date: **30 April 2015**

Original language: **French**

Classification: **Public**

**DECISION ON REQUEST FROM COUNSEL FOR MR EL HAJJ RECEIVED ON
23 OCTOBER 2014**

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

Office of the Prosecutor:
Mr Norman Farrell

Defence Office:
Mr François Roux



I. Introduction

1. By way of this decision, the Pre-Trial Judge rules on the request filed by Mr Maan Al-Assaad, counsel for Mr Ali El Hajj, seeking to obtain documents in possession of the Tribunal¹ and declares the request inadmissible insofar as the Applicant has no standing before the Tribunal.

2. The Request seeks to “obtain copies, authenticated by your Tribunal, of the investigation records held by you and the UNIIC² relating to non-protected and protected witnesses in which my client was the subject of slander and false testimony against him and direct and indirect incitement against him and his family”,³ with the aim of taking action before a competent judicial organ to claim his rights.⁴ In its Response,⁵ the Prosecution opposes the Request.⁶

II. Statement of reasons

A. Preliminary observations

3. In light of the way the proceedings in this matter are unfolding and the incidental issues raised by the Applicant, a number of preliminary observations regarding three matters are worthy of mention.

1. The Applicant

4. The Applicant was previously held in detention by the Lebanese authorities in connection with the investigation into the assassination of Mr Hariri. Once the Lebanese Courts relinquished jurisdiction in favour of the Tribunal in April 2009, the Pre-Trial Judge ordered the release of the Applicant.⁷

¹ STL, STL-El Hajj, F0002, Motion for the Attention of the Special Tribunal for Lebanon, confidential, 23 October 2014, p. 13 (“Request”). Any further references to filings or decisions relate to this case number unless otherwise indicated.

² United Nations International Independent Investigation Commission (“Commission”).

³ Request, p. 1.

⁴ *Id.*, p. 13.

⁵ F0009, Prosecutor’s Response to the Submissions of Mr. El Hajj in accordance with the Scheduling Order of 3 February 2015, confidential, 26 March 2015 (“Response”).

⁶ The Prosecution also opposed two requests filed by Mr Maan Al-Assaad, on 2 and 10 March 2015, not being informed of the irregularity of the filing of those two requests.

⁷ On 29 April 2009, at the request of the Prosecution, the Pre-Trial Judge notably ordered the release of Mr El Hajj and called on the Lebanese authorities to take all necessary steps to ensure his safety, *see* CH/PTJ/2009/06, STL-El Hajj/PTJ

2. The applicable law and procedures

5. The President of the Tribunal issued an order assigning the Request to the Pre-Trial Judge.⁸ In assigning that case, the President notably raised issues relating to the jurisdiction of the Tribunal to rule on the Request and the standing of Mr El Hajj before the Tribunal.⁹

6. Thus seised of the matter, the Pre-Trial Judge issued a scheduling order for the proceedings. He stated that, if he considered it appropriate, within fifteen working days of the notification of that Order, Mr El Hajj should submit in writing, in accordance with the modalities set forth in the Practice Direction on Filing of Documents before the Special Tribunal for Lebanon (the “Direction”),¹⁰ all the reasons in law and in fact together with, if applicable, any relevant documents and materials regarding the jurisdiction of the Tribunal to rule on the Request, as well as on the standing of the Applicant before the Tribunal. The Pre-Trial Judge stipulated that the Direction applied henceforth to Mr El Hajj and his counsel.¹¹

7. On 2 and 10 March 2015, Mr Al-Assaad filed two requests before the Tribunal. The first request was addressed to the Trial Chamber whereas the second one was addressed to the Tribunal. Noting the irregular way in which these requests were filed, they were not entered in the list, in accordance with the provisions of Article 11 of the Direction.¹²

8. The Pre-Trial Judge reiterates that as the Head of Defence Office has appointed Mr Al-Assaad to represent Mr El Hajj before the Tribunal,¹³ even though Mr El Hajj is not a suspect or an accused before the Tribunal,¹⁴ Mr Al-Assaad shall be subject “to the relevant provisions of the Statute, the Rules, Practice Directions [...] the Code of Professional Conduct for Counsel and the codes of practice and ethics governing their profession [...]” of defence counsel, in accordance with Rule 58 (B) of the Rules of Procedure and Evidence. That appointment took place even before the Tribunal declared that it had jurisdiction or had

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, p. 16 (“Order on Detention”).

⁸ F0001, Order Assigning Matter to Pre-Trial Judge, 30 January 2015, disposition (“President’s Order”).

⁹ *Id.*, para. 5.

¹⁰ STL/PD/2010/01/Rev.2, 14 June 2013.

¹¹ F0003, Order Assigning Matter to the Pre-Trial Judge, 3 February 2015, p. 3 (“Order”).

¹² Moreover, those requests were filed past the time limit as the filing deadline expired on 25 February 2015.

¹³ On 16 February 2015, at the request of Mr El Hajj and for the purposes of his representation, the Head of Defence Office appointed Mr Al-Assaad for the proceedings before the Tribunal linked to the Request “and any directly linked matter”, *see* F0004, Appointment of Counsel Pursuant to Rules 57) (D) (vii) and 58 of the Rules of Procedure and Evidence, 16 February 2015, p. 2 (“Appointment”).

¹⁴ According to Rule 57 (D) (vii) of the Rules, the Head of Defence Office performs the following duties: where an accused or a suspect has retained counsel, he confirms that this counsel meets the requirements of Rule 58 and appoints him to represent the accused or suspect in the proceedings before the Tribunal.

ruled on the standing of the Applicant. Furthermore, as the Appeals Chamber set forth in the matter of *El Sayed*, “the Rules give effect to the object and purpose of our Statute and are thus still germane to the exercise of the Tribunal’s inherent jurisdiction”.¹⁵ Consequently, the Rules and the Direction apply to the filing of any document before the Tribunal, including those filed by Messrs El Hajj and Al-Assaad.

3. The limitation of the scope of the decision

9. In this decision, the Pre-Trial Judge does not rule on whether or not, as the Applicant submits, some of the documents contain false, slanderous or defamatory materials against the Applicant and does not identify those alleged materials. The Pre-Trial Judge rules in a general manner on whether the Applicant should have access to procedural documents of which the Tribunal is or has been seised.

B. Examination of the Request

10. In support of his Request, the Applicant mentions that in the course of the testimony of witness 566 before the Tribunal on 6 February 2014 in the case of *Ayyash et al.*, witness 566 allegedly contradicted the position of the Internal Security Forces regarding the nature of the explosion which resulted in the death of Mr Hariri.¹⁶ The Applicant also challenges another testimony, dated 14 October 2014, during which the witness purportedly insinuated that Mr El Hajj was the one who had decreased the security personnel responsible for ensuring the protection of Mr Hariri before his assassination.¹⁷ Lastly, the Applicant requests that the Prosecution and the Defence rectify the material and factual errors in the testimonies of protected and non-protected witnesses heard in the case of *Ayyash et al.*¹⁸ Mr El Hajj is of the opinion that those errors have affected his rights and his reputation. He intends to bring a civil action for redress against those who have caused him prejudice.¹⁹

C. The jurisdiction of the Tribunal

11. Prior to any examination on the merits, it is important to determine whether the Tribunal has jurisdiction to rule on the Request. The Pre-Trial Judge notes that the Applicant

¹⁵ STL, *In the matter of El Sayed*, 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, para. 30.

¹⁶ Request, p. 2.

¹⁷ *Id.*, p. 3.

¹⁸ *Id.*, p. 11.

¹⁹ *Id.*, p. 12.

did not consider it appropriate to address that issue despite being offered the possibility to do so in the Order. On this point, the Prosecution submits that, not having responded to the Order calling on Mr El Hajj to submit all legal and factual arguments regarding both the jurisdiction of the Tribunal and his standing before the Tribunal, the Request should be dismissed on this basis alone.²⁰

12. The subject matter jurisdiction of the Tribunal is strictly limited by the mandate conferred on it by Article 1 of the Agreement between the United Nations and the Lebanese Republic on the establishment of the Tribunal, annexed to Security Council resolution 1757 (2007) of 30 May 2007 (the “Agreement”) and Articles 1 and 2 of the Statute.²¹ Nevertheless, as he recalled in the matter of *El Sayed*, the Pre-Trial Judge notes that “the Tribunal has implicit jurisdiction to rule on incidental issues that are connected to its mandate or have an impact on it and which must be settled in the interests of justice.”²² In the case at hand, the Request does not fall within the primary jurisdiction of the Tribunal, which is to try the persons responsible for the attack of 14 February 2005, and, if appropriate, the connected cases, in accordance with Articles 1 and 2 of the Statute. Therefore, it should be determined whether the Tribunal has incidental jurisdiction to deal with the Applicant’s request to obtain materials in its possession.

13. In this respect, the subject of the Request is to obtain materials in the sole possession of the Tribunal including, subject to what follows below, official records of testimony heard in the context of the *Ayyash et al.* proceedings, and even official records of the investigation of the Tribunal and the Commission which could relate to witnesses connected with the criminal case file of the Applicant, namely the case file from the proceedings in which the Applicant was held in detention in Lebanon and over which the Lebanese courts relinquished jurisdiction in favour of the Tribunal on 10 April 2009.

14. However, although the requested materials are not explicitly described, with two exceptions, the official records of the witnesses interviewed by the Commission and the Tribunal which mention Mr El Hajj and which are held by the Tribunal seem, nevertheless, to

²⁰ Response, paras 2, 11 and 12.

²¹ STL, *In the matter of El Sayed*, 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, para. 30.

²² *Id.*, para. 31.

be linked to the statutory subject matter jurisdiction of the Tribunal. Indeed, in the matter of *El Sayed*, the Appeals Chamber stated that:

Through the exercise of its primary jurisdiction, the Tribunal is now said to be in the possession of evidence on the basis of which the Applicant was detained for nearly four years. The incidental jurisdiction of the Tribunal's Chambers over that evidence and thus over the legal issues addressed in the Application arise as a direct consequence of the matter having been brought before the Tribunals' Prosecutor [...]. The power to consider whether a person with standing may request access to the Tribunal's evidence is also necessarily incidental to the exercise of the Tribunal's primary jurisdiction to collect and preserve that evidence. Further, [...] were the Tribunal to decide that it lacks the authority to determine this issue, the Applicant would be deprived of his right to have access to some relevant parts of his criminal file and would thereby be denied the right to seek compensation [...].²³

15. As such, in that case, as the Prosecution recalled,²⁴ the Appeals Chamber confirmed that the inherent jurisdiction of the Tribunal addressed a shortcoming. The same reasoning can be used for the request to access the official records of the witnesses mentioning Mr El Hajj, which are held by the Tribunal. There is no other body aside from the Tribunal which can rule on such a request.

16. Therefore, taking account of the fact that the Tribunal is in possession of the materials sought by the Applicant, whether relating to those materials which had been collected before the establishment of the Tribunal pursuant to Article 19 of the Statute or those which were gathered by the Prosecution in accordance with Article 11 of the Statute, the Tribunal has exclusive jurisdiction to rule on the Request.

D. The standing of the Applicant

17. As the jurisdiction of the Tribunal to rule on the Request has been established, it is important to determine whether the Applicant has standing before the Tribunal. The Pre-Trial Judge notes that, likewise on this point, the Applicant did not consider it appropriate to address this issue despite him being offered the possibility to do so in the Order.

18. On this point, the Prosecution recalls that the very nature of the Request must be examined in order to determine the Applicant's standing before the Tribunal. In this instance, it is of the opinion that the request submitted by Mr El Hajj differs from that of Mr El Sayed whom the Tribunal recognised as having the right to act and to receive some of the evidence from his criminal case file. The Prosecution submits that the issue of standing is not

²³ STL, *In the matter of El Sayed*, CH/AC/ 2010/02, Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010 ("Decision on Appeal"), para. 53.

²⁴ Response, paras 18 and 19 citing the Decision on Appeal, paras 60 and 59.

determined merely by the fact that Mr El Hajj, like Mr El Sayed, had been detained by the Lebanese authorities in the context of the Hariri case.²⁵ In point of fact, Mr El Hajj does not seek compensation for any prejudice linked to his detention, but requests a right of access to all the documents that are in the possession of the Tribunal and which mention his name in a defamatory manner, without basing his request on any form of legal foundation. The Prosecution further notes that the Applicant did not explicitly request access to his criminal case file, which is part of the criminal case file relating to the Hariri case which was transferred to the Tribunal by the Lebanese authorities on 10 April 2009. Lastly, even were the Request to have a legal foundation, the Prosecution submits that Mr El Hajj failed to demonstrate that he suffered a substantial injury on account of the testimonies whose content he challenges.²⁶ Mr El Hajj has not claimed that the Lebanese authorities refused to give him access to his criminal case file; he never once mentions this in his Request.²⁷ In any event, the Prosecution concludes that should the Applicant's standing be recognised in this matter, it would create a precedent for anyone who disputes in one way or another testimony heard before the Tribunal.²⁸

19. In order to determine this matter, it is necessary to have as clear an understanding as possible of the requests submitted by the Applicant.²⁹ On this point, it must be noted that the Request is not specific as to the documents being sought. In point of fact, although the request is clearly focused on the official records of the testimonies heard in the *Ayyash et al.* proceedings, it also refers to witness statements contained in the investigative evidence of the Commission and the Tribunal, including some items that might be part of the criminal case file of the Applicant. Despite that reference, after a detailed examination of the Request, it should be noted that there is a lack of specificity in the Request on that point and no reference is made to those materials in the grounds for the request, while all the reasoning is based on the fact that the Applicant considers that he is harmed by "that failure to set the record straight, or permitting the conveyance of insinuations and slander live and on the air".³⁰ In light of the foregoing, the Pre-Trial Judge considers in fact that the only materials being sought are those relating to the *Ayyash et al.* proceedings.

²⁵ Response, paras 5, 6, 19.

²⁶ *Id.*, paras 7-9, 28.

²⁷ *Id.*, para. 29.

²⁸ *Id.*, para. 33.

²⁹ Decision on Appeal, para. 59.

³⁰ Request, p. 12.

20. Had the Applicant requested with clarity materials from his criminal case file, although, as far as the Tribunal is concerned, he is neither a suspect, nor an accused or victim, insofar as he was placed under the authority of the Tribunal for a brief period after he was taken into custody by the Lebanese authorities in relation to the Hariri case, he would have been entitled to have access to those materials under similar terms and conditions to those set forth by the Appeals Chamber and the Pre-Trial Judge in the matter of *El Sayed*.

21. Insofar as the Request concerns the official records of protected and non-protected witnesses heard in the context of the investigation of the Tribunal or in the *Ayyash et al.* proceedings, that reasoning cannot stand. In point of fact, with regard to those materials, the Applicant is neither a suspect, nor an accused or victim participating in the proceedings in the *Ayyash et al.* case as defined in the Rules of the Tribunal, nor is he involved in any other capacity in that case. In this sense, in the case at hand, the Applicant has no standing to request access to evidence from the proceedings insofar as it is not classified as public.

22. Furthermore, the Pre-Trial Judge notes that there are specific procedures within the Tribunal, a number of which are available notably to third parties who claim to have been injured, which could be used to redress the issues raised by the Applicant. This includes the procedures set forth in Rule 60 *bis* of the Rules on contempt and obstruction of justice and in Rule 152 of the Rules on false testimony under solemn declaration.³¹

23. With regard to the materials classified as public among those mentioned in the official records of witnesses heard in the context of the *Ayyash et al.* case, as he has already done, if Mr El Hajj wishes to obtain certified copies, he is required to submit a request before the Registry of the Tribunal which will examine the appropriateness thereof.³²

E. The confidentiality of the proceedings

24. With regard to the classification of the Request as confidential, the Prosecution considers that it is justified in that reference is made to the name of a protected witness. It adds that the Response was also filed confidentially in accordance with Article 6 (1) of the

³¹ With regard to the referral capacity of the Tribunal, whereas a single Judge or a Chamber may refer the matter of false testimony to the President in accordance with Rule 152 (A), a Party or any other interested person may inform the Chamber of an allegation of contempt or obstruction of justice in accordance with Rule 60 *bis* (D) in certain cases which are not defined in a limited manner (not underlined in the original).

³² The Pre-Trial Judges notes that in fact that procedure was already adopted in this case, see the request of Mr El Hajj of 27 November 2014 to which the Registry responded on 2 February 2015.

Direction but that there is nothing to prevent the Pre-Trial Judge from reclassifying it as a public document.³³

25. The Pre-Trial Judge invites Mr El Hajj to file a public redacted version of the Request so as not to disclose identifying information of persons protected by the Tribunal and orders that the Response be reclassified as a public document.

III. Disposition

FOR THESE REASONS,

Pursuant to Rule 77 of the Rules,

THE PRE-TRIAL JUDGE,

DECLARES that the Tribunal has jurisdiction to rule on the merits of the Request;

DECLARES that the Request is inadmissible as Mr El Hajj has no standing before the Tribunal;

ORDERS that a public redacted version of the Request be filed;

ORDERS that the Response be reclassified as a public document.

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

Leidschendam, 30 April 2015

[stamp]

[signature]

Daniel Fransen
Pre-Trial Judge



³³ Response, para. 35.