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

APPEALS CHAMBER

Case No.:	**CH/AC/2010/02**
Before:	**Judge Antonio Cassese, Presiding and Judge-Rapporteur** **Judge Ralph Riachy** **Judge David Baragwanath** **Judge Afif Chamsedinne** **Judge Kjell Erik Björnberg**
Acting Registrar:	**Mr Herman von Hebel**
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DECISION ON APPEAL OF PRE-TRIAL JUDGE'S ORDER REGARDING JURISDICTION AND STANDING

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1. The Appeals Chamber of the Special Tribunal for Lebanon ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal filed by the Prosecutor in relation to the order by the Pre-Trial Judge of 17 September 2010,[1] according to which (i) the Tribunal has jurisdiction to entertain an application by Mr Jamil El Sayed for access to investigative material and (ii) Mr Jamil El Sayed has standing before the Tribunal for the matter at hand.

2. On 1 October 2010, the President of the Tribunal ("President") issued a Scheduling Order, staying the Pre-Trial Judge's order of 17 September 2010, convening the Appeals Chamber to consider the Prosecutor's appeal, and inviting the United Nations to submit an *amicus curiae* brief.[2] In the scheduling order, the President noted that the Tribunal's Rules of Procedure and Evidence ("Rules") do not explicitly provide for the right to appeal orders or decisions other than preliminary motions or final judgments. The Tribunal must interpret any ambiguity of the Rules, however, in accordance with the spirit of the Statute and general principles of international criminal procedure.[3] Therefore, the President considered the right to appeal in this instance to derive from the inherent authority of international criminal tribunals to provide immediate judicial review where justice requires and where delay of review could negatively impact further proceedings.

3. On 8 November 2010, the Appeals Chamber, without the participation of the President and in response to the submission of Mr El Sayed of 11 October 2010, nullified both the stay granted by the President in his scheduling order of 1 October 2010 and his invitation to the United Nations to submit an *amicus curiae* brief. In the same decision, however, the Appeals Chamber independently stayed the enforcement of the Pre-Trial Judge's order of 17 September 2010 pending the outcome of this appeal, and it noted that

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1 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, Case No. CH/PTJ/2010/005, 17 September 2010 ("Order of 17 September 2010").

2 Scheduling Order, Case No. CH/PRES/2010/02, 1 October 2010.

3 *See* Rules of Procedure and Evidence, Rule 3.

the admissibility of the United Nation's submissions and of any related filings was for the Pre-Trial Judge to decide in the first instance.[4]

PROCEDURAL BACKGROUND

I. Application of Mr Jamil El Sayed

4. According to his submissions before this Tribunal, Mr Jamil El Sayed (the "Applicant") was arrested on 29 August 2005 by the Lebanese authorities and was detained without charge for nearly four years in connection with the attack against Prime Minister Rafiq Hariri and others (the "Hariri case").[5]

5. On 10 April 2009, the Tribunal became officially seized with the Hariri case and assumed authority over the four persons detained by the Lebanese authorities in connection with the case, including the Applicant.[6]

6. On 27 April 2009, the Prosecutor, after reviewing all the material collected by the UN International Independent Investigation Commission ("UNIIIC"), by the Lebanese authorities, and by his own Office, requested that the Pre-Trial Judge order the immediate release of the Applicant and the three others in the Tribunal's custody. The Prosecutor submitted that the information currently available to him was insufficiently credible to support an indictment of those detained. He identified inconsistencies in witnesses' statements and a lack of corroborative evidence to support those statements, and he noted that some witnesses had modified their statements while one potentially key witness had retracted his statement. However, the Prosecutor added that the investigation was ongoing and that his current submission was without prejudice.[7]

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4 Décision relative au recours interjeté à l'encontre de l'ordonnance du president de la chambre de l'appel, Case No. CH/AC/2010/01, 8 November 2010.

5 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, Case No. CH/PTJ/2010/01, 27 May 2010, paras 9-11.

6 Order Assigning Matter to Pre-Trial Judge, Case No. CH/PRES/2010/01, 15 April 2010 ("Order of 15 April 2010"), para. 4.

7 Order of 15 April 2010, para. 5.

7. Upon the order of the Pre-Trial Judge,[8] the Lebanese authorities released the Applicant on 29 April 2009.

8. On 17 March 2010, the Applicant applied to the President of the Tribunal for access to investigative materials related to the Applicant's detention and release (the "Application").[9] The Applicant asserts (i) that he was arbitrarily detained between 3 September 2005 and 29 April 2009 on the basis of libellous denunciations and false statements and (ii) that he requires access to the evidence now held by the Tribunal in order to pursue civil remedies in national courts for these alleged wrongs.

9. On 15 April 2010, the President issued an order assigning the Application to the Pre-Trial Judge to determine whether the Tribunal has jurisdiction over the Application and whether the Applicant has standing before the Tribunal; if so, the Pre-Trial Judge was also to consider the merits of the Application.[10]

II. Proceedings before the Pre-Trial Judge

10. Following a scheduling order from the Pre-Trial Judge, the Applicant submitted a submission and a reply to the Prosecutor's response, and the Prosecutor filed a response to the Applicant's submission and a rejoinder to the Applicant's reply.

11. On 25 June 2010, the Pre-Trial Judge issued a "Scheduling Order for a Hearing", in which he notified the Applicant and the Prosecutor:

> [I]n light of the Rejoinders, it appears that an issue closely connected with the jurisdiction of the Tribunal and with the Applicant's standing to bring proceedings has already been [raised],[11] i.e. the possibility for the Applicant to have access to the requested documents during the investigation. A hearing will also allow the Applicant and the

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8 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 ("Order of 29 April 2009").

9 Mémo no 112 – Requête au Président du Tribunal Spécial pour le Liban, Beyrouth le 17 mars 2010 (the "Application").

10 Order of 15 April 2010.

11 "*... une question ... a d'ores et déjà été abordée...*"

> Prosecutor to present their views on this subject *and they will be invited to do so at the time*.[12]

The Pre-Trial Judge also stated that a hearing would provide an opportunity for him to obtain further information or explanations related to questions raised by the submissions, "for example, the state of the ongoing internal proceedings, legislation in force in terms of international judicial cooperation, *and any other issues of fact or of law that he may deem useful*."[13]

12. During the hearing on 13 July 2010, the Pre-Trial Judge posed several questions to both the Applicant and the Prosecutor regarding substantive matters related to the questions of jurisdiction and standing.[14] In particular, the Pre-Trial Judge asked the Prosecutor:

> In terms of principles, do you think that somebody who has been detained should have a right to access [...] in the case for which he was detained, and how would you characterise that right and could you give us your opinion about any possible limitations or conditions relating to such a right?[15]

13. Following a thirty-minute recess, the Prosecutor declined to answer the questions posed by the Pre-Trial Judge.[16] The Prosecutor believed the questions were unrelated to the issues of jurisdiction and standing, although the Pre-Trial Judge explained his contrary understanding.[17] The Prosecutor also stated he could only address the Pre-Trial Judge's questions adequately through a written submission.[18] The Prosecutor did not subsequently seek leave to file additional submissions in writing, nor did he express any interest in

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12 Scheduling Order for a Hearing, Case No. CH/PTJ/2010/003, 25 June 2010 ("Order of 25 June 2010"), para. 9 (emphasis added) (footnote omitted).

13 Scheduling Order of 25 June 2010, para. 8 (emphasis added).

14 Transcript of Hearing, 13 July 2010, pp. 31-34 ("Transcript").

15 Transcript, p. 33, lines 7-12.

16 Transcript, pp. 34-36.

17 Transcript, p. 36, lines 9-17, where the Pre-Trial Judge stated: "I take note of the position of the Prosecutor concerning the questions which I raised, and I consider that this does not, in his view, concern questions of jurisprudence or standing... I thought, at least in the framework of the order, you also thought of the possibility of expressing your views on that matter, because, in my opinion, these questions are not matters of merit but could be linked, is what I remind you of just now, both to question of jurisprudence and standing."

18 Transcript, p. 35, lines 15-19, 24-29.

supplementing his submissions on the issue before the release of the Pre-Trial Judge's decision.

III. The Pre-Trial Judge's Order of 17 September 2010

14. On 17 September 2010, the Pre-Trial Judge issued the "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". The Pre-Trial Judge concluded that the Tribunal had jurisdiction and that the Applicant had standing. He consequently turned to the merits, and noting that the right of access to one's criminal file is not an absolute right, he requested additional submissions regarding possible limitations to that right in the context of the Application.

15. The Pre-Trial Judge concluded first that the Application fell within the Tribunal's 'implicit' jurisdiction because the subject matter of the Application "is closely linked to [the Tribunal's] original subject matter jurisdiction and must be settled in the interests of fairness of the proceedings and good administration of justice."[19]

16. Second, the Pre-Trial Judge held that the Applicant had standing "to seize the Tribunal of the issues relating to the deprivation of liberty to which he was subjected."[20] Even though the Applicant is not a "party" to the proceedings as defined by the Tribunal's Rules, the Applicant had been detained in connection with the Hariri case and under the legal authority of the Tribunal. Further, the Rules had required the Pre-Trial Judge to rule on the Applicant's detention.[21] The Pre-Trial Judge also noted that the Applicant's release had been without prejudice and that he could still be indicted by the Tribunal.[22]

17. Third, the Pre-Trial Judge identified a general right of an accused to have access to documents in his criminal file, based on the broader right of defence and the general principle of equality of arms, as well as on the practice of national and international

19 Order of 17 September 2010, para. 32.

20 Order of 17 September 2010, para. 42.

21 Order of 17 September 2010, para. 39 (citing Article 4 of the Tribunal's Statute and Rule 17).

22 Order of 17 September 2010, paras 38-41.

courts.[23] Because the Applicant had not been indicted, even though he was detained for nearly four years, the Pre-Trial Judge stressed that the concept of an indictment should be interpreted flexibly in this context: even without a formal indictment, the right of access to one's criminal file may arise if an individual's situation has been substantially affected by an allegation of criminal conduct made by a competent authority.[24] The right of access must also continue to exist after the individual has been discharged, for otherwise the right to seek compensation for unlawful detention would be unenforceable.[25]

18. Fourth, the Pre-Trial Judge concluded that the right of access to one's criminal file is not absolute but can be limited to the extent its exercise would compromise investigations, endanger the physical security of individuals, or otherwise affect national or international security.[26] The Pre-Trial Judge therefore requested submissions from the Applicant and the Prosecutor regarding possible limitations or restrictions on the right of access to investigative materials held by the Prosecutor in this situation.[27] Specifically, the Pre-Trial Judge requested that the Applicant and the Prosecutor submit written responses to six questions raised in paragraph 57 of the order, noted in the margin,[28] by 1 October 2010.

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23 Order of 17 September 2010, para. 45.

24 Order of 17 September 2010, para. 50.

25 Order of 17 September 2010, para. 51.

26 Order of 17 September 2010, para. 53.

27 Order of 17 September 2010, para. 57.

28 "(i) Are all the documents requested by the Applicant part of the criminal file relating to him and are they in the possession of the Prosecutor?

(ii) Do the limitations or restrictions mentioned above in paragraphs 53 and 54 [of the Pre-Trial Judge's order] apply to the case in hand?

(iii) Are any other limitations or restrictions applicable?

(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?

(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?

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

SUBMISSIONS OF THE PARTIES

I. Prosecutor's Appeal

19. On 28 September 2010, the Prosecutor filed an appeal of the Pre-Trial Judge's order and an urgent request to suspend its operation.[29] The Prosecutor asserts four errors of law: (i) that the Pre-Trial Judge applied the wrong test in determining the Tribunal's inherent jurisdiction; (ii) that the Pre-Trial Judge applied the wrong test in determining standing; (iii) that the Pre-Trial Judge erred in his interpretation of the Rules regarding disclosure of evidence; and (iv) that the Pre-Trial Judge erred in ordering the Prosecution to translate its Rejoinder into French.

20. The Prosecutor makes the preliminary submission that the order is immediately appealable as of right because it addresses the jurisdiction of the Tribunal.[30] The Prosecutor analogizes from Rule 90(B)(i) to justify an interlocutory appeal as of right in this instance, although he acknowledges that Rule 90(B)(i), pursuant to Rule 90(E), applies "exclusively" to motions challenging an indictment on jurisdictional grounds. The Prosecutor stresses that under the Tribunal's Statute and Rules the Application is *sui generis*, and he urges the Appeals Chamber to interpret the Statute and Rules flexibly and in accordance with the documents' underlying principles in order to treat the Tribunal's appeals regime as applicable to the present situation and recognise his right to an immediate appeal without need for prior certification.[31]

21. The Prosecutor also urges that the Pre-Trial Judge's order be suspended immediately, asserting that compliance with the order would improperly reveal highly sensitive information to the Applicant and his counsel that would prejudice the

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29 Appeal of the "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," Filing No. OTP/AC/2010/01, 28 September 2010 (the "Appeal").

30 Appeal, paras 4-6.

31 Rule 90(B)(ii) requires advance certification for interlocutory appeals of all preliminary motions that are outside the scope of Rule 90(E). Noting the need for "a fair and expeditious ruling on this appeal," the President granted the Prosecutor's request for leave to bring an interlocutory appeal through the Scheduling Order of 1 October 2010. See para. 2, *supra*, and para. 54, *infra*.

Prosecutor.[32] The Prosecutor submits that the Pre-Trial Judge ruled on the merits of the Application without first receiving the Prosecutor's submissions on the existence of a right of access to investigatory files, and the Prosecutor suggests this alleged lack of hearing increases the likelihood of prejudice should he now be required to comment on potential limitations to such a right.[33]

22. In contrast to his argument regarding appellate jurisdiction, the Prosecutor urges the Appeals Chamber when considering the Application itself to interpret the Tribunal's jurisdiction narrowly.[34] In support of this position, the Prosecutor asserts the following points: (i) A court can exercise its inherent jurisdiction only to determine the scope of its primary jurisdiction.[35] (ii) The Tribunal's inherent jurisdiction "derives automatically from the exercise of the judicial function",[36] which the Prosecutor believes is "to hear the case or cases that will be prosecuted before it"; because there is no indictment, he reasons, that judicial function has not yet been engaged, so the Tribunal may not yet exercise its inherent jurisdiction over related but incidental issues.[37] (iii) The Statute's statement on jurisdiction is unambiguous and therefore does not require interpretation, so it was error for the Pre-Trial Judge to consider external jurisprudence regarding inherent jurisdiction.[38] (iv) The Pre-Trial Judge erroneously considered "the Applicant's standing and the nature of the remedy sought as a vehicle to determine whether jurisdiction exists."[39]

23. Regarding the second asserted error of law, the Prosecutor insists that the Applicant's detention under the custody of the Tribunal was insufficient to confer standing. Again urging a narrow interpretation of the Rules, the Prosecutor argues that the

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32 Appeal, paras 7-9.

33 Appeal, paras 10-12.

34 Appeal, paras 16-19.

35 Appeal, para. 16.

36 Appeal, para. 16; ICTY, *Prosecutor v. Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995 ("*Tadić* Jurisdiction Decision"), para. 14.

37 Appeal, para. 18.

38 Appeal, para. 19.

39 Appeal, para. 21.

Applicant cannot have standing before the Tribunal if the Applicant is not a party to the proceedings, a victim participating in the proceedings, a third party or *amicus curiae*, or a suspect or accused person, as envisaged by the Rules.[40]

24. As for the merits, the Prosecutor raises two arguments: first, he repeats that the Pre-Trial Judge deprived the Prosecutor of an opportunity to be heard on the merits of the Application, specifically on the existence of a right of access to an investigatory file,[41] and second, that the Pre-Trial Judge misapplied the explicit disclosure regime of the Rules.[42] Regarding the latter, the Prosecutor assumes that the Tribunal cannot order the disclosure of evidence outside the obligatory disclosure specifically required by the Rules, namely the disclosure of evidence to an accused following the confirmation of an indictment.[43] Noting that the Applicant is currently, at most, a possible suspect or person of interest, the Prosecutor argues that Article 15 of the Tribunal's Statute provides a suspect with only "[t]he right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Special Tribunal." According to the Prosecutor, that right "does not amount to a statutory obligation to grant access to evidentiary hearings or to make evidence available to a suspect or a person of interest to the investigation."[44]

25. Regarding the fourth and final asserted error of law, the Prosecutor interprets the Pre-Trial Judge's order as requiring the Prosecutor to translate his own rejoinder into French for use by the Applicant. He asserts there is no legal basis for requiring the Prosecutor to submit a filing in any particular one of the Tribunal's three official languages.[45]

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40 Appeal, paras 27-31.

41 Appeal, paras 10-11, 22-24.

42 Appeal, para. 34.

43 Appeal, para. 35; see Rule 110.

44 Appeal, para. 36.

45 Appeal, paras 38-43.

II. Applicant's Response

26. On 12 October 2010, the Applicant filed a response to the Prosecutor's Appeal.[46] On the merits of the appeal, the Applicant requests the Appeals Chamber declare the Prosecutor's Appeal inadmissible or otherwise unfounded and confirm the Pre-Trial Judge's Order of 17 September 2010 in every respect, referring all debate on the right of access back to the Pre-Trial Judge. The Applicant also reserves the right to respond to the President's *proprio motu* invitation to the United Nations to file an *amicus curiae* brief, as well as his right to seek reparation for damages caused by the further delay in turning over the documents he has requested. With regard to the proceedings, the Applicant requests a public hearing and leave to file a rejoinder to the Prosecutor's reply.

27. The Applicant first makes preliminary observations regarding the Tribunal's inherent powers, the nature of the proceedings, and the Prosecutor's strategy.[47] He then asserts that the Pre-Trial Judge's Order is not appealable because Rule 90 by its express terms does not apply and because the immediate appeal of interlocutory orders is otherwise not allowed. The appeal is also inadmissible because the Prosecutor does not have standing, there being no ruling on the merits and thus no harm to the Prosecutor, and because the Prosecutor failed to identify which court, if not the Tribunal, he considers competent to rule on the Applicant's request.[48]

28. Regarding the jurisdiction of the Tribunal over his Application, the Applicant rejects all of the Prosecutor's arguments, and in particular notes the following: First, the Prosecutor's argument that inherent jurisdiction arises from the exercise of the judicial function, which the Prosecutor believes is defined by the statutory mandate, would confine the inherent jurisdiction within the limits of the express primary authority.[49] Second, according to the Appellant, the Prosecutor's interpretation of the case law is unduly restrictive; rather, the cases mentioned in the Appeal are specific applications of a

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46 Réplique à l'Appel du Procureur, Case No: CH/PTJ/2010/01, 12 October 2010 (the "Response").

47 Response, paras 7-11.

48 Response, paras 13-23.

49 Response, paras 28-29.

broader principle of inherent jurisdiction.[50] Third, the Appellant argues that the Tribunal's jurisdiction over the Applicant's request and the documents is exclusive, owing to the Prosecutor's alleged custody of the documents in question, and the adoption of the Prosecutor's reasoning would deprive him of his right to an effective remedy.[51]

29. With regard to his standing, the Applicant disagrees with the Prosecutor's restrictive interpretation of the Rules, an approach the Applicant believes is inconsistent with the Tribunal's inherent jurisdiction. The Applicant argues that standing cannot be considered independently of the nature of the request and the posture of the parties, which define the issues. Because the Applicant requested the documents on which his detention was based, it was correct for the Pre-Trial Judge to define the Applicant's standing in terms of the deprivation of the Applicant's liberty.[52]

30. The Applicant fundamentally disagrees with the Prosecution's position that jurisdiction and standing must be considered in a vacuum. Thus the Applicant emphasizes that the Pre-Trial Judge did not rule on the merits of the Application, but properly considered the nature of the right of access in the context of the Tribunal's jurisdiction and the Applicant's standing. The Applicant also notes that the Prosecutor, who had notice that the Pre-Trial Judge intended to discuss at the public hearing the facts and substance of the Application to the limited extent relevant to jurisdiction, but then refused to answer the Pre-Trial Judge's questions, cannot now complain that his right to be heard has been violated.[53]

31. As for the Prosecutor's primary argument regarding the merits, the Applicant asserts that the disclosure regime established by the Rules does not apply to the current case. That the Applicant was detained for almost four years but never formally indicted cannot mean that his right of access to his criminal file is denied unless and until he is formally indicted. The Prosecutor's argument that the Applicant can only obtain access to his file if he is again accused, only this time formally, is "sadly paradoxical" and turns his

50 Response, paras 30-32.

51 Response, paras 32-33.

52 Response, paras 43-44.

53 Response, paras 34-41.

immediate and absolute right into a conditional and future one, thereby depriving him of both his right of access to his file and his right to an effective remedy.[54]

32. Finally, the Applicant rejects the Prosecutor's argument regarding the translation of papers, noting that the Prosecutor has previously agreed to the French translation of filings for the benefit of the Applicant.[55]

III. Prosecutor's Reply

33. The Prosecutor filed his Reply on 19 October 2010.[56] The Prosecutor asserts again that the Pre-Trial Judge's Order was immediately appealable[57] but that the Application itself falls outside both the primary and the inherent jurisdiction of the Tribunal.[58] According to the Prosecutor, the Pre-Trial Judge erred by ruling prematurely on the merits of the Application and by applying the wrong standard to determine standing, asking whether the Applicant was "not completely uninvolved" in the proceedings instead of whether he was a "party" to them.[59] The Prosecutor stands by his position that he is only required to disclose evidence to the accused and only after an indictment, and he reiterates that he has no obligation to translate his submissions into French for the Applicant's use.[60]

54 Response, paras 45-50.

55 Response, para. 51.

56 Prosecutor's Reply to "Réplique à l'appel du procureur," Case No. OTP/AC/2010/03, 19 October 2010 ("Reply").

57 Reply, para. 3.

58 Reply, paras 4-6.

59 Reply, paras 8-9.

60 Reply, paras 12, 14.

RULING

34. Having carefully considered the Applicant's request for a hearing, as well as the Prosecutor's opposition to the same, the Appeals Chamber has declined to hear oral arguments. This decision is based on the need for judicial economy and the legal nature of the questions to be decided. This does not prejudice whether oral argument would be necessary if appeal were taken from a subsequent judgment on the merits of the Application.

I. Language of Submissions

35. The Prosecutor's last ground for appeal will be addressed first, as it can be disposed of quickly. The Prosecutor claims the Pre-Trial Judge ordered him to translate his submission into French for the benefit of the Applicant. This complaint is based on such a patent and indeed surprising misreading of the Pre-Trial Judge's order that it borders on the frivolous.

36. In his disposition, the Pre-Trial Judge first ordered that the Applicant and the Prosecutor file their submissions by 1 October 2010; he then ordered those submissions be provided to the Applicant and the Prosecutor "after translation of the Prosecutor's submissions into French", implying that such translation would be undertaken by the Registry *after* the Prosecutor filed his submission; and lastly, he ordered that the Applicant and Prosecutor file their rejoinders "within 10 days of the simultaneous provision of the submissions, with the French translation of the Prosecutor's rejoinder."[61]

37. On a plain reading of the order, this last clause refers to the Applicant's prior request that filing deadlines be measured as of the day he receives a French translation of the relevant documents, a request that the Prosecutor did not oppose and that the Pre-Trial Judge granted.[62] In short, the Pre-Trial Judge ordered both parties to file submissions on

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61 Order of 17 September 2010, Disposition.

62 Demande de notification de la réponse du procureur du 2 juin 2010 et des documents subséquent en langue française, Case No. CH/PTJ/2010/01, 3 June 2010; Prosecutor's Response to Jamil El Sayed's "Demande de notification de la réponse du procureur du 2 juin 2010 et des documents

the same day (1 October 2010) and specified that they were to receive each other's submissions at the same time, *after* the Registry had translated the Prosecutor's submission into French, at which point they would both have 10 days to respond. If there could have been any legitimate confusion over the meaning of the disposition, the Office of the Prosecutor should have clarified the matter through an informal inquiry with the Registry, without involving Chambers.

II. Whether the Tribunal Is Endowed with Jurisdiction

A. The Power of International Tribunals to Pronounce Upon Their Own Jurisdiction

38. As mentioned above, the Prosecutor first asserts that the Pre-Trial Judge erred as a matter of law in concluding that the Tribunal has jurisdiction over the Application.[63] The Appeals Chamber must therefore rule on the question of the Tribunal's authority to pronounce on the matter raised by the Applicant, namely whether the Pre-Trial Judge may request that the Prosecutor and the Applicant argue the merits of the Applicant's request that he be granted access to the relevant pieces of evidence. In other words, the Appeals Chamber must pass judgment on the issue of the Tribunal's own jurisdiction.

39. The question of the scope of an international tribunal's jurisdiction such as this one is complex. In order to appropriately address this question, it is necessary to consider it within the general context of *international* adjudication.

40. In the case of domestic courts, the scope of their jurisdiction (whether subject-matter jurisdiction or personal, territorial, or temporal jurisdiction) is normally defined by law. That this should be so is only natural, given that domestic courts make up a proper judiciary, consisting of a number of judicial bodies distributed over the state's territory, each being endowed with specific powers, a well-defined field of action, and a distinct territorial competence. Domestic judiciaries are organized not only horizontally, but also vertically, being part of a hierarchical organization in which the higher courts may revise

subséquent en langue française," Case No. CH/PTJ/2010/01, 4 June 2010; Extension Order for the Date of Filing of the Reply by Mr Jamil El Sayed, Case No. CH/PTJ/2010/01, 4 June 2010.

63 Appeal, paras 16-19, referring to Order of 17 September 2010, para. 32.

or reverse decisions of the lower courts. Within domestic legal systems, questions of jurisdiction raised before a particular court may be settled by that court, if the law so provides, but may often be settled by a higher court. Indeed, in some countries, such questions must be referred to the highest judicial body, which has the authority to decide on the matter in such a manner that its decisions are binding on all the courts of the state. Similarly, other questions pertaining to the conduct of proceedings raised before a specific court may have to be settled by another court or by a higher court. This holds true for questions relating to the recusal of judges, to misconduct of the persons participating in the proceedings, and so on.

41. Things are different at the international level. In this field, there is no judicial *system.* Courts and tribunals are set up individually by States, or by intergovernmental organizations such as the United Nations, or through agreements between States and these organizations, but they do not constitute a closely intertwined set of judicial institutions. Indeed, each tribunal constitutes a self-contained unit or, as has been said, "a monad that is very inward-looking"[64] or "a kind of unicellular organism".[65] There is neither a *horizontal* link between the various tribunals, nor, *a fortiori*, a *vertical* hierarchy. As was aptly noted in 1995 by the ICTY Appeals Chamber in *Tadić (Interlocutory Appeal)*, international law "lacks a centralized structure, [and] does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others."[66]

42. It follows that international courts and tribunals may not rely on other international courts for the determination of jurisdiction and the host of other procedural matters not addressed by their own statutes. They have perforce to settle such issues for themselves.

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64 Condorelli, L., 'Jurisdictio et (dés)ordre judiciaire en droit international: Quelques remarques au sujet de l'arrêt du 2 octobre 1995 de la Chambre d'appel du TPIY dans l'affaire Tadić', in *Mélanges en l'honneur de Nicolas Valticos: Droit et Justice* (Paris: Pedone, 1999), at 285 where Condorelli states that international tribunals are «des sortes de ' monades' repliées sur elles-mêmes ».

65 Gaeta, P., 'Inherent powers of International Courts and Tribunals', in Vohrah, L.C. *et al.* (eds.), *Man's Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer, 2003), 353-372, at 365.

66 ICTY, *Tadić* Jurisdiction Decision, para. 11.

In other words, international judicial bodies must each exercise powers which in other legal systems are spread across a hierarchy of courts.

43. Whenever a question relating to the jurisdiction of an international tribunal is raised, therefore, it falls to the court itself to adjudicate it, for lack of any other judicial body empowered to settle the matter. In instances where that court's constituting documents do not expressly grant the court the power to decide on its own jurisdiction, the resulting condition may appear to be paradoxical. Indeed, in such instances, a court exercises a power not provided for in its statutory provisions, with a view to determining whether, under those provisions, it has the power to pass on the merits of the question at issue. The paradox, however, disappears if one recognizes that a customary international rule has evolved on the inherent jurisdiction of international courts, a rule which among other things confers on each one of them the power to determine its own jurisdiction (so-called *compétence de la compétence* or *Kompetenz-Kompetenz*). This rule is attested to, inter alia, by the numerous international decisions holding that international courts are endowed with the power to identify and determine the limits of their own jurisdiction.[67]

[67] See for instance the decision rendered on 28 November 1923 by the Arbitral Tribunal set up by the United Kingdom and the United States in *Rio Grande Irrigation & Land Company, Ltd. (Great Britain) v. United States*, Reports of International Arbitral Awards, Vol. VI, 131, at 135-136. See also *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, Advisory Opinion of 28 August 1928, P.C.I.J. Series B, No. 16, at 20 where it was stated: "[I]t is clear—having regard amongst other things to the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction—that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary."; *Lehigh Valley R.R. Co. (United States) v. Germany*, Decision of 15 December 1933, Reports of International Arbitral Awards, Vol. VIII, 160 ("*Lehigh Valley R.R. v. Germany*"), at 186: "I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it[.]"; IACHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C, No. 94 [2002] IACHR 4 (21 June 2002) ("*Hilaire v. Trinidad and Tobago*"), at paras 17-19: "[T]he Court, as with any other international organ with jurisdictional functions, has the inherent authority to determine the scope of its own competence."; SCSL, *Prosecutor v. Kallon et al.*, Decision on Constitutionality and Lack of Jurisdiction, Case Nos. SCSL-2004-14-AR72(E), SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 March 2004, paras 34-37; *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, at paras 79-82.

B. The Notion of Inherent Jurisdiction

44. The nature and structure of international courts referred to above entails, in addition to the power of each court to pronounce on its own jurisdiction, that international judicial bodies may have to exercise inherent jurisdiction to an extent larger than any domestic court. The notion of inherent jurisdiction has been referred to by many international judicial bodies, such as the International Court of Justice,[68] the ICTY,[69] the ICTR,[70] the Special Court for Sierra Leone,[71] the Inter-American Court of Human Rights,[72] the European Court of Human Rights,[73] the Iran-US Claims Tribunal,[74] and the ILO Administrative Tribunal.[75]

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68 In the *Nuclear Tests* case (*New Zealand v. France*) the International Court of Justice said: "In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded." *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports (1974) 457, at 463 (para. 23).

69 ICTY, *Tadić* Jurisdiction Decision, paras 18-20; ICTY, *Prosecutor v. Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108*bis*, 29 October 1997, paras 25-26, 28.

70 ICTR, *Prosecutor v. Rwamakuba,* Decision on Appropriate Remedy, Case No. ICTR-98-44C-T, 31 January 2007, paras 45-47, 62; ICTR, *Rwamakuba v. Prosecutor*, Decision on Appeal against Decision on Appropriate Remedy, Case No. ICTR-98-44C-A, 13 September 2007, para. 26.

71 SCSL, *Prosecutor v. Norman et al.*, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, Case No. SCSL-04-14-T, Appeals Chamber, 17 January 2005, at para. 32. There, the court explained: "The Appeals Chamber may have recourse to its inherent jurisdiction, in respect of proceedings of which it is properly seized, when the Rules are silent and such recourse is necessary in order to do justice.... Inherent powers of the court are powers which are inherent in a court by virtue of its nature. They are powers necessary for the administration of justice. They are not powers derived from the Rules or from statute but are powers which must be exercised in the interest of justice by reason of absence of express statutory provisions to cover a particular situation. It is an attribute of judicial power."

72 IACHR, *Hilaire v. Trinidad and Tobago*, paras 17-19.

73 ECHR, *Ringeisen v. Austria (Interpretation)*, Application No. 2614/65, Judgment of 23 June 1973, Series A, No. 16, para. 13; ECHR, *Allenet de Ribemont v. France (Interpretation)*, Application No. 15175/89, Judgment of 7 August 1996, Reports of Judgments and Decisions 1996-II, para. 17.

45. With regard to the Tribunal, by 'inherent jurisdiction' we mean the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction. This inherent jurisdiction arises as from the moment the matter over which the Tribunal has primary jurisdiction is brought before an organ of the Tribunal. It can, in particular, be exercised when no other court has the power to pronounce on the incidental legal issues, on account of legal impediments or practical obstacles. The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.

46. International courts have exercised this inherent jurisdiction in many instances where their statutory provisions did not expressly or by necessary implication contemplate their power to pronounce on the matter. By way of example, one can mention the power to take interim measures,[76] to request stays of domestic proceedings or to stay its own

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74 *E-Systems, Inc. v. Iran*, 2 Iran-U.S. C.T.R. 51 (4 February 1983) ("*E-Systems, Inc. v. Iran*"); see also Weiss, F., 'Inherent Powers of National and International Courts: The Practice of the Iran-US Claims Tribunal', in Binder, C. et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009), 185-199, at 193-194 (noting cases from the Iran-US Claims Tribunal which identify its inherent powers).

75 *In re Vollering (No. 15)*, ILO Administrative Tribunal, Judgment No. 1884, 8 July 1999, para. 8 ("The Tribunal has never heretofore imposed a costs penalty upon a complainant. However, it asserts unequivocally that it possesses the inherent power to do so as part of the necessary power to control its own process. Clearly, such power must be exercised with the greatest care and only in the most exceptional situations since it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards of costs. That said, however, there is another side to the coin: frivolous, vexatious and repeated complaints to the Tribunal absorb the latter's resources and impede its ability to deal expeditiously and fully with the many meritorious complaints which come before it. They are also, of course, costly and time-wasting for the defendant organization."); *In re Martinuzzi*, ILO Administrative Tribunal, Judgment No. 1962, 12 July 2000, para. 4.

76 *Veerman* case, Order of 28 October 1957, in *Decisions of the Arbitral Commission on Property, Rights and Interests in Germany*, Vol. I (Koblenz, 1958), at 120 where it was stated: "We have no doubt of our inherent power to issue such orders as may be necessary to conserve the respective rights of the parties, including their freedom from interference in the prosecution of their claims before us, and thereby to assure that this Tribunal's jurisdiction and authority are made fully effective."; SCSL, *Prosecutor v. Brima et al.* Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(ii), Case No. SCSL-04-16-AR77, 23 June 2005 ("*Brima* Decision"), para. 9; see also ECHR,

proceedings,[77] to order the discontinuance of a wrongful act or omission,[78] to appraise the credibility of a witness appearing to testify under solemn declaration before the international court,[79] to pronounce upon instances of contempt of the court,[80] to order compensation in appropriate circumstances,[81] to consider matters or issue orders *proprio motu*,[82] and to rectify material errors contained in a court's judgment.[83]

Mamakutlov and Askarov v. Turkey, Application Nos. 46827/99, 46951/99, Judgment of 4 February 2005, Reports of Judgments and Decisions 2005-I, paras 123-124 (determining that interim measures must apply with binding force on states).

77 *E-Systems, Inc. v. Iran* (requesting Iran stay related domestic proceedings); ICTY, *Prosecutor v. Bobetko*, Decision on Challenge of Croatia to Decision and Orders of Confirming Judge, Case Nos. IT-02-62-AR54*bis*, IT-02-62-AR108*bis*, 29 November 2002, para. 15 ("The Tribunal has an inherent power to stay proceedings which are an abuse of process, such a power arising from the need for the Tribunal to be able to exercise effectively the jurisdiction which it has to dispose of the proceedings."). As the eminent U.S. jurist Benjamin Cardozo put it, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its dockets[.]" *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

78 France-New Zealand Arbitral Tribunal, *Case Concerning the Difference between New Zealand and France concerning the Interpretation or Application of two Agreements, concluded on 9 July 1986 between the two States and which Related to the Problems Arising from the Rainbow Warrior Affair (New Zealand v. France)*, Decision of 30 April 1990, Reports of International Arbitral Awards, Vol. XX, 217, at 270, para. 114.

79 ICTY, *Prosecutor v. Tadić*, Judgement, Case No. IT-94-1-A, 15 July 1999, para. 322. The Chamber said: "With regard to the present case, once a Defence witness has testified, it is for a Trial Chamber to ascertain the credibility of his or her testimony. If he or she has made a prior statement, a Trial Chamber must be able to evaluate the testimony in the light of this statement, in its quest for the truth and for the purpose of ensuring a fair trial. Rather than deriving from the sweeping provisions of Sub-rule 89(B), this power is inherent in the jurisdiction of the International Tribunal, as it is within the jurisdiction of any criminal court, national or international. In other words, this is one of those powers mentioned by the Appeals Chamber in the *Blaškić (Subpoena)* decision which accrue to a judicial body even if not explicitly or implicitly provided for in the statute or rules of procedure of such a body, because they are essential for the carrying out of judicial functions and ensuring the fair administration of justice."

80 ICTY, *Prosecutor v. Tadić*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-R77, 31 January 2000, paras 18, 24-26, 28; ICTY, *Prosecutor v. Simić et al.*, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, Case No. IT-95-9-R77, 30 June 2000, para. 91; SCSL, *Brima* Decision, para. 26 (referencing the "inherent power to punish" contempt).

81 ICTR, *Prosecutor v. Rwamakuba*, Decision on Appropriate Remedy, Case No. ICTR-98-44C-T, 31 January 2007, paras 45-47, 62; ICTR, *Prosecutor v. Rwamakuba*, Decision on Appeal against Decision on Appropriate Remedy, Case No. ICTR-98-44C-A, 13 September 2007, para. 26; IACHR, *Aloeboetoe et al. Case – Reparations*, Series C, No. 15 [1993] IACHR 2 (10 September 1993), paras 43-52 (ordering reparations, including compensation for moral damages, and requiring the respondent State to establish trust funds and a foundation to aid in the distribution of damages).

82 See ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's

47. The extensive practice of international courts and tribunals to make use of their inherent powers and the lack of any objection by States, non-state actors or other interested parties evince the existence of a general rule of international law granting such inherent jurisdiction. The combination of a string of decisions in this field, coupled with the implicit acceptance or acquiescence of all the international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved.

48. The practice of international judicial bodies shows that the rule endowing international tribunals with inherent jurisdiction has the general goal of remedying possible gaps in the legal regulation of the proceedings. More specifically, it serves one or more of the following purposes: (i) to ensure the fair administration of justice; (ii) to control the process and the proper conduct of the proceedings; (iii) to safeguard and ensure the discharge by the court of its judicial functions (for instance, by dealing with contempt of the court). It follows that inherent jurisdiction can be exercised only to the

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Counsel, Case Nos. ICTR-97-21-T, ICTR-97-29-T, ICTR-96-15-T, ICTR-96-8-T, 10 July 2001, para. 19 (rephrasing proposed witness protection order *proprio motu*); ECCC, *Prosecutor v. Kaing*, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, paras 9-12 (noting possible procedural errors by co-investigating judges not raised by defence counsel); see also Jørgensen, N.H.B., 'The *Proprio Motu* and Interventionist Powers of Judges at International Criminal Tribunals', in Sluiter, G. and Vasiliev, S. (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May, 2009), at 121. It is noted that these cases do not explicitly address the power to act *proprio motu*, but from the context of the opinions, it is clear that the courts considered these *proprio motu* actions to be an exercise of their inherent judicial character.

[83] See the decision of 14 March 1978 by the French-British Arbitral Tribunal in the case of *Delimitation of the Continental Shelf: Interpretation of the Decision of 30 June 1977* in 54 *International Law Reports*, at 174.

Similarly, tribunals have considered their inherent jurisdiction to reopen judgments upon evidence of fraud or other extraordinary circumstances. See, e.g., *Lehigh Valley R.R. Co. v. Germany*, at 188 where it was stated that "[W]here the decision involves a material error of law, the commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules."; *ibid.*, at 190, "No tribunal worthy [of] its name or of any respect may allow its decision to stand if such allegations [of fraud, perjury, collusion, and suppression] are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud."; ICTY, *Prosecutor v. Mucić et al.*, Judgment on Sentence Appeal, Case No. IT-96-21-A*bis*, 8 April 2003, paras 49-52; see also *Ram International Industries Inc. v. Iran*, 29 Iran-U.S. C.T.R. 383 (28 December 1993), at para. 20, noting inherent authority to revise decisions but declining to exercise it; IACHR, *Genie Lacayo Case (Application for Judicial Review of Judgment of 19 January 1997)*, Series C, No. 45 [1997] IACHR 5 (13 September 1997), at paras 6-12 (same).

extent that it renders possible the full exercise of the court's primary jurisdiction (as is the case with the *compétence de la compétence*), or of its authority over any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.

49. Inherent jurisdiction is, however, subject to limitations. It must be consonant with the principles of fair administration of justice and full respect for human rights and, in the field of judicial settlement of interstate disputes, with the consent or will of the States concerned.[84] This means, in international criminal proceedings, that inherent jurisdiction may not be exercised in a manner inconsistent with the fundamental rights of the accused or of any other person involved in the criminal proceedings.[85]

C. Whether the Tribunal Is Endowed with Inherent Jurisdiction in the Case at Issue

50. In this case the Applicant was arrested and detained in 2005 by the Lebanese authorities at the request of the Commissioner of UNIIIC. He was held in prison for nearly four years under the jurisdiction of the Lebanese authorities. On 10 April 2009, on the strength of Article 4(2) of the Statute, the Lebanese authorities deferred to the Tribunal jurisdiction over the Applicant and the other three individuals detained in Lebanon in connection with the Hariri case. Following a request by the Prosecutor, on 29 April 2009, the Pre-Trial Judge ordered that the Lebanese authorities release the Applicant and the other persons in detention because the Prosecutor considered that, on the basis of the materials handed over by the Lebanese authorities, no charge could be proffered against them at that time. The Applicant now claims, *inter alia*, that his imprisonment was based on the false testimony of witnesses heard by UNIIIC, and he requests that the Tribunal disclose evidence in its possession that he believes will enable him to seek compensation for arbitrary detention and libel before a national court.

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84 See ICTY, *Prosecutor v. Delacić et al.*, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delacić and Zdravko Mucić, Case No. IT-96-21-T, 11 November 1996, at para. 24.

85 This last point was in particular made by an ICTY Trial Chamber in *Prosecutor v. Kupreškić et al.*, Judgment, Case No. IT-95-16-T, 14 January 2000, at paras 739-741.

51. The primary jurisdiction of the Tribunal is undoubtedly 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[86] (the "Agreement"), and Articles 1 and 2 of the Tribunal's Statute, *i.e.* to prosecute the perpetrators of the attack of 14 February 2005 which killed the former Prime Minister Rafiq Hariri and others, and, if appropriate, the perpetrators of other connected attacks. This limited jurisdiction is confirmed by Article 21 of the Statute, which clearly states that the Tribunal "shall confine the trial, appellate and review proceedings *strictly* to the expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively" (emphasis added). There is no doubt that the matter at hand does not fall within the Tribunal's primary jurisdiction. The question can therefore be framed as follows: does the Tribunal possess *inherent* jurisdiction over the issue of whether or not the Applicant is entitled to request evidentiary material related to his detention?

52. In answering this question, the Appeals Chamber bears in mind its obligation to apply the highest standards of justice and to ensure its fair administration, as provided for by the Tribunal's Statute[87] and general principles of international law.[88]

53. Through the exercise of its primary jurisdiction, the Tribunal is now said to be in the possession of the 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 arises as a direct consequence of the matter having been brought before the Tribunal's Prosecutor pursuant to Article 4, paragraph 2 of the Tribunal's Statute, although the substance of the Application is not directly dealt with in the Statute or Rules. 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.

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86 UN Doc. S/RES/1757(2007).

87 E.g., Statute of the Tribunal, Article 28(2).

88 See, e.g., *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 2)*, [2000] 1 AC 119 ("*Re Pinochet*"), at 132.

Further, as aptly noted by the Pre-Trial Judge in his decision of 17 September 2010 in paragraph 35, 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 for the allegedly false testimony that led to his imprisonment. In these circumstances, upholding the jurisdiction of the Tribunal would not run counter to the purposes set out in paragraph 48 above. Indeed, to affirmatively decide on this jurisdictional issue and thus find that the Tribunal possesses inherent jurisdiction fills an unforeseen gap in the legal regulations, and serves to determine a procedural issue incidental to the exercise of the Tribunal's primary jurisdiction. In addition, it is consonant with, and indeed required by, the principle of fair administration of justice and full respect for the rights of all those involved in the proceedings before this Tribunal.

D. The Jurisdiction of the Appeals Chamber to Consider the Interlocutory Appeal

54. The Appeals Chamber also exercises its inherent jurisdiction to consider this interlocutory appeal. The Appeals Chamber will not normally consider interlocutory appeals outside the scope of the Rules but finds it necessary to do so here, where a situation has arisen that was not foreseen by the Rules, and it is alleged that a jurisdictional error has been committed and injustice may result if such an error as is alleged were left uncorrected.[89]

55. It is appropriate to emphasize that, contrary to what is asserted by the Applicant in his Response of 12 October 2010 (paragraphs 12-20), the Appeals Chamber is empowered to decide at this stage not only on jurisdiction but also on standing. This power does not derive from the Rules, which only deal with cases where an accused has been brought before the Tribunal, a situation that has not yet come to pass. It rather derives from general principles of international criminal law, and from the fundamental principle of judicial economy. Indeed, both issues are preliminary to any question of merits and both must be adjudicated at this stage: should the Appeals Chamber determine that the Tribunal lacks jurisdiction or that the Applicant lacks standing, clearly no discussion on

[89] See *Tadić* Jurisdiction Decision, at para. 6; *Re Pinochet*, at 132.

the merits would take place. It would not make sense for the Appeals Chamber to pass on these preliminary issues *after* a decision on the merits by the Pre-Trial Judge. Should the Appeals Chamber find at that stage that there was no jurisdiction or no standing, all the proceedings on the merits before the Pre-Trial Judge would have been pointless.

56. To be sure, determining that the Tribunal has jurisdiction over this matter does not entail a ruling on the modalities and limits of the Applicant's right of access to a specific set of documents, including the appropriate time frame for exercising any such right. This is a question of merit that the Pre-Trial Judge must decide on the basis of the applicable rules and the submissions of the parties, taking into account the specific circumstances of this case, in particular the fact that a key witness allegedly recanted his testimony. In discharging this task, the Pre-Trial Judge will have to strike a careful balance between the right of the Applicant to judicial remedy if his detention was wrongful, on the one hand, and, on the other, the need for the Prosecutor to conduct his investigation efficiently and with the ability to protect the confidentiality of witnesses and evidence.

57. In light of the above, the Appeals Chamber exercises its jurisdiction and upholds the Pre-Trial Judge's finding that the Tribunal is endowed with inherent jurisdiction over the question raised by the Applicant.

III. Whether the Applicant Has Standing Before the Tribunal

58. The Pre-Trial Judge stated in his Order of 17 September 2010 that the Applicant has standing to seize the Tribunal of some specific issues relating to the deprivation of liberty to which he was subjected.[90] In his appeal, the Prosecutor instead argues that the Applicant has no standing before the Tribunal.[91] He briefly notes that the test for the determination of standing "focuses on the party and not on the issue [that a person] wishes to have adjudicated". According to the Prosecutor, since the Applicant is neither an accused nor a victim nor a third party nor an amicus curiae, he has no standing. This is too narrow an approach.

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90 Order of 17 September 2010, para. 42.

91 Appeal, paras 25-32.

59. As a preliminary matter, the Prosecutor appears to argue that the determination on standing is to be made in the abstract, based merely on the legal position of the Applicant vis-à-vis the Tribunal, without considering the issue at stake or the remedy sought. This assumption is fallacious. While a question of jurisdiction can be construed as a mere assessment of a court's authority to deal with certain matters in the abstract, an inquiry into standing involves a deeper understanding of the actual issues under litigation. Questions 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*. Without such an inquiry, the court would not be able to assess if it is empowered to determine the issue as it pertains to the litigant and thereby vindicate the rule of law by redressing the litigant's alleged wrong.[92]

60. Generally speaking, the notion of standing, to the extent that it can be derived from the general principles of criminal procedure, relates to the right of a person allegedly aggrieved by the violation of a legal rule to seek relief for any damage he may have suffered. When an international court of limited jurisdiction considers whether an applicant has standing to seek a certain remedy, relevant factors may include (i) that the applicant has been negatively affected by the conduct of another person or organ, (ii) that such conduct has caused or may cause a substantial injury or damage to him or her (*i.e.*, a causal link), (iii) that such conduct is incidental to the court's proceedings, or otherwise directly related to the court's primary mandate, and (iv) 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.[93]

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92 See SCSL, *Brima* Decision, at paras 33-34 (considering standing of participant in light of relief sought); cf. *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports (1974) 457, at 463, paras 22-24 (noting contextual nature of jurisdictional question).

93 Cf. SCSL, *Brima* Decision, at paras 13, 34 (evaluating standing of defendants to be heard regarding interim measures directed against a defence investigator and defendants' wives on the basis that such measures could impact the defendants' ability to present their case); ICTY, *Prosecutor v. Gotovina et al.*, Decision on Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz, Case No. IT-06-90-T, 1 December 2009, at para. 6 (defence has standing to request order restricting prosecutor's conduct outside the courtroom because such conduct could impact defendants' fair trial rights); ECCC, *Prosecutor v. Nuon et al.*, Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Thom Province, Case File No. 002/19-09-2007-ECCC-OCIJ, 14 September 2010 (evaluating standing of applicants to be admitted as civil

61. Other international criminal tribunals have rarely had cause to consider the standing of an applicant not already a participant in proceedings before the court, but this circumstance is not determinative. Regardless, the Pre-Trial Judge has rightly stated in paragraphs 40-42 that the Applicant fell within the class of persons envisaged in Article 4(2) of the Tribunal's Statute and Rule 17 (A) and (B) of the Rules. He was under the authority and jurisdiction of the Tribunal between 10 and 29 April 2009, and was released from the Lebanese prison on the basis of the Pre-Trial Judge's Order of 29 April 2009. Hence the Applicant, although technically not a suspect, an accused, or a victim within the meaning of the Tribunal's Statute and Rules, has nevertheless been under the jurisdiction of the Tribunal, albeit for a limited period of time. Similarly, the documents related to the Applicant which are in the possession of the Prosecutor can be held to be under the jurisdiction of the Tribunal.

62. The applicant claims that he has suffered severe harm from the imprisonment in Lebanon, and that one of the main reasons for his incarceration was "false testimony" said to have been given by one or more witnesses (by which we understand he refers to the "inconsistencies in the statements" of certain witnesses, "lack of corroborative evidence to support these statements", and subsequent retraction of certain witness statements, recorded by the Pre-Trial Judge in recounting submissions by the Prosecutor in April 2009).[94] He claims that he has the right to have access to his criminal file, so as to exercise his right to sue the false witnesses for compensation.

63. The Pre-Trial Judge stated at paragraphs 44-54 that there is a right, which is not absolute, of access to one's criminal file, and given that (i) the Applicant was himself detained, (ii) his rights may have been harmed by that conduct, and (iii) the Tribunal, which had temporary jurisdiction over his detention, now appears to have custody over the evidence required for him to redress his wrongs (and thus could provide him a remedy), the Applicant has standing with regard to this particular matter.

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parties based on whether applicants can establish the existence of real harm as a direct consequence of crimes for which the defendants were being prosecuted).

94 Order of 29 April 2009, para. 34.

64. We agree that there is in general terms such a right. In this case, that right may extend to all, part, or none of the file, depending on the result of the Pre-Trial Judge's evaluation of the factors noted in paragraph 56, above, and any other considerations he determines to be relevant. It is premature for us to comment as to the nature and extent of the right until an appeal is lodged which requires determination of these questions.

65. The Pre-Trial Judge has therefore appropriately considered, albeit to the limited extent possible given the stage of the proceedings, the nature of the remedy sought by the Applicant in ruling on his standing. It follows from the general right of access, as the Pre-Trial Judge consequently ruled, both that the Applicant is entitled to *apply* to have access to his criminal file and that the Tribunal has jurisdiction to pronounce upon that application. But a decision on the merits has still to be taken (i) on whether he does indeed have an enforceable right of access to all or some of the specific documents assumed to be held by the Prosecutor and, if so, (ii) on the modalities to allow such access. The Tribunal, if it were eventually to consider the Applicant's claim well-founded on the merits, would be in a position to grant the Applicant the relief sought. Consequently, the Appeals Chamber has satisfied itself that Pre-Trial Judge did not err in law when ruling that the Applicant has *locus standi* on the specific issue before the Tribunal.

IV. Disclosure Regime Relating to the Matters Covered by the Application

66. As we affirm the Tribunal's jurisdiction over the Application and the Applicant's standing to seize the Tribunal with some specific issues related to his past detention in Lebanon, the Pre-Trial Judge will now have to consider and decide on the merits of the Application, namely the existence and scope of the Applicant's right of access to documents from his criminal file that are in the possession of the Prosecutor. It is for the Pre-Trial Judge to consider this question in the first instance.

67. It is expedient, however, for the Appeals Chamber to clarify two points in response to the Prosecutor's submissions.

68. First, the Prosecutor should not have been surprised by the discussion in the 17 September 2010 order of the existence of a right of access. The Pre-Trial Judge, in his

scheduling order of 25 June 2010, explicitly notified the parties that he would address factual questions and questions relating to the merits of the Application's request at the hearing. He also posed direct questions to the Prosecutor at the hearing and granted a recess to allow the parties time to formulate their responses. (See paragraphs 11-13, above.) Although the Prosecutor was informed at the hearing that the Pre-Trial Judge expected to issue a ruling by mid-September,[95] he did not make any effort to file a written submission, or request permission to do so, in the two intervening months. On these facts, we do not believe the Prosecutor was denied any and all opportunity to be heard on the matter.

69. Further, the Prosecutor has a continuing opportunity to submit his views on all aspects of the merits question, through the written submission requested by the Pre-Trial Judge in his order of 17 September 2010. As the right of access is not an absolute right,[96] its existence in a given situation cannot be separated from the limitations and restrictions that would define it.

70. Second, the Prosecutor's arguments regarding the disclosure regime contemplated by the Rules miss the point. As the Prosecutor acknowledges,[97] this Application is a matter unforeseen by the Rules, and it cannot be addressed through the literal application of Rules that relate to accused defendants. That the Rules envisage and thus provide for the obligatory disclosure of evidence by the Prosecutor to an accused does not mean the Rules *forbid* the disclosure of evidence in a situation where there is no indictment and thus no accused, but where the interests of justice otherwise require it. Rather, this Application must be considered in accordance with the dictates of Rule 3, including

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95 Transcript, p. 42.

96 See, e.g., ECHR, *Jasper v. United Kingdom*, Application No. 27052/95, Judgment 16 February 2000, para. 52 ("[T]he entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused."); cf. ECHR, *Fox, Campbell and Hartley v. United Kingdom*, Application No. 12244/86, Judgment of 30 August 1990, Series A, No. 182, para. 34 (noting States "cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity").

97 Appeal, paras 4-6.

international standards of human rights and general principles of international criminal law and procedure, and in light of the spirit of the Statute and the Rules.

CONCLUSION

71. The appeal having failed, it is now for the Pre-Trial Judge to adjudicate the Application on the merits.

DISPOSITION

The Appeals Chamber, deciding unanimously,

1) Rejects the Prosecutor's Appeal;

2) Affirms the jurisdiction of the Tribunal to hear the Application;

3) Affirms the standing of the Applicant before the Tribunal to request documents that may be contained in his criminal file, without deciding whether he has a right to all or some of such documents, and if so, under what conditions;

4) Remands the Application to the Pre-Trial Judge to consider its merits; and

5) Refers the brief submitted by the United Nations and any related submissions to the Pre-Trial Judge for any determination he deems appropriate.

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

Dated this tenth day of November 2010,
Leidschendam, The Netherlands

Antonio Cassese

Judge Antonio Cassese
President