**BEFORE THE PRESIDENT**

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| Case No.: | **CH/PRES/2010/01** |
| President: | **Judge Antonio CASSESE** |
| Acting Registrar: | **Herman VON HEBEL** |
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# ORDER ASSIGNING MATTER TO PRE-TRIAL JUDGE

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1. In my capacity as President of the Special Tribunal for Lebanon (the "Tribunal", or "STL"), on 17 March 2010 I received a request by Mr Jamil El Sayed (the "Applicant"), represented by Counsel, Mr Akram Azoury of the Beirut Bar, in relation to evidentiary material related to his detention (the "Application").[1]

## I. PROCEDURAL BACKGROUND AND ARGUMENTS OF THE APPLICANT

2. Pursuant to Article 4 of the Statute of the Tribunal ("the Statute"), the Tribunal and the domestic judicial authorities in Lebanon have concurrent jurisdiction as regards the case related to the attack against Prime Minister Rafiq Hariri and others ("the *Hariri* case"). However, according to the second sentence of Article 4 of the Statute, the Tribunal has primacy over the domestic Lebanese authorities, within the confines of its criminal jurisdiction. In order to exercise this primacy, the Tribunal requests the national judicial authority to defer to its competence.

3. On 27 March 2009, at the request of the Prosecutor of the Tribunal ("the Prosecutor") and pursuant to Rule 17 of the Rules of Procedure and Evidence ("the RPE"), Pre-Trial Judge Daniel Fransen issued an order directing the Lebanese judicial authorities seized with the *Hariri* case to defer to the Tribunal's competence.[2]

4. On 8 April 2009, the Lebanese judicial authorities referred the list of persons detained by them in connection with the *Hariri* case to the Pre-Trial Judge. According to this list, the persons detained were Mr Jamil Mohamad Amin El Sayed, Mr Ali Salah El Dine El Hajj, Mr Raymond Fouad Azar and Mr Mostafa Fehmi Hamdan. On 10 April 2009, the Lebanese authorities transferred the results of the investigation and a copy of the court's records regarding the *Hariri* case to the Prosecutor. Since that date, the

[1] Mémo no 112 – Requête au Président du Tribunal Spécial pour le Liban, Beyrouth le 17 mars 2010.
[2] Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, 27 March 2009.

Tribunal has been officially seized of this case and the persons detained have been deemed to be formally under its authority.

5. On 27 April 2009, the Prosecutor, having examined all the material in the case file collected by the UN International Independent Investigation Commission ("UNIIIC") established pursuant to UN Security Council resolution 1595 (2005), by the Lebanese authorities, as well as by his Office, considered that "information gathered to date in relation to the possible involvement of the four detained persons in the attack against Rafiq Hariri has not proved sufficiently credible to warrant the filing of an indictment against any of them".[3] He added that "[t]he assessment that has been made is based on several considerations, including inconsistencies in potentially key witnesses' statements, and a lack of corroborative evidence to support these statements. Some witnesses also modified their statements and one potentially key witness expressly retracted his original incriminating statement".[4] The Prosecutor, without mentioning any specific name, added that the investigation was ongoing and that the Submission should not be understood as prejudging any future action.[5]

6. On 29 April 2009, the Pre-Trial Judge issued the "Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others", ordering *inter alia* the Lebanese authorities to release the above-mentioned detained persons, unless they were being held on another basis.[6] The Lebanese authorities complied on the same day. The Applicant was released.[7]

7. The Applicant submits that he was the victim of arbitrary detention between 3 September 2005 and 29 April 2009. He alleges that this arbitrary detention was based on libellous denunciations and false statements punishable under the Lebanese Penal Code

[3] Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence, No. CH/PTJ/2009/004, 27 April 2009 ("Submission"), para. 29.
[4] Submission, para. 30.
[5] Submission, paras 32-33.
[6] 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.
[7] Application, p. 2.

and other applicable domestic legal provisions[8] and that he wishes to pursue the matter before civil courts.[9]

8. He further alleges that the Tribunal should ordinarily have jurisdiction over breaches of the law that occurred during the UNIIIC investigation, but that since the Plenary of STL Judges modified the Rules of Procedure and Evidence so as to deny such jurisdiction, the alleged perpetrators of these acts now effectively enjoy immunity before the Tribunal.[10] The Applicant also attaches public statements from the Government of Lebanon as well as a Decision of 27 January 2010 by Lebanese Judge Ghassan Munif Owaidat (Case No. 11724/2008), stating that Lebanon does not have jurisdiction over the matter raised by the Applicant.[11]

9. The Applicant claims that the alleged perpetrators of the libellous acts referred to above may, however, be held liable before other jurisdictions. According to the Applicant, in order for him to pursue the matter before domestic jurisdictions, it is necessary for him to have access to evidentiary material of the UNIIIC, which is now in the possession of the Prosecutor. He alleges that this material is not part of the case file in the *Hariri* case.[12] He adds that the failure to receive this material directly from the

[8] Application, pp. 2-3.
[9] Application, p. 5.
[10] Application, p. 3.
[11] Application, pp. 5-6 and Annexes 1, 2, and 3.
The text of the decision, as translated into English, is as follows:
"I, Ghassan Owaidat, First Investigating Judge in Beirut
Upon review of direct lawsuit number 11724/2008 dated 31/07/2008 and the submission of the Prosecutor General at the Court of Appeal on the subject of jurisdiction and all the documents:
Whereas on 31/07/2008, plaintiff Major General Jamil Al-Sayyed submitted through his counsel Akram Azouri a direct lawsuit against an unknown person on the charges of forgery and use of forged official documents, according to which on 29/02/2008 the Lebanese State sent an official letter to the Office of the High Commissioner for Human Rights in Geneva containing incorrect and fabricated facts, as the judicial investigation which the plaintiff underwent did not follow any of the procedures mentioned in the letter.
Whereas this lawsuit seeks rebuttal of the investigations conducted following the assassination of former Prime Minister Rafiq Hariri, a case now under the jurisdiction of the Special Tribunal for Lebanon following deferral by the Lebanese judiciary effective 01/03/2009 pursuant to the Agreement between the United Nations and the Lebanese Republic on 06/02/2007, the Lebanese judiciary does not have jurisdiction for further consideration of the case and any other related matters.
Therefore,
And upon review, I have decided to:
1- Declare that I do not have jurisdiction to hear this case.
2- Keep the documents and make the plaintiff liable for the fees and expenses."
[12] Application, pp. 4-5.

Tribunal would make him unable to pursue his claims before other domestic jurisdictions, thus constituting an impediment to justice and creating an 'almost universal' immunity for the alleged authors of slanderous accusations.[13]

10. In conclusion, the Applicant requests:

a. A certified copy of the *procès-verbaux* of the claims filed by the Applicant before the Lebanese authorities, which are now in the possession of the Tribunal.

b. A certified copy of the *procès-verbaux* of the statements allegedly implicating him in the Hariri assassination.

c. The various reports to the Lebanese Prosecutor relating to the evaluation of these witnesses and in particular the report by Mr Brammertz of 8 December 2006.

d. The views ("*avis*") of Mr Daniel Bellemare regarding the detention of the Applicant and the other detained persons notified to the Lebanese Prosecutor.

e. Any other evidentiary material in the possession of the Tribunal necessary for pursuing the above-mentioned breaches of law.

11. Having set out the procedural background and the contents of the request addressed to me, it now falls to me to consider the matter in light of the Tribunal's Statute and Rules of Procedure and Evidence.

[13] Application, p. 7.

## II. APPLICABLE LAW

### A. Powers of the President

12. Article 10(1) of the Statute provides that the Tribunal's President, "in addition to his or her judicial functions", "shall […] be responsible for […] the good administration of justice." The provision is restated verbatim in Rule 32 (B) of the RPE.

13. This function entails that the President, in a primarily administrative capacity, must ensure that criminal proceedings before the Tribunal are conducted in consonance with the relevant legal provisions and rules and, in particular, that they be fair and expeditious. It also requires that the President shall ensure that the fundamental rights of the suspects, the accused, the victims and, more generally, all those who may fall under its jurisdiction, are fully safeguarded. Respect for human rights is the very foundation, and indeed, the bedrock principle of the Tribunal: this institution was established in order to prosecute and punish the perpetrators of egregious violations of human rights taking the form of terrorist acts, and thus to do justice to the victims of those horrific acts. The Tribunal is also anchored to its obligation to fully respect the rights of the suspects and accused. In short, this Tribunal, like any other international criminal court, finds its *raison d'être* in the incisive and efficacious realization of the fundamental human rights of a wide range of persons. It is in the light of these considerations that I will deal with the Application.

14. I should note at the outset that the Applicant failed to comply with the modalities for submitting a request to the Tribunal, laid down in the Practice Direction on the Filing of Documents Before the Special Tribunal for Lebanon ("Practice Direction", Doc. STL-PD-2010-01) issued by me on 15 January 2010 pursuant to Rule 32 (E) of the Rules. I understand that the Registrar sent counsel a letter explaining that this prevented the Court Management Services Section of the Registry from filing the Application. While I commend the Registrar for carrying out his duties in accordance with the Rules and the Practice Direction, I resolve that in the instant case – due to the particular circumstances

of the case and the importance of the human right at stake – the Application deserves to be considered.

15. Two points need to be made to warrant the above decision. First, the Practice Direction is applicable to "Participants" in the Tribunal's proceedings – which include "a Party, a victim participating in the proceedings, the Head of Defence Office, *amicus curiae*, a State or its representative, or any other entity or person who has been granted standing to submit a filing."[14] In this case, the Applicant – who was detained under the Tribunal's authority between 10 and 29 April 2009 – did not fall yet within these categories at the time the Application was lodged.

16. Second, in international proceedings pure formalities should not gain the upper hand whenever important rights might be at stake. As the Permanent Court of International Justice held in its Judgment of 30 August 1924 in the *Mavrommatis Palestine Concessions* case "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law".[15] In *Certain German Interests in Polish Upper Silesia* the same Court held that "the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned".[16] More recently, in its judgement of 18 November 2008 in the *Genocide* case, the International Court of Justice stated that "the Court, like its predecessor, has […] shown realism and flexibility in certain situations […]".[17]Although the authoritative judicial pronouncements just referred to relate to international judicial proceedings between States, they are also applicable to international *criminal* proceedings to the extent that such application (i) is not made to the detriment of fundamental rights of the accused, the victims or the witnesses or any other person appearing before international criminal courts, and (ii) does not amount to a serious infringement of strict procedural provisions aimed at safeguarding the principle of fair and expeditious justice.

[14] Practice Direction, Article 2.
[15] Judgment No. 2, 1924, *P.C.I.J., Series A, No. 2*, p. 34.
[16] Jurisdiction, Judgment No. 6, 1925, *P.C.I.J., Series A, No. 6*, p. 14.
[17] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia, Preliminary Objections), para. 81.

17. Thus, in light of the foregoing, I resolve to be seized of the Application regardless of the form it took. From this moment onwards, the Applicant is granted standing to submit filings in this matter and according to the relevant rules and procedures.

18. If the submissions contained in the Application are well-founded – a matter on which I am not to pronounce at this stage, acting as I am in an administrative rather than a judicial capacity – what might be at stake is the Applicant's fundamental right of access to justice. The Applicant claims that his right to sue the authors of alleged libelous accusations for compensation before the competent domestic jurisdictions is contingent upon receiving the documents that prove such accusations. His request to the Lebanese courts to obtain these documents has been dismissed, as the competent Lebanese judge found that the Lebanese courts have no jurisdiction on the matter, which should rather be submitted to the STL. He claims that without obtaining the evidence of those slanderous accusations, he is unable to sue the authors of such accusations before national or territorial courts other than the Lebanese courts.

19. Should these allegations prove correct, it would follow that the Applicant might be effectively deprived of access to justice to vindicate his rights.

**B. The Right of Access to Justice**

20. The right of access to justice (and the consequential right to be afforded judicial remedy) for the protection of one's rights is part of international customary law, as evidenced by international instruments, as well as by case law and pronouncements of States and international tribunals.[18]

21. Several international instruments lay down this right. Article 2(3) of the 1966 International Covenant on Civil and Political Rights ("ICCPR") – which was ratified by Lebanon on 3 November 1972 and entered into force for Lebanon on 23 March 1976 – provides *inter alia* that

[18] *Cf.* F. Francioni, 'The Right of Access to Justice under Customary International Law', in F. Francioni (ed.), Access to Justice as a Human Right, Oxford, Oxford University Press, 2007, pp. 1-55.

> [e]ach State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy […].

Furthermore, Article 14 of the ICCPR specifies that

> [i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

22. The same right is enshrined in the 1950 European Convention on Human Rights (Articles 6(1) and 13), the 1969 American Convention on Human Rights (Article 25), and the 1981 African Charter on Human and Peoples' Rights (Article 7(1)). The right is also laid down in some important international Declarations, such as the 1948 Universal Declaration of Human Rights (Article 8), the 1990 Cairo Declaration on Human Rights in Islam (Article 19, letter b), and the 2004 Arab Charter on Human Rights adopted by the League of Arab States (Article 12).

23. The right of access to justice, as well as the consequential right to judicial remedy and reparation, as laid down in the ICCPR, was spelled out by the UN Human Rights Committee in its General Comment no. 31, which states that "Article 2, paragraph 3 [of the ICCPR] requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights."[19]

24. In the important judgment of 14 March 2001 in *Barrios Altos v. Peru*, the Inter-American Court of Human Rights further held that

[19] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant of 29 March 2004 (CCPR/C/21/Rev.1/Add.13), para. 15. *See* also *Sundara Arachchige Lalith Rajapakse v. Sri Lanka*, HRC Decision of 14 July 2006, in particular at paras 9.5 and 10-12.

> [i]n the light of the general obligations established in Articles 1(1) and 2 of the American Convention the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.[20]

This statement was echoed by the Inter-American Commission on Human Rights in *Maria da Penha Maia Fernandes v. Brazil*[21] and in *Simone André Diniz* v. *Brazil*, where mention is made of the violation of the "right to judicial protection".[22]

25. In *Golder* v. *United Kingdom* the European Court of Human Rights held that '[I]n civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.'(para 34). The Court went on to say

> [t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice.[23]

In *Vaestberga Taxi Aktiebolag and Vulic v. Sweden* the Court stated:

> The Court reiterates that Article 6 § 1 of the Convention embodies the "right to a court" – of which the right of access is one aspect – as a constituent element of the right to a fair trial. This right is not absolute, but may be subject to limitations permitted by implication.[24]

More recently this holding was repeated, with particular reference to civil cases, in *Marini* v. *Albania* of 18 December 2007[25] and, on 6 April 2010 (with reference to the right to lodge a complaint against conditions of detention), in *Stegarescu and Bahrin v. Portugal*.[26]

[20] I/A Court H.R., *Barrios Altos case*, Judgment of March 14, 2001. Series C No. 75, para. 43
[21] IACHR, Report No. 54/01, case 12.051, *Maria da Penha Maia Fernandes* (Brazil), Apr. 16, 2001, paras. 37-38.
[22] IACHR, Report No. 66/06, case 12.001, *Simone André Diniz* (Brazil), Oct. 21, 2006, para. 145.
[23] *Golder v. the United Kingdom*, 21 February 1975, paras 34-35, Series A no. 18.
[24] *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, para. 92, 23 July 2002.
[25] *Marini v. Albania*, no. 3738/02, para. 112, ECHR 2007-XIV (extracts).
[26] *Stegarescu and Bahrin v. Portugal*, application no. 46194/06, para. 46.

26. It bears emphasizing that the case law of the international human rights courts mentioned above, although such courts do not have jurisdiction over Lebanon or the STL, is extremely important for two reasons. First, it spells out notions and legal consequences of provisions that are to a large extent similar to those of the ICCPR, a treaty that is binding on Lebanon and cannot but act as a set of crucial legal standards for the STL as well. Second, the case law in question has contributed and is contributing to the evolution of the international customary rule on the right of access to justice and, by the same token, can be regarded as evidence of the contents of that customary rule.

27. The right of access to justice – that is, to be able to claim the protection of the law – is not limited to pronouncements by international tribunals but is also enshrined in domestic systems. One of the best enunciations of this principle was set out in the seminal US case, *Marbury v. Madison* of 1803, where Chief Justice John Marshall held, on behalf of the US Supreme Court, that

> [t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court'[27]

The notion was more recently restated by the Supreme Court of Victoria at Melbourne in *Milan Tomasevic v. Danny Travaglini*, which based itself on the ICCPR.[28] Also the French Court of Cassation proclaimed the right at issue in many decisions. Suffice it to mention the judgment of the Court (*Chambre civile* 1) of 16 March 1999, no. 97-17.598, where the Court said:

> *Le droit de chacun d'accéder au juge chargé de statuer sur sa prétention, consacré par le second de ces textes [l'article 6.1 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales], relève de*

[27] 5 U.S. (1 Cranch), 137 *ff.*, at 163.

[28] [2007] VSC 337 (13 September 2007). The Court found that: "The right of every person to a fair criminal or civil trial, and the duty of every judge to ensure it, is deeply ingrained in the law. Expressed in traditional terms, the right is inherent in the rule of law – indeed, 'in every system of law that makes any pretension to civilisation' – and in the judicial process. Expressed in modern human rights terms, the right to a fair trial is important for promoting and respecting equality before the law and access to justice." (para. 68; *see* also paras 69-76).

*l'ordre public international, au sens du premier [ l'article 27.1° de la Convention de Bruxelles du 27 septembre 1968]*.[29]

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

29. The right of access to justice is regarded by the whole international community as essential and indeed crucial to any democratic society. It is therefore warranted to hold that the customary rule prescribing it has acquired the status of a peremptory norm (*jus cogens*). Such status denotes that an international norm has achieved such prominence in the international community that States and other international legal subjects may not derogate from it either in their international dealings or in their own national legislation – unless such derogations are strictly allowed by the norm itself. Admittedly there are few judicial pronouncements or State declarations suggesting that the right at issue has been elevated to this rank. One of them is a decision of the Inter-American Court of Human Rights of 22 September 2006 in the *Goiburú et al. v. Paraguay* case.[30] Similar statements had been made, prior to that judgment, by Judge Antônio Cançado Trindade in various Dissenting and Separate Opinions attached to judgments of the same Court.[31]

[29] Text of the decision on line: www.legifrance.gouv.fr. See also: *Cour de Cassation* of 19 December 2001, decision no. 01-84.394; *Cour de Cassation, Assemblée plénière*, of 7 April 2006, decision no. 05-11.519; *Cour de cassation, Chambre civile* 2, 5 March 2009, decision no. 07-19.763 (all unpublished, but available at the same website).

[30] The Court found: "Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so" (Judgment of 22 September 2006, Series C, No. 153, para. 131).

[31] *See Masacre de Pueblo Bello v. Colombia*, judgment of 31 January 2006, Separate Opinion, paras 8, 13, 64-65; *Baldeon Garcia v. Peru*, judgment of 6 April 2006, Dissenting Opinion, paras 5,7, 9-10; *Trabajadores Cesados del Congreso v. Peru*, judgment of 24 November 2006, Separate Opinion, paras 4-7; *Trabajadores Cesados del Congreso v. Peru* (interpretation), 30 November 2007, Dissenting Opinion, paras

30. However, are State practice and profuse case law really necessary for such characterization of the relevant international norm as belonging to *jus cogens*? The Martens Clause, whatever the diplomatic motivations of its adoption in 1899, over the years has been unanimously accepted by States and international judicial bodies as relaxing – at least as far as *usus* or practice of international subjects is concerned – the stringent requirements for the formation of international custom in the area of humanitarian law, whenever a new international rule evolves under the pressure and as a result of the "usages established between civilized nations, the laws of humanity and the requirements of the public conscience". This notion holds true for the formation of customary law not only in the field of international humanitarian law but also in that of human rights law, as evidenced by such judicial pronouncements as the Advisory Opinion of the International Court of Justice on *Reservations to the Convention on Genocide*, of 28 May 1951,[32] or the decision on *Filartiga* v. *Peña-Irala* (US Court of Appeals (2nd Circuit), of 30 June 1980.[33] These pronouncements attach great importance to international declarations, treaties and statements (that is, *opinio juris*) as opposed to the actual practice of States (that is, *usus*). If this is so, it seems reasonable to maintain that

35-43. Most dissenting and separate opinions of Judge Antônio Cançado Trindade on this matter can be read, in Spanish, in Antônio Cançado Trindade, *El Derecho de acceso a la justicia en su amplia dimensión*, Santiago de Chile, Librotecnia, 2008.

[32] The Court derived from the adoption process of the Convention by the UN General Assembly the consequence that the obligations laid down in the Convention were not only treaty obligations but were also general in nature, that is they also bound non-contracting states. The Court did not refer to any practice of States supporting this view. As the Court put it: "The origins and character of that Convention [on Genocide], the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, *furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations* to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 **(1)** of the General Assembly, December 11th 1946). The first consequence arising from this conception is that *the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.* A second consequence is the universal character both of the condemnation of genocide and of the CO-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States" (at 23, emphasis added).

[33] *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), 30 June 1980, on remand, 577 F.Supp. 860 (E.D.N.Y. 1984), 10 January 1984. The court emphasized that, although in fact many States practice torture, none of them claims that this is admissible, and all of them assert that torture is prohibited. There is therefore a gap between the *usus* and the *opinio juris*. The latter prevails, and it is consequently warranted to hold that a customary rule of international law has evolved on the matter.

the relaxing of the stringent requirements of *usus* should also apply to the upgrading of a customary rule to the higher rank of a peremptory norm (as is among other things born out by pronouncements of the International Court of Justice).[34]

31. It is significant that the UN Covenant on Civil and Political Rights, which, as noted above, enshrines the right, has been ratified by an overwhelming majority of members States of the international community (165 States). Among the rights laid down in the Covenant the right to a judge has great prominence, as attested to by international judicial decisions. It is also notable that on 16 December 2005 the UN General Assembly adopted by consensus a resolution (res. 60/147) in which it restated the importance of the right of access to justice, albeit in respect of a special category of violations, namely "gross violations of international human rights law or international humanitarian law".[35]

32. In short, the whole spirit of the current international drive towards full recognition of human rights, as evidenced by the aforementioned international instruments and the case law mentioned above, evinces an important postulate: the international community, as incarnated and institutionalized in the United Nations, would not tolerate the conclusion of an international agreement suppressing, or unduly and unreasonably curtailing, that right. Nor would that community condone or pass over in silence the adoption of a national law denying access to justice to nationals or foreigners, for instance on discriminatory grounds or by unreasonably adopting amnesties.

33. The right to have access to justice is not, however, absolute, as rightly and repeatedly held by the European Court of Human Rights.[36] The right can be indeed

[34] In the case concerning *Armed Activities on the Territory of the Congo (New Application 2002)* (*Democratic Republic of the Congo* v. *Rwanda*), Judgment of 3 February 2006, the Court held that the norm prohibiting genocide was "assuredly" a peremptory norm of international law (*jus cogens*) (para 64), without inquiring into the existence of any corresponding State practice. The holding in this case was restated by the Court in its decision of 26 February 2007 in the *Case Concerning the Application of the Convention on Genocide* (Bosnia-Herzegovina v. Serbia and Montenegro), at para 161.

[35] UNGA Res. 60/147 is titled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law".

[36] *See*, among others, the judgment the Court delivered on 6 April 2010 in *Stegarescu and Bahrin* v. *Portugal*, where the Court stated: "*La Cour rappelle que le « droit à un tribunal », dont le droit d'accès constitue un aspect particulier, n'est pas absolu ; il se prête à des limitations implicitement admises car il « appelle de par sa nature même une réglementation par l'Etat. En élaborant pareille réglementation, les Etats contractants jouissent d'une certaine marge d'appréciation. Il appartient pourtant à la Cour de statuer*

temporarily suspended, in accordance with international law, "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" (Article 4(1) of the ICCPR). In addition, even when the right of access to justice is not provisionally suspended under the aforementioned circumstances, the right to an effective remedy may be restricted when restrictions are imperatively justified by (i) the need to prevent the primary aim of access to justice being that of seriously infringing upon the right of others to privacy, or are warranted by (ii) imperative requirements of national security; (iii) the absolute necessity not to seriously jeopardize and indeed undermine ongoing judicial investigations; (iv) the need to respect personal or functional immunities accruing to the person or to the State against whom or which a claim is lodged.

34. All the above restrictions are not only limited in number but also subject to stringent requirements: (a) they may not be applied so as to reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired; (b) they must pursue a legitimate aim; (c) they must be reasonable and not disproportionate, or in other words a reasonable relationship of proportionality must exist between the means employed and the aim sought to be achieved.[37] For instance,

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*en dernier ressort sur le respect des exigences de la Convention ; elle doit se convaincre que les limitations appliquées ne restreignent pas l'accès ouvert à l'individu d'une manière ou à un point tels que le droit s'en trouve atteint dans sa substance même. En outre, pareille limitation ne se concilie avec l'article 6 § 1 que si elle tend à un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé » (voir, parmi beaucoup d'autres, l'arrêt Fayed c. Royaume-Uni du 21 septembre 1994, série A n° 294-B, pp. 49-50, para. 65). Par ailleurs, « l'effectivité du droit d'accès demande qu'un individu jouisse d'une possibilité claire et concrète de contester un acte constituant une ingérence dans ses droits » (Bellet c. France, arrêt du 4 décembre 1995, série A n° 333-B, § 36).*" (*Stegarescu and Bahrin v. Portugal*, no. 46194/06, para. 46, 6 April 2010).

[37] In *Stubbings and others* v. *United Kingdom*, the European Court of Human Rights held that "Article 6 para. 1 (art. 6-1) embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*see* the *Ashingdane v. United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 24, para. 57 and, more recently, the *Bellet v. France*, judgment of 4 December 1995, Series A no. 333-B, p. 41, para. 31)" (*Stubbings and Others v. the United Kingdom*, 22 October 1996, para. 50, *Reports of Judgments and Decisions* 1996-IV). As noted above, in *Vaestberga Taxi Aktiebolag and Vulic v. Sweden* (judgment of

procedural or other restrictions on the right at issue imposed for the purpose of satisfying national security requirements must not be unreasonable and out of proportion to the aim of protecting national security interests. Considering these restriction as admissible or instead contrary to the essence of the right of access to justice is inherent in the balancing exercise that is required of tribunals when weighing different (and possibly conflicting) rights and legal interests brought before them.

35. Whether or not it is held that the international general norm on the right to justice has been elevated to the rank of *jus cogens* (with the consequence that States may not derogate from it either through treaties or national legislation), it is axiomatic that an international court such as the STL may not derogate from or fail to comply with such a general norm.

36. As pointed out above, the norm at issue grants individuals – subject to certain restrictions – the right to go before an independent and impartial judge and to have their claims duly considered by such judge. Of course, the existence of this right does not automatically entitle individuals to *obtain* a *substantive* judicial remedy. The right at issue is essentially intended to afford individuals that protection of the law mentioned by Chief Justice Marshall in the aforementioned decision of the US Supreme Court: no individual may be deprived of the protection of the laws, whenever he receives an injury. Hence, every individual has the right to bring his or her claims before a court of law and to have them adjudicated by a competent judge.

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23 July 2002) the European Court of Human rights held that "[t]his right [to have access to a judge] is not absolute, but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. Furthermore, they will not be compatible with Article 6 § 1 [on fair trial rights] if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved." (para 92).
Similarly, the French Court of cassation (*Cour de Cassation, Chambre criminelle*), in a decision of 21 October 2003, no. 03-81.252 (unpublished), said that "*les règles procédurales limitant le droit de recourir contre une décision de justice ne sont pas justifiées que si elles poursuivent un but légitime et si elles présentent un rapport raisonnable de proportionnalité avec le but poursuivi.*" (text online retrievable at: http://www.easydroit.fr/jurisprudence/chambre-criminelle-21-Octobre-2003-INSTRUCTION-Ordonnances-Appel-Appel-de-la-partie-civile-Dela/C294822/).

## III. RULING

37. In the case at issue, the Applicant was held in prison in Lebanon for almost four years without charge in connection with the *Hariri* case. From 10 to 29 April 2009, he was under the jurisdiction of the Tribunal. On 29 April 2009 he was released upon an Order of the Tribunal's Pre-Trial Judge pursuant to Rule 17 of the RPE.

38. The Tribunal cannot but recognize that the Applicant enjoys the right of access to justice. As noted above, he claims that (i) the Lebanese courts hold that they lack jurisdiction over this request to obtain the evidence of the alleged slanderous accusations of which he has been a victim, and assert that instead this evidence is in the possession of the STL; he further claims that (ii) without such evidence he would be unable to sue the authors of those accusations for libel before other domestic courts competent on the grounds of nationality or territoriality. Should all his submissions prove correct (a circumstance that must be verified by a court of law), the Applicant's inability to have access to the evidence of the alleged libel might make it impossible for him to obtain substantive judicial remedy from a national court. Therefore, in my view, in these circumstances he should be provided an opportunity to make his representations before this Tribunal in order to show that the Tribunal has jurisdiction over the whole or part of his claims.

39. Consequently, in light of the foregoing,

**PURSUANT TO Article 10(1) of the Statute and Rule 32(B) of the RPE,**

**I hereby**

**REQUEST** the Registrar to file the Application;

**ASSIGN** the matter to the Pre-Trial Judge so that, after hearing the Prosecutor and the Applicant, he may pronounce on whether the Tribunal has jurisdiction over the issue and the Applicant has standing before the Tribunal. Should the Pre-Trial Judge consider it appropriate, he will thus be in a position to rule on the merits of the Application.

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

Dated this 15th day of April 2010
At Leidschendam, the Netherlands.

Judge Antonio Cassese
President