The Pre-Trial Judge

Le Juge de la mise en état

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

THE PRE-TRIAL JUDGE

Case no.:	**CH/PTJ/2010/005**
Before:	**Judge Daniel Fransen**
Acting Registrar:	**Mr Herman von Hebel**
Date:	**17 September 2010**
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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

Counsel:
Mr Akram Azoury

Office of the Prosecutor:
Mr Daniel Bellemare, MSM, QC

Defence Office:
Mr François Roux

I. – Summary of the Proceedings:

1. On 17 March 2010, Mr Jamil El Sayed (the "Applicant"), represented by his Counsel, Mr Akram Azoury, submitted an application before the President of the Special Tribunal for Lebanon (the "President" and the "Tribunal", respectively) requesting the "release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention" (the"Application").

2. On 15 April 2010, the President issued an order assigning the matter to the Pre-Trial Judge in order that he may: i) pronounce on whether the Tribunal has jurisdiction over the Application and whether the Applicant has standing before the Tribunal; and ii) in the event of an affirmative response to these two questions, rule on the merits of the Application.[1] After stating that every individual has an inalienable right, albeit not an absolute right, to have access to justice,[2] the President noted that according to the Applicant, the Lebanese courts have deprived him of this right by finding that they have no jurisdiction to rule on the request for evidentiary material related to libellous denunciations made against him and on which, according to him, his arbitrary detention from 3 September 2005 to 29 April 2009 was based.[3] The President also observed that, according to the Applicant, this material, which is now in the possession of the Tribunal, is necessary to sue the authors of such accusations before competent national courts.[4]

3. On 21 April 2010, in order to rule on the Application in accordance with the President's Order, the Pre-Trial Judge issued an order inviting the Applicant and the Prosecution to put forward their respective arguments on the matters relating to the jurisdiction of the Tribunal and the standing of the Applicant.[5]

[1] Order Assigning Matter to Pre-Trial Judge, 15 April 2010, para. 39.
[2] *Idem*, paras 20 to 36.
[3] *Id.* paras 7, 8 and 38.
[4] *Id.* paras 9 and 38.
[5] Scheduling Order for Determination of the Application of Mr Jamil El Sayed Dated 17 March 2010, 21 April 2010, pages 3 and 4.

4. In accordance with the time limits set out in the Scheduling Order of the Pre-Trial Judge dated 21 April 2010, the Applicant filed submissions on 12 May 2010 (the "Applicant's Submissions") and the Prosecutor filed his response ("Prosecution's Response") on 2 June 2010. They then filed submissions respectively on 17 June 2010 (the "Applicant's Reply") and on 23 June 2010 ("Prosecution's Rejoinder").

5. On 25 June 2010, the Pre-Trial Judge set 13 July 2010 as the date for a public hearing to allow the Applicant and the Prosecutor to present their arguments orally and notably to examine the possibility for the Applicant to have access to the requested material during the investigation.[6]

6. During the public hearing on 13 July 2010, the Applicant and the Prosecutor put forward their arguments and the Head of Defence Office also provided his views.

II. – Subject matter of the Application:

7. According to the Application,[7] the Applicant requests the following documents:

- a certified copy of the records of the Applicant's complaints that were forwarded to the Tribunal by the Lebanese authorities on 1 March 2009;

- a certified copy of the records of the witness statements which allegedly implicated him directly or indirectly in the assassination of Rafiq Hariri;[8]

- the reports provided to the Lebanese Prosecutor relating to the assessment of the above-mentioned statements and in particular the report by Mr Brammertz which was provided on 8 December 2006;

[6] Scheduling Order for a Hearing, 25 June 2010, paras 8 and 9.
[7] Application, 17 March 2010, pages 7 and 8.
[8] For reasons of confidentiality, the names of the persons cited in the Application are not mentioned in this Order.

- the opinion of Mr Bellemare regarding the detention of the Applicant and the other detainees, which was allegedly forwarded to the Lebanese Prosecutor General; and

- any other piece of evidence "necessary for prosecution of the offences" that the President might possess.

III. – The arguments of the Applicant and the Prosecution:

8. The Pre-Trial Judge shall summarise successively the arguments set out in the Applicant's Submissions (A), the Prosecution's Response (B), the Applicant's Reply (C) and the Prosecution's Rejoinder (D) as follows:

A. – The Applicant's Submissions:

9. The Applicant presents three main arguments: i) between 30 August 2005 and 7 April 2009, his rights to have access to his own file and to a judge to rule on the legality of his detention were continuously violated;[9] ii) since 7 April 2009, the Tribunal has had sole jurisdiction to rule on his request;[10] and iii) having been detained under the authority of the Tribunal from 7 to 29 April 2009, the Applicant has standing before the Tribunal, one of the organs of which (specifically, the Office of the Prosecutor) has an obligation to hand over the material from his own file to him.[11]

10. With regard to the first argument, the Applicant adduces:

- the following facts: i) on 29 August 2005, the Applicant was arrested and then transferred to the headquarters of the United Nations International Independent Investigation Commission (the "Investigation Commission") where he was detained for four days as a suspect on the basis of false witness statements;[12] ii) on 3 September

[9] Applicant's Submissions, paras 3 to 29.
[10] *Idem*, paras 30 to 33.
[11] *Id.* paras 35 to 37.
[12] *Id.* para. 9.

2005, the Applicant was heard by a Lebanese Investigating Judge, then detained until 7 April 2009,[13] on the basis of an arrest warrant issued by that judge, without the documents on which his detention was based being passed on to him;[14] iii) from 3 September 2005 to 7 April 2009, the Investigating Judge neither heard the witnesses referred to in point i), nor did he take any investigative measures in respect of the Applicant;[15] iv) during this same period, the Applicant was not able to have access to his own case file or to a judge for him to rule on the legality of his detention, despite repeated requests made to the Investigation Commission, the Lebanese judicial authorities and to the United Nations Security Council (the "Security Council");[16] v) the unlawful nature of the Applicant's detention is illustrated by the fact that on 27 and 29 April 2009, the Prosecutor and the Pre-Trial Judge of the Tribunal respectively requested and ordered the release of the Applicant and recognised that the witnesses mentioned above were not credible;[17] vi) the Applicant brought a civil action before other Investigating Judges in order to bring proceedings against "[…] those responsible for the crimes against him and closely connected to his arbitrary detention […]"[18] but those Judges all declared themselves to be without jurisdiction;[19] vii) in breach of the principle of the separation of powers, the Lebanese Justice Minister ordered the competent courts not to rule on the applications filed by the Applicant;[20] viii) the Applicant's detention was arbitrary, as recognised by the Working Group on Arbitrary Detention set up within the United Nations Office of the High Commissioner for Human Rights;[21] and

- the following points of law: i) the right to seize an independent judge and the right of access to the case file are distinct and independent of each other, the first is an absolute right, the second "is separate from the charge on which the detention is based and must

[13] *Id.* paras 10 and 11.
[14] *Id.* para. 10.
[15] *Id.* para. 13.
[16] *Id.* para. 16 to 18.
[17] *Id.* para. 19.
[18] *Id.* para. 24.
[19] *Id.* paras 22 to 24.
[20] *Id.* para. 26.
[21] *Id.* para. 28.

be respected rigorously and absolutely, particularly when detention is arbitrary";[22] ii) the European Court of Human Rights (the "ECHR") has stated on several occasions that the right to access the investigation file "[...] is of particular importance when the legality of detention is being challenged";[23] and iii) "[d]espite the fact that the two aforementioned rights are independent, it emerges that in the present case exercising the right to legal remedy is dependent on the right to access being respected. An infringement of the right of the Applicant to access the investigation file automatically deprives him of his right to seek legal remedy from a national judge."[24]

11. With regard to the second argument, the Applicant sets out:

- the following facts: although following the amendments made to its Rules of Procedure and Evidence (the "Rules"), the Tribunal has no jurisdiction to rule on the issue of the veracity of the witness statements on which the Applicant's detention was based, the Tribunal must allow him to access these documents in order for him to be able to bring proceedings before the competent Lebanese courts;[25] there are several reasons for this: i) from 7 to 29 April 2009, he was detained under the authority of the Tribunal without valid legal basis since, in his deferral decision of 7 April 2009, the Investigating Judge had cancelled the arrest warrant for him and the Prosecutor of the Tribunal had not opened any investigation to charge him;[26] ii) during that same period, the Applicant had a right to seek legal remedy before the Tribunal as to his detention;[27] iii) once released by the Tribunal, "in his capacity as a person formerly arbitrarily detained", the Applicant had the same right of access to exercise his effective right to seek legal remedy before the Lebanese courts;[28] iv) this especially in view of the fact that he cannot seek remedy before the Tribunal as it declared itself to have no jurisdiction on the subject of the "false witnesses";[29] v) the Tribunal cannot in any way hinder the right

[22] *Id.* para. 5.
[23] *Id.* para. 6.
[24] *Id,* para. 7.
[25] *Id.* para. 33.
[26] *Id.* para. 30.
[27] *Id.* para. 33.
[28] *Ibidem.*
[29] *Ibid.*

of the Applicant to have recourse to a national judge with the necessary jurisdiction by depriving him of the evidentiary material necessary for him to do so;[30] and vi) if it considered itself to have jurisdiction to order the Lebanese authorities to hand over the Applicant's case file and to rule on whether or not to keep the Applicant in detention, the Tribunal *a fortiori* has jurisdiction to rule on the Application;[31] and

- the following points of law: the Tribunal has jurisdiction to rule on the Application pursuant to Rule 17 of the Rules, which enables the Pre-Trial Judge to issue orders requesting the Lebanese authorities to hand over to the Prosecutor "the results of the investigations and a copy of the relevant court records and other probative material", and Rules 61, 77 (A) and (B), 88, 110, 112 and 114, which give power to this same Judge to issue orders or authorisations on the collection and disclosure of evidence.[32]

12. With regard to the third argument, the Applicant notes that, according to the President's Order, he can be compared to a "participant" in the proceedings within the meaning of Article 2 of the Practice Direction on Filings before the Tribunal, even if he is neither a detainee nor an accused person.[33]

B. – Prosecution's Response:

13. After stating the importance of the right of access to a court,[34] the Prosecution argues that: i) the Tribunal does not have jurisdiction to adjudicate these issues[35] and ii) the Applicant does not have standing.[36]

14. With regard to the issue of jurisdiction, the Prosecution emphasizes that neither the Statute of the Tribunal (the "Statute") nor the Rules provide jurisdiction to the Tribunal to rule on the Application. In this respect, he notes that Article 1 of the Statute limits the

[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Idem,* paras 40 to 42.
[34] Prosecution's Response, paras 2 to 4.
[35] *Id.* paras 6 to 24.
[36] *Id.* paras 25 to 42.

Tribunal's jurisdiction to ruling on the criminal responsibility of the individuals responsible for the attack against Rafiq Hariri and the connected attacks, and that Article 2 of the Statute lists the specific crimes that can be charged in respect of those individuals.[37] Of course, the Tribunal Judges must fully respect the rights of suspects and accused as well as the dignity of victims and witnesses.[38] However, sitting in a criminal court and not a human rights court,[39] they have no jurisdiction to rule on crimes other than those specifically set forth in the aforementioned provisions of the Statute, which must be strictly interpreted.[40] The fact that the Applicant was within the Tribunal's custody does not provide any legal basis for the Judges to extend their jurisdiction beyond these provisions.[41] In addition, the Rules on no account allow Judges to disclose material to persons other than suspects or accused.[42] The result is therefore that the Judges have neither *ratione personae* jurisdiction nor *ratione materiae* jurisdiction to adjudicate the Application and, consequently, it must be dismissed *in limine*.[43]

15. With regard to the issue of standing, apart from the Prosecutor, no one has standing until the indictment has been confirmed.[44] In support of this affirmation, the Prosecution refers to the case law of the International Criminal Tribunals for the former Yugoslavia (the "ICTY") and for Rwanda (the "ICTR"), notably in the *Opačić* and *Ntabakuze et alia* cases, and in particular, in the latter, the fact that the Appeals Chamber of the ICTR rejected "the assertion that any person who alleges some form of prejudice as a consequence of a particular decision has the requisite standing to seek its reconsideration."[45] In this regard, the Prosecution observes that the wording of Rule 131 of the Rules is analogous to the rules of those international tribunals (apart from the reference to third parties and *amicus curiae*).[46] Moreover, the Applicant is not a party in the proceedings within the meaning of Rules 2 (which only refers to the parties in the strict sense, i.e. the Prosecutor and the

[37] *Id.* paras 13 and 14.
[38] *Id.* para. 15.
[39] *Id.* paras 14 and 15.
[40] *Id.* para. 12.
[41] *Id.* para. 15.
[42] *Id.* para. 23.
[43] *Id.* paras 21 to 23.
[44] *Id.* para. 28.
[45] *Id.* paras 30 to 32.
[46] *Id.* para. 34.

Accused and/or his Counsel), 17 and 86 (which only refer to the victims participating in the proceedings) and 131 of the Rules (which only refers to third parties and *amicus curiae*).[47] Neither the Statute nor the Rules therefore confer any standing on him.

16. The Prosecution concludes from this that the Application should be dismissed on the grounds that the Tribunal lacks jurisdiction to rule on it and, alternatively, that the Applicant has no standing.[48]

C. –Applicant's Reply:

17. The Applicant puts forward several arguments against those of the Prosecution relating to the lack of jurisdiction of the Tribunal[49] and the Applicant's lack of standing before it.[50] The principal arguments among them should be noted.

18. With regard to the jurisdiction of the Tribunal, the Applicant argues that: i) the Tribunal's jurisdiction cannot be limited to the texts of the Statute and of the Rules insofar as those texts relate neither to the time before the Tribunal was established nor to "the fate of materials gathered by the UNIIIC [Investigation Commission], which have lost their utility for the investigations currently underway";[51] ii) even if, strictly speaking, it is not a court charged with guaranteeing the protection of human rights, the Tribunal must comply with the national and international legal rules which allow the Applicant to exercise his right to seek remedy before the competent national courts;[52] iii) the Tribunal must allow the Applicant to have access to his case file since he was detained under its authority between 10 and 29 April 2009;[53] iv) although the Applicant has been released, the right to access the file remains necessary for him to be able to exercise a right to recourse for his unlawful detention[54] and to obtain remedy for the resulting prejudice, in accordance with

[47] *Id.* para. 37.
[48] *Id.* paras 43 and 44.
[49] Applicant's Reply, paras 15 to 47.
[50] *Id.* paras 48 to 55.
[51] *Id.* para. 17.
[52] *Id.* para. 21.
[53] *Id.* para. 23.
[54] *Id.* para. 23.

international case law in force and with Article 85 of the Statute of the International Criminal Court (the "ICC");[55] and v) the Prosecutor is confusing the obligation to disclose the file after the indictment in criminal proceedings with the subject matter of the Application, which is separate from the ongoing investigation and the issuance of an indictment;[56] the requested documents are moreover "neutral" in relation to any indictment;[57] vi) the Tribunal has exclusive jurisdiction over the Application insofar as it alone holds the documents and information requested and, by declaring itself without jurisdiction, it deprives the Applicant of the right of access to a judge;[58] and viii) the international tribunals generally recognise that they may rule on "any incidental or related questions necessary for the proper administration of justice, without restricting [themselves] to the judicial jurisdiction as mentioned in the decisions of the Security Council."[59]

19. With regard to standing, the Applicant presents three arguments: i) he connects his own standing to the jurisdiction of the Tribunal arguing that, should the Tribunal find itself to have jurisdiction, it would have no choice but to recognise the standing of the Applicant detained by the same Tribunal. As a consequence, determination of his standing cannot be limited to Article 17 of the Statute and Rules 2, 86 and 131, as these cannot represent an exhaustive list of persons having a right of intervention before the Tribunal;[60] ii) in the case at hand, the Tribunal will not rule as a criminal court, but as an ordinary court; as a result, the Applicant's standing should be thoroughly examined, as would an ordinary national court having general and regular jurisdiction;[61] and iii) as the Application is not criminal in nature, the Prosecutor will be "simply a party invited by the President to submit his observations on the Application" and, consequently, "must demonstrate a legitimate interest to oppose the Applicant's claims in order to have standing."[62]

[55] *Id.* paras 27 and 28.
[56] *Id.* para. 30.
[57] *Id.* para. 31.
[58] *Id.* para. 38.
[59] *Id.* para. 39.
[60] *Id.* paras 48 and 49.
[61] *Id.* para. 51.
[62] *Id.* para. 53.

D. –Prosecution's Rejoinder:

20. In his Rejoinder, the Prosecutor replies to the submissions by the Applicant in respect of the jurisdiction of the Tribunal and his standing.[63]

21. With regard to the jurisdiction of the Tribunal, the Prosecutor confirms the aforementioned arguments set out in his Response and adds a number of comments. In response to the Applicant's submission that the proceedings he has brought are non-contentious, he affirms that the general rules on jurisdiction must in any case apply.[64] He also comments on the reference made by the Applicant to Article 85 of the Statute of the ICC, emphasizing that this is pertinent only to the ICC, not to the Tribunal and, in any case, applies to a different situation to the one in which the Applicant finds himself, namely to "a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason."[65]

22. With regard to the Applicant's standing, the Prosecutor refers to the aforementioned arguments set out in his Response and adds that the Applicant "confuses the issues of access to justice, jurisdiction, and standing."[66] He also considers it contradictory to argue that on the one hand the Prosecutor does not have standing, and on the other hand to request materials in the Prosecutor's possession.[67]

IV. – Statement of Reasons:

23. Following his preliminary remarks (A), the Pre-Trial Judge will examine the issue of the Tribunal's jurisdiction to rule on the Application (B) and that of the Applicant's standing (C) in succession. He will then consider the question of the right of access to the criminal file and of the implementation of that right (D).

[63] Prosecution's Rejoinder, paras 2 to 15.
[64] *Idem*, para. 4.
[65] *Id.* paras 5 and 6.
[66] *Id.* paras 7 and 8.
[67] *Id.* para. 9.

A. –Preliminary Remarks:

24. The following four preliminary remarks are worth making.

25. First, the Applicant makes submissions relating to the general context and the merits of the case, in particular with respect to the legal character of his detention in Lebanon and to the libellous nature of the testimonies he is requesting be forwarded to him.[68] Insofar as they go beyond the limits of this Order, these points will not be considered in this Order.

26. Second, all of the arguments, including those that may not have been referred to in paragraphs 8 to 22 above and those put forward during the hearing on 13 July 2010, have been taken into account in this Order.

27. Third, the Applicant holds that these proceedings are part of an "administrative" and not "judicial" litigation as a result of the fact that the Application was assigned to the Pre-Trial Judge by the President acting in his "administrative" capacity.[69] This reasoning cannot be followed. It is true that on 15 April 2010, to assign the Application to the Pre-Trial Judge, the President issued an order in accordance with the administrative powers available to him so as to guarantee the "effective functioning of the Tribunal and the good administration of justice", in conformity with paragraph 1 of Article 10 of the Statute and paragraph (B) of Rule 32 of the Rules.[70] The fact remains that the issues raised in the Application, which are aimed at requesting a number of case file documents from one of the Tribunal's organs, have a judicial character and fall under the jurisdictional functions of the Tribunal. These issues must then be settled by a judge, although the Applicant could also have addressed the Prosecutor directly to obtain these documents as part of non-contentious proceedings. Within the Tribunal, that judge is the Pre-Trial Judge, given that on the one hand the proceedings in the *Hariri* case are in the preliminary phase and on the

[68] *Cf.* in particular, Applicant's Submissions, paras 9 to 29.
[69] Applicant's Reply, paras 9 to 14.
[70] President's Order, 15 April 2010, para. 12.

other hand the President of the Tribunal expressly assigned the matter to him so that he may adjudicate the Application.[71]

28. Fourth, the two initial questions brought before the Pre-Trial Judge can be formulated as follows. First, does the Tribunal have jurisdiction to rule on the Applicant's request to have disclosed to him documents from the criminal file that might concern him? (B) Second, does the Applicant have the standing to address the Tribunal in person in order to obtain such documents? (C) The Pre-Trial Judge will also have to respond to a third question, underlying the first two: in the case at hand, does the Applicant have the right to access – even in part – the criminal file that relates to him? (D).

B. – The Jurisdiction of the Tribunal:

29. Prior to any examination of the merits, it must be determined whether the Tribunal has jurisdiction to receive the Applicant's request to access a number of documents from his own criminal file.

30. As noted by the Prosecution,[72] the subject matter jurisdiction of the Tribunal is strictly limited by the mandate conferred on it by Article 1 of the Agreement between the United Nations and the Lebanese Republic on the establishment of the Tribunal, annexed to Security Council resolution 1757 (2007) of 30 May 2007 (the "Agreement") and Articles 1 and 2 of the Statute, 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. The Tribunal cannot legitimately go beyond this mandate without violating the basic principles of the rule of law and of speciality.[73]

[71] *Ibidem.*
[72] Prosecution's Response, paras 12 to 14.
[73] *Cf.* in particular, ICJ, Advisory Opinion, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports, 1996, para. 25.

31. However, in conformity with the established case law from the International Court of Justice,[74] the International Criminal Tribunals[75] and other international courts,[76] an international tribunal may rule on issues which, although not falling, strictly speaking, within its "original jurisdiction",[77] are closely connected to it and should be examined in the interests of fairness of the proceedings and good administration of justice. In other words, in the exercise of its functions, the Tribunal has implicit jurisdiction to rule on incidental issues that are connected to its mandate or have an impact on it and which must be settled in the interests of justice.

32. In this regard, it should be noted that neither the Statute nor the Rules expressly confer on the Applicant a right of access to the documents in the criminal case in which he was implicated and detained. Nevertheless, the subject matter of the Application does indeed fall within the implicit powers of the Tribunal in that it is closely linked to its original subject matter jurisdiction and must be settled in the interests of fairness of the proceedings and good administration of justice.

33. Indeed, the Application relates to the case file concerning the attack that was carried out against the former Prime Minister Rafiq Hariri and others. However, since 10 April

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[74] *Cf.* in particular, ICJ, Judgment *Nuclear Tests Case (New Zealand v. France)*, 20 December 1974, ICJ Reports, 1974, p. 463, paras 22 and 23; ICJ, judgment in the *LaGrand Case (Germany v. United States of America)*, 27 June 2001, ICJ Reports, 2001, p. 502 *et seq.*

[75] *Cf.* in particular, ICTY, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, *The Prosecutor v. Duško Tadić*, 2 October 1995, paras 14 to 18; ICTY, Judgment On Appeal By Anto Nobilo Against Finding Of Contempt, *The Prosecutor v. Aleksovski*, 30 May 2001, para. 30; ICTY, Decision on Rule 11*bis* Referral, *The Prosecutor v. Radovan Stanković*, 1 September 2005, para. 51. In this case, regarding the theory of inherent powers, the Appeals Chamber held that: "*[i]t cannot be said that judges – whether a Referral Bench, a Trial Chamber, or the Appeals Chamber – are limited strictly and narrowly to the text of the Rules in carrying out their mandate. Instead, judges have the inherent authority to render orders that are reasonably related to the task before them and that 'derive automatically from the exercise of the judicial function'*". *Cf.* ICTR, Decision on Appropriate Remedy, *The Prosecutor v. Rwamakuba*, 31 January 2007, para. 47. In this case, with regard to the implicit power of the ICTR to award compensation to a former accused of the ICTR, the Trial Chamber held that: "[…] the power to give effect to the right to an effective remedy for violations of the rights of an accused or former accused accrues to the Chamber because this power is essential for the carrying out of judicial functions, including the fair and proper administration of justice. This is all the more true in the present case as the right at issue, the right to legal assistance, is one of the core fair trial rights held by an accused in criminal proceedings."

[76] ECHR, Judgment *Mamatkulov and Askarov v. Turkey*, 4 February 2005, paras 103 to 129.

[77] In this regard, the Appeals Chamber of the ICTY distinguishes between the "original" or "primary" jurisdiction of the ICTY, as defined by its Statute, and the "incidental" or "implicit" jurisdiction of the ICTY, which derives automatically from the exercise of its judicial function (ICTY, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, *The Prosecutor v. Duško Tadić*, *op. cit.*, para. 14).

2009, pursuant to paragraph 2 of Article 4 of the Statute, the Tribunal has exercised its primacy over the Lebanese courts with regard to this case.[78] Since then, it has had sole jurisdiction to rule on this matter, is the only court seized and holds the case documents.[79]

34. In addition, the Application concerns one of the basic aspects of the rights of defence as defined by international law, that is the right for an accused to have access to the case file, with which the Tribunal has to comply in the interests of justice. The Pre-Trial Judge shall return to this point when considering the third question mentioned in paragraph 28 above.

35. Given its exclusive jurisdiction, should it find itself without jurisdiction to rule on the Application, the Tribunal would deprive the Applicant of any possibility to have his basic right vindicated by a judge. It would thus exclude the Applicant from the right to effective judicial protection.[80]

36. To conclude, the Tribunal has jurisdiction to rule on the Application.

C. – The Applicant's Standing:

37. The Tribunal's jurisdiction to rule on the Application having been established, it is necessary now to determine whether the Applicant is authorised to bring proceedings before it.

38. In this respect, the Pre-Trial Judge notes that the Applicant is neither a party to the proceedings, i.e. the Prosecution or the Defence, within the meaning of Rule 2 of the Rules, nor a victim participating in the proceedings in the sense of Rules 2, 17 and 86, nor a third party or an *amicus curiae* in the sense of Rule 131. However, as has been rightly pointed

[78] *Cf.* Order Setting a Time Limit for Filing of an Application by the Prosecutor in accordance with Rule 17 (B) of the Rules of Procedure and Evidence, 15 April 2009, para. 5.
[79] *Cf.* Order of the Investigating Judge for the Lebanese Judicial Council [*sic*], dated 7 April 2009.
[80] President's Order, 15 April 2010; Court of First Instance of the European Communities, Judgment *Jégo-Quéré v. Commission*, T-177/01, 3 May 2002, para. 51.

out by the Prosecution,[81] neither the Agreement, nor the Statute, nor the Rules provide explicitly for the possibility for any other person to file applications with the Tribunal.

39. That being the case, the Applicant is not a person who is completely uninvolved in the proceedings that have taken place and are ongoing before the Tribunal. Indeed, paragraph 2 of Article 4 of the Statute provides that "[p]ersons detained [by the Lebanese courts] in connection with the investigation [into the *Hariri* case] shall be transferred to the custody of the Tribunal", and paragraphs (A) and (B) of Rule 17 of the Rules require that the Pre-Trial Judge decide within a reasonable time from their transfer to the Tribunal whether or not to continue to detain these persons. Now, the Applicant was in fact one of those persons.

40. More specifically, on 3 September 2005, pursuant to Article 107 of the new Lebanese Code of Criminal Procedure, the Applicant was served an arrest warrant by a Lebanese Investigating Judge, which included a description of the offence with which he was charged.[82] On this basis, he was detained by the Lebanese judicial authorities until 10 April 2009, when the case was transferred to the Tribunal. On that date, pursuant to the Order of the Investigating Judge for the Lebanese Judicial Council, dated 7 April 2009, the Applicant was transferred to the custody of the Tribunal.[83] He was then detained under the legal authority of the Tribunal from 10 April 2009 to 29 April 2009, when he was released by the Pre-Trial Judge.[84]

41. It should be emphasized that, after he was remanded to the Tribunal, the Applicant was not indicted by the Prosecutor. Nor, however, has he been formally discharged. In this

[81] Prosecution's Response, *op. cit.*, paras 37 and 38.
[82] Article 107, paragraph 5 of the New Lebanese Code of Criminal Procedure provides that: "The summons issued to the defendant, the warrant to produce him before the Judge and the arrest warrant must state his identity and the date on which it was issued. It must contain a description of the defendant and the offence with which he is charged and the legal provision applicable thereto, and bear the signature of the Investigating Judge who issued it and the seal of his department." Paragraph 6 of this Article mentions that: "The defendant shall be served with the warrant to produce him before the Judge and the arrest warrant upon execution, even if he is in custody for another offence, and shall be given a copy of the notice served."
[83] *Cf.* Order of the Investigating Judge for the Lebanese Judicial Council [*sic*], dated 7 April 2009 and the list annexed thereto.
[84] Order Regarding The Detention Of Persons Detained In Lebanon In Connection With The Case Of The Attack Against Prime Minister Rafiq Hariri And Others, 29 April 2009.

regard, it must be recalled that he was released "without prejudice to any possible future prosecution before the Tribunal", in accordance with the Order of the Pre-Trial Judge of 29 April 2009.[85]

42. Under these circumstances, the Applicant has standing to seize the Tribunal of the issues relating to the deprivation of liberty to which he was subjected.

D. – The right of access to the criminal file and the conditions for its implementation

43. The Tribunal having jurisdiction to rule on the Application and the Applicant having standing to seize it, it must now be determined whether the Applicant, in the light of his situation as described in paragraphs 39 to 41 above, has a right of access to the criminal file relating to him. If so, it will be necessary to examine the manner in which this right should be implemented and, if appropriate, to what extent and under what conditions.

44. With regard to the right of access to the criminal file, it should be noted that this is a customary international right recognised for all indicted persons and represents one of the essential means of guaranteeing the effective exercise of the rights of defence, especially when contesting the lawfulness or indeed the arbitrary nature of a detention.

45. It is true that this right is not explicitly set forth in the principal international instruments for the protection of human rights.[86] However, it derives directly from the rights of defence recognised by those instruments and, in particular, from the right a person has to be entitled to every means to prepare his defence, to be fully aware of the charges made against him and to the general principle of equality of arms.[87] In addition, this right is

[85] Order Regarding The Detention Of Persons Detained In Lebanon In Connection With The Case Of The Attack Against Prime Minister Rafiq Hariri And Others, *op. cit.*, para. 23. *See also* Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence, 27 April 2009, paras 31 to 33.

[86] Indeed, neither Article 14 of the International Covenant on Civil and Political Rights, nor Article 6 of the European Convention on Human Rights, nor Article 8 of the American Convention on Human Rights, nor Article 7 of the African Charter on Human and Peoples' Rights, nor Article 47 of the Charter of Fundamental Rights of the European Union, all relating to rights of the defence, specifically recognise the right of access to the criminal file.

[87] Article 14.3(b) of the International Covenant on Civil and Political Rights provides that any person charged with a criminal offence shall "have adequate time and facilities for the preparation of his defence." In paragraph 33 of General

recognised by a large number of States, of both civil and common law traditions,[88] as well as by the principal international institutions for the protection of human rights, including the Human Rights Committee[89] and the ECHR.[90]

46. In this regard, it should be recalled that, on 3 November 1972, Lebanon ratified the International Covenant on Civil and Political Rights (the "Covenant"), which entered into force on 23 March 1976. Moreover, although Lebanon is not party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force on 3 September 1953 (the "European Convention "), the case law of the ECHR is instructive in that it has been led to specify the limits of the rights guaranteed by this Convention by taking account of the existence of a factor common to all the legal systems,

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Comment no. 32: "Article 14: Right to equality before courts and tribunals and to a fair trial" of 23 August 2007, the Human Rights Committee noted that "the adequate facilities" must include "access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory". In addition, Article 16.4 (b) of the Statute of the Tribunal contains a similar provision.

[88] The fundamental nature of the right of access to the file is recognised by several national courts. For example, in a judgment dated 12 June 1996, the Criminal Chamber of the French Court of Cassation ruled "that it follows that any person having the standing of an accused has the right to obtain, pursuant to Article 6, para. 3 (Art. 6-3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, not direct disclosure of the case documents, but the issuance, at his expense, as appropriate through his counsel, of copies of the case documents submitted to the court before which has been called to appear" [STL translation]. The British courts have also emphasized the importance for the Prosecutor to forward documents in the file which would allow the detainee to contest the legality of his detention (*Regina v. the Director of Public Prosecutions, ex p. Lee* [1999] 2 All ER 737). In the same manner, the Supreme Court of Namibia has ruled that "[t]he order refusing disclosure of Police statements to the defence was tantamount to a denial of the right of a fair trial to an accused person " (*Abiud Joseph Kandovazu v. the State*, SA 4/96, 2 October 1998), while the Supreme Court of South Africa has ruled that the right of access to the file "[*e]xtends to all documents that might be 'important for an accused to properly 'adduce and challenge evidence' to ensure a fair trial'*" (*National Director of Public Prosecutions v. King* (86/09) [2010] ZASCA 8 (8 March 2010). This right is also recognised by the legal systems of several so-called "civil law" countries. In Belgium, for example, Article 61 *ter*, paragraph 1, of the Code of Criminal Procedure provides that "a defendant who is not detained and the civil party may make a request to the Investigating Judge in order to consult the case file" [STL translation]. Moreover, Article 61 *bis* of this same Code adds that "is entitled to the same rights as the defendant any person in respect of whom a public action has been brought within the context of the proceedings" [STL translation]. With regard to Switzerland, Article 101(1) of the (new) Code of Criminal Procedure provides that "the parties may consult the case file pertaining to criminal proceedings that are pending, at the latest after the first hearing of the accused and the adducing of the main evidence by the Prosecution" [STL translation]. In Algeria, Article 68 of the Code of Criminal Procedure also provides for access to the file from the start of the judicial investigation although this is limited to counsel only. Finally, Article 30, paragraph 1 of the Dutch Code of Criminal Procedure ("*Wetboek van Strafvordering*") allows the suspect to access his file. According to Article 30, paragraph 2 of this Code, restrictions may be placed on the forwarding of the file if necessary in the interests of the investigation. However, according to Article 33 of this Code, there can be no restrictions once the investigation is closed.

[89] HRC, Communication No. 676/1996, *Yasseen and Thomas v. Republic of Guyana*, 7 May 1998, para. 7.10.

[90] ECHR, Judgment *Öcalan v. Turkey*, 12 March 2003, paras 158 to 170.

be they of civil or common law,[91] of the States Parties.[92] Moreover, the principles propounded by this Court are especially significant for the Tribunal insofar as ECHR case law is widely recognised as a reference norm for the interpretation of fundamental rights, or even as reflecting and expressing general principles of law by many national jurisdictions bound or not by the European Convention, as well as by other international jurisdictions.[93]

47. Thus, for example, in *Mooren v. Germany* the ECHR thus stressed that:

> "Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention [...]".[94]

48. In the same manner, in *Öcalan v. Turkey* the ECHR considered that:

> "[...] the fact that the applicant was not given appropriate access to any documents in the case file other than the indictment also served to compound the difficulties encountered in the preparation of his defence, in breach of the provisions of Article 6 § 1, taken together with Article 6 § 3 (b)."[95]
> [...]
>
> "[...] the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon [...]."[96]

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[91] Order Setting A Time Limit For Filing Of An Application By The Prosecutor In Accordance With Rule 17 (B) Of The Rules Of Procedure And Evidence, *op. cit.*, paras 10 and 14.

[92] *Ibidem.* It should be emphasized that the provisions of the Covenant show significant similarities with those of the European Convention.

[93] See, International Criminal Court, Pre-Trial Chamber I, Decision On The Applications For Participation In The Proceedings Of Victims, Situation In The Democratic Republic Of The Congo, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006; ICTR, Decision *Barayagwiza v. The Prosecutor*, 3 November 1999, para. 83; ICTY, Order on Motion for Provisional Release, *The Prosecutor v. Rahim Ademi*, 20 February 2002; Supreme Court of the United States, Decision *Lawrence et al. v. Texas*, 26 June 2003, 539 U.S. 558 (2003); Supreme Court of the United States, Decision *Roper v. Simmons*, 1 March 2005, (03-633) 543 U.S. 551 (2005); Supreme Court of Canada, Judgment *Charkaoui v. Minister of Immigration (Citizenship and Immigration)*, 23 February 2007 [2007] 1 R.C.S. 350, 2007 CSC 9, para. 80; Constitutional Court of South Africa, Judgment *Mohamed and Another v. President of the Republic of South Africa and Others*, 28 May 2001, (CCT 17/01) [2001] ZACC 18, para. 49.

[94] ECHR, Judgment *Mooren v. Germany*, 9 July 2009, para. 124. *Cf.* also ECHR, Judgment *Lamy v. Belgium*, 30 March 1989, para. 29; ECHR, Judgment *Nikolova v. Bulgaria*, 25 March 1999, para. 58.

[95] ECHR, Judgment *Öcalan v. Turkey*, *op cit.*, para. 163.

[96] *Idem*, para. 166.

49. The right of an accused to have access to the documents in his own criminal file is also recognised indirectly by Rule 110 of the Rules. Indeed, this provision provides that the accused be forwarded, within 30 days of his initial appearance or any other time limit prescribed by the Pre-Trial Judge, "copies of the supporting material which accompanied the indictment when confirmation was sought as well as all statements obtained by the Prosecutor [...]". He should also receive, within the time limit prescribed by the Trial Chamber or the Pre-Trial Judge, copies of the statements of all the prosecution witnesses and of all statements, depositions, or transcripts taken.

50. In addition, with respect to the concept of the indictment, as the ECHR has noted, this is to be interpreted with a certain amount of flexibility and should not be understood in its formal sense, but as meaning "'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether '*the situation of the [suspect] has been substantially affected*'"(emphasis in italic added).[97]

51. Finally, the rights of defence continue to exist even if the person who has been the subject of a criminal investigation is no longer formally accused or has been discharged.[98] The same is true of the right of access to the criminal file, which does not cease to exist upon release of the individual. Indeed, the basic right to be able, if appropriate, to obtain compensation for prejudice suffered by way of an unlawful detention, a right also recognised by the principal instruments for the protection of human rights,[99] must have as a consequence the right of access to the documents in the case file, at the risk of that right being ignored, since it would not otherwise be possible to prove the unlawful nature of the detention.

52. As a result, even if the Applicant is not formally accused by the Tribunal, the official notification of the charges made against him in the arrest warrant issued by the Lebanese

[97] ECHR, Judgment *Mc Farlane v. Ireland*, 10 September 2010, para. 143; ECHR, Judgment *Tejedor García v. Spain*, 16 December 1997, para. 27 ; ECHR, Judgment *Serves v. France*, 20 October 1997, para. 42; ECHR, Judgment *Deweer v. Belgium*, 27 February 1980, para. 42.

[98] ECHR, Judgment *Tejedor García v. Spain*, *op.cit.*, paras 27 and 28.

[99] Article 9(5) International Covenant on Civil and Political Rights; Article 5(5) of the European Convention.

judicial authorities and the significant repercussions this had on his situation, particularly with regard to his detention, even if this has ended, must be taken into consideration. In this context, he must be entitled to the basic rights of defence similar to those conferred on an indictee, such as the right to have access to his criminal file.

53. With regard to the question of the exercising of the right of access to the criminal file, it follows from legislation and case law, both national and international, that this right is not an absolute one. Indeed, this right can be subject to limitations. These can arise in particular from the fact that to make the documents available might compromise an ongoing or future investigation,[100] undermine fundamental interests, such as the physical well-being of persons concerned by those documents, or affect national or international security. These limitations can also stem from difficulties inherent to the conduct of terrorist investigations.[101] In some cases, in order to resolve these difficulties, it has been accepted that this right was respected even if access to the file was limited to the counsel of the accused alone.[102]

54. There may also be other factors limiting the possibility for a person to request directly from a court the documents it holds. There are, for example, traditional mechanisms for mutual assistance and international cooperation among States, which require third parties to go through competent national authorities in order to make such requests. From the same

[100] Article 116 of the Rules of the Tribunal provides, for example, the possibility to restrict disclosure of some information when it: "i) may prejudice ongoing or future investigations, (ii) may cause grave risk to the security of a witness or his family, or (iii) for any other reasons may be contrary to the public interest". In this regard, the ECHR stated, for example, in *Garcia Alva v. Germany* on 13 February 2001 that: "*The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer.*" (para. 42).

[101] In this regard, for example, the ECHR maintained in *Fox, Campbell and Hartley v. The United Kingdom* of 30 August 1990 that: "[c]ertainly Article 5 § 1 (c) (art. 5-1-c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism (see, mutatis mutandis, the Klass and Others judgment of 6 September 1978, Series A no. 28, pp. 27 and 30-31, §§ 58 and 68). It follows that the Contracting 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." (para. 34).

[102] ECHR, Judgment *Kamasinski v. Austria*, 19 December 1989, paras 87 to 88; ECHR, Judgment *Kremzow v. Austria*, 21 September 1993, para. 52; ECHR, Judgment *Foucher v. France*, 18 March 1997, paras 35 and 36; and ECHR, Judgment *Öcalan v. Turkey*, *op cit.*, para. 160.

perspective, the ICTY requires, under the procedure provided for in paragraph (H) of Rule 75 of the Rules of Procedure and Evidence, that requests for cooperation be submitted to the judges of that Tribunal, in principle, with the endorsement of a judge or bench in another jurisdiction,[103] without prejudice to those which may be submitted directly to the Prosecution.

55. In the light of these considerations, it needs to be determined whether, in the case at hand, the Applicant can exercise his right of access to the criminal file or whether the aforementioned limitations and restrictions and/or others are applicable. In this regard, the Pre-Trial Judge invited the Applicant and the Prosecutor to present their views on these issues during the hearing of 13 July 2010.[104] By this means, the Applicant stressed in particular that: i) in terrorism cases, Lebanese law places no limitation on an individual's access to his case file;[105] ii) according to Article 76 of the Lebanese Code of Criminal Procedure, that individual must be able to know all the evidence held against him in the case file before being questioned by a judge;[106] and iii) the Syrian authorities, at the present time seized of the matter of the "false testimonies", will not be making any request for assistance from the Tribunal as they do not recognise its jurisdiction.[107] The Prosecution, however, did not wish to review these issues as it considers that they pertain to the merits of the case and are therefore not connected to the sole issues of jurisdiction and the Applicant's standing which have to be determined at this stage in the proceedings.[108] In

[103] This provision makes it possible for a request to be addressed directly to the Tribunal by a third party, either through a national judge or with his endorsement. Its content is as follows: "[a] Judge or Bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the Tribunal may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal, who shall refer the application: (i) to any Chamber, however constituted, remaining seised of the first proceedings; (ii) if no Chamber remains seised of the first proceedings, to a Chamber seised of second proceedings; or, (iii) if no Chamber remains seised, to a newly constituted Chamber." The Practice Direction adopted by the ICTY on 4 February 2008 and implementing this provision should also be considered. Its title is as follows: "*Practice Direction on Procedure for the variation of protective measures pursuant to Rule 75 (H) of the Rules of Procedure and Evidence of the International Tribunal for access to confidential Tribunal material*" (IT/254).
[104] *Cf.* Scheduling Order For A Hearing dated 25 June 2010, *op cit.*, paras 8 and 9.
[105] Transcripts of the court hearing of 13 July 2010, p. 38.
[106] *Idem.*
[107] *Id.* pp. 38 and 39.
[108] *Id.* pp. 33 to 36.

addition, the Prosecution requested time to reflect to enable such important issues to be addressed in writing.[109]

56. As the Tribunal's jurisdiction and the Applicant's standing to act to exercise his right of access to the criminal file have been recognised, the question of whether the issue of the limitations or restrictions on this right pertain or not to the merits of the case is now no longer a valid one. At this stage in the proceedings, however, the Prosecution and the Applicant should be allowed to present their views and arguments on this subject.

57. In this perspective, the Pre-Trial Judge invites the Applicant and the Prosecutor, who alone holds the file relating to the *Hariri* case, to reply to the following questions in particular, in accordance with the conditions and time limits set forth in the enacting clauses of this Order:

At the current stage in the investigation:

(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 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?

[109] *Id.* p. 34.

V. – Disposition:

FOR THESE REASONS,

IN ACCORDANCE with Articles 1, 4 (2) and 16 of the Statute,

THE PRE-TRIAL JUDGE,

DETERMINES that the Tribunal has jurisdiction to rule on the substance of the Application;

DETERMINES that the Applicant has standing to request access to the documents concerning him in the criminal file related to the *Hariri* case;

ORDERS, before pronouncing further on the substance of the Application, that the written submissions from the Applicant and the Prosecutor containing the replies to the questions raised in paragraph 57 of this Order shall be filed with the Registrar of the Tribunal by 1 October 2010 at the latest;

ORDERS that the submissions shall be simultaneously provided to the Applicant and to the Prosecutor after translation of the Prosecutor's submissions into French;

ORDERS that the Applicant and the Prosecutor shall file their rejoinders with the Registrar of the Tribunal within 10 days of the simultaneous provision of the submissions, with the French translation of the Prosecutor's rejoinder.

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

Leidschendam, 17 September 2010.

Daniel Fransen
Pre-Trial Judge