



The Pre-Trial Judge

Le Juge de la mise en état

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

Date: 27 March 2009
Case No.: CH/PTJ/2009/01

THE PRE-TRIAL JUDGE

Before: Judge Daniel Fransen

The Registrar: Mr Robin Vincent

**ORDER DIRECTING THE LEBANESE JUDICIAL AUTHORITY SEIZED WITH
THE CASE OF THE ATTACK AGAINST PRIME MINISTER RAFIQ HARIRI
AND OTHERS TO DEFER TO THE SPECIAL TRIBUNAL FOR LEBANON**

The Prosecutor: Mr D. A. Bellemare

The Government of Lebanon

I. – The application

1. On 25 March 2009, the Prosecutor of the Special Tribunal for Lebanon (the “Prosecutor” and the “Tribunal” respectively) made an application to the Pre-Trial Judge to “issue a request to the Lebanese authorities seized with the case of the attack against Prime Minister Rafiq Hariri and others (the “*Hariri* case”) to: 1) defer to the Tribunal’s competence, 2) hand over to the Prosecutor the results of the investigations, and a copy of the relevant court records and other probative material, and 3) submit to the Pre-Trial Judge a list of all persons detained in connection with the investigation” (the “Application”).

2. The Application is made pursuant to Article 4 (2) of the Statute of the Tribunal (the “Statute”) attached to the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (the “Agreement”), itself annexed to Resolution 1757 (2007) adopted by the Security Council on 30 May 2007 (S/RES/1757 (2007)). The Application is also based on Rule 17 of Procedure and Evidence which entered into force on 20 March 2009 (the “Rules”).

II. – The applicable provisions

3. The provisions to be considered in connection with this order are Article 4 (2) of the Statute, Rule 17 (A) and (B) and Article 15 (1) of the Agreement.

4. Article 4 governs in general the jurisdiction exercised concurrently by the Tribunal and the national courts of Lebanon. Paragraph (2) thereof, which speaks specifically to the *Hariri* case, reads as follows:

Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the

court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.

5. Rule 17 implements the provisions of Article 4 of the Statute and provides the practical modalities for the deferral of the Lebanese judicial authorities to the Tribunal. Paragraphs (A) to D) address the *Hariri* case specifically. Only paragraphs (A) and B) are relevant at this stage in the proceedings. They read as follows:

(A) Pursuant to Article 4 (2) of the Statute, no later than two months after the assumption of office by the Prosecutor, the Pre-Trial Judge, upon request of the Prosecutor, shall request the Lebanese judicial authorities seized with the investigation of the Hariri Attack within 14 days to:

- i) defer to the Tribunal's competence;
- ii) hand over to the Prosecutor the results of the investigations and a copy of the relevant court records, and other probative material; and
- iii) submit to the Pre-Trial Judge a list of all persons detained in connection with the investigation.

(B) Once he receives the list referred to in (A) (iii), the Pre-Trial Judge shall forward it to the Prosecutor. As soon as practicable, the Prosecutor shall file reasoned submissions together with any supporting material stating, for each person on the list, whether he requests the continuation of his detention or he does not oppose release by the Pre-Trial Judge and, in the latter event, whether the release should be subject to conditions in accordance with Rule 102.

- (i) For each person on the list whose release the Prosecutor does not oppose, the Pre-Trial Judge shall decide within a reasonable time whether or not to direct the Lebanese judicial authorities to release the person with immediate effect, subject to the necessary measures to ensure the safety of the person in question, if requested. His decision shall be rendered in public in the presence of the Head of Defence

Office and the Prosecutor. The Prosecutor's submission under paragraph (B) shall be made public at that time.

- (ii) For each person on the list whose release the Prosecutor opposes, the Pre-Trial Judge shall hold, as soon as practicable, a public hearing, which may include a videoconference for the person and his counsel, if appropriate, to determine whether the person shall be transferred to the custody of the Tribunal under Article 4 (2) of the Statute and may, after hearing the person or his counsel, issue any appropriate order or warrant of arrest in this respect.

6. Article 15 of the Agreement governs cooperation between the Tribunal and the Lebanese authorities in general. Paragraph 1 thereof reads as follows:

The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.

III. – Jurisdiction

7. Pursuant to Article 4 (1) of the Statute, the Tribunal and the national courts of Lebanon have concurrent jurisdiction as regards the *Hariri* case. However, within the confines of its jurisdiction, the Tribunal has primacy over the national courts of Lebanon. In order to exercise this primacy pursuant to Article 4 (2) of the Statute, the Tribunal shall request the national judicial authority seized with the *Hariri* case to defer to its competence, and shall do so upon the assumption of office of the Prosecutor and no later than two months thereafter. Furthermore, pursuant to Rule 17 (A), it is the Pre-Trial Judge, upon request of the Prosecutor, who shall make said request to defer.

8. With the commencement of the functioning of the Tribunal on 1 March 2009, the Prosecutor assumed office. On 25 March 2009, he applied to the Pre-Trial Judge to request the Lebanese authorities seized of the *Hariri* case to defer to the Tribunal's competence.

9. Pursuant Article 4 (1) and (2) of the Statute and Rule 17 (A), and as the Prosecutor has assumed office and filed his Application within the prescribed timeframe, the Pre-Trial Judge is competent to rule on the Application.

10. Furthermore, it should be noted that the Minister of Justice of Lebanon informed the Tribunal by a letter dated 27 February 2009 that Lebanon intended “to cooperate and [...] meet its international commitments” and that “the judicial authority [of that State] solemnly declare[d] [...] that it agree[d] to defer all files, records and results of investigations [...]” related to the *Hariri* case to the jurisdiction of the Tribunal. Although it bears witness to Lebanon’s intention to cooperate with the Tribunal, this letter is nonetheless not a formal instrument of deferral by the national courts of Lebanon, as such a deferral may only take place following a request by the Tribunal as stated in paragraph 7 of this order.

IV. – Discussion

11. The discussion commences with observations on the legal and logical bases of Rule 17, in light of Article 4 of the Statute. It then addresses the merits of the Application.

A. – Preliminary observations

12. In accordance with Article 4 (2) *in fine* of the Statute, “[p]ersons detained in connection with the investigation shall be transferred to the custody of the Tribunal”.

13. These terms – which could give the impression that all persons detained in connection with the investigation into the *Hariri* case are to be transferred automatically to the seat of the Tribunal – must be interpreted in accordance with Article 31 (1) of the Vienna Convention on the Law of Treaties (adopted on 23 May 1969 and which entered into force on 27 January 1980). That provision provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

14. When interpreted in the overall context of the Agreement and the attached Statute, the purpose of Article 4 (2) *in fine* is to ensure that all persons whose continued detention the Pre-Trial Judge orders, at the request of the Prosecutor, be transferred to the Tribunal. However, this provision cannot reasonably be interpreted as also applying to persons who the Pre-Trial Judge intends to release, at the request of the Prosecutor. Indeed for these persons to be transferred to the seat of the Tribunal only to be notified of their release and to be returned to their country would be against the requirements of a fair trial and of efficiency and judicial economy, inherent in the spirit of the Statute.

15. As a result, Article 4 (2) of the Statute must be interpreted as drawing a distinction between the request for deferral and referral of the results of the investigation and a copy of the court's records, on the one hand, and the transfer to the Tribunal of persons detained in Lebanon, if any, on the other. In fact, it is only when the results of the investigation and the copy of the court's records have been referred to the Tribunal that the latter can seize itself of the *Hariri* case and then rule on the transfer and continued detention of these persons.

16. In accordance with the interpretation of Article 4 (2) of the Statute set out above, Rule 17 (A) and (B) make this distinction. It specifies the various stages of deferral by the national courts of Lebanon seized with the *Hariri* case, *i.e.* a formal decision to defer, the handover of the records and of the list of the persons detained (Rule 17 (A)), and distinguishes them from the issue of detention, which can only be submitted to the Tribunal after the Tribunal is seized (Rule 17 (B)).

B. – Consideration of the Application

17. The Application was filed within a period of two months from the assumption of office of the Prosecutor. It is therefore admissible.

18. Given that the terms of Rule 17 (A) are explicitly used in its operative part, the Application has a valid basis. There is reason to grant it and to request the judicial authorities of Lebanon to defer formally to the Tribunal in the *Hariri* case.

19. However, in the interests of the proper administration of justice and of expeditious proceedings, it is appropriate that the procedure be conducted in two successive phases, as set out in paragraphs 15 and 16 of this order, and in the following manner:

- i) handover of the results of the investigation and a copy of the court's records as well as a list of all persons detained in connection with the investigation into the *Hariri* case, if any, as soon as possible; thus enabling the Prosecutor to seek or not to seek continued detention of these persons and their transfer to the Tribunal, if appropriate, in application of Rule 17 (B) ; and
- ii) subsequently, in light of the order issued by the Pre-Trial Judge on the application mentioned under item i), and after hearing the detained persons and their counsel if appropriate, in accordance with Rule 17 (B), transfer to the Tribunal of persons who are to be maintained in detention, or release.

V. – Disposition

FOR THESE REASONS,

IN APPLICATION of Article 4 (2) of the Statute, Rule 17 (A) and (B) and Article 15 of the Agreement,

THE PRE-TRIAL JUDGE

DECLARES the Application to be admissible and founded; and

REQUESTS the Lebanese judicial authority seized with the *Hariri* case to:

- i) defer to the Tribunal's competence in this case;
- ii) as soon as possible and at the latest within 14 days of receiving this order, refer to the Prosecutor the results of the investigation and a copy of the court's records regarding the *Hariri* case, if any;
- iii) as soon as possible and at the latest within 14 days of receiving this order, refer to the Pre-Trial Judge a list of all persons detained in connection with the *Hariri* case, if any ;
- iv) during the period elapsing between receipt of the results of the investigation and the copy of the court's records referred to under item ii) above and the issuance of a decision by the Pre-Trial Judge pursuant to Rule 17 (B) on whether or not to continue the detention of those persons detained in the *Hariri* case, detain those persons in Lebanon; and
- v) subsequently, subject to the order issued by the Pre-Trial Judge pursuant to Rule 17 (B) on whether or not to continue the detention of those persons referred to under item iv) above, transfer to the Tribunal those persons who are to be maintained in detention or release them with immediate effect.

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

Leidschendam, 27 March 2009

Daniel Fransen
Pre-Trial Judge

[Seal of the Tribunal]