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Criminal Courts and Tribunals

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CRIMINAL COURTS AND TRIBUNALS

INTERNATIONAL CRIMINAL TRIBUNALS

SPECIAL TRIBUNAL FOR LEBANON GRANTS MOTION TO JOIN AYYASH ET AL. WITH MEHRI CASE

The Trial Chamber of the Special Tribunal for Lebanon granted the Prosecution's motion to join the case against Hassan Habib Merhi with the case against Salim Ayyash, Mustafa Badreddine, Assad Sabra, and Hussein Oneissi (Ayyash et al.) on February 11, 2014. The Prosecutor indicted the five defendants for their alleged roles in the assassination of former Lebanese Prime Minister Rafik Hariri on February 14, 2005. The car-bomb assassination in the center of Beirut, Lebanon, killed twenty-two people, including Hariri. Although international investigations into the terrorist attack have led to several indictments, none of the defendants have been apprehended; Ayyash et al. and Merhi are being tried in absentia.

The Pre-Trial Chamber confirmed charges against Ayyash, Badreddine, Sabra, and Oneissi on June 10, 2011, for nine counts of conspiring and committing a terrorist act, conspiring and committing homicide, and being an accomplice to homicide and terrorist attacks in relation to the 2005 Hariri attack. The Trial Chamber, however, did not hear opening statements for the Ayyash et al. case on January 16, 2014. As a result of continued investigations into the 2005 Hariri attack, the Pre-Trial judge confirmed charges against Mehri for five counts of conspiracy to commit a terrorist act, being an accomplice to the commission of a terrorist act, and intentional homicide on July 31, 2013.

On December 30, 2013, the Prosecutor filed a motion of joinder, pursuant to Rule 70, requesting to join the Ayyash et al. and Mehri cases. Rule 70(B) allows the joinder of cases in which the defendants are accused "of the same or different crimes falling within Article 1 of the Statute." Article 1 lays out the authority of the Tribunal, providing broad jurisdiction over all persons responsible for the Hariri assassination and connected attacks. The Judge ruled that, pursuant to the joinder requirements of Rule 70(B), the cases were sufficiently connected due to the common charges, the need for consistency of findings, the concerns of duplicating evidence, and the imperative of witness protection. Neither Defense Team opposed the motion, provided that all of the accused are afforded the same rights and guarantees as in a separate trial.

On February 17, 2014, the Mehri Defense submitted a brief concerning the time needed to adequately prepare for the trial. The Prosecution agreed that a four-month delay would be reasonable to allow for the Mehri Defense team to adequately prepare. The Mehri Defense team requested a longer delay, arguing that a significant delay was warranted due to (1) the voluminous size of the Ayyash et al. case file, (2) the fact that the Mehri Defense would be unable to assimilate with the Ayyash et al. Defense, (3) the recent establishment of the Mehri Defense, (4) the fact that the joinder prevented the Defense from adequately preparing,

and (5) the necessity of crafting a defense strategy and obtaining experts to scrutinize the evidence of the Prosecutor.

The Mehri Defense Team argued that a significant delay is required under Article 16(4)(b), which guarantees the accused to have "adequate time and facilities for the preparation of his or her defence [*sic*]." The Mehri Defense Team noted that the lead counsel was appointed on December 20, 2013, and argued that he would not be able to sufficiently prepare for trial while concurrently assisting the Ayyash et al. Defense Team at trial. The Mehri Defense similarly argued against a phased resumption of the trial on the merits, which would allow for separate parts of the trial to resume in set stages as the Defense Teams continue to prepare. The Mehri Defense Team argued that such a phased resumption would violate Mehri's Article 16(2) rights to a fair trial by forcing the Defense to confront adverse witness, a right pursuant to Article 16(4)(e), before completely analyzing all the evidence presented by the Prosecutor, a right pursuant to Article 16(4)(f).

After the written and oral arguments of the Mehri Defense Team, the Trial Court ordered a delay of at least four months. Although the trial will not recommence before the Mehri Defense Team has had time to review the evidence in its entirety and to prepare a "useful and effective defense," the judge did not eliminate the possibility of a phased resumption of the trial. The Trial Court recognized the importance of judicial efficiency by suggesting that a phased resumption of the trial is possible; however, by conditioning the resumption of the trial on the Mehri Defense Team's ability to adequately prepare, the Trial Court assured Mehri's Article 16(2) right to a fair trial.

BANGLADESHI INTERNATIONAL CRIMES TRIBUNAL TO TRY JAMAAT-E-ISLAM FOR ROLE IN 1971 WAR

The Bangladeshi War Crimes Investigation Agency, the official investigatory body of the Bangladeshi International Crimes Tribunal (ICT), submitted a report to the ICT on March 25, 2014, on the alleged crimes of the Jamaat-e-Islami (Jamaat) as a political party during the 1971 Liberation War. If the ICT pursues charges against Jamaat as an organization, the case would be the first since the Nuremburg Trials to try an entire organization for war crimes and crimes against humanity. While the Bangladeshi government expanded the jurisdiction of the ICT in a 2013 amendment to allow for the prosecution of entire organizations, some have claimed that the ICT lacks the authority to impose any type of punishment on organizations.

During the 1971 War, the Jamaat party opposed Bangladeshi independence from Pakistan by collaborating with Pakistani military and committing atrocities against Bengali nationalists, intellectuals, and the Hindu minority. The ICT has already tried and convicted nine leaders of Jamaat for leadership roles in the 1971 War, in which up to three million Bengalis were killed and a systematic gender-based violence campaign resulted in the rape of up to 400,000 women and children. Despite its role in the

War, Jamaat remained an active political party in Bangladesh. In 2013, however, the Bangladeshi government withdrew registration of Jamaat, prohibiting the party from participating in the highly contested 2013 parliamentary elections. The Bangladeshi Supreme Court justified de-registration for three reasons: (1) Jamaat denies that the Bangladeshi people are the source of law-making; (2) it is a sub-faction of an international organization; and (3) it discriminates along religious and gender lines.

The Investigation Agency's report alleges that the Jamaat party aided the Pakistani army and participated in war crimes and crimes against humanity, including genocide and mass rape during the 1971 War. Officially, the Investigation Agency is pushing for seven counts against Jamaat under Section 3(2) of the Act. The Agency expects the Prosecution to charge Jamaat, as an organization, with (1) crimes against humanity, (2) genocide, (3) war crimes, (4) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949, (5) any other crimes under international law, (6) attempt, abetment or conspiracy to commit any such crimes, and (7) complicity in or failure to prevent commission of any such crimes. The Agency hopes that the ICT will completely ban the party and order the confiscation of party property.

In addition to undemocratic concerns, critics of trying the Jamaat argue that there is no statutory justification in the amended International Crimes (Tribunals) Act that would permit the ICT to impose any penalty on the organization. While the original International Crimes (Tribunal) Act of 1973 authorized the Bangladeshi government to establish the ICT, there was no authorization to try an entire organization. However, since the 2013 Amendment inserted the word "organization" into Section 3(1) of the Act, supporters of the report argue that pursuant to Section 3(1), the ICT has jurisdictional reach over organizations and can bring war crimes and crimes against humanity charges

enumerated in Sections 3(2)(a) and 3(2)(d). In response, Jamaat supporters argue that even if the 2013 Amendment permits the ICT to try organizations, the ICT cannot punish organizations. Sections 20(1)-20(3) empower the Court to impose the death penalty as a maximum sentence for convicted individuals, but are silent on the ability to impose punishment on organizations. Supporters of the potential trial, in contrast, maintain that Section 20 of the Act permits the ICT to impose any type of punishment at its discretion. Moreover, Section 39 of the Bangladeshi General Clauses Act defines "person" as "any company or association or body of individuals, whether incorporated or not." Using this definition, supporters of the report have argued that the ICT has the capacity to impose the suggested punishments.

The move to ban Jamaat as a political organization coincides with substantial international criticism of the ICT. International NGOs and other national governments have welcomed the ICT, but have expressed concerns regarding protections for the defendants and witnesses and fears that the trials were politically motivated. Additionally, Bangladesh has passed constitutional amendments to Articles 47(3) and 47(A) of the Constitution that, respectively, prevent the accused at the ICT from challenging the constitutional validity of any law and strip those accused by the ICT of many specific constitutional protections that are guaranteed to other Bangladeshi citizens. The constitutional amendments, coupled with a variety of questionable aspects of the ICT Rules of Procedure, have led some commentators to claim that fundamental problems with the ICT violate the fair trial protections enshrined in Article 14 of the International Covenant on Civil and Political Rights.

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