The Pre-Trial Judge **Le Juge de la mise en état**

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

Date: 15 April 2009
Case No.: CH/PTJ/2009/03

THE PRE-TRIAL JUDGE

Before: **Judge Daniel Fransen**

Registrar: **Mr Robin Vincent**

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

The Prosecutor: Mr D. A. Bellemare

The Head of the Defence Office: Mr F. Roux

STL Official Translation

I. – Procedural background

1. On 27 March 2009, at the request of the Prosecutor of the Special Tribunal for Lebanon (the "Prosecutor" and the "Tribunal" respectively), the Pre-Trial Judge issued an "order directing the Lebanese judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to the [...] Tribunal [...]" (the "Order" and the "*Hariri* case" respectively).

2. The order requests in particular the Lebanese judicial authority seized of the *Hariri* case to detain those persons detained in Lebanon in connection with the case (the "persons detained") during the period elapsing between receipt of the results of the investigation and the copy of the court's records and the issuance of a decision by the Pre-Trial Judge on whether or not to continue the detention of the persons detained. It is indeed in the interests of justice that these persons be detained during the period required by the Prosecutor to study these complex records and by the Pre-Trial Judge to make a decision on the Prosecutor's reasoned application (the "Application") in accordance with Rule 17 (B) of the Rules of Procedure and Evidence (the "Rules").

3. The Lebanese authorities referred the list of persons detained to the Pre-Trial Judge on 8 April 2009, and thus within the time limit set in the Order. According to this list, the persons detained are: General Jamil Mohamad Amin El Sayed, General Ali Salah El Dine El Hajj, Brigadier General Raymond Fouad Azar and Brigadier General Mostafa Fehmi Hamdan, in the framework of adversarial proceedings ["*au contradictoire*"]; and Mr Zuhair Mohamad Said Saddik, in the framework of *in absentia* proceedings ["*par contumace*"]. This list was appended to a decision of the Investigating Judge of the Lebanese Judicial Council in the *Hariri* case dated 7 April 2009, by virtue of which the judge, in addition to deferring to the competence of the Tribunal, lifted the arrest warrants issued for the four aforementioned generals in the framework of adversarial proceedings and for the last person mentioned *in absentia*.

4. The Pre-Trial Judge referred this list to the Prosecutor by letter dated 8 April 2009, inviting him, upon receipt of the aforementioned results of the investigation and records, to advise him of the date on which he would be in a position to file his Application.

5. On 10 April 2009, the Lebanese authorities referred to the Prosecutor the results of the investigation and a copy of the court's records regarding the *Hariri* case. The Tribunal has been officially seized of this case since the date of receipt of these results and records. Similarly, the persons detained have been under the legal authority of the Tribunal since that date, whilst continuing to be detained in Lebanon by the Lebanese authorities, in accordance with Article 4 (2) of the Statute of the Tribunal (the "Statute"), which provides that:

> "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 detention of the Tribunal".

6. By letter dated 15 April 2009, the Prosecutor indicated to the Pre-Trial Judge that he wished to file his Application within three weeks of 15 April 2009. The Prosecutor invoked the following circumstances in support of that timeframe: the volume of the records in question, consisting of 253 files and several thousand pages, most of which are handwritten and in Arabic; the need to record, number and summarily translate each document received, before comparing them with those gathered or received by the United Nations International Investigation Commission and appraising the implications for the measures to be taken; the need to proceed with the utmost diligence; and the gravity of the facts of the case. The Prosecutor did however state that if his review was completed earlier than envisaged, he would promptly apprise the Pre-Trial Judge of that fact.

7. Against this background, in order to rule as soon as possible on whether these persons should continue to be detained and to ensure that the basic requirements for the protection of human rights are met, the Pre-Trial Judge holds that a time limit must be set for the filing of the Application by the Prosecutor. Indeed, the persons detained are presumed innocent and freedom is the principle, detention the exception.

II. – Competence

8. The Pre-Trial Judge is competent to set a time limit pursuant to Rules 17 (B) and 88 of the Rules.

III. – Applicable law

9. Neither the Statute nor the Rules set a time limit within which judicial review of the detention of persons detained as part of the deferral procedure in the *Hariri* case must take place. Rule 17 (B) only provides that the Prosecutor file his Application "as soon as practicable". By way of comparison, Rule 62, governing provisional measures, states that the Prosecutor shall apply to the Pre-Trial Judge for an order to transfer a suspect or accused to a detention facility of the Tribunal within ten days of his/her arrest.

10. In that context, the term "as soon as practicable" in Rule 17 (B) must be interpreted in the light of the principles set out in Rule 3, and in particular in a manner consonant with international standards on human rights and the general principles of international criminal law and procedure. It is therefore appropriate to draw on internationally recognised standards regarding custody and in particular the provisions of the International Covenant on Civil and Political Rights (the "Covenant") which entered into force on 23 March 1976 and was ratified by Lebanon on 3 November 1972, the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention") which entered into force on 3 September 1953, and the American Convention on Human Rights (the "American Convention") which entered into force on 18 July 1978. Although Lebanon is

not formally a party to either the European Convention or the American Convention, they constitute standards upon which the Tribunal may draw, because they, like the Covenant, set out the most fundamental requirements of a fair trial. The case law of the European Court of Human Rights (the "ECHR") and the Inter-American Court of Human Rights (the "IACHR") is also instructive as those Courts have had the opportunity to specify the scope of the rights guaranteed by the Conventions, bearing in mind the existence of a denominator common to the legal systems, be they civil or *common law*, of the States party to those Conventions. Furthermore, the principles identified by these courts in this connection are particularly important for the Tribunal insofar as they reflect customary international law.

11. The relevant provisions of Article 9 (3) of the Covenant read as follows:

> Anyone arrested or detained on a criminal charge shall be brought *promptly* before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. [...] (emphasis added)

12. The relevant provisions of Article 5 (3) of the European Convention read as follows:

> Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought *promptly* before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. [...] (emphasis added)

13. The relevant provisions of Article 7 (5) of the American Convention read as follows:

> Any person detained shall be brought *promptly* before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. [...] (emphasis added)

14. Before considering the matter of length of custody, it should be underlined that the right of any person arrested or detained to be brought, promptly, before a judge is an international principle of *jus cogens*[1] – subject to derogation (i) of a temporary nature; (ii) justified by an exceptional public danger threatening the existence of the nation and proclaimed by an official act; (iii) strictly demanded by the situation; and (iv) subject to international review. Indeed, this fundamental safeguard against arbitrary action by a State is established in the law of all democratic systems[2], in the principal international human rights instruments, in the findings of the United Nation Human Rights Committee (the "Human Rights Committee") and the case law of the ECHR and the IACHR. It is thus part of the "[TRANSLATION] hard core of human rights which may be invoked at any time and in any place"[3] and therefore is binding upon both States and international bodies (of a judicial, political or administrative nature)[4].

15. According to the findings of the Human Rights Committee[5] and the case law of the ECHR[6] and the IACHR[7], the period of time for which a suspect may be held before being brought

---

[1] *Cf* Article 53 of the Vienna Convention on the Law of Treaties adopted on 23 May 1969 and entered into force on 27 January 1980.

[2] *Cf* Article 8 of the Lebanese Constitution and articles 47 (3), 48, 107 and 109 of the Lebanese Code of Criminal Procedure. The principle was stated by the Supreme Court of the United States in the Case of *Fay* v. *Noia* (Judgement of 18 March 1963). In that judgement, Judge W.J. Brennan affirmed in the name of the Court that the history of the right of *habeas corpus* "is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release" (372 U.S. 391(1963), pp. 401-402). *Cf.* also. ICTR, *Barayagwiza* Decision of 3 November 1999, §§ 70-71 (confirmed in law by a Decision of 31 March 2000, § 510).

[3] "*noyau dur des droits de l'homme, invocable toujours et partout*" P.M. Dupuy, *Droit international public*, 9th ed., Paris Dalloz, 2008, p. 243.

[4] As is the right not to be deprived arbitrarily of one's liberty (Human Rights Committee, Obs. gen. n° 24, 2 November 1994, § 8) or, more generally, as are the rights not to be deprived arbitrarily of one's life (ECHR, *Streletz, Kessler and Krenz v Germany* of 22 March 2001, § 87), not to be subjected to torture and other inhumane and degrading treatments ICTY, *Furundžija* Judgement of 10 December 1998, §§ 153-157; ECHR, *Al-Adsani v. United Kingdom* Judgement of 21 November 2001, § 57; IACHR, *Caesar v. Trinidad and Tobago* Judgement of 11 March 2005, § 100; *Goiburú et alii v. Paraguay* Judgement of 22 September 2006, §§ 93 and 128), to slavery practices (Human Rights Committee, *op. cit.*. Article 18 of the Draft Convention on State Responsibility, proposed by R. Ago, mentioned the prohibition of slavery as a rule of *jus cogens*, a proposition that was not the subject of objections or of reservations. *Cf.* International Law Commission, *Yearbook*, 1976, vol. 2, Part 1, p. 54) and forced disappearances (IACHR, *Goiburú et alii v. Paraguay* Judgement of 22 September 2006 §§ 84 and 128).

[5] *Cf.* in particular Human Rights Committee, Communication No. 845/1998 *Kennedy v Trinidad and Tobago*, § 7.6

[6] *Cf.* ECHR, *De Jong, Baljet and Van den Brink v Netherlands* Judgement of 22 May 1984, § 52; and ECHR, *Pantea v. Rumania* Judgement of 3 June 2003, § 240.

[7] *Cf.* IACHR, *Bámaca Velásquez* Judgement of 25 November 2000, series C No. 70; and IACHR, *Castillo Petruzzi et al.* Judgement of 30 May 1999, series C, No. 52, § 108.

before a judge must be appraised based on the circumstances of the case. The period may be extended exceptionally in particular in the interests of national security and owing to the difficulties arising in investigating terrorism[8]. Thus, by way of example, in the *Brannigan and McBride v. United Kingdom* judgement[9], the ECHR noted:

> [...] the opinions expressed in the various reports reviewing the operation of the Prevention of Terrorism legislation that the *difficulties of investigating and prosecuting terrorist crime give rise to the need for an extended period of detention which would not be subject to judicial control*: (emphasis added)

IV. – Discussion

16. First of all, it should be noted that in his decision of 7 April 2009 the Investigating Judge of the Lebanese Judicial Council in the *Hariri* case lifted "[TRANSLATION] the arrest warrant issued *in absentia*" for Mr Zuhair Mohamad Said Saddik.

17. It is appropriate to consider whether the period of three weeks indicated by the Prosecutor for the filing of his Application is reasonable in view of the practical circumstances of the case. In this connection, the following factual aspects must be noted:

a) the difficulties arising due to the nature of terrorist cases;
b) the complexity, scale and nature of the *Hariri* case;
c) the considerable volume of the records referred by the Lebanese authorities;
d) the need to translate the Arabic-language records referred;

---

[8] The ECHR has repeatedly recognised that investigations into terrorism pose specific difficulties for national authorities (*Cf.* in particular ECHR, *Brogan and others v United Kingdom* Judgement of 29 November 1988, § 61; ECHR, *Murray v. United Kingdom* Judgement of 28 October 1994, § 58; ECHR, *Aksoy v Turkey* Judgement of 18 December 1996, § 78; ECHR *Sakik and others v. Turkey* Judgement of 26 November 1997, § 44; ECHR, *Demir and others v. Turkey* Judgement of 23 September 1998, § 41; ECHR, *Dikme v. Turkey* Judgement of 11 July 2000, § 64; and ECHR, *Bora and others v Turkey* Judgement of 10 January 2006, § 24.

[9] ECHR, *Brannigan and others v. United Kingdom* Judgement of 26 May 1993, § 58. In the *Brogan and others v. United Kingdom* Judgement (*op. cit.*, note 8), the ECHR also affirmed that it: "[...] accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 (art. 5-3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer".

e) the international nature of the proceedings and the inherent difficulties thereof; and

f) the national and international security interests at stake.

18. Although he recognises that the Prosecutor is faced with exceptional difficulties and that the arguments put forward in his request are legitimate, the Pre-Trial Judge holds that, given the fundamental requirements of a fair trial and of Rule 17 (B) – interpreted in the light of the abovementioned provisions of the Covenant, the European Convention and the American Convention as well as of the findings of the Human Rights Committee and the case law of the ECHR and the IACHR – he is obliged to reduce the time period proposed by the Prosecutor and to direct him to file his Application by midday on 27 April 2009. In the event of exceptional circumstances, the Prosecutor may by midday on 22 April 2009 file a reasoned application for extension of this time limit. During this period, General Jamil Mohamad Amin El Sayed, General Ali Salah El Dine El Hajj, Brigadier General Raymond Fouad Azar and Brigadier General Mostafa Fehmi Hamdan shall be maintained in detention.

V. – Disposition

FOR THESE REASONS,

IN APPLICATION of Article 4 (2) of the Statute and Rules 17 (B) and 88 of the Rules,

THE PRE-TRIAL JUDGE

ORDERS the Prosecutor to file the Application by midday on 27 April 2009.

[signature]

Daniel Fransen
Pre-Trial Judge

Filed in Leidschendam, 15 April 2009