Date: 21 April 2009

Case No.: CH/PRES/2009/01/rev

BEFORE THE PRESIDENT

President: **Judge Antonio Cassese**

Registrar: **Robin Vincent**

Order of: **21 April 2009**

ORDER ON CONDITIONS OF DETENTION

The Prosecutor: D.A. Bellemare, MSM, QC

The Head of Defence Office: François Roux

The Government of Lebanon

1. In my capacity as President of the Special Tribunal for Lebanon ("Tribunal"), I have been seized of a request by Mr François Roux, Head of Defence Office, in relation to four persons currently detained by the Lebanese authorities.

I. PROCEDURAL HISTORY

2. On 1 March 2009, the Tribunal commenced its operations. The Plenary of the Judges adopted the Rules of Procedure and Evidence (the "Rules"), the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Tribunal for Lebanon or Otherwise Detained on the Authority of the Special Tribunal for Lebanon (the "Rules of Detention"), and the Directive on the Assignment of Defence Counsel (the "Directive on Counsel"). These all entered into force on 20 March 2009.

3. On 27 March 2009, at the request of the Prosecutor of the Tribunal (the "Prosecutor"), 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 (the "*Hariri* case") to defer to the Tribunal within fourteen days of receipt of the order.[1]

4. The Order of 27 March 2009 requested, in accordance with Rule 17, the Lebanese judicial authority seized of the *Hariri* case to continue to detain those persons held in Lebanon in connection with the case from the time of the Prosecutor's receipt of the results of the investigation by the Lebanese authority and the copy of the Lebanese court records until the issuance of a decision by the Pre-Trial Judge.[2]

5. On 8 April 2009, the Lebanese judicial authorities referred the list of persons detained to the Pre-Trial Judge. According to this list, the persons detained are Mr

[1] Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, 27 March 2009 ("Order of 27 March 2009").
[2] Id.

Jamil Mohamad Amin El Sayed, Mr Ali Salah El Dine El Hajj, Mr Raymond Fouad Azar and Mr Mostafa Fehmi Hamdan (the "detained persons").

6. On 15 April 2009, the Pre-Trial Judge issued an order confirming that since 10 April 2009 the detained persons have been under the legal authority of the Tribunal, though they continue to be detained in Lebanon by the Lebanese authorities. He ordered that, pursuant to international standards on human rights and the general principles of international criminal law and procedure and considering the complexity of the matter at hand, the Prosecutor must file no later than 27 April 2009 his reasoned application according to Rule 17(B) on whether he requests the continuation of detention for the detained persons.[3]

7. On 20 April 2009, the Head of the Defence Office, after visiting the detention facility where the detained persons are currently held pursuant to the Order of the Pre-Trial Judge of 15 April 2009, addressed a letter (the "Request") to me, in my capacity as President of the Tribunal, requesting an order that:

> (i) any meetings between the lawyers and their clients be privileged and confidential, without any prison staff or other persons being able to listen to, or record, the communication.
>
> (ii) the detainees be allowed to meet each other, subject to reasonable security restrictions, for a period of two hours a day; and
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> (iii) the Registrar, who is responsible for the conditions of detention while under the authority of the Tribunal, is requested to inform the relevant Lebanese authorities of this decision.[4]

I have given an opportunity to the Prosecutor to voice his views on the matter and he has done so.

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[3] 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, Case No. STL/PTJ/2009/03, 15 April 2009 ("Order of 15 April 2009").

[4] Request, p. 2.

II. COMPETENCE

8. According to the Rules of Detention (Rules 3 and 6 in particular), detention of persons by the Tribunal is generally under the authority of the Registrar, with the Chief of Detention being responsible for all aspects of the daily management of detention. However, these provisions mainly apply when a person is detained in a detention facility of the Tribunal.[5]

9. In the present circumstances, the Lebanese authorities are to conduct the daily management of the detention regime of the detained persons. The Pre-Trial Judge found that it would be contrary to the requirements of a fair trial and of efficiency and judicial economy to transfer the detained persons to the direct authority of the Tribunal in the Netherlands until he has heard reasoned submissions from the Prosecutor as to whether he requests their continued detention or whether he does not oppose their release.[6]

10. In order to ensure that the detained persons have an effective remedy against any violation of their rights during their detention by the Lebanese authorities on behalf of the Tribunal, the Tribunal must be able to exercise some form of supervision over their detention. Without such supervision by the Tribunal, the rights of the detained persons may be gravely compromised and they may be left without any effective remedy against a potential violation of their rights.[7]

11. Specifically, the powers conferred on the President by Rule 32(D) (according to which the President "shall supervise the conditions of detention") render the provisions of Rule 101(G) (which allows the President to "request modification of the conditions of detention" when a person is detained in facilities outside the Host State) applicable to the present circumstances. Although the detained persons have not themselves filed a request, Rule 57(F) provides the Head of Defence Office with a right of audience in relation to the rights of suspects or accused.

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[5] See, for example, Rules 83 and 101(G) of the Rules.
[6] Order of 27 March 2009, para. 14.
[7] On the necessity of an effective remedy for the violation of fundamental rights during detention under Article 2(3) of the ICCPR, see, *inter alia*, *Prosecutor v, Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras 255 and 324.

12. Under the circumstances, and considering that the detained persons are being held in detention pursuant to the Order of 15 April 2009 under the authority of the Tribunal, I find that as President I am competent to entertain the Request.

III. APPLICABLE LAW

A) The Right Freely and Privately to Communicate with Counsel

13. The Statute of the Tribunal ("Statute") provides in Article 16(4)(b) that an accused is entitled, *inter alia*, "to communicate without hindrance with counsel of his or her own choosing". Moreover, Rule 163 – modelled upon Rule 97 of the ICTY Rules of Procedure and Evidence – expressly describes communications "made in the context of the professional relationship between a person and his legal counsel as privileged". Rule 65(F) of the Rules of Detention specifies that visits of counsel shall be conducted within sight but not within the hearing of the staff of the Detention Facility. The rights attaching to suspects or accused in detention under these provisions are necessarily to be considered applicable, *mutatis mutandis*, to all detained persons even if they have not formally been held to be suspects or accused.

14. The right of accused persons to communicate freely and privately with counsel is laid down in international instruments on human rights. It is enshrined expressly in the American Convention on Human Rights (Article 8 (2) (d)), and implicitly in the UN Covenant on Civil and Political Rights (Article 14 (3) (b)) ("ICCPR") and the European Convention on Human Rights (Article 6 (3) (b)). When the right is simply implied in the text of the international instrument, it has been subsequently spelled out in the case law of the relevant supervisory body. This holds true in particular for the European Court of Human Rights.[8]

[8] In *S.* v. *Switzerland*, Judgment of 28 November 1991 ("*S. v. Switzerland*"), the Court said that "unlike some national laws and unlike Article 8 (2) (d) of the American Convention on Human Rights, the European Convention does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance. That right is set forth, however, within the Council, in Article 93 of the Standard Minimum Rules for the Treatment of Prisoners (…) The Court considers that an accused's right to communicate with his advocate out of hearing of a third person is

15. Article 14(3)(b) of the ICCPR – which was ratified by Lebanon on 3 November 1972 and entered into force on 23 March 1976 – provides for the right "to communicate with counsel of his own choosing". The Human Rights Committee has clarified that this provision "requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter."[9] In a similar vein, paragraph 93 of the UN Standard Minimum Rules for the Treatment of Detainees provides that "[i]nterviews between the [untried] prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."[10]

16. The very broad recognition of the right to communicate freely and privately with counsel by the international community, and the general attitude taken by States and international judicial bodies as to its importance, show that the right is now accepted in customary international law as one of the fundamental human rights relating to due process. Indeed, the right of an accused person to freely and confidentially communicate with his or her counsel is an indispensable condition for the effective exercise of most his or her other rights. As the European Court has aptly noted, "if a lawyer were unable to confer with his client and receive confidential instructions from him without [...] surveillance, his assistance would lose much of its usefulness".[11] The rights of the defence, of which this right is an indispensable component, are one of the foundations of the concept of a fair trial.

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part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) (art. 6-3-c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective" (para. 48). See also *Brennan v. The United Kingdom*, Judgment of 16 October 2001: "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6 § 3 (c). (...),The importance to be attached to the confidentiality of such consultations, in particular that they should be conducted out of hearing of third persons, is illustrated by the international provisions cited above." (para. 38) and *Lanz v. Austria*, Judgment of 21 January 2002 para. 50.

[9] HRC, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984, para. 9.

[10] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[11] See *Artico v. Italy*, 13 May 1980, para. 33 as well as *S. v. Switzerland*, para. 48.

17. The right to communicate freely and privately with counsel also accrues to a person *suspected* of having committed a crime. Such persons may also find themselves in need of confidential legal assistance, particularly when held in detention.

18. The right at issue is not, however, unlimited. Other imperative exigencies relating to the good administration of justice or to the need to prevent crimes may make it necessary to temporarily restrict the right.[12] Thus, for instance, the European Court of Human Rights has acknowledged that restrictions may be justified when there is a risk of collusion between the accused and a defence counsel,[13] or when an accused may use a defence counsel to influence witnesses or tamper with evidence.

19. However, restrictions of the right may only be admissible if they fulfil certain conditions, namely, that: (i) they are envisaged by law; (ii) they are necessary (that is, they are rendered indispensable by the need to countervail possible negative effects); (iii) they are proportionate to the exigency that warrants them (that is, they are commensurate to and do not exceed the fulfilment of such exigency – this may imply that the restriction be of limited duration); and (iv) they are submitted to regular and judicial scrutiny.

20. Likewise, for any detained person, this fundamental right can be restricted only if such conditions as set out above in relation to accused persons are fulfilled. This

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[12] In *Brennan* v. *United Kingdom*, Judgment of 16 October 2001, the European Court of Human Rights stated that "[...] the Court's case-law indicates that the right of access to a solicitor may be subject to restrictions for good cause and the question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. While it is not necessary for the applicant to prove, assuming such were possible, that the restriction had a prejudicial effect on the course of the trial, the applicant must be able to be claim to have been directly affected by the restriction in the exercise of the rights of the defence" (para. 58).

[13] For instance, in *Lanz* v. *Austria*, Judgment of 21 January 2002, the Court said that: "However, the Court cannot find that these reasons are sufficient to justify the measure. Surveillance by the investigating judge of the contacts of a detainee with his defence counsel is a serious interference with an accused's defence rights and very weighty reasons should be given for its justification. This was so in the case of Kempers v. Austria where the applicant was suspected of being the member of a gang and utmost confidentiality was necessary in order to catch the other members (No. 21842/93, Kempers v. Austria, Dec. 27.2.97, unpublished). In the present case such extraordinary features cannot be made out. The Court finds that the domestic courts essentially relied on a risk of collusion, but this was the very reason for which detention on remand had already been ordered. The restriction on contacts with defence counsel for a person who is already placed in detention on remand is an additional measure which requires further arguments. The Court cannot find that the Austrian courts or the Government have furnished convincing arguments in this respect. (para 52). There has, therefore, been a violation of Article 6 § 3 (b) and (c) of the Convention" (para. 53).

notion is clearly spelled out in Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[14] which states that:

> 1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
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> 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
>
> 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

B. The Question of Segregation of Detainees

21. A distinction must be made between the segregation of a detainee from a co-accused or a co-suspect, on the one hand, and the segregation of a detainee from all other persons held in the same detention facility. The rationale behind, and the legal regime for each of these two categories of segregation is different, as shown below.

22. As to the segregation of a detainee from all other detainees, according to the general principle set out in Rule 41 of the Rules of Detention, a detainee shall not be segregated from other detainees except for the reasons set out in Rule 42(A). These are: (i) preserving security and good order in the Detention Facility; (ii) protecting the detainee or detainees in question; or (iii) preventing any prejudice or otherwise undermining the outcome of the proceedings against the detainee or detainees or any other proceedings. While the Rules of Detention are not expressly applicable to a person detained by State authorities, this provision enshrines a more general rule relevant to the present circumstances.

23. Segregation from all other persons detained in a detention facility, if prolonged, may amount to inhuman or degrading treatment. Article 7 of the ICCPR provides that

[14] Adopted by General Assembly resolution 43/173 of 9 December 1988.

"[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The Human Rights Committee's General Comment on this provision states that prolonged solitary confinement of the detained or imprisoned person may amount to cruel, inhuman and degrading treatment or punishment prohibited by Article 7.[15]

24. The power of prison authorities to order the segregation of a detainee must be justified on well-founded grounds and be proportionate to the need for the isolation. Segregation must be reviewed on a frequent basis by a judicial authority and be terminated as soon as the exceptional grounds for imposing it have come to an end.

25. On the other hand, segregation of a detainee from a co-accused or a co-suspect is often predicated on the need to prevent collusion between persons who may have been involved in the same crime and may thus have a motive to concoct alibis or to agree on other designs aimed at undermining their responsibility for the crime of which they are suspected or accused. Another ground for segregating a detainee from a co-accused or co-suspect may be the need to prevent one defendant from putting pressure on another co-defendant, or from conspiring to obstruct the proceedings.[16]

26. International case law has regarded as justified, under certain conditions, this latter category of segregation. For example, in a recent decision, the International Criminal Court held that "measures to restrict communication and contact" between accused "constitute an important restriction of the rights" and "therefore can only be imposed if the requirements of necessity and proportionality are met."[17] The Court considered that in the case at issue there was no concrete evidence of collusion that justified segregation.

27. Likewise, the Co-Investigating Judges of the Extraordinary Chambers in the Court of Cambodia, in an Order Concerning Provisional Detention Conditions issued on 20 May 2008, held that "a pre-trial detention regime may be justified, *inter alia*, by

[15] HRC, General Comment No. 20, Prohibition of torture and cruel treatment or punishment (Art. 7), 10 March 1992, para. 6.
[16] See in this respect, *mutatis mutandis*, the judgment of the European Court of Human Rights in *Gorski v. Poland* of 4 October 2005, at paras 56-58.
[17] *Situation in the Democratic Republic of the Congo in the Case Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01-07, Decision Revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008, in particular pp. 9-11.

the need to prevent any collusion between co-accused". Subsequently, the Pre-Trial Chamber of the same Court held that "limitations of contacts can only be ordered to prevent pressure on witnesses or victims when there is evidence reasonably capable of showing that there is a concrete risk that the charged person might collude with other charged persons to exert such pressure while in detention. With the passage of time, the threshold becomes higher as the investigation progresses and the risk necessarily decreases".[18]

28. In summary, segregation of a detainee from another co-detainee allegedly involved in the same crime may be justified as long as there is a serious risk of collusion or of a joint attempt to tamper with the evidence or influence witnesses or obstruct proceedings. In these circumstances segregation may be warranted provided it is necessary and proportionate to the risk. With the passage of time the risk may diminish and the segregation may turn out to be unnecessary or disproportionate. At that stage it shall be terminated.

IV. GROUNDS FOR THE DECISION

A. The Right to Freely and Privately Communicate with Counsel

29. For the fundamental right of a detained person to communicate with his or her counsel to be effective, it is imperative that communication between the detained person and his or her lawyer be privileged, unless the detaining authorities demonstrate that extraordinary reasons exist to temporarily restrict the right.

30. Taking into account the legal considerations set out above in paragraphs 18 to 20, I find that, whatever the nature and impact of the original reasons for restricting the right to freely and privately communicate with counsel, at present any such restriction appears to be no longer justified. With the passage of time, and without any new

[18] Extraordinary Chambers in the Courts of Cambodia, Case No. 002/19-09-2007-ECCC/OCIJ (PTC09), *Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions*, 26 September 2008, para. 21.

evidence, any such restriction would be unreasonable and disproportionate to the need to prevent the risk of collusion, or further crimes.

31. In addition, the Prosecutor has not objected to restrictions of the detained persons' rights to freely and privately communicate with counsel.

B. The Question of Segregation of Detainees

32. It appears from the Request and clarifications subsequently provided by the Head of Defence Office, that the four detained persons are being held in a building of the Beirut prison separated from other detention facilities. The four detainees do not ask to be allowed to mix with the other detainees; they simply request to be allowed to communicate with one another within the separate building in which they are being held.

33. While it might be that the segregation of the detainees from each other was initially justified by one of the grounds mentioned above in paragraphs 26 to 28, it would seem that any reasonable need for such segregation has ceased to be relevant at this point in time. Further, with regard to the issue of segregating the detained persons from each other, the Prosecutor does not consider this regime necessary. Thus, I find that only compelling reasons of the type discussed above would justify refusing the detained persons to meet with each other, if they so request.

V. DISPOSITION

On the strength of the above legal considerations, I hereby:

1) **GRANT** the request of the Head of Defence Office and accordingly;

2) **REQUEST** the Lebanese authorities

   (i) to ensure that the right of the detained persons to freely and privately communicate with their counsel be fully implemented. It is understood

that the Lebanese authorities may take all security measures they consider necessary under the circumstances, including visual surveillance through remote video-camera, as long as the right to their privileged communication with counsel is respected; and

(ii) to terminate the regime of segregation of the detained persons and to ensure that, in keeping with any security regime deemed appropriate, the detained persons be allowed to communicate with each other upon request, for a period of two hours per day; and

3) **REQUEST** the Registrar to notify the Lebanese authorities of this Order and to request their assistance in notifying it to the detained persons.

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

Leidschendam, 21 April 2009

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Antonio Cassese
President

[Seal of the Tribunal]