

The Pre-Trial Judge



Le Juge de la mise en état

Date: 29 April 2009
Case No.: CH/PTJ/2009/06

THE PRE-TRIAL JUDGE

Before: Judge Daniel Fransen

The Registrar: Mr Robin Vincent

**ORDER REGARDING THE DETENTION OF PERSONS DETAINED IN
LEBANON IN CONNECTION WITH THE CASE OF THE ATTACK AGAINST
PRIME MINISTER RAFIQ HARIRI AND OTHERS**

The Prosecutor: Mr D. A. Bellemare, MSM, QC
The Head of the Defence Office: Mr F. Roux

I. – Procedural Background

1. The Special Tribunal for Lebanon (the “Tribunal”) officially commenced functioning on 1 March 2009. The judges of the Tribunal, meeting in plenary, subsequently adopted the Rules of Procedure and Evidence of the Tribunal (the “Rules”), the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal, and the Directive on Assignment of Defence Counsel. These documents entered into force on 20 March 2009.
2. On 25 March 2009, the Prosecutor of the Tribunal (the “Prosecutor”) applied to the Pre-Trial Judge for an order directing the Lebanese authorities seized with the case of the attack against Prime Minister Rafiq Hariri and others (the “*Hariri*” case) to: i) defer to the competence of the Tribunal; 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 (the “persons detained”). This application was made under 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 UN Security Council Resolution 1757 (2007) of 30 May 2007 (S/RES/1757 (2007)). The application was also made under Rule 17 of the Rules.
3. In response to the Prosecutor’s application, the Pre-Trial Judge issued an order on 27 March 2009 directing the Lebanese judicial authority seized with the *Hariri* case to defer to the Tribunal. This order requested the said judicial authority: i) to defer to the Tribunal’s competence in this case; ii) to refer to the Prosecutor the results of the investigation and a copy of the court’s records regarding the *Hariri case*, if any; iii) to refer to the Pre-Trial Judge a list of all persons detained in connection with that case, if any; and iv) between receipt of the results of the investigation and the copy of the court’s records, and issuance of a decision by the Pre-Trial Judge on whether or not to continue the detention of those persons detained, to detain those persons in Lebanon.

4. The Lebanese authorities referred the list of persons detained to the Pre-Trial Judge on 8 April 2009. According to that 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; and Mr Zuhair Mohamad Said Saddik, in the framework of *in absentia* proceedings. This list was appended to a decision of the Investigating Judge at 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 in the framework of adversarial proceedings for the four generals and *in absentia* for the last person mentioned.
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. Since that date, the Tribunal has been officially seized of this case and the persons detained have been formally under its authority.
6. On 15 April 2009, the Prosecutor informed the Pre-Trial Judge, at the request of the latter, that he wished to file his reasoned submissions on whether or not to continue the detention of the persons detained, within three weeks of 15 April 2009. The Prosecutor invoked the following circumstances in support of that timeframe: i) the volume of the records in question, which consisted of 253 files and several thousand pages, most of which were handwritten and in Arabic; ii) the need to record, number and summarily translate each document received, before comparing them with those gathered or received by the United Nations International Independent Investigation Commission (the "Investigation Commission") and appraising the implications for the measures to be taken; iii) the need to proceed with the utmost diligence; and iv) 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. On 15 April 2009, the Pre-Trial Judge issued an order setting a time limit within which the Prosecutor was to file an application on whether or not to continue the detention of the persons detained. That order stated that, given the fundamental requirements of a fair trial, the exceptional circumstances of the case and the arguments put forward by the Prosecutor in his letter of 15 April 2009, the latter was to submit his application by midday on 27 April 2009. In the event of exceptional circumstances, the Prosecutor was, however, permitted to file a reasoned application for extension of this time limit by midday on 22 April 2009. In the order, the Pre-Trial Judge also noted the fact that, in a decision of 7 April 2009, the Investigating Judge at the Lebanese Judicial Council in the *Hariri* case had lifted “[TRANSLATION] the arrest warrant issued *in absentia*” for Mr Zuhair Mohamad Said Saddik.
8. No extension of the time limit was sought and the Prosecutor made his submission to the Pre-Trial Judge by midday on 27 April 2009 under Rule 17 of the Rules of Procedure and Evidence (the “Submission”).
9. On 27 April 2009, the Pre-Trial Judge scheduled the public hearing provided for in Rule 17, at 2 p.m. on 29 April 2009.

II. – The Submission

10. Under Article 4 of the Statute and Rules 2, 17, 63, 68, 101 and 102 of the Rules,¹ the Prosecutor submitted that the Pre-Trial Judge order the release, with immediate effect, of Jamil Mohamad Amin El Sayed, Ali Salah El Dine El Hajj, Raymond Fouad Azar and Mostafa Fehmi Hamdan.² He noted moreover that, given the special circumstances of this case, it would be appropriate to order measures to ensure the safety of these individuals, if released.³

¹ Submission, paras 18 to 22.

² *Ibid.*, para. 34.

³ *Ibid.*

11. In support of his Submission, the Prosecutor cited the fact that, under Rule 63 (D), a person may not be detained as a suspect for more than ninety days, unless an indictment has been confirmed by the Pre-Trial Judge by the expiry of that period.⁴ The Prosecutor submitted therefore that he may not seek provisional detention of a suspect, unless he is in a position to indict within a very short timeframe.⁵
12. Now, in the case in hand, having examined thoroughly all the material in the case file, collected by the Investigation Commission, the Lebanese authorities, and his Office, the Prosecutor considered that the information currently available to him was insufficiently credible to warrant indictment of the persons detained.⁶ In light of these circumstances and of the principle of presumption of innocence, the Prosecutor considered that there was no cause, at this stage in the proceedings, to hold them in detention.

III. – Applicable Law

13. The provisions to be considered in connection with the present order are Article 4 (2) of the Statute, Rules 17 (B), 63 (A) to (D), 101 (A) and (B), and 102 (A) of the Rules, and Article 15 of the Agreement.
14. Article 4 of the Statute governs the jurisdiction concurrently exercised by the Tribunal and the Lebanese courts. Paragraph 2 thereof addresses the *Hariri* case specifically and reads as follows:

2. 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

⁴ *Ibid.*, para. 19.

⁵ *Ibid.*, para. 25.

⁶ *Ibid.*, paras 23 to 33.

detained in connection with the investigation shall be transferred to the custody of the Tribunal.

15. Rule 17 implements the provisions of Article 4 of the Statute and sets out the procedure regarding continued detention or release of persons detained. Paragraphs (A) to (D) address the *Hariri* case specifically. Given that the Prosecutor is not seeking continued detention of the persons detained, only paragraph (B) (i) is relevant. It reads as follows:

(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.

16. Rule 63 addresses transfer and provisional detention of suspects. Paragraph (D) thereof reads as follows:

(D) The provisional detention of a suspect shall be ordered for a period not exceeding thirty days from the date of the transfer of the suspect to the seat of the Tribunal. At the end of that period, at the Prosecutor's request, the Pre-Trial Judge may decide, subsequent to an *inter partes* hearing of the Prosecutor and the suspect or his counsel, to extend the detention for a period not exceeding thirty days, if warranted by the needs of the investigation. At the end of that extension, at the Prosecutor's request, the Pre-Trial Judge may decide, subsequent to an *inter partes* hearing of the

Prosecutor and the suspect or his counsel, to extend the detention for a further period not exceeding thirty days, if warranted by special circumstances. The total period of detention shall in no case exceed ninety days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed by the Tribunal, the suspect shall be released or, if appropriate, delivered to the authorities of the requested State.

17. Rule 101 governs detention on remand. Only paragraphs (A) and (B) thereof are relevant. They read as follows:

- (A) Upon (i) the transfer of a suspect or accused to the Tribunal pursuant to Rule 83 or (ii) the transfer of a detained individual to the Tribunal, including transfer pursuant to Article 4 of the Statute, or (iii) upon the arrest of an accused in accordance with Rule 79 following his voluntary appearance before the Tribunal, the Pre-Trial Judge or a Chamber, as appropriate, shall satisfy itself that the person has been informed of the crimes of which he is accused or suspected and of his rights under the Statute and the Rules, including the right to apply for provisional release.
- (B) A person transferred to the Tribunal, who is arrested and detained under paragraph (A), or his counsel, may apply for provisional release. In deciding such an application, the Pre-Trial Judge or a Chamber, as appropriate, shall apply the test set out in Rule 102 and give reasons for his or its decision.

18. Rule 102 (A) enumerates the conditions that must be met if provisional release is to be refused. It reads as follows:

- (A) The Pre-Trial Judge or a Chamber, as appropriate, may refuse provisional release only if satisfied that provisional detention is necessary: (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, for instance by posing a danger to, or intimidating, any victim or witness; or (iii) to prevent conduct of a kind of which he is suspected. Such release shall not be made in the Host State without its consent.

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

1. The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and the 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.

IV. – Jurisdiction

20. The Pre-Trial Judge is competent to rule on the merits of the Submission, pursuant to Rules 17, 101 and 102 as referred to above.

V. – Discussion

A. – Preliminary observations

21. The following three preliminary observations are apposite.

22. Firstly, provisional detention is an exceptional measure, which is only warranted where it proves strictly necessary⁷ and under the circumstances set out in the Rules.

23. Secondly, the Pre-Trial Judge shall only address the matter of provisional detention, at the current stage of the investigation, of persons detained, who are presumed innocent.

⁷ The Human Rights Committee has repeatedly affirmed that “pre-trial detention should be the exception” (Human Rights Committee, *Hill v. Spain*, Communication No. 525/1993, 2 April 1997, para. 12.3). Furthermore, it considers that remand in custody must not only be lawful, but also “reasonable ... and necessary in all circumstances” (Human Rights Committee, *Van Alphen v. The Netherlands*, Communication No. 305/1988, 23 July 1990, para. 5.9 and Human Rights Committee, *Spakmo v. Norway*, Communication No. 631/1995, 5 November 1999, para. 6.3). Similarly, the case law of the European Court of Human Rights holds that “[TRANSLATION] The very essence of paragraph 3 [of Article 5 of the Convention] [...] is the right to freedom pending a criminal trial. [...] Fundamentally, the purpose of Article 5 § 3 is to impose provisional release as soon as detention ceases to be reasonable [...]. In light of this, the Court considers that provisional detention should be seen as the last solution, that is to say only warranted when all the other available options prove insufficient” (Judgment, *Lelièvre v. Belgium*, 21 March 2008, para. 97).

The order is also without prejudice to any possible future prosecution before the Tribunal.

24. Finally, it is important to note the exceptional situation in which the order is being made: since 10 April 2009, the persons detained have been held not as the result of a decision to arrest made by the Prosecutor, but as a consequence of the application of Article (4) (2) of the Statute, which provides that deferral of competence by the Lebanese judicial authority results in those detained in connection with the *Hariri* case being transferred to the custody of the Tribunal.

B. – The legal standards applied to the Submission

25. Pursuant to Article 11 of the Statute, the Prosecutor is responsible for the investigation and prosecution of persons thought to be responsible for the crimes falling within the jurisdiction of the Tribunal. As he rightly points out,⁸ in so doing, the Prosecutor must act, not merely as a party to the proceedings, but also as an agent of Justice, representing and safeguarding the public interest. In that capacity, in accordance with Rule 55 (C), he shall “assist the Tribunal in establishing the truth and protect the interests of the victims and witnesses. He shall also respect the fundamental rights of suspects and accused”. Moreover, having directed the work of the Investigation Commission, which began investigating in June 2005, having conducted his own investigations and received the records provided by the Lebanese authorities, the Prosecutor has an in-depth knowledge of the *Hariri* case file. That knowledge enables him to determine, cognizant of the facts, whether or not the persons detained must be placed or kept in detention.

26. Without prejudice to the investigative powers vested in him by the Rules,⁹ the Pre-Trial Judge should not substitute himself for the Prosecutor, to seek out, by reviewing the case file, incriminating evidence which might or might not justify the provisional detention of an individual. It is only in the event that the Prosecutor applies for a person to be placed in provisional detention that the Pre-Trial Judge must examine all relevant

⁸ Submission, para. 23.

⁹ Cf. Rules 89 (I) and 92.

evidence in the case file, to ensure that the fundamental rights of the person are safeguarded.

27. Given that the Prosecutor has requested the release of the persons detained in the case at hand, it is not incumbent upon the Pre-Trial Judge to review the material in the case file, collected by the Prosecutor and the Investigation Commission in the course of their investigations, and provided by the Lebanese authorities on 10 April 2009. Rather, he must rule on the merits of the Submission for an order for release of the persons detained, solely based on the arguments put forward by the Prosecutor in support of the Submission and with due regard to the discretionary power of the Prosecutor in this domain. As such, the Pre-Trial Judge must confine himself to considering: i) the legal conditions which apply to provisional detention; and ii) whether the way the Prosecutor has applied those conditions to the facts of the case in hand is not manifestly unreasonable.¹⁰

C. – The legal conditions governing provisional detention

28. As recalled above, on 7 April 2009, the Investigating Judge at the Lebanese Judicial Council seized of the *Hariri* case lifted the arrest warrants issued for General Jamil Mohamad Amin El Sayed, General Ali Salah El Dine El Hajj, Brigadier General Raymond Fouad Azar and Brigadier General Mostafa Fehmi Hamdan. When these persons officially came under the authority of the Tribunal on 10 April 2009, they were placed in “custody” for the period of time required by the Prosecutor to review the *Hariri* case file and to file submissions as to whether or not they should be placed in provisional detention.

¹⁰ Against this background, the Pre-Trial Judge’s power is broadly comparable to that exercised by the Appeals Chamber of the Criminal Tribunals for former Yugoslavia and for Rwanda when called upon to review a decision made by a trial chamber exercising its discretionary power. *Cf.* In particular ICTY, Decision on interlocutory appeal of the Trial Chamber’s decision on the assignment of defense counsel, *Slobodan Milosević v. The Prosecutor*, IT-02-54-AR73.7, 1 November 2004, paras. 9 & 10; and ICTY, Decision on interlocutory appeal of the Trial Chamber’s decisions on provisional release, *The Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, IT-04-80-AR65.1, 19 December 2005, para. 4.

29. Rule 102 (A) provides that a person must only be placed in provisional detention if it is necessary: i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) to prevent conduct of a kind of which he is suspected.
30. However, it should first be established, in accordance with Rule 101 (A) and current international standards and case law,¹¹ whether the person is suspected or accused of a crime within the jurisdiction of the Tribunal. Indeed, as the European Court of Human Rights has emphasized "[t]he persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention".¹² If that condition is not met, reviewing the other conditions for provisional detention set out in Rule 102 becomes superfluous.
31. Rule 2 defines a suspect as "a person who the Prosecutor has reasonable grounds to believe has committed a crime" and an accused as "a person against whom one or more counts in an indictment have been confirmed in accordance with Article 18 (1) of the Statute and Rule 68 (H)". Rule 68 (B) provides that the Prosecutor submit an indictment, together with supporting material, to the Pre-Trial Judge "if satisfied in the course of an investigation that there is sufficient evidence that a suspect has committed a crime that may fall within the jurisdiction of the Tribunal".
32. Finally, it should be noted that, according to Rule 63 (D), a suspect may not be placed in provisional detention for a period exceeding ninety days in total, unless an indictment has been confirmed and an arrest warrant issued by the Tribunal by the expiry of that period.

¹¹ Cf. Article 9 of the Covenant on Civil and Political Rights; Article 5 paras. 1 and 3 of the European Convention for the Protection of Human Rights; Article 7 of the American Convention on Human Rights. Cf. also Article 107 of the Lebanese Code of Criminal Procedure.

¹² ECHR, Judgement, *Letellier v. France* of 26 June 1991, para. 35. Cf. also ECHR, Judgement, *Stögmüller v. Austria* of 10 November 1969, para. 4, and ECHR, Judgement, *Lelièvre v. Belgium* of 21 March 2008, para. 94. This case law is in line with that of the Inter-American Court of Human Rights (Judgement, *Acosta-Calderón v. Ecuador*, 24 June 2005, para. 75) and of the United Nations Human Rights Committee. In Communication No. 16/1977, *Monguya Mbenge v. Zaire* of 25 March 1983 (para. 20), the Committee affirmed that, insofar as the state had not alleged charges against the person, the latter was arbitrarily detained in violation of Article 9 of the Covenant.

D. – Analysis of the merits of the case

33. In support of his Submission, the Prosecutor recalled that in order to apply for the provisional detention of a suspect, he must be in a position to indict within the timeframe set out in the Rules. However, the Prosecutor considered that the information available to him at this point in time did not enable him to indict the persons detained. He thus submitted that the question of whether provisional detention was necessary did not arise.¹³

34. The Prosecutor stated that in arriving at this conclusion, he had:

- i) thoroughly reviewed all relevant material and information available at this point in time, whether gathered by his Office, the Investigation Commission, or received from the Lebanese authorities;¹⁴
- ii) taken into account and reviewed the statements made by the persons detained and by others that relate to the detained persons and had assessed their credibility;¹⁵
- iii) reviewed relevant communications data and all other material, including physical evidence collected;¹⁶
- iv) reviewed the forensic assessments made;¹⁷
- v) reviewed the filings and decisions made in relation to motions for release filed by the detained persons and their counsel before the Lebanese authorities;¹⁸

¹³ Submission, para. 25.

¹⁴ *Ibid.*, para. 27.

¹⁵ *Ibid.*, para. 28.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

- vi) taken account, in light of a review of all this information, of inconsistencies in the statements of key witnesses and of a lack of corroborative evidence to support these statements;¹⁹ and
- vii) taken account of the fact that some witnesses had modified their statements and one key witness had expressly retracted his original statement incriminating the persons detained.²⁰

35. The Pre-Trial Judge considers that the Prosecutor could theoretically seek provisional detention under Rule 63 of a person as a suspect, if he believes he has sufficient evidence to do so. It would then be incumbent upon him, at the end of a thirty-day period, which could be extended twice, to assess whether, in light of the evidence collected by that date, there were grounds to indict the suspect and, if appropriate, then apply for extension of the provisional detention.

36. However, as pointed out in paragraph 26 of the present order, it does not behove the Pre-Trial Judge to exercise, in the place of the Prosecutor, the power to appraise, on the basis of the factual evidence available, whether a person is a suspect and whether it is appropriate to indict and, if so, to apply for provisional detention. In other words, the Prosecutor alone is in a position to evaluate whether – and in what timeframe – he is in a position to consider a person a suspect and, if necessary, to indict that person.

37. In assessing the reasonableness of the Prosecutor's conclusions in line with paragraph 27 of this order, the Pre-Trial Judge notes the fact that the Prosecutor does not intend to indict the persons detained within the timeframe set out in Rule 63. He also notes that, in arriving at this conclusion, the Prosecutor has based himself on the information listed above and, in particular, on the fact that he has reviewed the entire file anew, notably in light of the documents provided by the Lebanese authorities, that some witnesses have

¹⁹ *Ibid.*, para. 30.

²⁰ *Ibid.*

modified their statements and that a key witness has expressly retracted his original statement, which incriminated the persons detained. Finally, the Pre-Trial Judge notes the context in which the Submission is made, that is to say the detention of these persons in Lebanon since 30 August 2005.

38. Against this background, and given the succinct, but sufficient, information and considerations presented by the Prosecutor, the Pre-Trial Judge considers that the conclusions reached by the Prosecutor are not unreasonable to the point that he might have made a manifest error of judgement in exercising his discretionary power.

39. In conclusion, the Pre-Trial Judge notes that the persons detained cannot, at this stage in the investigation, be considered as either suspects or accused persons in the proceedings pending before the Tribunal. As a result, in application of the Rules, they do not meet the conditions *sine qua non* to be placed in provisional detention, or even to be released subject to conditions.

40. Analysis of the conditions provided for in Rule 63 (B) (iii) and 102 (A) is thus moot.

VI. – Disposition

FOR THESE REASONS,

IN ACCORDANCE WITH Article 4 (2) of the Statute, Rule 17 (B), 63 (A) to (D), 101 (A) and (B) and 102 (A) of the Rules, and Article 15 of the Agreement;

THE PRE-TRIAL JUDGE

ORDERS, unless they are held on another basis, the release of Messrs Jamil Mohamad Amin El Sayed, Ali Salah El Dine El Hajj, Raymond Fouad Azar and Mostafa Fehmi Hamdan;

INSTRUCTS the Lebanese authorities immediately to take the measures necessary to ensure the safety of Messrs Jamil Mohamad Amin El Sayed, Ali Salah El Dine El Hajj, Raymond Fouad Azar and Mostafa Fehmi Hamdan, in compliance with their obligation to cooperate with the Tribunal;

INSTRUCTS the Lebanese authorities to enforce the present order;

RULES that, unless the parties concerned, or any one of them, file a notice of appeal at the Registry of the Tribunal or expressly waive that right in advance, the present order shall take effect upon expiry of the time-limit for appeal as provided in Rule 102 (C), (D) and (E); and

DIRECTS the Registrar to notify this order to whom it may concern, to oversee proper enforcement hereof, and to notify the Lebanese authorities of any appeal filed.

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

Leidschendam, 29 April 2009

Daniel Fransen
Pre-Trial Judge

[Seal of the Tribunal]