

The Pre-Trial Judge



Le Juge de la mise en état

THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/I**

The Pre-Trial Judge: **Mr Daniel Fransen**

The Registrar: **Mr Herman von Hebel**

Date: **17 October 2011**

Original: **French**

Type of document: **Public**

**ORDER TO SEIZE THE TRIAL CHAMBER PURSUANT TO RULE 105 BIS (A) OF
THE RULES OF PROCEDURE AND EVIDENCE IN ORDER TO DETERMINE
WHETHER TO INITIATE PROCEEDINGS *IN ABSENTIA***

Office of the Prosecutor:
Mr Daniel A. Bellemare, QC

Defence Office:
Mr François Roux



1. By way of the present Order, pursuant to Rule 105 *bis* (A) of the Rules of Procedure and Evidence (the “Rules”), the Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) seizes the Trial Chamber for the purpose of ruling on the question of determining whether it is appropriate to initiate proceedings *in absentia* against Messrs. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra.

2. After having reviewed the principal stages of the procedure (I), the applicable law to the case at hand (II) and the observations of the Head of Defence Office and the Prosecutor with regard to the determination of the period of time as set forth in Rule 105 *bis* (A) of the Rules (III), the Pre-Trial Judge will set out the grounds for this order (IV).

I. Procedural background

3. On 28 June 2011, pursuant to Article 18 (1) of the Statute and Rules 68 and 74 (A) of the Rules, the Pre-Trial Judge issued a “Decision Relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra”, according to which those persons were indicted in connection with the attack of 14 February 2005 against Mr Rafiq Hariri and other persons (respectively the “Decision on the Indictment”, the “Indictment” and the “Accused”).¹ The same day, the Pre-Trial Judge issued four arrest warrants including transfer and detention orders against the Accused (the “Arrest Warrants”).² In order to facilitate the arrest of the Accused, the Indictment, the Arrest Warrants and the Decision on the Indictment were kept confidential.

4. On 30 June 2011, pursuant to Rules 76 (A) and 79 (D) of the Rules, the Registrar transmitted the Indictment together with the Arrest Warrants to the competent authorities of the Lebanese Republic, the State of which the Accused are nationals and in whose territory

¹ Case No. STL-11-01/I, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011.

² Case No. STL-11-01/I, Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Order, 28 June 2011; Case No. STL-11-01/I, Warrant to Arrest Mr Mustafa Amine Badreddine Including Transfer and Detention Order, 28 June 2011; Warrant to Arrest Mr Hussein Hassan Oneissi Including Transfer and Detention Order, 28 June 2011; Case No. ° STL-11-01/I, Warrant to Arrest Mr Assad Hassan Sabra Including Transfer and Detention Order, 28 June 2011.

the Accused were last known to be residing. In the Arrest Warrants, the Pre-Trial Judge requested the competent authorities of the Lebanese Republic to search for and arrest the Accused, in any place where they might be found in the territory of the Lebanese Republic, to detain and transfer them to the Headquarters of the Tribunal. He also requested the competent authorities of the Lebanese Republic to execute the Arrest Warrants at the earliest opportunity and to serve them, together with the Indictment, to the Accused in person.

5. On 8 July 2011, upon request of the Prosecutor and pursuant to Rule 84 of the Rules, the Pre-Trial Judge issued international arrest warrants against the Accused intended for the competent authorities of all States and authorised the Prosecutor to request the International Criminal Police Organisation (“INTERPOL”) that it issue and circulate red notices relating to the Accused (the “International Arrest Warrants”).³

6. On 28 July 2011, upon request of the Prosecutor, the Pre-Trial Judge authorised that the names, aliases and other personal information, including photographs of the Accused as well as the charges laid against them, be rendered public.⁴

7. On 9 August 2011, the Public Prosecutor at the Lebanese Court of Cassation (the “Public Prosecutor”) transmitted to the Registrar a copy of a report indicating the measures taken by the authorities of the Lebanese Republic in order to execute the Arrest Warrants and noting that the Accused could not be arrested (the “Public Prosecutor’s Report of 9 August 2011”).

8. On 11 August 2011, the President of the Tribunal publicly announced that the Indictment had not been served on the Accused and that they had not been arrested. In the same statement, he also invited the Accused to appear before the Tribunal, either in person or

³ Case No. STL-11-01/I, International Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Order, 8 July 2011; Case No. STL-11-01/I, International Warrant to Arrest Mr Mustafa Amine Badreddine Including Transfer and Detention Order, 8 July 2011; Case No. STL-11-01/I, International Warrant to Arrest Mr Hussein Hassan Oneissi Including Transfer and Detention Order, 8 July 2011; Case No. STL-11-01/I, International Warrant to Arrest Mr Assad Hassan Sabra Including Transfer and Detention Order, 8 July 2011.

⁴ Case No. STL-11-01/I, Order on the Prosecutor’s Motion for Variation of the Order for Non-disclosure of the Indictment, 28 July 2011.

by video-link, and to appoint counsel responsible for representing them in the legal proceedings (the “President’s Statement of 11 August 2011”).⁵

9. On 16 August 2011, after consultation with the Prosecutor, the Pre-Trial Judge lifted the confidentiality of the Indictment, the Decision on the Indictment, the Arrest Warrants and the International Arrest Warrants.⁶

10. On 18 August 2011, pursuant to Rule 76 (E) of the Rules, taking note of the fact that the efforts undertaken by the authorities of the Lebanese Republic to execute the Arrest Warrants had not been successful⁷ and that reasonable attempts had been made to serve the Indictment and the Arrest Warrants on the Accused,⁸ the President of the Tribunal issued an order requesting in particular the Registrar to identify “alternative means” of service of the Indictment to Lebanon and, if appropriate, other countries, and calling upon the Accused to surrender to the jurisdiction of the Tribunal (the “President’s Order of 18 August 2011”). He also ordered the authorities of the Lebanese Republic to take all reasonable steps to provide notification to the public of the existence of the Indictment and to call upon the Accused to surrender to the Tribunal.⁹

11. On 31 August 2011, the Registrar sent a letter to the Public Prosecutor in which he provided him with the text of a wanted notice for the Accused in Arabic, English and French, so that it might be publicly advertised in the Lebanese media, in accordance with Rule 76 *bis* of the Rules (the “Registrar’s Letter of 31 August 2011”).¹⁰ On 8 September 2011, the Registrar sent an additional letter to the Public Prosecutor in which he specified the means by which the wanted notice for the Accused should be publicly advertised, in particular in three Arabic, one French and one English-language newspaper (the “Registrar’s Letter of 8 September 2011”).¹¹

12. On 15 September 2011, the text of an advertisement notifying the public of the identity of the Accused and of the charges laid against them was published in five Lebanese

⁵ Statement of the President of the Special Tribunal for Lebanon, Antonio Cassese, 11 August 2011.

⁶ Case No. STL-11-01/I, Order on Lifting the Confidentiality of the Indictment Against Messrs. Ayyash, Badreddine, Oneissi and Sabra and Other Documents, 16 August 2011. Certain information nevertheless was kept confidential so as to protect the ongoing investigation and the security of the victims and witnesses.

⁷ Case No. STL-11-01/I/PRES, Order Pursuant to Rule 76 (E), 18 August 2011, paras 8 to 12.

⁸ *Ibid.*, paras 17 to 22.

⁹ *Ibid.*, para. 25.

¹⁰ Letter from the Registrar to the Public Prosecutor, 31 August 2011.

¹¹ Letter from the Registrar to the Public Prosecutor, 8 September 2011.

newspapers: three Arabic,¹² one English,¹³ and one French,¹⁴ as requested in the Registrar's Letter of 8 September 2011.

13. On 21 September 2011, the President of the Tribunal transmitted to the Pre-Trial Judge the report forwarded to him by the Public Prosecutor on 19 September 2011 (the "Public Prosecutor's Report of 19 September 2011") on the subject of the measures undertaken pursuant to Rule 76 (A) and (B) of the Rules in order to serve the Indictment and the Arrest Warrants. In a memorandum included with that Report, the President of the Tribunal invited the Pre-Trial Judge to seize, as soon as he deemed it necessary, the Trial Chamber in order that it might determine what action should be taken with regard to the proceedings, in accordance with Rule 105 *bis* (A) of the Rules ("Internal Memorandum of the President of 21 September 2011").¹⁵

14. On 23 September 2011, the Pre-Trial Judge sent a confidential letter to the Registrar inviting him to transmit to him, by 28 September 2011 at the latest, any pertinent information and documents relating to the public advertisement demonstrating the publication of the text of the advertisement in newspapers and/or its broadcast in the media, as set forth in Rule 76 *bis* of the Rules (the "Pre-Trial Judge's Letter of 23 September 2011").¹⁶ In the same letter, the Pre-Trial Judge also invited the Registrar to provide him with information – with supporting documents if possible – demonstrating the publication of the advertisement on the Tribunal website and the broadcast of the President's Statement of 11 August 2011 and the President's Order of 18 August 2011 in both the Lebanese and international media.

15. On 28 September 2011 and 12 October 2011, in reply to the Pre-Trial Judge's Letter of 23 September 2011, the Registrar sent him two letters, together with summaries of the publications placed in the Lebanese and international press, excerpts of those publications and other documents (the "Registrar's Report").¹⁷

¹² Cf. the following newspapers: *An Nahar*, *As Safir* and *Al Mustaqbal*.

¹³ Cf. the following newspaper: *The Daily Star*.

¹⁴ Cf. the following newspaper: *L'Orient le Jour*.

¹⁵ Internal memorandum from the President of the Tribunal to the Pre-Trial Judge, "Case No. STL-11-01/I, Prosecutor v. Ayyash et al. – Report from the Lebanese Prosecutor General", 21 September 2011.

¹⁶ Letter from the Pre-Trial Judge to the Registrar, Application of Rules 76 *bis* and 105 *bis* of the Rules, 23 September 2011.

¹⁷ Letter including documents from the Registrar to the Pre-Trial Judge, Reply to your letter concerning the application of Rules 76 *bis* and 105 *bis* of the Rules, 28 September 2011 and second letter including documents from the Registrar to the Pre-Trial Judge, 12 October 2011.

16. It should be noted that, to date, the Accused have not been arrested, nor have they appeared voluntarily before the Tribunal and that nor are they in any other way under its jurisdiction. Furthermore, the Pre-Trial Judge has no knowledge that the Accused have contacted the Tribunal in any manner whatsoever.

II. Applicable law

17. The provisions to be taken into consideration with regard to this Order are Rules 76 *bis* and 105 *bis* of the Rules.

18. Rule 76 *bis* of the Rules, which governs the procedure of public advertisement of the Indictment, is worded as follows:

In keeping with the President's order made under Rule 76 (E), a form of advertisement shall be transmitted by the Registrar to the authorities of any relevant State or entity for publication in newspapers and/or for broadcast via radio, television and/or other media, including the internet, providing notification to the public of the existence of an indictment and calling upon the accused to surrender to the Tribunal or in any case to submit to its jurisdiction. The advertisement shall invite any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.

19. Rule 105 *bis* of the Rules is entitled "Absence of the Accused from the Proceedings before the Pre-Trial Judge". At the present stage of the proceedings, only paragraph (A) of this provision specifically relating to referring a case to the Trial Chamber is relevant. It is worded as follows:

If, within a period of 30 calendar days starting from the advertisement referred to in Rule 76 *bis*, the accused is not under the Tribunal's authority, the Pre-Trial Judge shall ask the Trial Chamber to initiate proceedings *in absentia*.

20. Before seizing the Trial Chamber in order that it may determine whether it is appropriate to initiate proceedings against the Accused *in absentia*, notably in keeping with Rule 106 of the Rules, the Pre-Trial Judge must ensure that the period of 30 calendar days set out by Rule 105 *bis* of the Rules has elapsed, starting from the public advertisement referred to in Rule 76 *bis* of the Rules. Since, as can be seen in the procedural background of this Order, the public has been informed on several occasions and at different intervals – in particular by way of statements, notifications and advertisements – of the existence of the Indictment and of the need for the Accused to surrender to the Tribunal, when the period of time in Rule 105 *bis* of the Rules started is subject to interpretation. However, determining when that period of time started is essential insofar as the aforementioned period of time is intended, in particular, to ensure that the Accused have had sufficient time to be informed of

the Indictment issued against them and, if appropriate, to obtain the necessary advice relating to what action they should take with regard to the proceedings relating to them.

III. Observations from the Head of Defence and the Prosecutor

21. On 28 September 2011, the Pre-Trial Judge received an internal memorandum from the Head of Defence Office by way of which he acknowledged “[TRANSLATION] the importance of ensuring that the procedure of public advertisement of the Indictment as provided for in Rule 76 *bis* of the Rules is respected”.¹⁸ The Head of Defence Office pointed out in this connection that:

[TRANSLATION] It [...] results [from the Rules] that without giving an opinion on whether or not the public advertisement, transmitted by the Registrar to the Lebanese authorities that had it published in several newspapers on 15 September 2011, is restrictive, it is clear that in any case, according to the Head of Defence Office, the period of 30 calendar days provided for in Rule 105 *bis* of the Rules could not have started before the publication of that advertisement.

22. Further to the considerations expressed by the Head of Defence Office, the Pre-Trial Judge invited the Prosecutor to present, if he so wished, his observations in this connection.¹⁹ On 3 October 2011, the Prosecutor replied to the Pre-Trial Judge noting that the Public Prosecutor at the Lebanese Court of Cassation reported to the Tribunal that the advertisements undertaken in accordance with Rule 76 *bis* of the Rules were published in the Lebanese newspapers on 15 September 2011.²⁰ According to the Prosecutor, it follows from this that the period of time set forth in Rule 105 *bis* of the Rules starts from that date and that consequently the Pre-Trial Judge may not request the Trial Chamber to initiate proceedings *in absentia* before 15 October 2011 at the earliest.

IV. Statement of reasons

23. The Pre-Trial Judge wishes firstly to point out that it is not for him to rule on whether the requirements to initiate proceedings *in absentia*, mentioned in Rule 106 of the Rules, have been met, nor whether it is appropriate to start such proceedings. Indeed, in accordance with Rule 105 *bis* (B) of the Rules, this responsibility is incumbent upon the Trial Chamber. The objective of this Order is specifically to seize the Chamber for that purpose while

¹⁸ Internal memorandum from the Head of Defence Office to the Pre-Trial Judge, Case No. STL-11-01/I, *The Prosecutor v. Ayyash et al.* – Public Advertisement of the Indictment, 28 September 2011.

¹⁹ Internal memorandum from the Pre-Trial Judge to the Prosecutor, Case No. STL-11-01/I Application of Rule 105 *bis* of the Rules, 29 September 2011.

²⁰ Letter from the Prosecutor to the Pre-Trial Judge, 3 October 2011.

ensuring that the period of 30 calendar days referred to in Rule 105 *bis* (A) of the Rules has elapsed. Henceforth it is for the Pre-Trial Judge, as indicated above, to determine the precise moment at which that period of time started.

24. In this respect, the Pre-Trial Judge notes, according to the text of Rule 105 *bis* of the Rules, that that period of time starts from the public advertisement mentioned in Rule 76 *bis* of the Rules. However, according to this last provision, that advertisement shall take the form of a text “providing notification to the public of the existence of an indictment and calling upon the accused to surrender to the Tribunal” and “invit[ing] any person with information as to the whereabouts of the accused to communicate that information to the Tribunal”. That text shall be published and/or broadcast, by appropriate means, in the State or States of origin of the Accused or in those States in whose territory the Accused were last known to be residing.

25. The Pre-Trial Judge notes that the President’s Statement of 11 August 2011 calling upon in particular the Accused to surrender to the Tribunal was published on the Tribunal website and was quoted in numerous Lebanese media outlets²¹ which also relayed the Indictment, the Arrest Warrants,²² and the President’s Order of 18 August 2011.²³ However, it was only on 15 September 2011 that the text of a public advertisement was published by the Lebanese newspapers²⁴ in the form of a wanted notice showing photographs of the Accused and providing, for each one, their name, first name and date of birth, as well as the charges laid against them. This wanted notice also mentions that any person with information on the Accused could contact the Tribunal on the telephone numbers indicated in that notice.²⁵ Therefore the requirements stipulated in Rule 105 *bis* (A) of the Rules were only met as of 15 September 2011.

26. Consequently, in keeping with the spirit of Rule 105 *bis* of the Rules and of the rights of the Accused, the Pre-Trial Judge is of the opinion that it is appropriate to consider 15 September 2011 as the starting date of the period of time stipulated by this provision, which

²¹ Cf. the following newspapers of 11 August 2011: *Al Hayat*, *Now Lebanon*, *Al Manar*, *Naharnet*; and the following newspapers of 12 August 2011: *Al Akhbar*, *Al Diyar*, *Al Joumhouria*, *Annahar*, *Al Mustaqbal*, *As Safir* and *Daily Star*.

²² Cf. the following newspapers of 18 August 2011: *Al Akhbar*, *Al Diyar*, *Al Hayat*, *Al Joumhouria*, *Al-Liwa’a*, *As Safir*, *L’Orient le Jour* and *Daily Star*.

²³ Cf. the following newspapers of 19 August 2011: *Al Akhbar*, *Al Hayat*, *Al Joumhouria*, *Al-Liwa’a* and *L’Orient le Jour*.

²⁴ Cf. *supra* notes 12, 13 and 14.

²⁵ Public Prosecutor’s Report of 19 September 2011, p. 2.

is moreover the most advantageous date with regard to the Accused. This period of time therefore had elapsed as of 15 October 2011 at the very least. As a consequence, as of that date, the Pre-Trial Judge is well-founded to seize the Trial Chamber so that it may determine whether it is appropriate to initiate proceedings against the Accused *in absentia*.

27. For this purpose, in order that it may rule on this issue with full knowledge of the facts, the Trial Chamber must be able to have at its disposal the relevant documents in this respect and notably those which are listed in the Annex to this Order. The Pre-Trial Judge therefore requests that the Registrar transmit those documents to the Chamber, whilst respecting their confidential status, where appropriate.

V. Disposition**FOR THESE REASONS,**

Pursuant to Rules 76 *bis* and 105 *bis* (A) of the Rules,

THE PRE-TRIAL JUDGE,

SEIZES the Trial Chamber so that it may determine whether it is appropriate to initiate proceedings *in absentia* against Messrs. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra; and

REQUESTS the Registrar to transmit to the Trial Chamber, as soon as possible, the documents listed in the Annex to this Order, whilst respecting their confidential status, where appropriate.

Done in French.

Leidschendam, 17 October 2011

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[signature]

Daniel Fransen
Pre-Trial Judge

