



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE PRESIDENT**

**SPECIAL TRIBUNAL FOR LEBANON**

**Case No:** STL-18-10/I/PRES  
**Before:** Judge Ivana Hrdličková, President  
**Registrar:** Mr Daryl Mundis  
**Date:** 25 November 2019  
**Original language:** English  
**Classification:** Public

**THE PROSECUTOR**  
v.  
**SALIM JAMIL AYYASH**

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**URGENT APPLICATION TO REVOKE ORDER CONVENING TRIAL CHAMBER  
II**

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**Prosecutor:**  
Mr Norman Farrell

**Head of Defence Office:**  
Ms Dorothée Le Fraper du Hellen



## BACKGROUND

1. The Statute of the Special Tribunal for Lebanon, in Article 7 (a) and Article 8, specifies that its chambers are composed of: an Appeals Chamber of five judges, a Trial Chamber of three judges, a Pre-Trial Judge and two alternate judges who, under Article 8 (3), may be assigned to a trial upon the request of the Presiding Judge of the Trial Chamber.
2. On 8 September 2011, the then President of the Special Tribunal, Judge Antonio Cassese, convened the Trial Chamber to hear the case of STL-11-01, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*.<sup>1</sup> The Trial Chamber—composed of Judges David Re (presiding), Judge Janet Nosworthy and Judge Micheline Braidy—is currently in the process of completing its judgement in that case for delivery in the near future. The two alternate judges, Judge Walid Akoum and Judge Nicola Lettieri, are assigned to the trial. Under Rule 27 (A) of the Special Tribunal's Rules of Procedure and Evidence they 'shall be present at each stage of a trial or appeal to which that Judge has been assigned'. Thus, they are required to be present at the Special Tribunal in the proceedings and deliberations until the judgement in *Ayyash*, STL-11-01, is rendered.
3. On 19 June 2019, the Pre-Trial Judge confirmed a second indictment against Mr Salim Jamil Ayyash in case number STL-18-10, and the following day issued an arrest warrant that was transmitted to Lebanon.<sup>2</sup>
4. On 6 November 2019, the President of the Special Tribunal, Judge Ivana Hrdličková, issued an order convening Trial Chamber II,<sup>3</sup> in which at paragraph 7 she stated that 'I consider it appropriate to convene the second Trial Chamber for the purposes of hearing any future proceedings before the Trial Chamber in *Prosecutor v. Ayyash*'. It was to be composed of the two alternate judges, Judges Akoum and Lettieri—currently assigned to sit with the Trial

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<sup>1</sup> STL-11-01/PRES, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0044, Order on Composition of Trial Chamber, 8 September 2011. The Trial Chamber joined the case of STL-13-04/I/TC, *Prosecutor v. Hassan Habib Merhi* to that of *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra* on 11 February 2014, see Joint Hearing, transcript of 11 February 2014, pp. 91-96. The proceedings against Mustafa Amine Badreddine were terminated by F2633, Order Terminating Proceedings against Mustafa Amine Badreddine without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016.

<sup>2</sup> STL-18-10/I /PTJ, F0015, *Version publique expurgée de la « Décision relative à la version de l'Acte d'accusation du 14 juin 2019 et aux pièces déposées en application de la décision du 15 mai 2019 » datée du 19 juin 2019*, 16 September 2019, F0017, Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Request, 20 June 2019.

<sup>3</sup> STL-18-10/I/PRES, *Prosecutor v. Samil Jamil Ayyash*, F0056, Order Convening Trial Chamber II, 6 November 2019.

Chamber in the case of STL-11-01, *Ayyash and others*—and a new *ad hoc* judge, Anna Bednarek.

5. The President, in her order, gave no reasons for her decision.

6. The day before this, on Tuesday 5 November 2019, she called a meeting with the three Trial Chamber Judges. In the meeting, she informed Judges Re, Nosworthy and Braidy—in the presence of the Registrar—of her decision to convene Trial Chamber II. Up until that moment, the three Trial Chamber judges were unaware that the President was contemplating this course. Her order, at footnote 4, states that Judges Akoum and Lettieri had already accepted their appointments, on Monday 4 November 2019. This was the day *before* the President informed the three Trial Chamber judges that she was convening Trial Chamber II.

7. In the meeting on 5 November 2019, the President informed the three Trial Chamber judges that she had *herself* requested that the Secretary-General of the United Nations appoint a second trial chamber.<sup>4</sup> In response to a question as to ‘why’ she had done this, the President informed the three Trial Chamber judges that they ‘lacked the capacity’ to deal with a possible pre-trial motion in relation to a second trial *in absentia* against Mr Ayyash, while finalizing the judgement in *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*.

8. The three Trial Chamber judges pointed out to the President that (a) she had not consulted them about this and (b) saying that they lacked the capacity to deal with a trial *in absentia* motion was inaccurate, as the Trial Chamber did in fact have this capacity.

9. The President also declined, upon being asked, to inform the three Trial Chamber judges whether she had informed the Secretary-General of these two facts. Both would have been highly material to his decision to make the appointments. She also declined to say whether she had consulted the two alternate judges about the appointment of a second Trial Chamber or when. However, by their accepting their appointments on 4 November 2019 it is obvious that they had been consulted about their anticipated appointments well in advance of that date.

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<sup>4</sup> This is under Article 2 of the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, under which the Secretary-General or President may request the creation of a second trial chamber.

## RELEVANT LEGAL PRINCIPLES

10. The most fundamental principles of administrative law require that a decision maker take into account only relevant considerations and, additionally, to disregard the irrelevant. The rules of natural justice must also be respected. A decision-maker must also adhere to any mandatory statutory requirements touching upon the exercise of their discretion and decision-making. It is respectfully submitted that the President, however, has made two decisions infringing these principles of administrative law. Further, she has also infringed a mandatory rule requiring her to consult the Council of Judges on such matters.

11. Her first decision was in requesting the Secretary-General to appoint the three judges to a second Trial Chamber—on a date unknown, but presumably after 20 June 2019—while the second was her order of 6 November 2019 convening this chamber.

12. The sole reason, according to the President, for making her two decisions was the Trial Chamber's alleged lack of capacity to deal with a motion for a trial *in absentia*. However, both decisions are predicated on an objectively incorrect fact, namely, that the Trial Chamber 'lacked capacity'. Moreover, how she could have formed such an impression is unknown as she did not consult the Trial Chamber as to whether it had the capacity she informed it that it lacks.

13. The Trial Chamber has already twice issued decisions on holding trials *in absentia*, the most pertinent being that of Mr Hassan Habib Merhi, which the Trial Chamber made on 20 December 2013<sup>5</sup> while in preparation for the commencement of the trial of *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra* on 16 January 2014. Objectively, it therefore cannot be true that the Trial Chamber lacks the capacity to deal with a motion to hold a second trial *in absentia* against Mr Ayyash, while finalizing the draft of a judgement. It has already done precisely the same thing before in the analogous situation of dealing with a similar motion in relation to Mr Merhi while engaged in other (pre-trial) work.<sup>6</sup> Moreover, the judgement in STL-11-01 will be issued far in advance of the referral to a Trial Chamber of the case STL-18-10 for trial, thus negating any suggestion that the Trial Chamber would be expected to conduct two trials at the same time. And, of further relevance is that the two alternate judges, now assigned

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<sup>5</sup> STL-13-04/I/TC, *Prosecutor v. Hassan Habib Merhi*, F0037, Decision to Hold Trial *In Absentia*, 20 December 2013.

<sup>6</sup> STL-11-01/1/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0112, Decision to Hold Trial *In Absentia*, 1 February 2012.

to the case of STL-18-10, must also be present at all stages of the first *Ayyash* trial, STL-11-01, including judgement, and if relevant, sentence.

14. The President also failed to consult or inform another relevant body that she must legally consult on such matters, namely the Council of Judges. The Council is composed of the President, the Vice-President, the Presiding Judge of the Trial Chamber and the Pre-Trial Judge.

15. Rule 37 (B) is mandatory. It states that the ‘President *shall* consult the other members of the Council on all major questions relating to the functioning of the Tribunal’ (*italics added*). The convening of a second Trial Chamber is clearly within the rubric of ‘major questions relating to the functioning of the Tribunal’, most specifically in view of Article 7 (a) of the Statute which states that the Chambers comprise a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber. The President failed to consult the Council of Judges on this issue. Not only was the Council not informed, but the President did not even inform it of her decision to request the Secretary-General to appoint judges to a second Trial Chamber.

16. Moreover, under Rule 37 (C) ‘A Judge may draw the attention of any member of the Council to issues that the Judge considers ought to be discussed by the Council or submitted to a plenary meeting of the Tribunal’. As the President did not inform the Trial Chamber of her decision to ask the Secretary-General to appoint a second Trial Chamber—nor even that she was contemplating this course—the three Trial Chamber judges were unable to refer the matter to the Council or a plenary meeting, and thus inform either body of their capacity to deal with pre-trial matters in the second *Ayyash* case, STL-18-10.

17. Of additional relevance is Rule 32, ‘Functions of the President’. Rule 32 (B) provides that the President ‘shall coordinate the work of the Chambers and be responsible for the effective functioning of the Tribunal and the good administration of justice’. However, inherent in the ordinary meaning of ‘coordinate’, namely, ‘to bring into a common action, movement, or condition’ or ‘to harmonize’<sup>7</sup> is that of consultation with relevant parties. None occurred.

18. It is therefore respectfully submitted that failing to consult the Council of Judges or the Trial Chamber, and taking two significant decisions that were based upon false premises is consistent neither with ‘the effective functioning of the Tribunal’ nor ‘the good administration of justice’.

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<sup>7</sup> See e.g. Merriam-Webster on-line dictionary.

19. It must follow that both of the President's decisions are wrong in law as they were made (a) without consultation with those who had the material information necessary to have informed her decisions, namely the three Trial Chamber judges, (b) without consulting the Council of Judges, and (c) on an incorrect legal and factual basis. They also, it is respectfully submitted, conflict with Rule 32 (B). If the sole stated basis for the decision was factually flawed—namely the Trial Chamber's alleged lack of capacity—the decisions themselves are irretrievably legally flawed, and must, it is respectfully submitted, be revoked and their basis reconsidered. Judicial review of such a decision would normally render it void.

20. Another consideration is the wording of Article 2 (3) of the Agreement between the United Nations and Lebanon. It provides that after the creation of a second Trial Chamber, the Special Tribunal will consist of two Trial Chambers and two alternate judges—in addition to the five Appeals Chamber judges and the Pre-Trial Judge. The President's decision of 6 November 2019, on its face, therefore appears to conflict with this provision.

### **OTHER CONSIDERATIONS**

21. To the above, I add some further considerations relevant to the exercise of quasi-judicial administrative function. Value 1 'Independence' of the *Bangalore Principles of Judicial Conduct*, states,<sup>8</sup>

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects (emphasis added).

22. The Council of Europe's Consultative Council of European Judges (CCJE) in 2016 issued an opinion on 'The Role of Court Presidents'. It is instructive in stating,<sup>9</sup>

Courts are essentially collegial bodies. The CCJE encourages the establishment of bodies composed of judges of the court which play an advisory role and which cooperate with the court president and give advice on key issues.

Cases should be allocated to judges in accordance with objective pre-established criteria. They should not be withdrawn from a particular judge without valid reasons. Decisions on the

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<sup>8</sup> *Bangalore Principles of Judicial Conduct*, 2002, (The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002).

<sup>9</sup> Consultative Council of European Judges (CCJE), Opinion no 19 (2016), *The Role of Court Presidents*, CCJE(2016)2, clauses 19, 21 and 31 (internal footnotes omitted).

withdrawal of cases should only be taken on the basis of pre-established criteria following a transparent procedure. Where the court presidents have a role in the allocation of cases among the members of the court, these principles should be followed.

Court presidents should also have the authority to establish organisational units or divisions in the court, as well as individual posts and positions in order to respond to various needs within the court operations. *Where court presidents intend to make significant changes in the organisation of the court, the judges should be consulted* (emphasis added).

23. Finally, judges must act independently, according to their conscience and on the available facts or information. They must act fearlessly. Personal popularity, or otherwise, with judicial colleagues should not inform decisions such as to make an application like this one. When confronted with such situations, a judge must act in accordance with the law and their conscience.

### **RELIEF SOUGHT**

Accordingly, the President is respectfully requested to *urgently*:

- (1) revoke her order of 6 November 2019 convening Trial Chamber II;
- (2) engage in proper consultations—and in writing—with the Trial Chamber as to its capacity to deal with pre-trial motions in case STL-18-10 while finalizing the draft judgement in case STL-11-01;
- (3) consult the Council of Judges as Rule 37 (B) mandates, after first consulting the Trial Chamber;
- (4) produce a copy of her request to the Secretary-General of the United Nations to establish Trial Chamber II; and
- (5) inform the Secretary-General of the matters referred to in this application.

Leidschendam,  
The Netherlands  
25 November 2019

*David Re*

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Judge David Re  
Presiding Judge  
Trial Chamber

