



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-18-10/I

Before: Judge Ivana Hrdličková, President
Judge Ralph Riachy, Vice President
Judge David Baragwanath
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko

Registrar: Mr Daryl Mundis

Date: 26 November 2019

Original language: English

Classification: Public

THE PROSECUTOR
v.
SALIM JAMIL AYYASH

**APPEAL AGAINST DECISION OF PRESIDENT CONVENING
TRIAL CHAMBER II**

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Ms Dorothée Le Fraper du Hellen



BACKGROUND

1. This application seeks to appeal the decision of the President of the Special Tribunal for Lebanon, Judge Ivana Hrdličková, on 6 November 2019, to convene Trial Chamber II. As the primary decision-maker she cannot be a member of the appellate bench deciding this matter.

2. A preliminary issue is that of my standing to take this appeal. The Appeals Chamber dealt with this issue in *El-Sayyed*, in deciding that Mr Jamil El-Sayyed had the standing to make certain applications before the Special Tribunal in relation to the enforcement of his rights.¹ The Appeals Chamber has the inherent jurisdiction to deal with all matters ancillary to the exercise of its jurisdiction. The Appeals Chamber held that,²

With regard to the Tribunal, by ‘inherent jurisdiction’ we mean the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction. This inherent jurisdiction arises as from the moment the matter over which the Tribunal has primary jurisdiction is brought before an organ of the Tribunal. It can, in particular, be exercised when no other court has the power to pronounce on the incidental legal issues, on account of legal impediments or practical obstacles. The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice, including full respect for human rights, as applicable, of all those involved in the international proceedings over which the Tribunal has express jurisdiction.

3. The Trial Chamber was affected by the President’s decision, taken without consultation with its judges. I am one of the three judges of that chamber. Under the principles enunciated by the Appeals Chamber in *El-Sayyed*, I therefore have the necessary standing to take this appeal, and the Appeals Chamber has the jurisdiction to hear it. The Appeals Chamber would be performing judicial review of a quasi-judicial administrative decision.

4. Further, for two reasons this application is distinguishable from the Appeals Chamber’s decision in *Ayyash* in relation to the composition of the Trial Chamber in September 2013. First, the Appeals Chamber held there that the applicants, namely, counsel for the Accused, Mr

¹ CH/AC/2010/02, *In the matter of El-Sayyed*, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, see generally at paras 54-65, and specifically at para. 60.

² At paragraph 45.

Mustafa Amine Badreddine and Mr Hussein Hassan Oneissi, had not taken the primary route available to challenge the appointment of Judge Janet Nosworthy as a judge of the Trial Chamber. That was, by challenging the matter directly before the Trial Chamber and, if unsuccessful, seeking to have it certified for interlocutory appeal.³ Second, this concerns the *creation* of a second Trial Chamber, as opposed to its composition. The decision is thus distinguishable on its facts and application.

5. The background to this is the following. The Statute of the Special Tribunal for Lebanon, in Articles 7 (a) and 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.

6. 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*.⁴ 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.

7. 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.⁵

³ STL-11-01/PT/AC, F1178, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, Decision on Application by Counsel for Messrs Badreddine and Oneissi against President’s Order on Composition of the Trial Chamber of 10 September 2013, 25 October 2013, para. 14.

⁴ 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.

⁵ 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

8. On 6 November 2019, the President issued an order convening Trial Chamber II,⁶ 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 Chamber in the case of STL-11-01, *Ayyash and others*—and a new *ad hoc* judge, Anna Bednarek. They were to sit on an *ad hoc* basis.

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

10. 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.

11. 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.⁷ 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*.

12. 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.

13. 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

September 2019, F0017, Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Request, 20 June 2019.

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

⁷ 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.

had consulted the two alternate judges about the appointment of a second Trial Chamber or when. However, they accepted their appointments on 4 November 2019, and it is obvious that they had been consulted about their anticipated appointments well in advance of that date.⁸

RELEVANT LEGAL PRINCIPLES

14. 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, made two decisions infringing these principles of administrative law. Further, she also infringed a mandatory rule requiring her to consult the Council of Judges on such matters.

15. 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.

16. 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.

17. 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 2013⁹ 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.¹⁰

⁸ The Registrar was also not consulted about any of these matters.

⁹ STL-13-04/I/TC, *Prosecutor v. Hassan Habib Merhi*, F0037, Decision to Hold Trial *In Absentia*, 20 December 2013.

¹⁰ STL-11-01/1/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0112, Decision to Hold Trial *In Absentia*, 1 February 2012.

18. 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 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.

19. 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, under Rule 37 (A), is composed of the President, the Vice-President, the Presiding Judge of the Trial Chamber and the Pre-Trial Judge.

20. 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 consulted, but the President did not even inform it of her decision to request the Secretary-General to appoint judges to a second Trial Chamber on an *ad hoc* basis.

21. 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’. However, 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.

22. 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’¹¹ is that of consultation with relevant parties. None occurred.

¹¹ See e.g. Merriam-Webster on-line dictionary.

23. 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’.

24. 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. A successful application for judicial review of such a decision would result in it being declared void.

25. 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.

26. The relief sought, accordingly, is to declare void the President’s decision of 6 November 2019, and to revoke it. Before doing this, however, the Appeals Chamber should stay any ancillary matters relating to implementing the President’s decision, including the swearing-in of an *ad hoc* judge, pending resolution of this appeal. The President should also be required to consult the Trial Chamber as to its capacity to deal with the relevant pre-trial motions in the second *Ayyash* case, STL-18-10, in accordance with her statutory obligations under Rule 32 (B). The President should also be required to consult the Council of Judges, under Rule 37 (B), after first having consulted the Trial Chamber on these matters.

27. In order to inform itself further, it is respectfully suggested that the Appeals Chamber obtain from the President a copy of her letter to the Secretary-General requesting the creation of a second Trial Chamber. Informal notes of the meeting with the President on 5 November 2019 are also available if required.

OTHER CONSIDERATIONS

28. 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,¹²

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).

29. 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,¹³

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 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).

30. These are all matters that the President should have considered in taking her two decisions.

¹² *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).

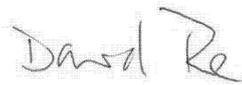
¹³ Consultative Council of European Judges (CCJE), Opinion no 19 (2016), *The Role of Court Presidents*, CCJE(2016)2, clauses 19, 21 and 31 (internal footnotes omitted).

RELIEF SOUGHT

Accordingly, the Appeals Chamber is respectfully requested to, *urgently*:

- (1) Order the stay of any ancillary matters relating to implementing the President's decision, including the swearing-in of an *ad hoc* judge, pending resolution of this appeal;
- (2) Declare the President's order of 6 November 2019 convening Trial Chamber II void in law and revoke the decision;
- (3) Require the President to 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; and
- (4) Require the President to consult the Council of Judges as Rule 37 (B) mandates, after first consulting the Trial Chamber.

Leidschendam,
The Netherlands
26 November 2019



Judge David Re
Presiding Judge
Trial Chamber

