SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

SPECIAL TRIBUNAL FOR LEBANON

Case No:	**STL-18-10/MISC.2/AC**
Before:	**Judge Ralph Riachy, Vice President** **Judge David Baragwanath** **Judge Afif Chamseddine** **Judge Daniel David Ntanda Nsereko**
Registrar:	**Mr Daryl Mundis**
Date:	**2 December 2019**
Original language:	**English**
Classification:	**Public**

THE PROSECUTOR
v.
SALIM JAMIL AYYASH

FURTHER SUBMISSIONS RELEVANT TO APPEAL AGAINST DECISION OF PRESIDENT CONVENING TRIAL CHAMBER II

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Ms Dorothée Le Fraper du Hellen

المحكمة الخاصة بلبنان
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1. On 6 November 2019, without having consulted the Trial Chamber, comprising Judges David Re, Janet Nosworthy and Micheline Braidy, the Council of Judges, or the Registrar, the Special Tribunal's President, Judge Ivana Hrdličková, ordered the composition of a second Trial Chamber to hear any proceedings in the case of STL-18-10, *Prosecutor v. Salim Jamil Ayyash.*[1] For the reasons cited in my appeal, the decision was procedurally, legally and factually flawed.[2]

2. On 25 November 2019, I also asked the President to revoke her decision and her earlier decision, of an unknown date, requesting the Secretary-General of the United Nations to appoint judges to a second Trial Chamber.[3] The President, after initially refusing to accept the filing of my application, accepted it but then had it reclassified as 'confidential' and, on 29 November 2019, dismissed it as inadmissible and frivolous.[4]

3. For the purposes of my appeal, I am filing these further submissions following the President's decision of 29 November and am making three essential supplementary points. First, the President did not challenge anything in my application, suggesting that she is not disputing that her two decisions were procedurally flawed and thus—on the relevant international case law—open to judicial review. Second, several of the international decisions she cited in support of her decision actually support my contention. The third is that the President's decision of 29 November graphically illustrates why Presidential administrative or quasi-judicial decisions must be the subject of higher judicial review.

(1) The President's decision did not challenge the facts

4. Dealing with the first point, the President's decision of 29 November ignored the substance of my application, namely, that her decisions were procedurally flawed and my reasoning for this. She made no challenge to my recitation of the facts, namely, that she had consulted neither the Trial Chamber nor the Council of Judges, consultation with the latter being mandated by Rule 37 (B) of the Special Tribunal's Rules of Procedure and Evidence.

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[1] STL-18-10/I/PRES, *Prosecutor v. Samil Jamil Ayyash*, F0056, Order Convening Trial Chamber II, 6 November 2019.
[2] STL-18-10/MISC.2/AC, F0001, Appeal Against Decision of President Convening Trial Chamber II, 26 November 2019.
[3] STL-18-10/MISC.1/PRES, F0001, Urgent Application to Revoke Order Convening Trial Chamber II, 25 November 2019.
[4] STL-18-10/MISC.1/PRES, F0003, Decision on "Urgent Application to Revoke Order Convening Trial Chamber II", 29 November 2019.

5. The President did not challenge any of the facts that I recounted, which could amount to a tacit concession of a breach of Rule 37 (B), which would in turn provide sufficient basis for a successful judicial review of her decision.

6. The facts that the President has not contested are: (a) that the sole (expressed) reason for her request to the Secretary-General was that the Trial Chamber 'lacked capacity' to deal with a motion to hold a trial *in absentia* while completing the judgement in the case of STL-11-01, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*; (b) that this is objectively incorrect because the Trial Chamber informed her on 5 November 2019 that it did have this capacity; (c) that she had not informed the Secretary-General that she had not consulted the Trial Chamber before she made her request of him to appoint judges to a second Trial Chamber; and (d) that she did not inform him that the Trial Chamber did have the capacity to deal with the relevant motion.

(2) The international case law on administrative decisions

7. In relation to the second point, in support of her decision dismissing my application, the President cited some international decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Residual Mechanism for Criminal Tribunals (IRMCT) and the Special Court for Sierra Leone (SCSL). None of the cases cited, however, support her decision to dismiss my application as inadmissible and frivolous. Four are distinguishable on their facts and the remaining three all support the inherent power of an Appeals Chamber to judicially review Presidential administrative or quasi-judicial decisions.

8. The following four cases are distinguishable on their facts: the ICTY case of *Lukić* is inapposite as it related to a challenge to the right of the ICTY's President and Vice-President to appoint judges to an *existing* Appeals Chamber and to disqualify judges.[5] *Taylor*, at the SCSL, is also distinguishable as it related to a motion before the President of that Court opposing a change in venue of the trial of the Accused.[6] The ICTY case of *Krajišnik* concerned the replacement of a judge on an appeal after the judge had stated that the proceedings were unfair and that he could not continue on the case and wished to be removed, meaning that its

[5] *Prosecutor v. Lukić and Lukić*, IT-98-32/1-ARll*bis*.l, Decision on 'Motion to Disqualify President and Vice-President from Appointing Appeals Chamber and to Disqualify President Judge and Judge Meron from Sitting on Appeals Chamber', 4 May 2007.
[6] *Prosecutor v. Taylor*, SCSL-2003-01-PT, Decision of the President on Defence Motion for Reconsideration of Order Changing Venue of Proceedings, 12 March 2007.

facts are likewise distinguishable.[7] Finally, the IRMCT case of *Karadžić* concerned a complicated procedural history of applications to disqualify judges fr om sitting on an appellate bench, including reconsideration of decisions.[8] None of these cases is relevant to a Presidential decision to *create* a second Trial Chamber after first making a request of the Secretary-General to do so.

9. Furthermore, the three international Appeals Chamber decisions cited by the President support that an Appeals Chamber has the jurisdiction to judicially review Presidential administrative or quasi-judicial decisions.

10. *Nahimana* concerned the ICTR President judicially reviewing a decision of the Registrar regarding the assignment of counsel.[9] The ICTR Appeals Chamber held that it had the inherent power to review such a decision, and it would be in the nature of judicial review of the decision, 'primarily concerned with the regularity of the procedure followed'.[10] Following the established principles of administrative law, it held that the decision will be quashed if it failed to comply with legal requirements, took into account irrelevant material or failed to take into account relevant material, or took a decision that no reasonable person could have taken (the 'unreasonableness' test).

11. Significantly, it held that it could judicially review such Presidential decisions in those defined circumstances. The case accordingly supports my contention that the Appeals Chamber has the jurisdiction to judicially review the President's decisions to request the Secretary-General to appoint judges to a second Trial Chamber and then to create that Trial Chamber.

12. The cited IRMCT case of *Mladić* concerned various disqualification applications against judges. The Appeals Chamber decided that (*italics* added),[11]

> it has inherent jurisdiction to review decisions of the President that are closely related to the fairness of proceedings on appeal. *The Appeals Chamber may also assert jurisdiction over*

[7] *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Prosecution Request for Clarification of President's Order of 16 May 2007, 28 June 2007.
[8] *Prosecutor v. Karadžić*, MICT-13-55, Decision on Prosecution Motion to Strike Karadzic's Second Motion to Disqualify Judge Theodor Meron, Motion to Disqualify Judge William Sekule, and for Related Orders, 1 November 2018.
[9] *Nahimana v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006.
[10] At para. 9.
[11] *Prosecutor v. Mladić*, MICT-13-56-A, Decision on Prosecution Appeal of the Acting President's Decision of 13 September 2018, 4 December 2018, para. 12.

matters raising issues related to the proper functioning of the Mechanism or that are of general significance to its jurisprudence.

13. In that particular case, while it was not convinced that jurisdiction to intervene had been established, the Appeals Chamber's reasoning makes it clear that it will consider this on a case-by-case basis. Indisputably, the creation of a second Trial Chamber, on the President's request to the Secretary-General—and the manner in which it was done—is a matter pertaining to the 'proper functioning' of the Special Tribunal. Due process must be followed in all Presidential administrative or quasi-judicial decisions.

14. The ICTR case of *Nshogoza* concerned judicial review of a decision by the Registrar relating to counsel's fees. The ICTR Appeals Chamber decided that the Trial Chamber could review the decision and the President had inherent power to review such decisions, but not the Appeals Chamber.[12] This decision therefore also supports the existence of a power of judicial review of an administrative decision.

15. The relevant analogy here is that the judicial review in *Nshogoza* was of a judicial body reviewing the decision of an administrative decision-maker. The President is the relevant administrative decision-maker here; thus, her decision could only be judicially reviewed by a higher judicial body such as the Appeals Chamber.

(3) Why Presidential administrative decisions must be judicially reviewable

16. My third point is that the President's decision of 29 November illustrates precisely why her administrative decisions must be reviewable. At paragraph 11 she states, that it is 'a general principle recognized in the jurisprudence of this and other international tribunals that a President's administrative decisions are not generally subject to any form of review'. However, the three appellate cases she cites in support of this state the opposite.

17. *Nahimana*, in fact, sets out coherently why Presidential administrative decisions may be judicially reviewable and when. To the principles set out in that case, must also be added that an administrative decision cannot be taken for an improper purpose. To do so would be to breach the principle that irrelevant material cannot be considered in making a decision. Yet, the President is claiming—contrary to the general principles of law—that *every one* of her

[12] *Nshogoza v. The Prosecutor*, ICTR-2007-91-A, Decision on Request for Judicial Review of the Registrar's and President's Decisions Concerning Payment of Fees and Expenses, 13 April 2010, para. 13.

administrative decisions is unreviewable. To accept this would mean that an administrative decision taken corruptly or for an improper purpose would be judicially unreviewable and must stand. This is contrary to all accepted principles of judicial propriety and the good administration of justice. This could not be tolerated as it goes against every value relating to the independence and integrity of judicial decision-making.

18. Further, factually, the President's assertion at paragraph 13 that she is a mere conduit in implementing the Secretary-General's decision—and thus has no discretion—appears to be at odds with what occurred. The Secretary-General acted only because *she* asked him to do so. Without her intervention he would not have so acted. It was at *her request*. Having not been informed of the most material matter relevant to his decision-making, namely, that the Trial Chamber had the capacity that she claims it lacked, his decision was uninformed. She cannot now claim—in the face of facts contradicting her stated rationale for her request to the Secretary-General—that she can only but rubber-stamp the procedurally flawed decision that she asked him to make. Further, the Secretary-General can only presume that the President's request to him was procedurally regular, in that she had consulted the Trial Chamber as to its capacity, and moreover, had consulted the Council of Judges on the issue.

19. These circumstances are distinguishable from the case the President also cited, of *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, concerning the appointment of Judge Nosworthy as a judge of the Trial Chamber. There, the appointment was triggered by the resignation of the Trial Chamber's Presiding Judge, Judge Robert Roth, whereas here, the President *herself* initiated the process by making her request of the Secretary-General.[13]

20. Some further considerations are relevant to the inquiry as to whether the President's decisions were procedurally flawed. The Pre-Trial Judge, who is a member of the Council of Judges, was neither consulted nor informed about the President's two decisions. Nor was I as the Presiding Judge of the Trial Chamber, and another member of the Council. The Vice-President may have been, but not as a member of the Council.

21. The Appeals Chamber, it is respectfully submitted, as part of its inquiry in the judicial review process, should also examine whether provision was made in the Special Tribunal's

[13] 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.

submission of its 2020 budget to the Management Committee for judges and staffing of a second Trial Chamber. If not, the President should be asked to explain why not, as this goes towards the procedural (ir)regularity of her requesting the Secretary-General to appoint judges to a second Trial Chamber, in circumstances where those the most concerned, namely, the Trial Chamber, had not been consulted.

22. The Appeals Chamber is accordingly respectfully requested to consider these further matters in determining my application for judicial review of the President's decisions.

Leidschendam,
The Netherlands
2 December 2019

David Re

Judge David Re
Presiding Judge
Trial Chamber