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THE PRESIDENT OF THE TRIBUNAL

Case No.: **CH/PRES/2010/09**
Before: **Judge Antonio Cassese**
Acting Registrar: **Mr Herman von Hebel**
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**DECISION ON MR EL SAYED'S MOTION FOR THE
DISQUALIFICATION OF JUDGE CHAMSEDDINE FROM THE
APPEALS CHAMBER PURSUANT TO RULE 25**

Counsel:
Mr Akram Azoury

Office of the Prosecutor:
Mr Daniel Bellemare, MSM, QC

Defence Office:
Mr François Roux



I, **Antonio Cassese**, President of the Special Tribunal for Lebanon (the “Tribunal”) am seized of the “*Demande de récusation et de dessaisissement de Monsieur le Juge Afif Chamseddine*” (“Motion”), filed publicly on 20 October 2010. Acting pursuant to Rule 25 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), I hereby render the following decision.

BACKGROUND

1. On 30 August 2005, Mr El Sayed (the “Applicant”) was detained in connection with the attack against Prime Minister Rafiq Hariri (the “*Hariri case*”) by Lebanese authorities under domestic criminal procedures. A Lebanese Investigating Judge issued an arrest warrant on 3 September 2005, under which the Applicant remained in detention.

2. On 27 March 2009, the Pre-Trial Judge, upon the request of the Tribunal’s Prosecutor (the “Prosecutor”), issued an order directing the Lebanese judicial authorities seized of the *Hariri case* to defer to the Tribunal’s competence.¹

3. On 8 April 2009, the Lebanese judicial authorities referred a list of persons detained by them in connection with the *Hariri case*. The Applicant was among those listed. On 10 April 2010, the investigative results and the case records were transferred to the Tribunal. From that date the Applicant came under the formal authority of the Tribunal.

4. On 27 April 2009, the Prosecutor determined that the information in his possession did not warrant the filing of an indictment against any of those held by the Tribunal.² On 29 April 2009, the Pre-Trial Judge issued an order directing *inter alia* the Lebanese authorities to release the Applicant and three others.³ This order was complied with on the same day.

5. On 17 March 2010, an application was filed by the Applicant through his Counsel, Mr Akram Azoury, seeking the “release of evidentiary material related to the crimes of

¹ Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, 27 March 2009.

² Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence, Case No. CH/PTJ/2009/004, 27 April 2009.

³ Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, 29 April 2009.

libellous denunciations and arbitrary detention”. On 15 April 2010, I issued an order assigning the matter to the Pre-Trial Judge for determination.⁴

6. After duly considering the written submissions of the Applicant and the Office of the Prosecutor (“Prosecution”) and after conducting a public hearing on 13 July 2010, the Pre-Trial Judge issued his decision on 17 September 2010.⁵ He held that the Tribunal had jurisdiction to rule on the substance of the application, that the applicant had standing to seize the Tribunal of issues relating to his prior detention, and ordered the parties to submit responses to a number of questions outlined in the decision.⁶

7. On 29 September 2010, the Prosecution appealed the Pre-Trial Judge’s decision.⁷ On 1 October 2010, I issued a scheduling order inviting the Applicant to file a response brief and the Prosecution to file a brief in reply.⁸ On 12 October 2010, I issued a further order announcing the composition of the Appeals Chamber.⁹

8. On 20 October 2010, the Applicant filed the Motion pursuant to Rule 25 of the Rules for the disqualification of Judge Chamseddine from the Appeals Chamber.¹⁰

9. In my scheduling order of 21 October 2010, I called on Judge Chamseddine to comment on the Applicant’s disqualification motion.¹¹ He did so on 22 October 2010 in a memorandum that is annexed to this decision.¹²

⁴ Order Assigning Matter to Pre-Trial Judge, Case No. CH/PRES/2010/01, 15 April 2010.

⁵ Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed dated 17 March 2010 and whether Mr El Sayed has Standing before the Tribunal, Case No. CH/PTJ/2010/005, 17 September 2010 (“Pre-Trial Chamber Decision”).

⁶ Pre-Trial Chamber Decision, paras 36, 42, 57.

⁷ Appeal of the “Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed dated 17 March 2010 and whether Mr El Sayed has Standing before the Tribunal” and Urgent Request for Suspensive Effect, No. OTP/AC/2010/01, 28 September 2010.

⁸ Scheduling Order, Case No. CH/PRES/2010/02, 1 October 2010.

⁹ Order on Composition of the Appeals Chamber, Case No. CH/PRES/2010/03, 12 October 2010.

¹⁰ Demande de récusation et de dessaisissement de Monsieur le Juge Afif Chamseddine, Case No. OTP/AC/2010/01, 20 October 2010 (“Motion”).

¹¹ Scheduling Order on Judge Chamseddine Disqualification Motion, Case No. CH/PRES/2010/07, 21 October 2010.

¹² Réponse à la demande de M. Jamil El Sayed de récuser le Juge Afif Chamseddine, 22 October 2010 (“Annex”).

APPLICABLE LAW

10. Rule 25(A) of the Rules provides that:

A Judge may not sit on a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association that might affect or appear to affect his impartiality. The Judge shall, in any such circumstance, withdraw, and the President shall assign another Judge to the case.

11. Rule 25(A) is practically identical in substance to its equivalent rule in the Rules of the International Criminal Tribunal for the former Yugoslavia (“ICTY”)¹³ and the International Criminal Tribunal for Rwanda (“ICTR”).¹⁴ In light of these important textual similarities, it is useful and relevant to consider the jurisprudence of these tribunals in interpreting their equivalent of Rule 25(A).

12. As for the relevant case law on the matter and the proper interpretation of Rule 25(A), I will refer to what I have set out in my Order on the Disqualification of Judge Riachy, of 5 November 2010,¹⁵ at paragraphs 13 through 41.

SUBMISSIONS

I. The Applicant’s Submissions

13. The Applicant submits that Judge Chamseddine has been chosen by a Government that was “partial” and responsible for the arbitrary detention of Mr El Sayed. In particular, the

¹³ ICTY Rules of Procedure and Evidence, IT/32/Rev. 44, 10 December 2009, Rule 15(A) reads:

A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

¹⁴ ICTR Rules of Procedure and Evidence, 9 February 2010, Rule 15(A) reads:

A Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

¹⁵ Decision on Mr El Sayed’s Motion for the Disqualification of Judge Riachy from the Appeals Chamber pursuant to Rule 25, Case No. CH/PRES/2010/08, 5 November 2010.

Applicant points to the public statements of the then-Minister of Justice Charles Rizk that the Applicant and others detained by the Lebanese authorities would not be released until the formation of the Tribunal.¹⁶ The Applicant views such statements as an impermissible violation of the independence of the Lebanese judiciary and as evidence of such an engrained governmental bias so as to cast doubt on the impartiality of any judge nominated by that government. These circumstances, in the opinion of the Applicant, raise a “legitimate suspicion” of the impartiality or the appearance of impartiality of Judge Chamseddine.

II. Judge Chamseddine’s Memorandum

14. In his Memorandum addressed to me pursuant to my Scheduling Order of 21 October 2010, Judge Chamseddine notes that (1) it is not for Mr El Sayed to appraise whether the executive power at the time was or was not “partial”;¹⁷ (2) during the detention of Mr El Sayed Judge Chamseddine presided over the Third Criminal Chamber of the Court of Cassation and never passed on any case relating to Mr El Sayed;¹⁸ (3) his candidature for the Tribunal had not been proposed by the Government but by the Lebanese Supreme Council of the Judiciary, following which the United Nations (“UN”) Secretary-General had chosen four out of the twelve Lebanese candidates;¹⁹ (4) the Tribunal has been established by the Government assailed by Mr El Sayed, yet he has brought his case before the Tribunal, thereby considering it legal, a fact that shows he is contradicting himself;²⁰ (5) under Rule 25, a judge can only be disqualified if he has an interest in or an association with a case, which affects his impartiality or appearance of impartiality; however, Mr El Sayed has not pointed to any such interest or association, with the consequence that his motion does not stand up to the requirements of Rule 25.²¹

DISCUSSION

¹⁶ Motion, para. 6.

¹⁷ Annex, para. 2(a).

¹⁸ Annex, para. 2(b).

¹⁹ Annex, para. 2(c).

²⁰ Annex, para. 2(e).

²¹ Annex, para. 3.

15. The motion for the disqualification of Judge Chamseddine is substantially grounded in the objection that Judge Chamseddine, like the other Lebanese Judges, was nominated by the Lebanese Government, a government that had been criticized by the UN Working Group on Arbitrary Detention. This mere fact shows, according to the Applicant, that the impartiality of Judge Chamseddine, or his appearance of impartiality, is compromised.

16. As I have already stated in my decision on the disqualification of Judge Riachy, who had been the object of an identical objection, this challenge does not hold water. The selection process for all Lebanese judges was not the one described by the Applicant. The Lebanese Higher Council of the Judiciary—not the executive branch of the Lebanese Government—proposed the name of Judge Chamseddine as one of twelve candidates for four positions at the Tribunal. The Government presented these twelve names to the UN Secretary-General. Ultimately it was the UN Secretary-General, after careful scrutiny by a Selection Committee consisting of two distinguished international Judges and chaired by the UN Legal Counsel, who chose from among the various candidates those most suitable to meet the requirements laid down in Article 9 of the Tribunal’s Statute and who were therefore not only “persons with extensive judicial experience,” but also “persons of high moral character, impartiality and integrity.” Thus, whether or not the Lebanese Government acted in conformity with international standards in keeping various persons in prison for almost four years without bringing them to trial, is unrelated to the nomination and appointment of Judge Chamseddine to the Tribunal.

17. Further, as has been held by international courts, international Judges benefit from a presumption of impartiality and integrity, on account of the careful and painstaking process for their appointment.²² To rebut this presumption, the Applicant would have to produce compelling evidence that a Judge lacks impartiality or integrity, or other evidence demonstrating an appearance of bias. No such evidence has been submitted in this case.

²² This notion has been clearly set out by the ICTY and the ICTR. See ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para. 11. See also ICTY *Prosecutor v. Karadžić*, Case No. IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), 22 July 2009, para.17; ICTY, *Prosecutor v. Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008, para. 3; ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007, para. 5; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 196.

18. Therefore, applying Rule 25(A) of the Rules, I find that Judge Chamseddine's nomination by the Lebanese authorities does not indicate that he had or currently entertains any *bias* in the matter under consideration. Nothing shows that Judge Chamseddine had or has a personal interest in the case at issue or has or has had any association with the case which might affect his impartiality.

19. As for the *appearance of bias*, applying the test commonly employed for ascertaining such an appearance (namely, viewing the facts presented through a hypothetical fair-minded observer with sufficient knowledge of the actual circumstances to make a reasonable judgment), I am satisfied that Judge Chamseddine's nomination by the Lebanese authorities does not create any appearance of bias. Time and again the ICTY and other international tribunals have stated that the nationalities of Judges and the policies of their governments are irrelevant for the purposes of determining impartiality.²³ I only add that the Applicant's submissions, if accepted, would have the deplorable effect that no Lebanese judge could ever sit on any Chamber of the Tribunal – thus frustrating the very nature of its 'hybrid' character, with all of the consequences this entails.

20. In any event, Judge Chamseddine neither has or had a personal interest in the matter at issue, nor has or has had any association with the case that *might appear* to affect his impartiality.

21. I firmly believe that, while Judges must be absolutely free and appear to be free from any preconceived beliefs, it is also necessary for them to be sheltered from mere speculation and innuendoes about the motivations of governments in proposing them for Judgeship. If they are not so safeguarded, they are unable to discharge their difficult mission with equanimity. Charges of bias unsupported by compelling evidence can only sow confusion and uncertainty in the mind of all those who watch the unfolding of international justice, as well as trouble the conscience of Judges, thereby affecting their serenity.

22. While both the accused and the Prosecution, as well as victims or any other person involved in criminal proceedings, have the right to challenge the *impartiality* or *independence* of a Judge, this right must not be abused. Nobody should submit insubstantial, manifestly

²³ ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, Order on Defence Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal, 23 October 2007, Annex, p. 3.

unfounded or even frivolous motions. International justice is too serious a matter to be subjected to conjectures, speculation or guesswork.

DISPOSITION

FOR THESE REASONS,

IN ACCORDANCE with Articles 9(1), 10(1) and 21 of the Statute and Rule 25,

I DETERMINE that the Motion of Mr El Sayed for the disqualification of Judge Chamseddine is rejected.

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

Dated this fifth day of November 2010,

Leidschendam, The Netherlands.



Judge Antonio Cassese
President





OBSERVATIONS

Date: 22 October 2010

To: Judge Antonio Cassese, President of the Special Tribunal for Lebanon

From: Judge Afif Chamseddine, member of the Appeals Chamber

Subject: Response to the application by Mr Jamil El Sayed for the disqualification of Judge Afif Chamseddine

- 1- On 20 October 2010, Mr Jamil El Sayed filed an application calling for my disqualification and withdrawal on the grounds stated in that application, basing himself on one reason alone: the fact that I had been shortlisted and my candidature submitted to the United Nations for the position of Judge at the Special Tribunal for Lebanon (hereinafter “the Tribunal”) by the Lebanese executive which, from his standpoint, was biased and responsible for his “arbitrary” detention.
- 2- In response to that application, I submit the following observations:
 - a. I do not believe Mr El Sayed has the authority to assess whether or not the executive at the time was biased, as long as such an assessment has not been made by a competent authority and continues to be an issue that divides the politicians and the people of Lebanon.
 - b. When Mr El Sayed was detained, I was the President of the Third Criminal Chamber of the Court of Cassation. During my term, I did not rule on a single

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case or issue related to Mr El Sayed, a fact that the Applicant cannot in any way contest.

- c. My candidature was submitted not by the Lebanese executive but by the Magistracy Superior Council which drew up a list of twelve magistrates. The Secretary-General of the United Nations chose four among them, based on a report from a specially appointed committee. This shows that the Lebanese executive played no part in the process.
- d. On 1 July 2010, I retired. On 12 February 2009 (i.e. ten months after retiring), I was appointed Judge at the Tribunal.
- e. The Tribunal was established at the request of and in cooperation with the very executive criticised by Mr El Sayed. He nonetheless turns to it to seek its assistance, thereby considering it to be lawful and able to rule in respect of his requests, which shows the Applicant's reasoning to be somewhat contradictory.

3- Furthermore, it is significant that according to the provisions of Rule 25 of the Rules of Procedure and Evidence, a Judge of the Tribunal may only be disqualified or withdrawn if:

- he has a personal interest in the case or;
- any association with it;
- and if the interest or association might affect or appear to affect his impartiality.

Since Mr El Sayed has mentioned no such relation or interest, the conditions set out in Rule 25 are not fulfilled.

4- On the basis of the above, and pursuant to the provisions of Rule 25, there is no legal or factual basis for the application for disqualification.

For these reasons:

I would seek, Mr President, that the application in question should be dismissed.

Most respectfully,

Judge Afif Chamseddine

(signature)

