

**BEFORE THE APPEALS CHAMBER**

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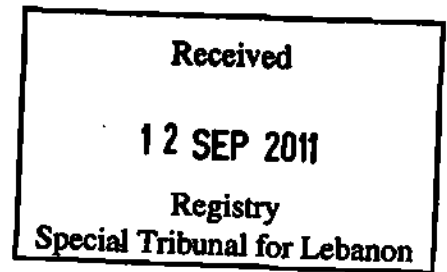
Before: Judge Antonio Cassese, Presiding
Judge Ralph Riachy
Judge Sir David Baragwanath
Judge Afif Chamsedinne
Judge Kjell Erik Björnberg

Registrar: Mr. Herman von Hebel

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**ORDER ON URGENT PROSECUTION'S REQUEST
FOR SUSPENSIVE EFFECT PENDING APPEAL**

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INTRODUCTION

1. On 12 September 2011, the Prosecution filed before the Appeals Chamber of the Special Tribunal for Lebanon (“STL” or “Tribunal”) an urgent appeal against a decision of the Pre-Trial Judge dated 2 September 2011 (“Decision of 2 September 2011”),¹ in the context of the ongoing proceedings involving Jamil El Sayed (“Mr. El Sayed”) (“Prosecution’s Appeal”).² The Prosecution’s Appeal includes a request that the Appeals Chamber suspend the Pre-Trial Judge’s order that the Prosecution disclose specified witness statements to Mr. El Sayed.

2. Also on 12 September 2011, Mr. Sayed submitted a reply to the Prosecution’s request for suspension in the Prosecution’s Appeal.³

GROUND FOR SUSPENSION

3. Pursuant to Rule 126(F) of the Tribunal’s Rules, “[a]n appeal shall not, of itself, have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules.”

4. The President’s Scheduling Order of 9 September 2011 clarified that the Appeals Chamber has jurisdiction to issue orders on suspension only *after* an appeal has been filed, on the basis of the reasons set forth in the appeal (save in exceptional circumstances to be demonstrated by the applicant).⁴

5. Under Lebanese law, the appeal of a final decision, within the time-limits imposed by the law, suspends necessarily the effects of the first instance decision. Decisions taken during the first instance proceedings, preceding the final decision resolving the case as a whole, can only be appealed together with the final decision.⁵

¹ Decision relating to the Prosecutor’s second application for suspension of the Decision of 6 July 2011, CH/PTJ/2011/15, 2 September 2011.

² Urgent Prosecution’s Appeal of the Pre-Trial Judge’s Decision of 2 September 2011 and Request for Suspensive Effect Pending Appeal, OTP/AC/2011/02, 12 September 2011.

³ Réplique à “Prosecution’s Appeal of the Pre-Trial Judge’s Decision of 2 September 2011 and Request for the Suspensive Effect Pending Appeal.”

⁴ Scheduling Order, CH/PRES/2011/01, 9 September 2011.

⁵ Article 615 LCCP.



6. However, the Lebanese Code of Civil Procedure (“LCCP”) provides for a few exceptions. One of these exceptions is the “provisionally enforceable” decision, defined in Articles 570 para. 2 and 571 of the LCCP. These decisions are immediately enforceable and can be executed before the expiry of the time-limit imposed by law for appeals.

7. Pursuant to Article 615 LCCP, these decisions are appealable during the proceedings, independently from the final judgment. Such appeals will not, however, necessarily suspend the “provisionally enforceable” decision. To stay the decision, parties should apply to the Appeals Court with a reasoned request, showing that (i) there are serious reasons to believe that the provisional execution will irrevocably harm them; or that (ii) the execution of the “provisionally enforceable” decision will, *inter alia* and under the circumstances of the case, have prejudicial consequences (such as rendering the appeal moot).⁶

8. This is not unlike the practice of the international criminal tribunals. For example, according to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and general principles, a request to suspend an order may be granted if it meets the following three conditions:

- a. there is a good cause for the requested suspension;
- b. the duration of the requested suspension is reasonable; and
- c. the appeal itself has reasonable prospects of success on its merits.

9. The Appeals Chamber of the ICTY has clearly stated that the *preservation of the object of an appeal* constitutes “good cause” for granting a request for a stay.⁷ In *Prosecutor v. Prlić et al.*, the Appeals Chamber considered the need to preserve the object of the Prosecution’s appeal to be justified, and accordingly used its inherent power to render what was an ancillary order in aid of the

⁶ Article 577 LCCP.

⁷ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para. 11. See also *Prosecutor v. Jovica Stanišić et al.*, Case No. IT-03-69-AR73, Decision on Interlocutory Appeals from Decision of Trial Chamber to Stay Provisional Release, 29 September 2004, paras. 25, 27.



exercise of its appellate function.⁸ Although this principle has primarily been enunciated in the context of decisions on the provisional release of accused, it appears to be of general value. For instance, a request for suspension of an order admitting evidence would normally *not* be granted, because the provisional admission of evidence can be often remedied by striking the evidence from the record later on in the proceedings.

10. ICTY jurisprudence also prescribes that the new timeline proposed by the applicant must be *reasonable*. In *Milutinović et al.*, the Trial Chamber held that the Prosecution's application for a further partial stay of the execution of a decision on protective measures and the suspension of a time limit for an application for certification for leave to appeal was "reasonable in the circumstances" set out in the Prosecution's motion.⁹ This was despite the fact that the time limits the Prosecution sought to suspend expired on the day it filed its request for relief.

11. Furthermore, the Appeals Chamber holds that the appeal itself must have *reasonable chances of success*, and that it does not simply constitute a delaying tactic on the part of the requesting party.

DISCUSSION

12. The Appeals Chamber considers that the matters expounded in the Prosecution's Appeal warrant further examination. In particular, the Appeals Chamber considers that:

- a. there may be good cause for suspending the Decision of 2 September 2011;
- b. that, if good cause is found to exist, disclosing the material that is the subject of the Decision of 2 September 2011 would make that decision irrevocable; and
- c. the suspension should be for the minimum period required to allow the Appeals Chamber to understand whether or not there are such serious grounds.

⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para. 11. See also *Prosecutor v. Jadranko Prlić et al.*, Case Nos. IT-04-74-AR65.1, IT-04-74-AT65.2, IT-04-74-AR65.3, Decision for Motions on Reconsideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, paras.15-16.

⁹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, Order Granting Prosecution Request for Further Partial Stay and Suspension of Time Limit for Application for Certification for Appeal and Motion for Modification, 29 August 2003. See also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, Order Granting Prosecution Request for Stay of Execution and Suspension of Time Limit for an Application for Certification for Leave to Appeal, 24 July 2003.



DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER

SUSPENDS the Decision of 2 September 2011;

WILL shortly pronounce a timetable for further submissions.

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

Filed this twelfth day of September 2011,

Leidschendam, the Netherlands

Judge Antonio Cassese
President

