

The Pre-Trial Judge



Le Juge de la mise en état

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

THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/PT**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr. Herman von Hebel**

Date: **2 March 2012**

Original language: **English**

Type of document: **Public**

**ORDER ON PRELIMINARY QUESTIONS CONCERNING THE CRIME OF
CRIMINAL ASSOCIATION ADDRESSED TO THE APPEALS CHAMBER
PURSUANT TO RULES 68 (G) AND 71 (A) (ii) OF THE RULES OF PROCEDURE
AND EVIDENCE**

Office of the Prosecutor:
Ms. Joyce Tabet

Counsel for Mr. Salim Jamil Ayyash:
Mr. Eugene O'Sullivan
Mr. Émile Aoun

Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz
Mr. John Jones

Counsel for Mr. Hussein Hassan Oneissi:
Mr. Vincent Courcelle-Labrousse
Mr. Yasser Hassan

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young
Mr. Guénaël Mettraux

1. Pursuant to Rule 68 (G) and Rule 71 (A) (ii) of the Rules of Procedure and Evidence (the “Rules”) of the Tribunal, the Pre-Trial Judge respectfully submits to the Appeals Chamber the preliminary questions presented below. These questions are intended to solicit the clarification of the applicable law which the Pre-Trial Judge requires in order to examine and rule on the Prosecutor’s request to amend the indictment in the case of *Ayyash et al.*, filed on 8 February 2012 (the “Prosecution Request to Amend the Indictment”).¹

I. Procedural History

2. On 17 January 2011, the Prosecutor seized the Pre-Trial Judge with a request under Rule 68 of the Rules to confirm an indictment including counts of terrorism, homicide and conspiracy against four suspects related to the attack against former Lebanese Prime Minister Rafiq Hariri and others on 14 February 2005 (the “Indictment”).² Amended versions of the Indictment were filed on 11 March, 6 May, and 10 June 2011 (the “Indictment of 10 June 2011”).³

3. On 21 January 2011, the Pre-Trial Judge submitted 15 preliminary questions of law to the Appeals Chamber pursuant to Rule 68 (G) of the Rules relating to the offences charged, the modes of responsibility, as well as cumulative charging and plurality of offences covered in the Indictment.⁴

4. On 16 February 2011, the Appeals Chamber rendered an Interlocutory Decision on the Applicable Law, clarifying the applicable law relevant to the Indictment (the “Decision of 16 February 2011”).⁵

5. On 28 June 2011, the Pre-Trial Judge issued a decision relating to the examination of the Indictment of 10 June 2011 and confirmed charges against the four accused with counts of terrorism, homicide, and conspiracy, among others.⁶

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Request for Leave to Amend the Indictment Pursuant to Rule 71 (A) (ii), Submission of an Amended Indictment, and Related Prosecution Applications, 8 February 2012.

² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Indictment, 17 January 2011.

³ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, Indictment, 10 June 2011.

⁴ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber Pursuant to Rule 68, Paragraph (G) of the Rules of Procedure and Evidence, 21 January 2011.

⁵ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011.

6. On 8 February 2012, the Pre-Trial Judge received the Prosecution Request to Amend the Indictment. This request raises questions relating to the applicable law that could not have been submitted to the Appeals Chamber at an earlier stage and consequently were not addressed in the Decision of 16 February 2011.

II. Preliminary Observations

7. The Pre-Trial Judges observes that the Prosecution Request to Amend the Indictment is based on Rule 71 (A) (ii) of the Rules, requiring leave from the Pre-Trial Judge.

8. The rationale behind preliminary questions provided for by Rule 68 (G) of the Rules regarding the submission of an indictment by the Prosecution is, in the words of the Appeals Chamber, “to clarify in advance the law to be applied by the Pre-Trial Judge and the Trial Chamber, thereby expediting the justice process”.⁷ This requires the Tribunal, having reference to Articles 21 and 28 of the Statute of the Tribunal (the “Statute”), “to avoid unreasonable delay in its proceedings and to adopt rules of procedure and evidence ‘with a view to ensuring a fair and expeditious trial’”.⁸ The rationale is the same in this case – for granting leave to amend an indictment pursuant to Rule 71 (A) (ii) of the Rules – as it is for the procedure of confirmation of an indictment pursuant to Rule 68 of the Rules. Both situations involve charging a person – a suspect, pursuant to Rule 68 of the Rules, or an accused, pursuant to Rule 71 of the Rules – with counts, whether new or additional. The congruent spirit and purpose of both rules requires that the Pre-Trial Judge be satisfied that there is *prima facie* evidence in support of each of the proposed counts.⁹

9. The Pre-Trial Judge therefore considers that the submission of preliminary questions to the Appeals Chamber at this stage of the proceedings not only has a valid legal basis in the Rules, but is indispensable for ensuring a fair and expeditious trial which is guided by the interests of justice and general principles of law. When seised of a request for an amendment to an indictment which includes a new charge for a crime, and in the absence of a clearly defined interpretation of the applicable law of the Tribunal for this crime, answers to such

⁶ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011.

⁷ Decision of 16 February 2011, para. 7.

⁸ *Ibid.*, referring to Article 21 (4) and Article 28 (2) of the Statute.

⁹ Rule 68 (F) and (I) and Rule 71 (B) of the Rules, respectively.

preliminary questions are necessary in order to ensure compliance of the proceedings with the interests of justice.

III. The Offence

10. In the Prosecution Request to Amend the Indictment, the Prosecution adds a new count of criminal association pursuant to Article 3 (1) (a) of the Statute and Articles 188, 212, 213, and 335 of the Lebanese Criminal Code. This count raises questions on the interpretation of the applicable law which were not addressed in the Decision of 16 February 2011.

11. The Pre-Trial Judge is mindful of the Appeals Chamber's incidental reference to the crime of criminal association under Article 335 of the Lebanese Criminal Code in the Decision of 16 February 2011. First, the Appeals Chamber distinguished the crime of conspiracy from criminal association which, in its view, is a more "inclusive" criminal agreement.¹⁰ Second, the Appeals Chamber held that, whenever an agreement lacks the specific aim of being directed against the security of a State (which is the specific aim required for the crime of conspiracy), it may still be "characterised as a 'criminal association' under Article 335 of the Lebanese Criminal Code".¹¹ However, since it was not called on to do so, the Appeals Chamber did not clarify the elements of the crime of criminal association.

12. Article 2 of the Statute provides that substantive Lebanese criminal law must be applied to the crimes prosecuted before the Tribunal, subject to the provisions of the Statute. The relevant Lebanese law for criminal association is set out in Article 335 of the Lebanese Criminal Code, which reads:

If two or more persons establish an association or enter into a written or oral agreement to commit felonies against persons or property, or to undermine the authority of the State, its prestige or its civil, military, financial or economic institutions, they shall be punishable by fixed-term hard labour. The term of this penalty shall be not less than 10 years if the offenders' acts were directed against the lives of other persons or those of employees of public institutions and administrations.

However, any person who reveals the existence of an association or agreement and divulges such information as he possesses regarding the other offenders shall be exempt from punishment.

13. The Pre-Trial Judge notes that in the Decision of 16 February 2011, the Appeals Chamber offered an interpretation of various provisions of Lebanese law in accordance with

¹⁰ Decision of 16 February 2011, para. 193.

¹¹ *Id.*, at para. 197.

and in the light of international law, thereby adhering to “the principle that one should construe the national legislation of a State in such a manner as to align it as much as possible to international legal standards binding upon the State”.¹² It added that the Tribunal’s application and interpretation of Lebanese law may depart from that of Lebanese domestic courts “under certain conditions: when such interpretation or application appears to be *unreasonable*, or may result in a *manifest injustice*, or is *not consonant with international principles and rules* binding upon Lebanon”.¹³

14. In light of the foregoing, the Pre-Trial Judge respectfully requests the Appeals Chamber to clarify the constituent elements of the crime of criminal association to be applied by the Tribunal. In particular, the Pre-Trial Judge seeks clarification of the following issues: (i) the *actus reus* and *mens rea* of the crime; (ii) the particularities of the required criminal agreement; and (iii) whether and, if so, to what extent, the identification of all of the participants in the criminal agreement is necessary for the crime to be made out.

15. Moreover, the Pre-Trial Judge considers that it would be appropriate for the Appeals Chamber to pronounce on the difference between the elements of the crime of conspiracy, as interpreted by the Appeals Chamber in the Decision of 16 February 2011, and those of criminal association.¹⁴ Notably, this involves clarification of the difference between a crime being directed “against the security of a State”, which is required for conspiracy, and a crime undermining “the authority of the State, its prestige or its civil, military, financial or economic institutions”, which is required for criminal association.¹⁵ In addition, the further question arises as to which felonies are covered under Article 335 of the Lebanese Criminal Code.

16. Finally, the Pre-Trial Judge seeks clarification from the Appeals Chamber as to whether the two crimes of conspiracy and criminal association may permissibly be cumulatively charged or not. More specifically, is it permissible to charge cumulatively an individual with conspiring to commit a terrorist act and the crime of criminal association with the aim of committing one or more terrorist acts, based on the same underlying conduct?

¹² *Id.*, at para. 41.

¹³ *Id.*, at para. 39 [footnotes omitted].

¹⁴ *Id.*, at paras 189 to 203.

¹⁵ *Id.*, at para. 197.

FOR THESE REASONS,

PURSUANT TO Rule 68, paragraph (G), and Rule 71, paragraph (A) (ii) of the Rules,

THE PRE-TRIAL JUDGE respectfully submits to the Appeals Chamber the following preliminary questions on the interpretation of the notion of criminal association applicable to the Tribunal:

- a) What are the constituent elements (*actus reus* and *mens rea*) of the crime of criminal association?
- b) What are the particularities of the required criminal agreement for the crime of criminal association? Is the identification of all of the participants in the criminal agreement necessary for the crime to be made out and, if so, to what extent?
- c) With regard to the relationship between the crime of criminal association and that of conspiracy:
 - i) What distinguishes criminal association from conspiracy? In particular, what is the difference between an illicit association directed “against the security of a State” and one directed at undermining “the authority of the State, its prestige or its civil, military, financial or economic institutions”?
 - ii) Which felonies are covered under Article 335 of the Lebanese Criminal Code?
 - iii) Can the crimes of criminal association and conspiracy permissibly be charged cumulatively? More particularly, can an individual permissibly be charged cumulatively with conspiring to commit a terrorist act and the crime of criminal association with the aim of committing a terrorist act, based on the same underlying conduct?

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

Leidschendam, 2 March 2012.



A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a series of loops and a horizontal line.

Daniel Fransen
Pre-Trial Judge