

**THE PRE-TRIAL JUDGE**

Case No.: STL-11-01/PT/PTJ
The Pre-Trial Judge: Mr Daniel Fransen
The Registrar: Mr Herman von Hebel
Date: 29 August 2012
Original language: French
Classification: Public

THE PROSECUTOR

v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI &
ASSAD HASSAN SABRA

**DECISION ON THE MOTION BY THE DEFENCE FOR MR MUSTAFA
BADREDDINE TO HAVE THE INDICTMENT OF 10 JUNE 2011, CONFIRMED ON 28
JUNE 2011, ANNULLED ON THE GROUNDS OF ABSENCE OF AUTHORITY**

Office of the Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan

Victims' Legal Representative:
Mr Peter Haynes

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz

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

Counsel for Mr Assad Hassan Sabra:
Mr David Young



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1. With this Decision, the Pre-Trial Judge rules on the Motion of 25 June 2012 submitted by the Defence for Mr Mustafa Amine Badreddine (respectively the "Motion" and the "Defence") calling for the annulment, on the grounds of the absence of authority on the part of the Prosecutor, of the indictment of 10 June 2011 (the "Indictment") and of the acts resulting from it.

I. The Motion

2. On 25 June 2012, the Defence requested the annulment of the Indictment and related arrest warrants on the grounds of the absence of authority of the Prosecutor of the Tribunal, Mr Bellemare, at the time the Indictment was filed.¹ Defence Counsel for the other accused joined the Motion.²
3. The Defence justifies the filing of the Motion before the Pre-Trial Judge by the fact that, pursuant to Rule 77 (A) of the Rules of Procedure and Evidence (the "Rules"), the Pre-Trial Judge has the authority, at this stage in the proceedings, to issue such orders "as may be necessary for the [...] preparation [...] of the proceedings".³ Indeed, the Defence is of the view that the Trial Chamber has not been formally seized of the case at issue. The Defence notes, however, that the defect affecting the Indictment is not only substantive but also formal.⁴ From this point of view, the Defence informs the Pre-Trial Judge that it has seized the Trial Chamber of a preliminary motion to that end.⁵ The Defence points out that this situation could lead to conflicting decisions by the Pre-Trial Judge and the Trial Chamber if both were to rule on this issue.⁶ To remedy this, in the interest of the proper administration of justice, the Defence calls upon the Pre-Trial Judge to transfer the Motion to the Trial Chamber, and failing this, to find that the Indictment, together with all the acts taken pursuant thereto, is null and void.⁷

¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, *Requête de la Défense de M. Mustafa Amine Badreddine en annulation pour défaut de pouvoir de l'acte d'accusation du 10 juin 2011 confirmé le 28 juin 2011*, 25 June 2012.

² *Id.*, para. 2.

³ *Id.*, para. 4.

⁴ *Id.*, para. 5.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid*

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4. On the merits of the Motion, the Defence asserts that the Secretary-General of the United Nations (the “Secretary-General”) appointed Mr Bellemare as the Prosecutor on 14 November 2007 for a three-year term, even though he did not take up his duties until 1 March 2009.⁸ However, Mr Bellemare’s term of office was not renewed when it expired on 13 November 2010.⁹ As a result, all the acts carried out by Mr Bellemare after that date – including the Indictment and the associated arrest warrants – are, according to the Defence, null and void.¹⁰
5. From a theoretical point of view, the Defence argues that according to the general principles of law, the Prosecutor’s mandate involves carrying out the duties defined by the Statute.¹¹ The Defence is therefore of the view that “[TRANSLATION] the Prosecutor’s mandate immediately confers the authority to undertake the duties of the Prosecutor on the person to whom it is granted and these functions cannot be exercised by a person with no mandate. However, it was only possible to exercise the functions of Prosecutor of the Tribunal after the effective installation of the Tribunal 1 March 2009. Under these circumstances, rather than appointing Mr Bellemare as Prosecutor on 14 November 2007, whilst postponing until later the actual exercise of his duties, it would have been better had the Secretary-General announced that he simply intended to appoint him to that position at a later date – the day on which he would actually be able to commence his term of office. In the meantime, the ineffectiveness of the mandate, although contrary to the principles, had barely any disadvantages on a practical level.”¹²
6. Lastly, the Defence adds that the appointment of a Lebanese Deputy Prosecutor would not remedy the defect affecting the Indictment insofar as: (i) the Deputy Prosecutor cannot replace a “non-existent Prosecutor” in drawing up an Indictment which is vital for initiating proceedings and therefore seizing the Tribunal; (ii) Rule 56 (B) of the Rules on the Prosecutor’s “absence from duty” or “inability to act”, by definition, only applies to a Prosecutor in the context of the mandate he is carrying out; and (iii) the Indictment was

⁸ *Id.*, para. 7.⁹ *Id.*, para. 8.¹⁰ *Id.*, para. 9.¹¹ *Id.*, para. 11.¹² *Id.*, para. 12.

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signed by the Prosecutor, which rules out any possibility of representation by the Deputy Prosecutor.¹³

II. The Prosecution Response

7. On 6 July 2012, the Prosecution responded to the Motion (the “Response”).¹⁴ According to the Response, the issues raised in the Motion did not come under the authority of the Trial Chamber, but rather under that of the Pre-Trial Judge, pursuant to Rule 77 (A) of the Rules.¹⁵ Indeed, the Motion does not relate to a defect in the form of the Indictment within the meaning of Rules 89 (H) and 90 (A) (ii) and therefore need not be sent to the Trial Chamber.¹⁶
8. On the merits, the Prosecution recalls that in a letter dated 12 November 2007 circulated to the Members of the United Nations Security Council (the “Security Council”) on 14 November 2007,¹⁷ the Secretary-General informed the President of the Security Council of his decision to appoint Mr Bellemare as Prosecutor, whilst stating that he would commence his official duties at a later date.¹⁸ The Prosecution notes, in this regard, that Mr Bellemare took up his duties on 1 March 2009, when the Tribunal commenced functioning.¹⁹ The Prosecution also notes that a letter dated 3 July 2012 from the United Nations Office of the Legal Counsel (the “Legal Counsel”) confirms that a Prosecutor is appointed for a three-year term, that his term of office commenced on 1 March 2009 and expired on 29 February 2012.²⁰ It also recalls that paragraph 167 of the Tribunal’s first Annual Report for 2009-2010 notes that: “The OTP began its operations when the Prosecutor assumed his functions, on 1 March 2009, upon the official launch of the Special Tribunal for Lebanon [...].”²¹ As a result, the Prosecution maintains that Mr Bellemare’s term of office expired on 29 February 2012 and not on 14 November 2010 as alleged by the Defence.²² Therefore, according to the Prosecution, the Indictment of 10 June 2011 is valid.

¹³ *Id.*, para 20.

¹⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No STL-11-01/PT/PTJ, Prosecution Response to the Joint Defence Request to Annul the Indictment for Absence of Authority, 6 July 2012.

¹⁵ *Id.*, paras 6 and 7.

¹⁶ *Id.*, para. 6.

¹⁷ S/2007/669.

¹⁸ Response, para. 2.

¹⁹ *Ibid*

²⁰ *Id.*, para. 3.

²¹ *Id.*, para. 4.

²² *Id.*, para. 7.

III. The Defence's Reply

9. Having been granted leave to do so,²³ the Defence filed a Reply to the Response (the "Reply")²⁴ on 16 July 2012. It submitted that the Prosecution provided no explanation for its assertions that the ground submitted by the Defence is not vitiated by a procedural defect.²⁵
10. With regard to the merits, the Defence contends that the letter from the Office of the Legal Counsel provides no explanation whatsoever for how, given that he was appointed for three years on 14 November 2007, Mr Bellemare could have reasonably continued to exercise his duties until 29 February 2012.²⁶ In this respect, the Defence adds that the Letter from the Office of the Legal Counsel draws a distinction between the appointment of Mr Bellemare for a term of office as Prosecutor on the one hand and the execution of his duties on the other.²⁷ Furthermore, to assert the validity of the extension to the Prosecutor's term of office, the Office of the Legal Counsel makes the duration thereof dependent on the duration of the duties carried out by Mr Bellemare.²⁸ In reality, according to the Defence, the duration of the validity of the duties in question is dependent on the duration of the term of office which expires after three years.²⁹ In the absence of any specific provision in the Statute or the Rules, it is not possible to separate the date the Prosecutor was appointed from the exercise of his duties, nor is it possible to make the duration of the former dependent on the exercise of the latter.³⁰

²³ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order in Respect of 10 July 2012 Motion by the Defence of Mr Badreddine, 12 July 2012.

²⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, *Réplique de la Défense de M. Badreddine à la réponse du Procureur relative à la requête de la Défense en annulation pour défaut de pouvoir de l'acte d'accusation*, 16 July 2012.

²⁵ *Id.*, para. 5.

²⁶ *Id.*, paras 7 to 9.

²⁷ *Id.*, para. 11.

²⁸ *Id.*, para. 12.

²⁹ *Id.*, para. 14.

³⁰ *Id.*, para. 15.

Statement of reasons**A. Jurisdiction**

11. The Pre-Trial Judge notes that the Motion raises an issue which goes beyond the Indictment and the associated arrest warrants. Indeed, the defect raised is likely to affect all the acts emanating from the Prosecutor during the period in question, including some on which the Pre-Trial Judge ruled during the preparation stage of the case, such as the various motions on which he ruled during this period. As a result, aside from the issue of whether the arguments made form part of a challenge linked to the procedural defects of the Indictment within the meaning of Rule 90 (A) (ii) of the Rules, the Pre-Trial Judge is of the view that he has the necessary authority to respond pursuant to Rule 77 (A) of the Rules.
12. Furthermore, in order to avoid the Trial Chamber ruling simultaneously on the issue and the associated risk of conflicting decisions, as the Defence fears, in the interest of the proper administration of justice, in August 2012, the Pre-Trial Judge informed the Presiding Judge of the Trial Chamber of the existence of the Motion and of the fact that he intended to rule on it.

B. Examination of the merits of the Motion**1. Applicable law**

13. The applicable legal provisions in the present case are Article 11 (3) of the Statute and also Article 3 (1) and Article 19 (2) of the Annex to the United Nations Security Council Resolution 1757 (2007) entitled "Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon" (the "Annex").
14. Article 11 (3) of the Statute is worded as follows:

The Prosecutor shall be appointed, as set forth in article 3 of the Agreement, by the Secretary-General for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

15. Article 3 (1) of the Annex is worded as follows:

The Secretary-General, after consultation with the Government, shall appoint a Prosecutor for a three-year term. The Prosecutor may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

16. Article 19 (2) of the Annex is worded as follows:

The Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government, taking into account the progress of the work of the International Independent Investigation Commission.

2. Examination

17. By way of a letter dated 12 November 2007, the Secretary-General informed the President of the Security Council that his intention was two-fold. Firstly, to appoint Mr Bellemare as the next Commissioner of the United Nations International Independent Investigation Commission (the “Commissioner”) once the mandate of Mr Brammertz expired on 31 December 2007.³¹ Secondly, to appoint Mr Bellemare as Prosecutor, whilst making it clear that he would only commence his official duties in this role at a later date, in keeping with the provisions of the Annex. In the same letter, the Secretary-General clarified the reasons underpinning this course of action, namely: “[to] ensure a coordinated transition from the activities of the Commission to those of the Office of the Prosecutor [...].”
18. In a letter dated 3 July 2012, the Office of the Legal Counsel stated for its part that: (i) in the letter dated 12 February 2009, the Secretary-General requested that Mr Bellemare assume the office of the Prosecutor on the date that the Special Tribunal commenced functioning, that is, on 1 March 2009; and (ii) since Mr Bellemare did not seek reappointment, his term of office expired on 29 February 2012.
19. It is clear from the foregoing that, contrary to what the Defence asserts, Mr Bellemare’s term of office as Prosecutor did not begin on 14 November 2007 and that it could not run simultaneously with his term of office as Commissioner. Indeed, it is clear from the letters of 12 November 2007 and 3 July 2012 that, on 12 November 2007, Mr Bellemare was appointed: (i) Commissioner for a term of office which began on 1 January 2008 and which would end when the Tribunal commenced its work, when he would carry out the duties of Prosecutor; and (ii) Prosecutor, for a three-year period, taking up his official duties at a later date, namely when the Tribunal commenced its work, that is on 1 March 2009. In this regard, contrary to the Defence’s allegations, there was nothing preventing an appointment

³¹ S/2007/669.

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– even as Prosecutor – being made at a given time, even though it would not take effect until a later date.

20. This interpretation is moreover in line with the Statute of the Tribunal. Indeed, as an organ of the Tribunal,³² the Prosecutor would not be able to commence his duties before the court to which he had been appointed to exercise his duties had begun its work. As a result, Mr Bellemare would not have been able to carry out his duties as Prosecutor of the Tribunal before it began its work, on the date set by the Secretary-General pursuant to Article 19 (2) of the Annex, namely on 1 March 2009.
21. In light of the foregoing, it is clear that Mr Bellemare's term of office as Prosecutor began on 1 March 2009 and expired on 29 February 2012 after three years, in accordance with Article 3 (1) of the Annex and Article 11 (3) of the Statute. Therefore, all the acts carried out during that time by Mr Bellemare in his capacity as Prosecutor cannot be declared null and void on the grounds of an absence of authority on his part.

FOR THESE REASONS,

Pursuant to Rule 77 (A) of the Rules,

THE PRE-TRIAL JUDGE,

DISMISSES the Motion.

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

Leidschendam, 29 August 2012

[signature]

Daniel Fransen
Pre-Trial Judge



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³² Article 7 of the Statute.
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