



**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: **18 September 2012**  
Original language: **French**  
Classification: **Public**

**THE PROSECUTOR**

**v.**

**SALIM JAMIL AYYASH  
MUSTAFA AMINE BADREDDINE  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

**DECISION ON THE BADREDDINE DEFENCE MOTION FOR CERTIFICATION TO  
APPEAL THE DECISION OF 29 AUGUST 2012**

**Office of the Prosecutor:**  
Mr Norman Farrell

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

**Legal Representative of Victims:**  
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



**I. The subject of the decision**

1. By way of this decision, the Pre-Trial Judge rules on the motion of the Badreddine Defence of 7 September 2012 for certification to appeal the “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” (respectively the “Motion”, the “Decision” and the “Indictment”).

**II. Procedural background**

2. On 29 August 2012, the Pre-Trial Judge issued the Decision by which he rejects the application for the annulment of the Indictment on the grounds of absence of authority filed on 25 June 2012 by the Badreddine Defence (the “Defence”).<sup>1</sup> On 7 September 2012, the Defence sought certification to appeal the Decision.<sup>2</sup> On 12 September 2012, the Prosecution submitted a response to the Motion (the “Response”).<sup>3</sup> On 14 September 2012, the Defence sought leave to file a reply.<sup>4</sup>

**III. The arguments of the Parties**

3. The Defence states, firstly, that the appeal against the Decision must be certified insofar as the conditions set forth in Rule 126 (C) of the Rules have been met.<sup>5</sup> Indeed, according to the Defence, the application for annulment of the Indictment, as well as the Decision rejecting it, affect the integrity of the entire proceedings and, thereby, the fairness and expeditiousness of the proceedings.<sup>6</sup> The Defence points out in fact that the issue of the absence of authority of the Prosecutor is, as the Pre-Trial Judge himself observed, “likely to affect all the acts emanating

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<sup>1</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, 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, 29 August 2012.

<sup>2</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, *Requête de la Défense de M. Badreddine aux fins de certification de l'appel de la « Décision relative à la requête de la Défense de M. Mustafa Badreddine sollicitant l'annulation pour défaut de pouvoir de l'acte d'accusation du 10 juin 2011 confirmé le 28 juin 2011 »*, 7 September 2012.

<sup>3</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Prosecution Response to the Request of the Badreddine Defence for Certification to Appeal the “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”, 12 September 2012.

<sup>4</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, *Requête de la Défense de M. Mustafa Badreddine sollicitant l'autorisation de déposer une réplique à la réponse du Procureur relative à la Requête de la Défense aux fins de certification d'appel de la Décision du 29 août 2012*, 14 September 2012.

<sup>5</sup> Motion, para. 4.

<sup>6</sup> Id., para. 3.

from the Prosecutor during the period in question.”<sup>7</sup> The Defence further adds that the issue must be ruled on forthwith. Indeed, if that were not the case “[TRANSLATION] at the time of the appeal on the merits, [if] it were demonstrated that the entire proceedings were deprived of validity as they were initiated on the basis of a vitiated act, then the fundamental principle of judicial economy would be negatively affected”.<sup>8</sup>

4. The Prosecution objects to the Motion. It recalls that certification of an appeal is discretionary.<sup>9</sup> It points out that, even when the conditions mentioned in Rule 126 (C) of the Rules have been met, that certification does not necessarily have to be granted given that, in accordance with established international case law on the matter, it must remain an exceptional measure.<sup>10</sup> Furthermore, the Prosecution points out that the response to the issue raised by the Defence is clear insofar as it is based on factual information which, in turn, is based on a letter of the United Nations Secretary-General dated 12 November 2007.<sup>11</sup> Lastly, the Prosecution adds that to authorise certification for such an appeal would encourage the Parties to file frivolous requests and motions for certification.<sup>12</sup>

#### **IV. Jurisdiction**

5. The Pre-Trial Judge has jurisdiction to rule on the Motion pursuant to Rule 126 (C) of the Rules.

#### **V. Statement of reasons**

6. As a preliminary matter, the Pre-Trial Judge states that he considers that he has sufficient information relating to the arguments raised in the Motion. It is not therefore appropriate to grant the Defence request to file a reply.

7. Rule 126 (C) of the Rules sets forth the conditions in which an appeal may be certified. It is worded as follows:

Decisions on all motions under this rule are without interlocutory appeal save with certification, if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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<sup>7</sup> Ibid.

<sup>8</sup> Id., para. 4.

<sup>9</sup> Reponse, para. 4.

<sup>10</sup> Ibid.

<sup>11</sup> Id., para. 3.

<sup>12</sup> Id., para. 4.

8. The Pre-Trial Judge notes that, in accordance with this provision, in order to certify an appeal, two cumulative criteria must be satisfied: firstly, the decision in question must involve an issue that would significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial and, secondly, an immediate resolution by the Appeals Chamber would materially advance the proceedings. The Pre-Trial Judge also notes that the first criterion contains an alternative. Indeed, according to that requirement, it is either the fairness and expeditiousness of the trial, or the outcome thereof, which must be likely to be significantly affected.

9. As the Pre-Trial Judge pointed out in the Decision, the question of the absence of authority of the former Prosecutor of the Tribunal “raises an issue which goes beyond the Indictment and the associated arrest warrants”.<sup>13</sup> 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”.<sup>14</sup> As a consequence, if the Decision were to be set aside until a later stage of the proceedings, numerous acts which are essential for the conduct of the proceedings could be annulled, including the Indictment. Clearly, that situation would be likely to affect the outcome of the trial. Furthermore, under those circumstances, the immediate resolution of that issue could unquestionably materially advance the proceedings. In the light of that exceptional situation, the Pre-Trial Judge considers therefore that the Motion is well-founded.

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<sup>13</sup> Decision, para. 11.

<sup>14</sup> Ibid.

**PUBLIC**

**FOR THESE REASONS,**

Pursuant to Rule 126 (C) of the Rules,

**THE PRE-TRIAL JUDGE,**

**DECLARES** the Motion admissible and well-founded; and

**DECLARES** the request of the Defence to file a reply unfounded.

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

Leidschendam, 18 September 2012

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[signature]

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Daniël Fransen  
Pre-Trial Judge

