



**THE APPEALS CHAMBER**

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

**Before:** Judge Ralph Riachy, Presiding  
Judge Afif Chamseddine  
Judge Daniel David Ntanda Nsereko  
Judge Ivana Hrdličková

**Registrar:** Mr Daryl Mundis

**Date:** 25 October 2013

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

**DECISION ON APPLICATION BY COUNSEL FOR MESSRS BADREDDINE AND  
ONEISSI AGAINST PRESIDENT'S ORDER ON COMPOSITION OF THE TRIAL  
CHAMBER OF 10 SEPTEMBER 2013**

**Prosecutor:**  
Mr Norman Farrell

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

**Head of Defence Office:**  
Mr François Roux

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

**Legal Representatives of Victims:**  
Mr Peter Haynes  
Ms Nada Abdelsater-Abusamra  
Mr Mohammad F. Mattar

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

**Counsel for Mr Assad Hassan Sabra:**  
Mr David Young  
Mr Guénaél Mettraux



## **INTRODUCTION**

1. The Appeals Chamber is seized with an application filed jointly by the Defence teams for Messrs Badreddine and Oneissi (“Defence”)<sup>1</sup> against an order of the President (“President’s Order”) in which the President re-composed the Trial Chamber following the resignation of its Presiding Judge.<sup>2</sup>

## **BACKGROUND**

2. After the determination of the United Nations Secretary-General that the Judges of the Trial Chamber should take office,<sup>3</sup> the then President Antonio Cassese first convened the Trial Chamber as of 20 September 2011, assigning two alternate Judges (in addition to the three sitting Judges) pursuant to Article 8 (3) of the Statute of the Special Tribunal for Lebanon (“Statute” and “Tribunal”, respectively).<sup>4</sup>

3. On 9 September 2013, Judge Robert Roth, Presiding Judge of the Trial Chamber, resigned. The four remaining Judges requested the President, Judge David Baragwanath, to “take all necessary steps according to Article 8(3) of the Statute of the Tribunal to ensure that the international alternate Judge, Judge Janet Nosworthy, is appointed as a Judge of the Trial Chamber”, so as to “allow the Trial Chamber to continue functioning”.<sup>5</sup>

4. On 10 September 2013, the President issued the Order and appointed Judge Nosworthy—hitherto international alternate Judge—as sitting Judge on the Trial Chamber’s bench.

5. Thereafter, three Defence teams requested the President to reconsider the Order.<sup>6</sup> The President ruled that he had no power to do so.<sup>7</sup> On 22 October 2013, the Defence teams for

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<sup>1</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, Application Alleging Abuse of Authority against the Order of the President of the Tribunal of 10 September 2013, 21 October 2013 (“Application”).

<sup>2</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, Order on Composition of the Trial Chamber, 10 September 2013 (“Order”).

<sup>3</sup> See Article 17 (b) of the Annex to UN Security Council resolution 1757 (2007).

<sup>4</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/1/PRES, Order on Composition of the Trial Chamber, 8 September 2011.

<sup>5</sup> Confidential letter from Judge Micheline Braidy, Judge David Re, Judge Janet Nosworthy (alternate Judge), Judge Walid Akoum (alternate Judge), 9 September 2013.

<sup>6</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, Motion for Reconsideration and Rescission of the President’s “Order on Composition of the Trial Chamber” of 10 September 2013, 23 September 2013.

<sup>7</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, Decision on Defence Motion for Reconsideration and Rescission of Order Composing the Trial Chamber, 4 October 2013 (“Reconsideration Decision”).

Messrs Badreddine and Oneissi filed the present Application. On 24 October 2013, the Prosecutor informed the Appeals Chamber that he would not respond.<sup>8</sup>

## DISCUSSION

### **I. Composition of the Appeals Chamber**

6. The Presiding Judge of the Chamber, Judge Baragwanath, has elected to recuse himself from these proceedings due to the fact that the Order was made by him in his capacity as President.<sup>9</sup>

7. Pursuant to Article 8 (1) (c) of the Statute, the Appeals Chamber is composed of five judges including the Presiding Judge (who is *ex officio* President of the Tribunal), with no designated alternate judge. The recusal of the President reduces the composition of the Appeals Chamber to four judges.<sup>10</sup>

8. We have previously held that in such circumstances the necessity principle requires the remaining four Judges to exercise the jurisdiction of the Appeals Chamber,<sup>11</sup> and we see no reason to depart from that position in the instant case. The Appeals Chamber is properly seized of a case even when composed of only four Judges, because none of its members can be replaced by an alternate Judge. Moreover, unlike other international tribunals, the Statute of this Tribunal does not provide for the appointment of a Judge from the other Chambers to temporarily serve on

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<sup>8</sup> E-mail to President's Chef de Cabinet of 24 October (also copied to the Defence).

<sup>9</sup> Letter from President Baragwanath to Vice-President Riachy, 24 October 2013. The full text of the letter reads: "Dear Vice-President, [a]n appeal has been filed in the Appeals Chamber against my decision as President under Article 8(3) of the Statute of the Tribunal to assign Judge Nosworthy, appointed by the UN Secretary General as an alternate judge under Article 8 (1)(d), to replace Judge Roth as a member of the Trial Chamber under Article 8(1)(b). It is well settled that a judge is disqualified from sitting both if he is actually biased or if to do so would cause an informed observer to form a reasonable apprehension of bias. The sole exception is where no judicial decision is possible unless the judge sits. I am satisfied that to sit on an appeal from my own decision would clearly infringe the test of reasonable apprehension of bias. The Appeals Chamber has already ruled that it may sit in the absence of its President whose decision is challenged in the particular appeal. It follows that it is my duty to advise you that I hereby disqualify myself from participating as a member of the Appeals Chamber which is to determine the appeal."

<sup>10</sup> STL, *In the matter of El Sayed*, CH-AC-2010-01, Decision on the Application to Challenge the Order of the President of the Appeals Chamber to Stay the Order of the Pre-Trial Judge and to Call upon Amicus Curiae, 8 November 2010, para. 14 ("*El Sayed* Decision of 8 November 2010").

<sup>11</sup> *Id.* at paras 14-17, referring to other international jurisprudence; see also Grant Hammond, *Judicial Recusal – Principles, Process and Problems* (Hart 2009), pp. 84-85 (for the practice of various Supreme Courts, such as the US Supreme Court and the High Court of Australia).

the Appeals Chamber.<sup>12</sup> We therefore see what we have done previously as the only course of action to overcome the impasse and to avoid denial of justice.<sup>13</sup> We further note that in this specific instance the Defence itself acknowledges the possibility for the President recusing himself.<sup>14</sup>

## II. Admissibility of the Application

9. We first note that neither the Statute nor the Tribunal's Rules of Procedure and Evidence ("Rules") grant the parties an explicit right to challenge a decision by the President. Indeed, as held by the President, in common with the practice of other international tribunals with similar provisions, an order of the President composing or re-composing a bench of the Tribunal is a purely administrative matter and not subject to challenge by the parties.<sup>15</sup> This includes both requests for reconsideration of the order by the President and any requests for review by the Appeals Chamber.

10. Acknowledging this position of the law, Defence counsel rely on the inherent powers of the Appeals Chamber to find their application admissible. They argue in effect that the Defence must be able to ensure respect of all fundamental rights of the Accused and that adhering to a formalistic reading of applicable provisions would lead to a denial of justice.<sup>16</sup> While we have recognized limited inherent powers before, we have also held that the authority of the Appeals Chamber to entertain appeals outside of the Rules is exceptional and limited to cases where a situation has arisen that was not foreseen by the Rules.<sup>17</sup>

11. Indeed, we stated that "the jurisdiction of the Appeals Chamber is limited by the Statute and Rules" and that "there can be no right of appeal if it was the express intention of the drafters to exclude it".<sup>18</sup> This is also the approach applied by both domestic and other international

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<sup>12</sup> See, e.g., Rule 27 (C) of the ICTY Rules of Procedure and Evidence.

<sup>13</sup> *El Sayed* Decision of 8 November 2010, paras 15-17.

<sup>14</sup> Application, para. 7.

<sup>15</sup> Reconsideration Decision, paras 12-15 (with further reference to the case-law of other courts).

<sup>16</sup> Application, para. 6.

<sup>17</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012 ("*Ayyash et al.* Jurisdiction Decision"), para. 17; STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 54.

<sup>18</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, para. 11.

jurisdictions.<sup>19</sup> Even assuming that the Appeals Chamber will, in exceptional circumstances, consider appeals or other applications outside the scope of the Rules, this would rest on the consideration that “injustice may result if such an error as is alleged were left uncorrected”.<sup>20</sup> In other words, any exercise of inherent jurisdiction would have to address a lacuna in our legal regime. But this is not the case here.

12. In this context, the reliance of counsel on a decision of the International Criminal Tribunal for Rwanda (“ICTR”), which addressed a completely different factual situation, is misplaced. In this and other decisions, the ICTR Appeals Chamber held that it had the inherent power to review decisions of that tribunal’s President which concerned issues such as the status of counsel or the detention regime but only if those issues involved “the fairness of proceedings on appeal”.<sup>21</sup> This was because the Appeals Chamber had the “statutory duty” to safeguard the appellate proceedings.<sup>22</sup> Those cases are thus distinguishable from the instant case.

13. In sum, the Application is not admissible. We find it necessary, however, to add an observation. The Defence’s arguments seem to be based on the false premise that, absent the ability to contest the President’s Order as such, the Defence (or, for that matter, the Prosecutor) would be limited in their ability to challenge the consequences arising from an irregular composition of the Trial Chamber. We cannot agree with such a reading.

14. Indeed, it was open to the Defence to challenge the allegedly incorrect composition of the Trial Chamber with that Chamber directly. Counsel could have raised this as a certifiable issue in their motions seeking certification to appeal the Trial Chamber’s Decision on Defence Motions

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<sup>19</sup> *Ayyash et al.* Jurisdiction Decision, fns 54, 55 (providing references).

<sup>20</sup> STL, *El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, paras 54-55.

<sup>21</sup> ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006, para. 9; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on “Appellant Hassan Ngeze’s Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays”, 25 April 2005, p. 3; ICTR, *Nshogoza v. Prosecutor*, ICTR-2007-91-A, Decision on Request for Judicial Review of the Registrar’s And President’s Decisions Concerning Payment of Fees and Expenses, 13 April 2010, para. 14; *see also* ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, paras 19-20 (relating to the similar statutory obligation of Trial Chambers, but cautioning that “exercise of such power should, however, be closely related to the fairness of the trial, and it should not be used as a substitute for a general power of review”); ICTY, *Prosecutor v. Galić*, IT-98-29-AR54, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge, 13 March 2003, para. 8.

<sup>22</sup> ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana’s Motion for Assistance from Registrar in the Appeals Phase, 3 May 2005, paras 4 and 7.

for Certification for Appeal of the Trial Chamber's 13 September 2013 'Decision on Alleged Defects in the form of the Indictment', issued on 9 October 2013.<sup>23</sup> They chose not to do so.

15. We note that the Defence relies on case-law of the European Court of Human Rights to establish a right of appeal against the President's Order. However, in Latvia (from which one of the cases, dealing with irregular composition of the bench cited by the Defence, originated) the Code of Criminal Procedure requires any motion against the composition of a Chamber to be decided by the same Chamber, without the Judge who is sought to be disqualified.<sup>24</sup>

16. More importantly in the context of this Tribunal, Lebanese law does not have provisions that allow a direct challenge of the type raised by the Defence. In Lebanon, the proper way to challenge the allegedly irregular composition of a bench is to raise the matter before the Court of Cassation against a substantive criminal decision taken by that bench.<sup>25</sup> There is no provision to directly appeal, or otherwise seek remedy against, the appointment of judges to a bench—but this of course does not mean that parties in Lebanon are not allowed to challenge decisions issued by a purportedly irregularly constituted bench.

17. We further find the Application frivolous. Indeed, we have previously issued a warning that “we will not tolerate the filing of appeals that lack any serious legal or factual basis”.<sup>26</sup> This is the case here. We therefore order the Registrar, pursuant to Rule 126 (G), to withhold payment of fees associated with the production of the Application and the costs thereof, with the necessary information to be obtained from the Defence Office's Legal Aid Unit.

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<sup>23</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Decision on Defence Motions for Certification for Appeal of the Trial Chamber's 13 September 2013 'Decision on Alleged Defects in the form of the Indictment', 9 October 2013 (see fn. 2 for references to the motions filed by three Defence teams).

<sup>24</sup> See ECtHR, *Lavents v. Latvia*, 58442/00, Judgment, 28 November 2002 (cited by the Defence at fn. 8 of the Application), para. 49.

<sup>25</sup> Apart from cases of requests for disqualification (which are in any event not brought before the authority assigning judges to a bench), see in particular Article 296 (a) of the Lebanese New Code of Criminal Procedure, providing that a judgment may be challenged if it was delivered “by a body that was not legally constituted” (English text available on the Tribunal's website).

<sup>26</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.2, Decision on Appeal against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 22.

## DISPOSITION

**FOR THESE REASONS;**

**THE APPEALS CHAMBER**

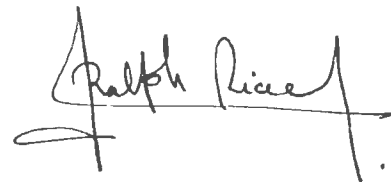
**FINDS** the Application inadmissible;

**ORDERS** the Registrar to withhold the fees associated with the production of the Application.

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

Dated 25 October 2013

Leidschendam, the Netherlands



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Judge Ralph Riachy

Presiding

