

**THE PRE-TRIAL JUDGE**

Case No.: **STL-17-07/I**

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

The Registrar: **Mr Daryl Mundis**

Date: **11 September 2017**

Original language: **French**

Classification: **Public**

**PUBLIC REDACTED VERSION OF THE “ORDER ON PRELIMINARY
QUESTIONS ADDRESSED TO THE APPEALS CHAMBER PURSUANT TO RULE
68 (G) OF THE RULES OF PROCEDURE AND EVIDENCE” OF 11 AUGUST 2017**

Office of the Prosecutor:

Mr Norman Farrell

Defence Office:

Mr François Roux



I. Introduction

1. Pursuant to Rule 68 (G) of the Rules of Procedure and Evidence (“Rules”), the Pre-Trial Judge may submit to the Appeals Chamber any question on the interpretation, in particular of the Statute and the Rules, regarding the applicable law in order to examine and rule on the indictment. After having read the counts in the indictment submitted by the Prosecutor on 21 July 2017¹ in the case STL-17-07, the Pre-Trial Judge considers that several questions arise regarding the interpretation of the applicable law. Those questions relate to the crime of illicit association provided for in Article 2 of the Statute and to the test for the *prima facie* review of counts of the indictment in the light of the supporting materials provided for in Rule 68 of the Rules.

2. The Pre-Trial Judge recalls that at his request,² on 16 February 2011, the Appeals Chamber rendered an interlocutory decision on the interpretation of a number of elements of the applicable criminal law under Article 2 of the Statute in connection with the review of the first indictment relating to the attack³ committed on 14 February 2005 against, among others, the former Lebanese Prime Minister Rafic Hariri (the “*Ayyash et al.* case”).⁴ Article 2 of the Statute provides that Lebanese criminal law is applicable to the prosecution and punishment of the crimes referred to in Article 1 of the Statute. That Article refers in particular to terrorist attacks which took place in Lebanon between 1 October 2004 and 12 December 2005 which are connected to the attack of 14 February 2005 and of a similar nature and gravity, which is the case in this instance.⁵ In the context of the *Ayyash et al.* case concerning the attack of

¹ [REDACTED], 21 July 2017 (“Submission”); Annex A, Indictment, confidential and *ex parte*, 21 July 2017 (“Indictment”).

² STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/I, F0927, Order on Preliminary Questions Addressed to the Appeals Chamber Pursuant to Rule 68 (G) of the Rules of Procedure and Evidence, 21 January 2011, (“Order of 21 January 2011”).

³ The term “attack” originates from Article 1 of the Statute. It bears no legal status in the context of the present order.

⁴ STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/I, F0936, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, (“Decision of 16 February 2011”).

⁵ STL, STL-11-02/CCS/PTJ, F0002, Decision on the Prosecutor’s Connected Case Submission of 30 June 2011, confidential and *ex parte*, 5 August 2011. This Decision was filed confidentially on 5 August 2011 and was subsequently reclassified “confidential and *ex parte*” by an order issued on 14 November 2011. *Cf.* STL, STL-11-02/CCS/PTJ, F0007, Reclassification Order, 14 November 2011.

14 February 2005, the Appeals Chamber ruled in particular on the notions of acts of terrorism and of conspiracy, as well as on the application of the modes of responsibility and cumulative charging. As the charge of criminal association was not included in that indictment, it was not clarified by the Appeals Chamber.⁶ The Pre-Trial Judge therefore cannot rely on a clearly established interpretation of the applicable law for the crime in question. However, such interpretation is imperative to guarantee an expeditious and fair trial, guided by the interests of justice and the general principles of law.

II. Discussion

3. In order to review the Indictment, the Pre-Trial Judge seeks clarifications from the Appeals Chamber relating to the interpretation of the Statute and of the Rules regarding the applicable law.

4. The first series of questions⁷ relates to the applicable criminal law defined in Article 2 of the Statute and the constituent elements of the crime of criminal association set out in Article 335 of the Lebanese Criminal Code as follows:

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.

5. In its Decision of 16 February 2011, the Appeals Chamber interpreted a number of provisions of Lebanese law in accordance with and in the light of international law, according

⁶ On 2 March 2012, the Pre-Trial Judge once again submitted to the Appeals Chamber preliminary questions relating to the issue of the precise definition of the crime of criminal association in the context of a request by the Prosecutor to amend the indictment in the *Ayyash et al.* case. (Cf. STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/I/PT, F0137, 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, 2 March 2012, ("Order of 2 March 2012"). After the Prosecution request to amend the indictment was dismissed for procedural reasons, the Appeals Chamber did not rule on those new preliminary questions.

⁷ Cf. Parts (A) and (C) of the disposition.

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”.⁸

6. The Pre-Trial Judge further notes that the Appeals Chamber states that the application and the interpretation of Lebanese law by the Tribunal may differ from that of Lebanese 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”.⁹

7. Lastly, the Pre-Trial Judge also notes that, in the Decision of 16 February 2011, the Appeals Chamber refers additionally to the crime of criminal association. It makes a distinction between the crime of conspiracy and criminal association which, in the Chamber’s view, represents a more “open” criminal agreement.¹⁰ It adds that when the purpose of an agreement is not specifically the commission of a crime against the security of a State (which is the specific purpose required for the crime of conspiracy), it may “however, be characterised as a ‘criminal association’ under Article 335 of the Lebanese Criminal Code”.¹¹

8. The second series of questions¹² regarding the applicable law relates to the criteria for review of the Indictment by the Pre-Trial Judge. Article 18 (1) of the Statute states that the Pre-Trial Judge shall confirm the indictment “[i]f satisfied that a *prima facie* case has been established by the Prosecutor”. Furthermore, pursuant to Rule 68 (F) of the Rules, the Pre-Trial Judge shall examine each of the counts in the indictment and any supporting materials provided by the Prosecutor to determine whether a “*prima facie*” case exists against a suspect. As neither the Statute nor the Rules specify the meaning to be given to those terms, the Pre-Trial Judge interpreted those expressions in the context of the *Ayyash et al.* case¹³ for the purposes of that review. He concluded that he should determine whether the review of the materials included with the indictment was based *prima facie* on “sufficient and credible evidence [...] to institute proceedings against the suspects”.¹⁴ He also recalled that his powers

⁸ Decision of 16 February 2011, para. 41 (footnote omitted).

⁹ *Id.*, para. 39 (footnotes omitted).

¹⁰ *Id.*, para. 193.

¹¹ *Id.*, para. 197.

¹² *Cf.* Part (D) of the disposition.

¹³ STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/I, F0012, 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.

¹⁴ *Id.*, para. 28.

were limited and that he could not under any circumstance act as a substitute for the trial judges, who bear the responsibility of determining whether the evidence has been established, at the end of the adversarial proceedings.¹⁵

9. Insofar as some of the supporting materials submitted to him for review in the context of the confirmation of the Indictment comprise evidence whose assessment as to the credibility and reliability was the subject of adversarial proceedings in the *Ayyash et al.* case (testimony and exhibits filed during those testimonies), the Pre-Trial Judge seeks from the Appeals Chamber clarifications of the applicable law relating to the test for the reliability of that evidence in the context of the confirmation of the Indictment.

III. Confidentiality

10. [REDACTED].¹⁶ [REDACTED].¹⁷ [REDACTED].¹⁸ [REDACTED].¹⁹
[REDACTED]²⁰ [REDACTED].²¹ [REDACTED].²² [REDACTED].²³

11. [REDACTED].²⁴

12. [REDACTED]²⁵ [REDACTED].²⁶ [REDACTED].

13. [REDACTED].²⁷ [REDACTED].

14. [REDACTED].

IV. Disposition

PURSUANT TO Rule 68 (G) of the Rules,

THE PRE-TRIAL JUDGE,

¹⁵ *Id.*, para. 26.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

SUBMITS respectfully to the Appeals Chamber the following preliminary questions:

A. Regarding the material element (*actus reus*) of the crime of criminal association:

- a) How should the material element (*actus reus*) of the crime of criminal association be defined?
- b) Is it necessary for all the participants in the criminal association to be identified?
- c) Is the crime of criminal association committed as soon as the agreement has been entered into?
- d) What specific form must the association or the written or oral agreement take? Is it necessary for the association or the agreement to be demonstrated by material acts or is community of thought sufficient?
- e) Is it necessary for the means of achieving the criminal purpose of the criminal association to be identified?
- f) Insofar as Article 335 of the Lebanese Criminal Code provides that the agreement may be established either “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”, what “crimes” or offences fall respectively into these two categories? Furthermore, is it necessary to list those specific offences or crimes as constituent elements of the crime of criminal association?
- g) In order to bear criminal responsibility in the context of a criminal association, must the perpetrator necessarily have participated in its establishment, as might be indicated by a literal interpretation of Article 335 of the Lebanese Criminal Code, or may they incur responsibility if they join an association already formed?

B. Regarding the intent (*mens rea*) of the crime of criminal association:

- a) How should the intent (*mens rea*) of the crime of criminal association be defined?

- b) To incur criminal responsibility, must a participant in the association or the agreement know precisely what the unlawful purpose of the criminal association is?

C. Regarding the crimes of conspiracy and criminal association:

- a) What are the characteristics that distinguish a criminal association which undermines “the authority of the State”, referred to in Article 335 of the Lebanese Criminal Code, from the crime of conspiracy referred to in Article 270 of the Lebanese Criminal Code and Article 7 of the Lebanese Law of 11 January 1958 increasing the penalties for sedition, civil war and interfaith struggle?²⁸
- b) In particular, what are the characteristics that distinguish a criminal association in order to assassinate Lebanese political figures from a conspiracy to commit a terrorist act through an agreement to assassinate Lebanese political figures?
- c) May the crime of conspiracy be considered to be a form of criminal association, or vice versa, and if so, in what context and under what conditions?
- d) May the crimes of conspiracy and criminal association be the subject of cumulative charging based on the same underlying conduct (see in particular Articles 181 and 182 of the Lebanese Criminal Code)? If not, in the context of a *concoures idéal d’infractions*, which of the two offences should be charged?

D. Regarding the criteria for reviewing the Indictment:

- a) To what extent must the Pre-Trial Judge assess the credibility and the reliability of the evidence presented in the *Ayyash et al.* case, which has been submitted as supporting materials to the Indictment, for his *prima facie* review?
- b) Insofar as some of the supporting materials submitted to him for review in the context of the confirmation of the Indictment constitute evidence whose assessment of the

²⁸ The Pre-Trial Judge notes that paragraphs 48 and 190 of the English and French versions of the Decision of 16 February 2011 refer erroneously to the punishment of the death penalty whereas Article 7 of the Law of 11 January 1958 punishes conspiracy as referred to in that Law with hard labour for life.

credibility and reliability was the subject of adversarial proceedings in the *Ayyash et al.* case (testimony and exhibits filed during those testimonies), must the Pre-Trial Judge take into account and assess, in the context of the confirmation of the Indictment, the submissions made during those adversarial proceedings? Does the fact that the content of those discussions has not been submitted to him pursuant to Rule 68 (B) of the Rules, but is publicly available, have an effect on the answer to the previous question?

- E.** Any other clarifications which, as determined by the Appeals Chamber, might stem from the answers to the previous questions.

[REDACTED]; and

ORDERS that the present order remain confidential until further notice.

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

Leidschendam, 11 September 2017

[stamp]

[signature]

Daniel Fransen
Pre-Trial Judge

