

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE TRIAL CHAMBER****SPECIAL TRIBUNAL FOR LEBANON**

**Case No:** STL-11-01/T/TC

**Before:** Judge David Re, Presiding  
Judge Janet Nosworthy  
Judge Micheline Braidy  
Judge Walid Akoum, Alternate Judge  
Judge Nicola Lettieri, Alternate Judge

**Registrar:** Mr Daryl Mundis

**Date:** 22 September 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH  
HASSAN HABIB MERHI  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

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**DECISION DENYING THE HEAD OF THE DEFENCE OFFICE CERTIFICATION  
TO APPEAL THE TRIAL CHAMBER'S 'DECISION ON OBSERVATIONS FROM  
HEAD OF DEFENCE OFFICE ON LEBANESE CRIMINAL LAW'**

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**Office of the Prosecutor:**Mr Norman Farrell & Mr Alexander Hugh  
Milne**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &  
Mr Chad Mair**Defence Office:**

Mr François Roux

**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothée Le Fraper  
du Hellen & Mr Jad Youssef Khalil**Legal Representatives of  
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar  
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yasser  
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Geoffrey Robert  
Ms Sarah Bafadhel

## BACKGROUND

1. In February 2011, before any indictments had been confirmed against any Accused in any case before the Special Tribunal—and hence there were no assigned Defence counsel—the Appeals Chamber issued a decision defining certain aspects of Lebanese criminal law, and the modes of liability for committing offences.<sup>1</sup>

2. This was done under Rule 176 *bis* (A) of the Special Tribunal’s Rules of Procedure and Evidence, on a referral by the Pre-Trial Judge under Rule 68 (G).<sup>2</sup> The Prosecutor—and the Head of the Defence Office in the absence of assigned Defence counsel—made relevant legal submissions at the time. The decision was necessarily *ex parte* any Defence counsel because there were then no Accused. After the Trial Chamber’s decisions to proceed to trial *in absentia*, first in 2012 against the then four Accused, Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, and then again in 2013 against Mr Hassan Habib Merhi,<sup>3</sup> the Head of the Defence Office assigned counsel to represent each of the five Accused.<sup>4</sup>

3. Rule 176 *bis* (C) allows an Accused to seek reconsideration of an Appeals Chamber decision under Rule 176 *bis* (A) within thirty days of receiving disclosure of the material supporting the confirmation of an indictment.<sup>5</sup> No Accused sought such reconsideration at the time. However, the rule specifies that any decision is made ‘without prejudging the rights of any accused’. Moreover, and pertinently, the Appeals Chamber’s decision was rendered over six and a half years ago.

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<sup>1</sup> STL-11-01/I/AC/R176*bis*, F0936, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011.

<sup>2</sup> Rule 68 (G) provides that the Pre-Trial Judge may submit to the Appeals Chamber any preliminary question on the interpretation (relevantly) of the Statute of the Special Tribunal or its Rules regarding the applicable law ‘that he deems necessary in order to examine and rule on the indictment’. *See*, for example, STL-17-07/I/AC, F0003, Version Publique Expurgée de l’« Ordonnance Relative aux Questions Préjudicielles Adressées à la Chambre d’appel Conformément à l’article 68 G) du Règlement De Procédure et de Preuve » du 11 Août 2017, 11 September 2017.

<sup>3</sup> STL-11-01/I/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0112, Decision to Hold Trial *In Absentia*, 1 February 2012; STL-13-04/I/TC, *Prosecutor v. Merhi*, F0037, Decision to Hold Trial *In Absentia*, 20 December 2013; *see also* STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0320, Decision on Reconsideration of the Trial *In Absentia* Decision, 11 July 2012; STL-11-01/PT/AC/AR126.1, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0012, Decision on Defence Appeals against Trial Chamber’s Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012.

<sup>4</sup> STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0113, Assignment of Counsel for the Proceedings Held *In Absentia* pursuant to Rule 106 of the Rules, 2 February 2012; STL-13-04/I/PTJ, *Prosecutor v. Merhi*, F0039, Assignment of a Counsel for the *In Absentia* Proceedings Held pursuant to Rule 106 of the Rules, 20 December 2013; *see also* F0049, Assignment of Co-Counsel, 30 December 2013. Subsequent assignments have been made during the trial to replace Defence counsel.

<sup>5</sup> Under Rule 110 (A) (i).

4. As the Accused were not parties to the Appeals Chamber's decision, and no victims were then participating, the interests of justice required the Trial Chamber to seek—before the close of the Prosecution's case—their submissions and observations concerning the current state of Lebanese law. Consequently, the Trial Chamber, on 27 July 2017, after holding a case-management meeting at which timetabling for such an order was discussed,<sup>6</sup> ordered the Parties and the Legal Representatives of Victims to file submissions on substantive Lebanese law by Friday 8 September 2017.<sup>7</sup> Orders such as this are basic judicial case-management tools.<sup>8</sup>

5. A month later, however, on 25 August 2017, and in an *ex parte* email sent to the five judges working in the Trial Chamber, the Head of the Defence Office announced his intention to intervene and to file observations without specifying on what issue.<sup>9</sup> The Trial Chamber then sought information from the Head of the Defence Office as to why he wished to intervene under Rule 57 (F), namely, whether his intended intervention related to the 'general interest to defence teams', the fairness of the proceedings, or the rights of the Accused.<sup>10</sup> This was because the four Accused are each represented by three assigned counsel,<sup>11</sup> and circumstances had very much changed since February 2011.

6. The Head of the Defence Office, however, failed to so inform the Trial Chamber. Consequently, on 7 September 2017, the Trial Chamber decided that any observations should follow the letter of the order of 27 July 2017, namely, 'the elements of the offences charged in the amended consolidated indictment, on the modes of liability applicable under the relevant Lebanese laws, and on any other relevant legal matter'. The decision also specified a word limit for the observations (3,000 words) and that the 'observations must be sourced to the

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<sup>6</sup> And at which the Head of the Defence Office was represented by the chief of the legal advisory section of the Defence Office.

<sup>7</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3254, Order to Parties and Legal Representatives of Victims to File Submissions and Observations on Lebanese Law, 27 July 2017.

<sup>8</sup> For example, Rule 130 (A) 'conduct of the proceedings' provides that the Trial Chamber, after hearing the Parties may give directions on the conduct of the proceedings, including making various orders.

<sup>9</sup> Coincidentally, on 24 August 2017, the Appeals Chamber issued a scheduling order in a Rule 176 *bis* matter, STL-17-07/I/AC/R176*bis*, F0006, Scheduling Order for Written Submissions pursuant to Rule 176 *bis* (B) of the Rules, 24 August 2017 ('Appeals Chamber Scheduling Order'). The Head of the Defence Office's written submissions in response to this scheduling order have a great deal of similarity to the filing that is the subject of this decision; *see* F0012, Public Redacted Version of the "Defence Office Submissions Following the Order of the Appeals Chamber dated 24 August 2017" dated 7 September 2017, 11 September 2017 ('Defence Office Submissions to the Appeals Chamber').

<sup>10</sup> Email, 29 August 2017 from Trial Chamber's senior legal officer to the Head of the Defence Office.

<sup>11</sup> Moreover, the Defence of each Accused is properly assisted by 16 staff members, plus interns and consultants, divided between the four Defence teams. All are employed or engaged under the auspices of the Head of the Defence Office.

relevant Lebanese statutory or case law and any case or statutory provision cited must be filed—with English translations for the three judges who are not Arabic speakers—as an annex.<sup>12</sup>

### **ISSUE FOR CERTIFICATION**

7. The Head of the Defence Office, however, filed no observations related to the decision or the general order of 27 July 2017, but instead filed a document asking the Trial Chamber to issue a ‘stay’ on the issue of any applicable law,<sup>13</sup> and further, in a separate filing, sought certification for interlocutory appeal of the Trial Chamber’s decision of 7 September 2017.<sup>14</sup> The Trial Chamber has separately dismissed the application for a stay.<sup>15</sup> The issue identified for certification is,

Can the right of audience of the Head of Defence Office, in the absence of duly justified exceptional circumstances, be subject to oversight *a priori* by the Chamber?

8. This question, however, is unclearly expressed.<sup>16</sup> Issues for certification must be posed with clarity; a court should not be required to guess at or to have to attempt to glean the sense of the submission or the relief sought.

9. The issue also somewhat misstates the effect of the decision. The Trial Chamber did not deny the Head of the Defence Office a right of audience; rather it regulated, as it could with any Party, participant, or relevant other person such as the Registrar, the manner in

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<sup>12</sup> F3313, Decision on Observations from Head of Defence Office on Lebanese Criminal Law, 7 September 2017 (‘Decision of 7 September 2017’), paras 22-23; *see also* F3308, Prosecution Response to ‘Observations du Chef du Bureau de la Défense sur son droit d’audience proprio motu et demande de clarification’, 4 September 2017; F3306, Observations du Chef du Bureau de la Défense sur son droit d’audience *proprio motu* et demande de clarification, 31 August 2017; F3299, Prosecution Response to Head of Defence Office Indication of Submissions under Rule 57 (F), 29 August 2017.

<sup>13</sup> F3316, Submissions *proprio motu* from the Head of Defence Office following the Trial Chamber’s Order of 27 July 2017 on the Applicable Law, 8 September 2017.

<sup>14</sup> F3319, Requête en certification de la décision de la Chambre de première instance du 7 septembre 2017 sur le droit d’audience du Chef du Bureau de la Défense, 8 September 2017.

<sup>15</sup> F3332, Decision Dismissing the Head of the Defence Office’s Application to Stay any Ruling on the Applicable Law in the Proceedings, 21 September 2017.

<sup>16</sup> The Latin phrase *a priori*, translated as ‘from what is before’ is legally defined as ‘[d]eductively; from the general to the particular, or from previous experiences or facts to an inference of what the likely result or effect will be’; *see* Bryan A. Garner (ed.), *Black’s Law Dictionary*, 10<sup>th</sup> ed. (Thompson Reuters, 2014), p. 123. The Oxford On-line Dictionary defines it, as an adjective, as ‘[r]elating to or denoting reasoning or knowledge which proceeds from theoretical deduction rather than from observation or experience’, and, as an adverb, ‘[i]n a way based on theoretical deduction rather than empirical observation’. The use of ambiguous Latin in legal submissions is strongly discouraged as it may obfuscate the intended meaning.

which it would receive legal submissions on a narrowly defined issue. (And in any event, the Head of the Defence Office made no substantive or relevant legal submission.)<sup>17</sup>

*A court's inherent and implied powers to regulate its proceedings*

10. The Trial Chamber, like any other court, can regulate—in a lawful manner—how *anyone* may appear before it, either in exercising a right of audience or in granting one, such as to *amicus curiae* or another type of intervener. The Trial Chamber noted in its decision,

It is trite to state that the Trial Chamber, like any other court, has the inherent power to control its proceedings and that it may make any necessary orders to the Registrar, Parties, Legal Representatives of Victims and Head of Defence Office in exercising these powers. This may include orders on the content, size and timetable for submissions, observations or other filings, or any matters occurring in the courtroom. Here, the Trial Chamber did not seek observations from the Head of Defence Office on Lebanese law, and no-one has sought to file an *amicus curiae* brief under Rule 131.<sup>18</sup>

11. In the context of a decision relating to legal assistance to Defence counsel, the Trial Chamber considered these inherent powers, noting (footnotes omitted),

International courts and tribunals have identified—in the absence of express statutory powers—‘inherent powers’ necessary to exercise their functions. The International Court of Justice elaborated on these in the *Northern Cameroons* and *Nuclear Test* cases. In the latter, it found that:<sup>19</sup>

the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the “inherent limitations on the exercise of the judicial function” of the Court, and

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<sup>17</sup> Coincidentally, on 7 September 2017, the Head of the Defence Office also declined to make legal submissions in the Rule 176 *bis* case before the Appeals Chamber, despite its order that he do so; see Appeals Chamber Scheduling Order; Defence Office Submissions to the Appeals Chamber; F0015, Prosecution Response to Defence Office Submissions of 7 September 2017 and Request to Appeals Chamber Arising from Defence Office Submissions, 14 September 2017.

<sup>18</sup> Decision of 7 September 2017, para. 20.

<sup>19</sup> F2286, Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013, 23 October 2015 (‘Nashabe Decision’), para. 30, fn 37 (citing ICJ, *Nuclear Tests Case, New Zealand v. France*, Judgment, I.C.J. Reports 1974, p. 457, at para. 23), 38 (stating ‘Referring to ICJ, *Northern Cameroons*, Judgment, I.C.J. Reports 1963, at p. 29’).

to “maintain its judicial character”. Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

12. And, further,

The Trial Chamber may intervene in exercising its inherent powers, pursuant to Article 16 of the Statute of the Special Tribunal, and in the absence of any specific statutory provision, to ensure a fair trial and to maintain the integrity of its proceedings.<sup>20</sup>

13. These principles apply equally to this application to certify for interlocutory appeal the Trial Chamber’s decision. The decision delimiting the parameters of legal submissions on an issue in the case—including the date for submission, the word length and the general content—falls squarely within the Trial Chamber’s inherent and implied powers to control its own proceedings including ‘to ensure a fair trial and to maintain the integrity of its proceedings’.

*Why the decision cannot be certified for interlocutory appeal*

14. In relation to the Head of the Defence Office’s participation, the Trial Chamber has held that a right of audience ‘does not provide a general right of participation in the proceedings in the same manner as that of a Party or a participating victim, including to appeal decisions or a judgement’.<sup>21</sup> Although the issue identified—at least in the abstract—conceivably could affect the rights of the Head of the Defence Office in his statutory position, and hence be *potentially* certifiable for interlocutory appeal, it cannot, on the facts, satisfy any of the tests in Rule 126 (C).

15. A decision may be certified for interlocutory appeal under Rule 126 (C) if it identifies an issue that would *significantly* affect the fair *and* expeditious conduct of the proceedings or the outcome of the trial *and* for which immediate resolution by the Appeals Chamber may

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<sup>20</sup> Nashabe Decision, para. 34.

<sup>21</sup> F1472, Decision on Certification of ‘Decision on Trial Management and Reasons for Decision on Joinder’, 31 March 2014, para. 20, dismissing an application by the Head of the Defence Office for certification to appeal the decision; *see also* para. 26.

materially advance the proceedings. As the Trial Chamber and Appeals Chamber have held, it is a high threshold; consequently certification must be an exception.<sup>22</sup>

16. The Trial Chamber’s decision to confine the Head of the Defence Office’s observations on a specific legal issue to the same topic as that of the Parties and participants—especially in the absence of any information about the topic of his proposed intervention—cannot *in any way*, much less *significantly*, ‘affect the fair and expeditious conduct of the proceedings, or the outcome of the trial’. The application is without merit and is therefore dismissed.<sup>23</sup>

**FOR THESE REASONS**, the application is dismissed.

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

Leidschendam,  
The Netherlands  
22 September 2017

*David Re*

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Judge David Re, Presiding

*Janet Nosworthy*

\_\_\_\_\_  
Judge Janet Nosworthy

*Micheline Braidy*

\_\_\_\_\_  
Judge Micheline Braidy

<sup>22</sup> See e.g. F2987, Written Reasons for Decision Denying Certification to Appeal the “Decision Clarifying Mr Gary Platt’s Area of Expertise” dated 25 January 2017, 14 February 2017, paras 5-6; F2874, Decision Denying Certification to Appeal ‘Decision on the Admission of Call Sequence Tables related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements’, 6 December 2016, paras 5-6; F1798, Decision on Application for Certification of Decision regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, paras 12-14; STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecution, 13 November 2012, paras 11-15.

<sup>23</sup> The Trial Chamber therefore did not await the Prosecution’s response and notified the Parties and participants that it was not required; email from Trial Chamber’s senior legal officer on 21 September 2017.

