



Office of the Prosecutor

Bureau du Procureur

المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

مكتب المدعي العام

BEFORE THE APPEALS CHAMBER
Special Tribunal for Lebanon

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

Before: **Judge Sir David Baragwanath, Presiding**
Judge Ralph Riachy, Judge Rapporteur
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko
Judge Kjell Erik Björnberg

Registrar: **Mr. Herman von Hebel**

Date: **28 March 2012**

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THE PROSECUTOR

v.

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

**PROSECUTION REQUEST FOR LEAVE TO RESPOND TO
DEFENCE SUBMISSIONS ON ORDER FOR STAY**

Office of the Prosecutor:
Mr. Norman Farrell

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

Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz and Mr. John Jones

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

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young and Mr. Guénaél Mettraux



I. INTRODUCTION

1. The Prosecution seeks leave to file this Response to the submissions of Counsel assigned to Mustafa Amine Badreddine (Counsel for Badreddine),¹ filed pursuant to the Order for Stay.² By his Order for Stay, the President stayed the Scheduling Order³ pending the final decision of the Appeals Chamber on the matter of the Pre-Trial Judge's Preliminary Questions.⁴ Consequently, the parties and the Defence Office are awaiting a decision by the Appeals Chamber on this matter.
2. The Prosecution did not file further observations regarding the Order for Stay, as the Prosecution Submissions sufficiently dealt with the reasons that led to the stay of the Rule 176bis proceedings.⁵
3. The Submissions of Counsel for Badreddine of 21 March 2012 reference its Submissions of 15 March 2012,⁶ and raise issues similar to those put forward by Counsel for Assad Hassan Sabra (Counsel for Sabra)⁷ and Hussein Hassan Oneissi (Counsel for Oneissi)⁸ pursuant to the Scheduling Order.

¹ *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC, Observations de la Défense de M. Badreddine suite à l'Ordonnance du Président du 16 mars 2012, 21 March 2012. On 23 March 2012, Counsel for Badreddine filed a redacted version of this submission (Submissions of Counsel for Badreddine of 21 March 2012).

² *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC, Order for Stay of the Scheduling Order of 7 March 2012 and Giving Further Directions, 16 March 2012 (Order for Stay).

³ *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC, Scheduling Order for the Second Submission by the Pre-Trial Judge Pursuant to Rule 68(G), 7 March 2012 (Scheduling Order).

⁴ *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT, 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 (Preliminary Questions).

⁵ *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Prosecution Submissions Pursuant to the President's Scheduling Order of 7 March 2012, 15 March 2012 (Prosecution Submissions).

⁶ *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC, Mémoire de la Défense de M. Badreddine en réponse à l'Ordonnance du Président du Tribunal du 7 mars 2012, 15 March 2012 (Submissions of Counsel for Badreddine of 15 March 2012).

⁷ *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Defence Submissions Pursuant to President's Order of 7 March 2012, 9 March 2012 (Submissions of Counsel for Sabra).

⁸ *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC, Observations of the Defence for Mr Oneissi in Compliance with the President of the Tribunal's Order of 7 March 2012, 13 March 2012 (Submissions of Counsel for Oneissi).

4. As a result of the extraneous submissions and requests of Counsel for Badreddine (similar to those of Counsel for Sabra and Oneissi) – which mostly relate to whether the Pre-Trial Judge or the Trial Chamber is seized of or assigned the case – the Prosecution is obliged to seek leave to submit this Response in order to be heard on matters of jurisdiction, as well as to assist the Appeals Chamber.
5. The Prosecution submits that the Appeals Chamber should dismiss, or at the very least disregard, the submissions of Counsel which exceeded the permitted scope of the Scheduling Order and the Order for Stay. The Prosecution only seeks leave if the Appeals Chamber intends to consider or address these Defence arguments. If the Appeals Chamber decides on the issue before it without regard to these Defence submissions, which the Prosecution considers extraneous, then leave to respond may not be required.

II. PROCEDURAL HISTORY

6. On 8 February 2012, the Prosecution filed before the Pre-Trial Judge a confidential and *ex parte* request for leave to amend the confirmed indictment, accompanied by a confidential and *ex parte* amended indictment, pursuant to Rule 71(A)(ii).⁹
7. On 2 March 2012, the Pre-Trial Judge submitted to the Appeals Chamber preliminary questions regarding the offence of criminal association applicable to the Tribunal, based on Rule 68(G) and Rule 71(A)(ii).¹⁰
8. On 7 March 2012, the President issued a Scheduling Order by which he ordered the parties and the Defence Office to file written observations by 15 March 2012 on the following: (i) whether the Appeals Chamber should hear and determine the Pre-Trial Judge's request; (ii) the questions raised by the Pre-Trial Judge; and (iii) whether there is need for an oral hearing in the matter.¹¹ Further, the President ordered the parties to file by 27 March 2012 submissions in response to the other parties.

⁹ *Prosecutor v Ayyash et al*, Case No. STL-11-01/I/PTJ, Prosecution Request for Leave to Amend the Indictment Pursuant to Rule 71(A)(ii), Submission of an Amended Indictment, and Related Prosecution Applications, 8 February 2012 (Amended Indictment Request).

¹⁰ Preliminary Questions.

¹¹ Scheduling Order.

9. On 13 and 15 March 2012, in the confidential and *inter partes* Decision and Clarification, respectively, the Pre-Trial Judge rejected for procedural reasons the Amended Indictment Request.¹²
10. Between 9 and 15 March 2012, the parties and the Defence Office filed submissions pursuant to the Scheduling Order.¹³
11. On 16 March 2012, the President issued his Order for Stay which stayed the Scheduling Order until further order because the Pre-Trial Judge's Decision raised new issues as to the admissibility of the Preliminary Questions. The President directed the parties and the Defence Office to file by 21 March 2012 any further submissions on this issue in light of the Pre-Trial Judge's rejection of the Amended Indictment Request, and on the need for a public hearing on this matter.¹⁴ The President also reserved leave to all parties to apply by memorandum for further directions in any other respect.
12. On 21 March 2012, Counsel for Badreddine filed observations regarding the President's Order for Stay.¹⁵
13. The Prosecution did not file further observations regarding the President's Order for Stay, as the Prosecution Submissions sufficiently dealt with the reasons that led to the stay of the Rule 176bis proceedings.

¹² *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Décision relative à la requête du Procureur du 8 février 2012 aux fins de déposer un acte d'accusation modifié, 13 March 2012 (Decision), *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Ordonnance relative à la requête urgente du Procureur aux fins de clarification de la Décision du Judge de la Mise en état du 13 mars 2012, 15 March 2012 (Clarification).

¹³ Submissions of Counsel for Sabra; Submissions of Counsel for Oneissi; Submissions of Counsel for Badreddine of 15 March 2012; *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/AC, Observations of the Defence Office, 15 March 2012 (Defence Office Submissions); Prosecution Submissions.

¹⁴ Order for Stay, Disposition.

¹⁵ Submissions of Counsel for Badreddine of 21 March 2012.

III. GROUNDS FOR LEAVE TO RESPOND TO DEFENCE SUBMISSIONS

14. Counsel for Badreddine submitted, *inter alia*, that the *Ayyash et al.* case was assigned to the Trial Chamber when the proceedings *in absentia* were initiated.¹⁶ These arguments are similar to those raised by Counsel for Sabra and Oneissi, and Counsel for Badreddine's previous submission, which also rely on the assignment of Counsel to the accused as a basis for the claim that the Trial Chamber is now assigned the case and, as a consequence, the Prosecution must file any request to amend the confirmed indictment before the Trial Chamber pursuant to Rule 71(A)(iii).¹⁷ Counsel for Badreddine argues, in its Submissions of 21 March 2012, that the Pre-Trial Judge no longer has the power to rule on an amendment of the confirmed indictment at this stage of the proceedings,¹⁸ and in its Submissions of 15 March 2012, expressly requested the Appeals Chamber to "refer the Prosecutor before the Trial Chamber."¹⁹ In addition, Counsel for Sabra specifically submitted that "the Prosecution misdirected its application to amend the Indictment by sending it to the Pre-Trial Judge rather than to the Trial Chamber,"²⁰ and that the Appeals Chamber has the inherent jurisdiction to make such a finding.²¹
15. The Prosecution hereby seeks leave to respond to these specific claims of Counsel for Badreddine, which raise issues similar to those put forward in previous submissions by other Counsel, as set forth above. The Prosecution is of the view that the extraneous submissions and requests – which mostly relate to whether the Pre-Trial Judge or the Trial Chamber is seized of or assigned the case – compels the Prosecution to seek leave to submit this Response in order to be heard on matters of jurisdiction, as well as to assist the Appeals Chamber.

¹⁶ See, *inter alia*, Submissions of Counsel for Badreddine of 21 March 2012, paras. 11-13:

¹⁷ See, *inter alia*, Submissions of Counsel for Sabra, para. 12, 14; Submissions of Counsel for Oneissi, paras. 14-17, 19; Submissions of Counsel for Badreddine of 15 March 2012, paras. 4-13.

¹⁸ See, *inter alia*, Submissions of Counsel for Badreddine of 21 March 2012, para. 11.

¹⁹ Submissions of Counsel for Badreddine of 15 March 2012, p. 13.

²⁰ Submissions of Counsel for Sabra, para. 14.

²¹ *Id.*, para. 15.

IV. SUBMISSIONS

A. Inadmissible submissions by the Defence

16. Counsel for Badreddine, as well as Counsel for Sabra and Oneissi, alleges claims and seeks relief which exceed the scope of the permitted submissions as set forth in the Scheduling Order and the Order for Stay. In the Scheduling Order, the parties were limited to written submissions regarding: (i) whether the Appeals Chamber should hear and determine the Pre-Trial Judge's request; (ii) the questions raised by the Pre-Trial Judge; and (iii) whether there is need for an oral hearing in the matter.²² The first question relates to the Pre-Trial Judge's decision to initiate Rule 68(G) proceedings, and not whether the Pre-Trial Judge had jurisdiction to rule on the Amended Indictment Request. The Order for Stay permitted the parties to file any further submissions on the issue of the stay in light of the Pre-Trial Judge's rejection of the Amended Indictment Request, and on the need for a public hearing on the matter.²³
17. The Prosecution submits that Counsel for the accused cannot litigate these issues which are not before the Appeals Chamber. The Appeals Chamber's jurisdiction is set out in Article 26 of the Statute and Rules 176 and 176*bis*. The Appeals Chamber cannot hear first instance issues from "which no appeal could be brought"²⁴ through "inherent jurisdiction." Further, Counsel for Badreddine, as well as Counsel for Sabra and Oneissi, has not stated any statutory ground or Rule to grant the Appeals Chamber with jurisdiction, at this time, to determine whether the Trial Chamber is currently seized of (and therefore assigned) the case.²⁵ Indeed, Counsel for Sabra admits that the issue of the Appeals Chamber's jurisdiction is "unclear" and, in its alternative

²² Scheduling Order.

²³ Order for Stay, Disposition.

²⁴ *In the Matter of El Sayed*, Case No. CH/AC/2011/02, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents, 7 October 2011, para. 23

²⁵ This is the underlying relief sought by Counsel for Badreddine, Sabra, and Oneissi. See, *inter alia*, Submissions of Counsel for Badreddine of 21 March 2012, p. 5, and 15 March 2012, p. 13; Submissions of Counsel for Sabra, para. 19; Submissions of Counsel for Oneissi, paras. 27-28.

submission, concedes that the Pre-Trial Judge should “consider inviting the parties to be heard on this matter.”²⁶

18. In addition, procedural fairness prohibits Counsel for the accused from seeking first instance relief from the Appeals Chamber. If a party is permitted to seek immediate, first instance relief from the appellate body of a court, this would, *inter alia*, deny procedural fairness to the other parties by denying their right of appeal, or at the very least their right to seek leave to appeal. It would also undermine the authority of the chamber of first instance, and the overall judicial structure of the court. In sum, the Prosecution submits that the specified issues raised by Counsel for the accused are inadmissible.

B. The status of the case

19. Contrary to Counsel for Badreddine, as well as Counsel for Sabra and Oneissi, the Pre-Trial Judge, pursuant to Rule 95(B), remains seized of (*i.e.*, assigned) the case at this time.²⁷ [Redacted].²⁸ Under Rule 95(B), the Trial Chamber only becomes “seized of the case” when it has received the case file from the Pre-Trial Judge.
20. In terms of the Rule 106 proceedings, the Trial Chamber, by virtue of the Order of the Pre-Trial Judge of 17 October 2011, was seized only of a request from the Pre-Trial Judge pursuant to Rule 105*bis*(A) to initiate proceedings *in absentia*. The Trial Chamber’s role was limited to that specific request as explicitly authorised by the Rules and stated by the Pre-Trial Judge in his Order.²⁹ This interpretation is further supported by the fact that, absent Rule 106 proceedings, the Trial Chamber would not

²⁶ Submissions of Counsel for Sabra, para. 15.

²⁷ *See, inter alia*, Submissions of Counsel for Badreddine of 21 March 2012, para. 11, and 15th March 2012, paras. 12-13; Submissions of Counsel for Sabra, paras. 12-15; Submissions of Counsel for Oneissi, paras. 15-17, 19, 28.

²⁸ [Redacted].

²⁹ The Pre-Trial Judge, in his Order of 17 October 2011, stated that “pursuant to Rule 105*bis*(A) of the Rules of Procedure and Evidence (the “Rules”), the Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) seizes the Trial Chamber for the purpose of ruling on the question of determining whether it is appropriate to initiate proceedings *in absentia* against Messrs. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra”. *Prosecutor v Ayyash et al*, Case No. STL-11-01/I, Order to Seize the Trial Chamber Pursuant to Rule 105*bis*(A) of the Rules of Procedure and Evidence in Order to Determine Whether to Initiate Proceedings *In Absentia*, 17 October 2011, para. 1.

have a role in the proceedings (save for, perhaps, the initial appearance of the accused pursuant to Rule 98) until Rule 95(B) seizure of the case occurs. The Rules were not drafted to create two separate tracks for when the Trial Chamber can be “seized” of the case (*i.e.*, at different times depending on whether there is a trial *in absentia* or a trial in the presence of the accused). In fact, Rule 107 states that: “The rules on pre-trial, trial, and appellate proceedings shall apply *mutatis mutandis* to proceedings *in absentia*.” As such, it defies logic that the Trial Chamber would be assigned the case at different points in time, depending on the nature of the proceedings.

21. Counsel for Sabra ignores the Rules of this Tribunal and instead relies on the Rules of the International Criminal Tribunal for the former Yugoslavia (ICTY) for the proposition that the Trial Chamber at this Tribunal has been assigned the case. Counsel for Sabra appears to suggest that ICTY Rule 62(A) is applicable or analogous to the matter at hand.³⁰ The procedure of assignment of a case at the ICTY is distinguishable because, *inter alia*, it requires: (i) transfer of an accused to the seat of the ICTY; and (ii) an order of the ICTY President to assign the case to a Trial Chamber.³¹ As noted above, this is not how a case is assigned at this Tribunal.
22. Further, Counsel for Sabra misinterprets the Rules and argues that the decision to hold the trial *in absentia* and the subsequent assignment of Counsel “has taken the place of the initial appearance of the accused.”³² As discussed above, the trial *in absentia* decision was explicitly authorised pursuant to Rules 105*bis* and 106, which seized the Trial Chamber for a limited purpose. Nothing in the Rules suggests that a case is

³⁰ The portion of ICTY Rule 62(A) quoted in Submissions of Counsel for Sabra states: “Upon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber” (Submissions of Counsel for Sabra, fn. 6).

³¹ Submissions of Counsel for Sabra cites one decision (Submissions of Counsel for Sabra, fn. 6: *Prosecutor v Rasim Delić*, Case No. IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006 (ICTY Trial Chamber) (*Delić Decision*)). It is unclear as to the relevance of the *Delić Decision* to the issue at hand. Regardless, it should be mentioned that the ICTY President, noting ICTY Rule 62, assigned the case to the Trial Chamber, which then granted the Trial Chamber jurisdiction in order to, *inter alia*, review proposed amendments to the indictment (*Prosecutor v Rasim Delić*, Case No. IT-04-83-I, Order Assigning a Case to a Trial Chamber, 25 February 2005 (ICTY President)). Assignment of the *Delić* case to the Trial Chamber was triggered by the Order of the ICTY President of 25 February 2005 and not due to the initial appearance of the accused, especially since the initial appearance of the accused took place afterwards on 3 March 2005 (*Delić Decision*, p. 43). As submitted by the Prosecution, ICTY Rule 62(A) is neither applicable nor analogous to the situation at this Tribunal.

³² Submissions of Counsel for Sabra, fn. 6; *see also* Submissions of Counsel for Oneissi, para. 15; *supra* note 31.

assigned to the Trial Chamber when a decision is taken pursuant to Rule 106, and assignment of a case is not predicated on the appearance of any accused. As noted above, the Trial Chamber is seized of a case by the Pre-Trial Judge pursuant to Rule 95(B). All other pre-trial, trial, and appellate proceedings occur pursuant to Rule 107, as set forth above. Without Rule 107, the relevant Rules would not apply to proceedings *in absentia* simply based on the argument that certain steps had taken the place of the initial appearance of the accused.

23. Moreover, pursuant to the Statute and the Rules, the President of this Tribunal does not have the authority to assign a case to the Trial Chamber, which appears to be a purposeful decision of the drafters of the Rules. Although Rule 98(A) of this Tribunal appears to be based on ICTY Rule 62(A), it does not provide for the assignment of the case to a Trial Chamber by the President.³³ Given the apparent purposeful omission in Rule 98(A) of the assignment regime, the only Rule which speaks to when and how the Trial Chamber may be seized or assigned a case is Rule 95(B).
24. Further, Counsel for Badreddine, as well as Counsel for Sabra, incorrectly interprets Rule 95. Counsel for Badreddine in effect proposes a two-track procedural system whereby the Pre-Trial Judge coordinates (“*coordonée*”) the pre-trial proceedings, but the Trial Chamber is concurrently assigned the case and may hear pre-trial motions such as requests to amend an indictment.³⁴ Counsel for Sabra argues that Rule 95 does not use the term “assigning.”³⁵ Contrary to these arguments, it is clear that to be assigned the case requires the Trial Chamber to be seized of the case, pursuant to Rule 95(B). To argue otherwise would run afoul of the Rules, both in letter and legislative scheme, and create the situation where the Trial Chamber is assigned the case, but not seized of it. The drafters of the Rules have wisely established a bright-line distinction whereby the Pre-Trial Judge remains seized of (*i.e.*, assigned) the case until he provides the case file to the Trial Chamber, which then becomes seized of (*i.e.*, assigned) the case.

³³ See *supra* note 31.

³⁴ Submissions of Counsel for Badreddine of 21 March 2012, para. 11, and 15 March 2012, paras. 6-10; see also Submissions of Counsel for Oneissi, para. 16.


³⁵ Submissions of Counsel for Sabra, fn. 5, 8.

- 25. As a result, any amendments to the confirmed indictment, sought before the Trial Chamber is seized of the case, require the leave of the Pre-Trial Judge pursuant to Rule 71(A)(ii).
- 26. The Prosecution reserves the right to respond to any other submissions filed, or which may be subsequently filed, by Counsel for the accused and/or the Defence Office on these matters.

Respectfully submitted,

N. Farrell.

 Norman Farrell
 Prosecutor



Dated this 28th day of March 2012
Leidschendam, The Netherlands

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