

BEFORE THE TRIAL CHAMBER
SPECIAL TRIBUNAL FOR LEBANON

Case No: STL-11-01/PT/TC

Before: Judge Robert Roth, Presiding
Judge Micheline Braidy
Judge David Re
Judge Janet Nosworthy, Alternate Judge
Judge Walid Akoum, Alternate Judge

Registrar: Mr. Herman von Hebel

Date: 27 June 2012

Filing Party: Defence Counsel

Original Language: English

Classification: PUBLIC

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

**JOINT SUBMISSION REGARDING THE MATERIAL RELIED UPON BY THE
TRIAL CHAMBER IN ITS *ABSENTIA* DECISION**

Office of the Prosecutor:
Mr. Norman Farrell

Defence Office:
Mr. François Roux

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

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

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

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

Counsel for Assad Sabra:
Mr. David Young
Dr. Guénaél Mettraux



I. SHORT PROCEDURAL BACKGROUND

1. On 10 June 2011, the Prosecutor filed an amended indictment in the case of *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*.
2. On 17 October 2011, pursuant to Rule 105bis (A) of the Rules, the Pre-Trial Judge asked the Trial Chamber to determine whether to initiate proceedings *in absentia* against the four Accused.¹
3. On 01 February 2012, the Trial Chamber ordered that proceedings should take place *in absentia*.² Representatives for the accused were not given an opportunity to be heard prior to the *Absentia* Decision.
4. On 22, 23 and 24 May 2012, Defence Counsel filed Motions for Reconsideration of the *Absentia* Decision on behalf of all four Accused.³ In its *Absentia* Decision, the Trial Chamber relied upon a number of documents to make its findings – including its impugned findings. As part of its motions for reconsideration, the Defence had asked to be given access to the material and information relied upon by the Trial Chamber to render its impugned *Absentia* Decision.⁴
5. On 12 June 2012, the Prosecution filed its Consolidated Response to the Defence Requests for Reconsideration of the Trial *In Absentia* Decision.
6. Pursuant to an oral order of 14 June 2012, the Trial Chamber indicated that it would grant the relief sought by the Defence regarding the documents underlying the *Absentia* Decision.⁵
7. On 21 June 2012, the Trial Chamber ordered the Defence to file any supplementary motion based on these new materials as a joint filing no later than 26 June 2012 at 1600.

¹ 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.

² Decision to Hold Trial *In Absentia*, 1 February 2012 (“*Absentia* Decision”).

³ Requête de la Défense de M. Badreddine aux fins de réexamen de la « Décision portant ouverture d'une procédure par défaut » rendue par la Chambre de première instance le 1^{er} février 2012, 22 May 2012 ; *Sabra* Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial in Absentia, 23 May 2012 ; Demande de la défense de M. Oneissi en réexamen de la décision d'ouverture d'une procédure par défaut du 1^{er} février 2012, 24 May 2012 ; *Ayyash* Motion Joining *Sabra* Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial in Absentia, 24 May 2012.

⁴ See, e.g., *Sabra* Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial in Absentia, 23 May 2012, p. 1, par 2.

⁵ Transcript of 14 June 2012, Jurisdictional Hearing, at p. 45-46.

Before its communication to the Defence, this material was redacted and expurgated of certain information by the Trial Chamber. It was made available to counsel the next day.

8. On 25 June 2012, the Prosecution filed a "Prosecution Report Regarding Rule 106 Proceedings" (hereinafter, "Prosecution Report") with four (4) confidential annexes.
9. On 25 June 2012, having been seized of a request for extension of time, the Trial Chamber granted a one-day extension until Wednesday 27 June 2012.⁶
10. In light of the fact that the Chamber's 14 and 21 June 2012 orders were public (with a confidential annex), and so as to preserve the publicity of the proceedings, the Defence is filing the present submissions publically.⁷ A confidential annex is attached.
11. The present submissions are common and supported by all four Defence teams.

II. ISSUES PERTAINING TO THE RELIABILITY AND WEIGHT OF THE MATERIAL COMMUNICATED BY THE TRIAL CHAMBER

12. The Defence notes that the Trial Chamber, acting *proprio motu*, collected information which, in turn, it relied upon to render its *Absentia* Decision.⁸ The Defence notes that Rule 106 provides no legal basis enabling the Trial Chamber to adopt such a course. The legal basis upon which the Trial Chamber relied to collect and use this material is not mentioned in its *Absentia* Decision. Furthermore, what steps, if any, the Trial Chamber took to verify the reliability and credibility of the information contained in this material is unclear from the *Absentia* Decision.
13. The Defence notes that none of the material relied upon by the Trial Chamber was tested through an adversarial process. In particular, the Defence was not given an opportunity, or time, to collect and produce evidence relevant to making findings relevant to the Chamber's decision to order *absentia* proceedings. The reliability, authenticity and credibility of much of this material has not otherwise been tested or established.
14. These considerations, and the untested reliability and weight of the material relied upon by the Trial Chamber, called for, and justified, a cautious approach to making findings of fact regarding the necessary conditions to order a trial *in absentia*, in particular those which were prejudicial to the accused (e.g., that they absconded; that they did not "wish"

⁶ Email from the Trial Chamber sent on 25 June 2012.

⁷ No reference is made to the actual content of the documents.

⁸ See also *Absentia* Decision, par 115.

to participate; that they might have waived their right to be present; that they had received notice of the charges and consequences of their failure to attend). The suggestion, for instance, that, based on the material at its disposal, the Trial Chamber could have satisfied itself that the accused had received actual notice of the charges and their content and that they were made aware of the consequences of their non-attendance is not a reasonable one based on the material that was before the Chamber. Nor are any of the other challenged and impugned findings.

15. The communication of documents to the Defence also appears to have been incomplete. Thus, for instance, none of the Progress Reports submitted by the Lebanese Prosecutor General to the President of the Tribunal of 9 August, 19 September, 19 October, 18 November, 19 December 2011 and 18 January 2012 appear to have been communicated to the Defence.⁹ In the absence of these documents, the Defence was precluded from forming a view on their relevance, credibility or weight.¹⁰
16. The Defence also records its concern at the extremely short deadline that was set by the Trial Chamber to review this material carefully and diligently. Considering the amount of material to review, the Defence submits that a more generous timeframe would have been in order. The Defence intends to preserve and protect its right to have adequate time to perform its function effectively – a fundamental right of the accused which the Trial Chamber is required to guarantee in accordance with Article 16(4)(b) of the Statute.

III. ABSENCE OF EVIDENCE PERTAINING TO CRITICAL FACTS RELEVANT TO ORDERING LAWFUL *ABSENTIA* PROCEEDINGS

17. The Defence has identified no material (or no material of any demonstrable reliability) among the documents provided by the Chamber that would support several of the requirements necessary to the lawful ordering of *absentia* proceedings:

- (i) There is no (credible) evidence that notification of the charges was attempted or made outside of Lebanon;

⁹ These are referred in paragraph 24 of the *Absentia* Decision

¹⁰ Confidential Annex A contains a list of those documents which appear to be missing and which the Defence has been unable to review and comment upon. The reason for the Trial Chamber's failure to communicate these documents to the Defence was not specified.

- (ii) There is no (credible) evidence that any of the accused was made aware of the consequences of their non-attendance (a necessary legal pre-requisite¹¹);
- (iii) There is no (credible) evidence of the *actual* whereabouts of the four accused at the time when the charges were being publicized in the Lebanese media;
- (iv) There is no (credible) evidence that any of the accused waived their right to be tried in their presence or that the legal requirements for a valid waiver could be said to have been met in relation to any of them:¹² (i) waiver must be free; (ii) it must be unequivocal; (iii) it must be informed, in the sense of being done with full knowledge of its effect and consequences; (iv) it might require the adoption of additional safeguards.
- (v) There is no (credible) evidence that the four accused did not “wish” to participate or, if this expression is understood as a reference to a waiver to be present, that any of the accused did so “expressly” and “in writing” as required under Article 22(1)(A) of the Statute;
- (vi) There is no (credible) evidence that from June 2011 onwards, any of the four accused was in a position to surrender to the Tribunal had he chosen to do so;
- (vii) There is no (credible) evidence that, at the time of the *Absentia* Decision, the four accused were still alive and could therefore be validly tried by the STL;
- (viii) There is no (credible) evidence that the Tribunal would be capable of ensuring a re-trial should the defendants be apprehended regardless of when this would occur;
- (ix) There is no (credible) evidence and no indication that the Trial Chamber sought to verify and ensure that representation could be effective and proceedings fair despite

¹¹ See, e.g. *Dembukov v Bulgaria*, par 47 (ECHR)

¹² See, e.g. *Prosecution v Nahimana*, Appeals Judgment, 28 November 2007, par 109 (and references) (ICTR).

the absence of the accused and considering the peculiar circumstances of this Tribunal.

18. The absence of evidence pertaining to these facts all support the submissions made by the Defence teams in their earlier findings and reinforce them.

IV. CONCLUSION AND RELIEF

19. In light of the above and for the reasons advanced in their motions for reconsideration of the *Absentia* Decision, the Defence reiterates and adopts its submissions regarding the unlawfulness of the *Absentia* Decision. Taking into account the very short period of time given to the Defence to do so, a review of select material communicated to the Defence demonstrates clearly the unreasonableness of the finding of facts made by the Trial Chamber in its *Absentia* Decision and challenged by the Defence. It, therefore, prays the Trial Chamber to grant the relief sought in the Defence Motions for Reconsideration.

Respectfully submitted 27 June 2012,



EUGENE O'SULLIVAN
Lead Counsel for Salim Ayyash



EMILE AOUN
Co-counsel for Salim Ayyash



ANTOINE KORKMAZ



JOHN JONES

Lead Counsel for Mustafa Badreddine



VINCENT COURCELLE-LABROUSSE

Lead Counsel for Hussein Oneissi

Co-counsel for Mustafa Badreddine



YASSER HASSAN

Co-counsel for Hussein Oneissi



DAVID YOUNG

Lead Counsel for Assad Sabra



GUÉNAËL METTRAUX

Co-counsel for Assad Sabra

Word Count: 1,676

