

**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:** 20 July 2012

**Filing Party:** Sabra Defence

**Original Language:** English

**Classification:** PUBLIC

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

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**SABRA MOTION FOR CERTIFICATION FOR LEAVE TO APPEAL DECISION  
ON RECONSIDERATION OF THE TRIAL *IN ABSENTIA* DECISION**

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**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



## PROCEDURAL HISTORY

1. On 1 February 2012, the Trial Chamber issued a decision to try Mr. Ayyash, Mr. Badreddine, Mr. Oneissi and Mr. Sabra *in absentia*.<sup>1</sup> Counsel for the accused filed motions seeking reconsideration of this decision.<sup>2</sup> On 11 July 2012, the Trial Chamber dismissed the Defence Motions for reconsideration.<sup>3</sup>

## II. APPLICABLE LAW

2. Rule 126(C) provides that certification for leave to appeal a decision may be granted if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
3. The power to reconsider decisions is provided in Rule 140, which states that a Chamber may reconsider a decision if necessary to avoid injustice. In the Reconsideration Decision, the Trial Chamber also accepted that reconsideration may be granted where there is a clear error of reasoning or where new facts or a change in circumstances emerge after the decision.<sup>4</sup>

## II. SUBMISSIONS

### A. Issues derived from the Reconsideration Decision

4. The Defence for Mr. Sabra submits that Reconsideration Decision raises a number of issues which significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and therefore merit certification to appeal.

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<sup>1</sup> *Prosecutor v. Ayyash et al.*, Decision to Hold Trial *in Absentia*, 1 February 2012 (“Trial Decision”).

<sup>2</sup> Sabra Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial in Absentia, 23 May 2012 (“Sabra Motion”); Ayyash Motion Joining Sabra Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial in Absentia, 24 May 2012; 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<sup>er</sup> février 2012, 22 mai 2012; Demande de la défense de M. Oneissi en réexamen de la décision d'ouverture d'une procédure par défaut du 1<sup>er</sup> février 2012, 24 mai 2012; (“collectively, “Defence Motions”). See also Prosecutor Consolidated Response to the Defence Requests for Reconsideration of the Trial in Absentia Decision, 12 June 2012.

<sup>3</sup> *Prosecutor v. Ayyash et al.*, Decision on Reconsideration of the Trial *in Absentia* Decision, 11 July 2012 (“Reconsideration Decision”).

<sup>4</sup> Reconsideration Decision, para. 6.

5. **First**, the Trial Chamber held that held that “[a]rguments supporting a reconsideration must relate to (a) whether an Accused had absconded or otherwise could not be found, (b) whether all reasonable steps were taken to secure his appearance, and (c) whether all reasonable steps were taken to inform him of the charges.”<sup>5</sup> It further held that the function of Rule 140 is not to clarify an earlier decision.<sup>6</sup> The Reconsideration Decision therefore raises the issue of whether the Trial Chamber applied the correct legal standard for reconsideration, in particular by restricting the legal basis for reconsideration too narrowly.<sup>7</sup> The Reconsideration Decision also raises questions concerning what issues may properly be raised on a request for reconsideration, and whether the parties are entitled to seek clarification of an earlier decision.
6. The Trial Chamber misapplied the test for reconsideration, as defined by the Appeals Chamber, defining the scope of its reconsideration power in such a narrow way that it failed to consider whether any of the errors alleged by the Defence teams had resulted in an injustice.<sup>8</sup> Had the proper standard for reconsideration been applied, the Trial Chamber would have had to consider (a) whether it committed any of the errors alleged (which it failed to do) and (b) whether any of these errors (individually or in combination) resulted in an injustice to the accused (which, again, it failed to do). Under that test, the Trial Chamber would have had to deal with the substance of the Defence’s complaints and not merely with the question of whether a “new fact” had been established.
7. **Second**, the Trial Chamber further held that “arguments relating to the possible conduct of a trial or retrial (which are necessarily *subsequent* to the Decision to hold one *in absentia*) are equally unrelated to the reasoning necessary or used to *make* an order under Rule 106(A).”<sup>9</sup> As a consequence, according to the Trial Chamber, challenges to the fairness of the *in absentia* trial did not properly support a request for reconsideration.<sup>10</sup>
8. This decision by the Trial Chamber involves the issue of whether the Trial Chamber may order a particular form of trial, where there are serious and genuine concerns

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<sup>5</sup> Reconsideration Decision, para 9.

<sup>6</sup> Reconsideration Decision, paras. 32, 34.

<sup>7</sup> See *Prosecutor v. Ayyash et al.*, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012, para. 25.

<sup>8</sup> *Prosecutor v Ayyash et al*, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012 pars 19-25.

<sup>9</sup> Reconsideration Decision, para. 10 (emphasis in original).

<sup>10</sup> Reconsideration Decisions, paras 19, 20-21, 24, 26, 27, 34, 38.

about its consistency with international human rights standards, without making an assessment of the prospective fairness of proceedings. Although raised by the Defence in its submissions before, the inherent legality and fairness of the form of trials *in absentia* was not analysed by the Trial Chamber in the Reconsideration Decision.

9. **Third**, the Trial Chamber held that it has no discretion to refuse to order a trial *in absentia* once the pre-conditions set out in Rule 106(A)(iii) were met.<sup>11</sup> The Reconsideration Decision therefore raises the issue of whether the Rules may fetter the inherent discretion of the Trial Chamber to take all relevant circumstances into account before deciding upon the manner of trial or whether this Rule is in violation of international human rights standards.
10. **Fourth**, the Trial Chamber held that, although the appointment of Defence Counsel was a change in circumstances, given that it “necessarily procedurally followed” the Trial Decision, it could not lead to a reconsideration of that decision.<sup>12</sup> The Reconsideration Decision therefore raises the issue as to whether or not the change in circumstances justifying reconsideration must be unknown when the initial decision was taken. This position of the Trial Chamber appears to conflict with that of the Appeals Chamber which held that when requesting reconsideration of a decision issued under Rule 176bis(C) “the fact that [the accused] was not heard at this stage will be a major factor in deciding whether to revisit any of the issues decided herein.”<sup>13</sup> The later appearance of the accused was necessarily known by the Appeals Chamber when issuing its decision, but this later appearance was considered to be a major factor, akin to a change in circumstances, which could justify reconsideration.
11. **Fifth**, the Trial Chamber rejected the submission that it failed to consider whether Mr. Sabra is alive and a request to Lebanese authorities to verify whether he is, noting that there were “no new facts or evidence” in this regard.<sup>14</sup> The Reconsideration Decision therefore involves the issue of how the Trial Chamber may determine that it has personal jurisdiction over an accused by holding that he is alive, including who bears the burden of proof in proving this and to what standard.

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<sup>11</sup> Reconsideration Decision, para. 42.

<sup>12</sup> Reconsideration Decision, para. 13.

<sup>13</sup> *Prosecutor v. Ayyash et al.*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 10.

<sup>14</sup> Reconsideration Decision, para. 35.

12. **Sixth**, the Trial Chamber rejected the argument that adequate notification was not given to the accused because there was no indication that notification was formally and lawfully carried out outside of Lebanon. The Trial Chamber held that this amounted to a disagreement with the Trial Chamber's fact-finding, without presenting any "new facts".<sup>15</sup> The Reconsideration Decision therefore raises the issue of what constitutes adequate notice to an accused in order to order an *in absentia* trial under Rule 106(A)(iii), and who bears the burden of proof in this regard and to what standard.
13. **Seventh**, the Trial Chamber found that it did not wrongly use the word "absconding" in the Trial Decision.<sup>16</sup> The Reconsideration Decision therefore raises the issue of the proper interpretation of Article 22(1)(c) and Rule 106 and the circumstances in which a trial *in absentia* can be ordered.
14. **Eighth**, the Trial Chamber found that it may inform itself on procedural issues by referring to public material,<sup>17</sup> and rely on evidence provided by the Lebanese Prosecutor-General which was not provided to the Defence.<sup>18</sup> Relying on *ex parte* material concerning such fundamental issues, and on public material upon which the Defence could not make submissions, deprives the Defence of the ability to make effective submissions before the Trial Chamber on this issue. The issue that derives from the Reconsideration Decision is therefore whether the Trial Chamber is permitted to proceed in this manner.

**B. Effect on the fairness and expeditiousness of proceedings or outcome of the trial**

15. The above issues significantly affect the fair and expeditious conduct of the proceedings, given that any error would warrant reconsideration of the Trial Decision, which may in turn result in a decision not to try the accused *in absentia*. The proceedings in their entirety could be jeopardized if an appeal of these issues was left until after a judgement on the merits.
16. For instance, with respect to the second issue, if the Appeals Chamber considers that the Trial Chamber should have made a determination concerning the fairness of the *in*

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<sup>15</sup> Reconsideration Decision, para. 36.

<sup>16</sup> Reconsideration Decision, para. 37.

<sup>17</sup> Reconsideration Decision, para. 46.

<sup>18</sup> See Trial Decision, para. 115.

*absentia* proceedings before allowing such proceedings to continue, it will obviously have to examine their fairness in light of the concerns raised by the Defence. Furthermore, should the Trial Chamber decide that the issues raised would render a trial initiated under Rule 106 unfair, this would clearly affect its outcome as there would be no trial at all. A similar outcome could result should the Appeals Chamber find that the Trial Chamber should have considered whether Mr. Sabra is alive, and the sufficiency of notice given to him.

17. Further, some of the enumerated issues concern important points of law that are of general importance to the jurisprudence of the Tribunal, and therefore consideration of these issues by the Appeals Chamber would provide vital guidance to the Trial Chamber.<sup>19</sup> For instance, the divergent approach between the Trial and Appeals Chambers on the criteria of change in circumstances requiring reconsideration of a decision may significantly affect the trial, given that it is an issue that may arise frequently in the proceedings. Further, the question of the proper interpretation of the term “absconding” in Article 22(1)(c) and Rule 106, and therefore of the criteria for commencing *in absentia* proceedings, is a legal question that should be considered by the Appeals Chamber both in order to guide future proceedings and to determine whether the current proceeding was legally commenced.
18. Moreover, the Trial Chamber’s finding that it is permitted to instruct itself with respect to public material and material not made available to the Defence raises a fundamental question regarding the method of adjudication at the Tribunal, which merits consideration by the Appeals Chamber in order to ensure that the proceedings are conducted according to the highest standards of justice and therefore significantly affects the fair conduct of the proceedings. In these circumstances an immediate resolution by the Appeals Chamber would materially advance the proceedings.

### III. RELIEF REQUESTED

19. The Defence respectfully requests that the Trial Chamber grant leave to appeal the Reconsideration Decision.<sup>20</sup>

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<sup>19</sup> ICTY, *Prosecutor v Krnojelac*, Appeal Judgement, 17 September 2003, para. 7.

<sup>20</sup> The Defence reserves its right to argue that the issues raised are jurisdictional in nature.

Respectfully submitted 20 July 2012,



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