

**BEFORE THE TRIAL CHAMBER**

**Case No.:** STL-11-01/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:** 23 November 2011

**Original language:** English

**Type of document:** Public

**THE PROSECUTOR**

v.

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

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**INTERIM DECISION UNDER RULE 106  
(PROCEEDINGS *IN ABSENTIA*)**

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**Office of the Prosecutor:**  
Mr. Daniel A. Bellemare, MSM, Q.C.

**Accused:**  
Mr. Salim Jamil Ayyash  
Mr. Mustafa Amine Badreddine  
Mr. Hussein Hassan Oneissi  
Mr. Assad Hassan Sabra

**Head of the Defence Office:**  
Mr. François Roux





1. The Trial Chamber, for the purposes of this Interim Decision, is seised with, firstly, an order of the Pre-Trial Judge under Rule 105 *bis* (A) of the Rules of Procedure and Evidence to determine whether to try the four Accused, Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra *in absentia* and, secondly, with requests from the Prosecution to adjourn the proceedings and to invite the Government of Lebanon to appear before the Trial Chamber. As a third issue, the Trial Chamber has received oral submissions from the Tribunal's Defence Office suggesting that the Chamber should withdraw or suspend arrest warrants to allow the four Accused to be notified of the possibility of participating in the proceedings via video-conference.

### BACKGROUND

2. On 10 June 2011, the Prosecution filed an amended indictment in the case of *The Prosecutor v. Ayyash et al.*<sup>1</sup> The Pre-Trial Judge confirmed the Indictment,<sup>2</sup> and, on 28 June 2011, issued arrest warrants for the apprehension of the four Accused, Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra.<sup>3</sup> On 16 August 2011, the Pre-Trial Judge lifted the confidentiality of the Indictment and its annexes, his Decision on Confirmation, and the arrest warrants.<sup>4</sup>
3. On 17 October 2011, pursuant to Rule 105 *bis* (A), the Pre-Trial Judge issued an order seising the Trial Chamber with determining whether to initiate proceedings *in absentia* against the four Accused.<sup>5</sup> On 20 October 2011, the Trial Chamber issued an order scheduling a hearing on its Rule 106 determination for 11 November 2011, and

<sup>1</sup> Case No. STL-11-01/ITC, Public Redacted Version, Indictment, 10 June 2011.

<sup>2</sup> Case No. STL-11-01/ITC, 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.

<sup>3</sup> Warrant to Arrest Mr Salim Jamil Ayyash Including Transfer and Detention Order, 28 June 2011; Warrant to Arrest Mr Mustafa Amine Badreddine Including Transfer and Detention Order, 28 June 2011; Warrant to Arrest Mr Hussein Hassan Oneissi Including Transfer and Detention Order, 28 June 2011; Warrant to Arrest Mr Assad Hassan Sabra Including Transfer and Detention Order; *see also*, Rectification of the Warrants of 28 June 2011 and 8 July 2011 to Arrest Mr Mustafa Amine Badreddine, 20 September 2011.

<sup>4</sup> Order on Lifting the Confidentiality of the Indictment against Messrs. Ayyash, Badreddine, Oneissi and Sabra and Other Documents, 16 August 2011. Redacted versions of the Indictment and its Annexes, and the Decision on Confirmation, were made public on 17 August 2011, while the arrest warrants were made public in their entirety.

<sup>5</sup> 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.



requesting the Prosecution and the Accused, and inviting the Defence Office, to file written submissions.<sup>6</sup>

4. The Trial Chamber subsequently received written submissions from the Prosecution and the Defence Office.<sup>7</sup> The Trial Chamber conducted an oral hearing on 11 November 2011. During the hearing the Prosecution orally supplemented its written submissions, while the Defence Office orally made its submissions under Rule 106, (having made no substantive written submissions in respect of the rule). The Victims' Participation Unit appeared and made a statement pertaining to the rights of the victims, as defined in Rule 2.<sup>8</sup>
5. At the hearing, the Prosecution referred to the content of monthly progress reports from the Lebanese Prosecutor-General dated 9 August, 19 September, and 19 October 2011 in respect of his ongoing efforts to effect the arrest warrants and to apprehend the four Accused. Additionally, the Prosecution made submissions in relation to a Request for Assistance it had sent to the Lebanese Prosecutor-General on 7 October 2011, and the Prosecutor-General's response of 25 October 2011. However, at the request of the Lebanese Prosecutor-General, it had now divided this request into ten discrete requests (but comprised of the same subject matter) and had resent these "new" (but in effect, reformatted) requests to the Lebanese Prosecutor-General on 11 November 2011.<sup>9</sup> The Trial Chamber has no information as to whether the Lebanese Prosecutor-General has responded.
6. Consequently, the Prosecution asked for the proceedings to be adjourned for three months to allow these further investigative measures to occur and for the Lebanese Prosecutor-General to respond to the ten requests for assistance of 11 November 2011.<sup>10</sup>

<sup>6</sup> Scheduling Order in Respect of Rule 106 of the Rules of Procedure and Evidence, 20 October 2011.

<sup>7</sup> Prosecution's Preliminary Submission on Rule 106, 25 October 2011; Defence Office Response to the Prosecution's Preliminary Submission on Rule 106, 31 October 2011; Prosecution's Submission in Respect of Rule 106, 2 November 2011; Observations du Bureau de la Defense Relatives à l'Application de l'Article 106 A) du règlement de procédure et de preuve, 2 novembre 2011; and Prosecution's Supplementary Submissions in Respect of Rule 106, 10 November 2011.

<sup>8</sup> The Chief of the Victims' Participation Unit noted the length of time victims have been "awaiting justice", reaffirmed the importance of their rights, and conveyed a statement to the Trial Chamber on their behalf, "Please don't start without us", Transcript, pp. 90-93.

<sup>9</sup> Transcript, pp. 51, 88-89.

<sup>10</sup> Transcript, pp. 11, 18-21, 26-27.



Additionally, the Prosecution requested the Trial Chamber to invite a representative of the Government of Lebanon to make submissions, and appear at a future hearing, to explain the measures undertaken to apprehend the four Accused.<sup>11</sup>

7. The Defence Office submitted that the Trial Chamber should initiate proceedings to lift or to suspend the arrest warrants to allow the Accused to “appear freely” at the proceedings after their notification of the possibility of their participating in a hearing via video-conference.<sup>12</sup>

### DISCUSSION

8. Before initiating proceedings *in absentia*, the Trial Chamber must determine whether the requirements of Rule 106 have been met, namely;

(A) Where the accused:

- (i) has expressly and in writing waived his right to be present at proceedings before the Tribunal;
- (ii) has not been handed over to the Tribunal by the State authorities concerned within a reasonable time; or
- (iii) has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his appearance before the Tribunal and to inform him of the charges by the Pre-Trial Judge;

the Trial Chamber shall conduct proceedings *in absentia*.

(B) Where the accused is not present on account of the failure or refusal of the relevant State to hand him over, before deciding to conduct proceedings *in absentia*, the Trial Chamber shall: (i) consult with the President and ensure that all necessary steps have been taken with a view to ensuring that the accused may, in the most appropriate way, participate in the proceedings; and (ii) ensure that the requirements of Article 22 (2) of the Statute have been met.

<sup>11</sup> Transcript, pp. 39-42, 44-47; Prosecution’s Supplementary Submissions, paras. 14(i), 17.

<sup>12</sup> Transcript, p. 78.



9. The essence of the Prosecution's submissions supporting its request for an adjournment is that the Prosecution in The Hague relies upon the assistance of the Lebanese authorities to apprehend the four Accused, it being powerless to do so without their assistance, but that the Lebanese authorities have not yet exhausted all reasonable or necessary steps. Consequently, the Prosecution argues, the Trial Chamber should hear from the Lebanese authorities before taking any decision under Rule 106. This, argues the Prosecution, necessitates an adjournment, both to allow the Lebanese authorities time to properly respond to its requests for assistance of 11 November 2011, and to allow the Lebanese authorities to inform the Trial Chamber of the steps that have and can be taken to apprehend the four Accused.
10. The Trial Chamber has carefully examined all of the material provided by the Prosecution and, in particular, its request for assistance of 7 October 2011 (now divided into ten) and the response of the Lebanese Prosecutor-General of 25 October 2011. The Trial Chamber notes that despite various steps taken by the Lebanese authorities since 30 June 2011 none of the four Accused has yet been apprehended and transferred to the custody of the Tribunal.
11. The Prosecution's outstanding ten requests for assistance, sent on 11 November 2011, request the Lebanese authorities to take further investigatory steps designed to facilitate the apprehension of the four Accused. These, in the Trial Chamber's view, could be considered - as a matter of State practice - fairly standard investigatory measures. Not having yet received and assessed the Prosecutor-General's response(s) (and further submissions, if any, from the Prosecution, the Defence Office and the four Accused) the Trial Chamber does not consider that it has all the information necessary to make an informed decision under either limb of Rule 106. Consequently, it adjourns its consideration under Rule 106 pending receipt of this supplementary information. The Trial Chamber would also be assisted by a report from the Prosecution, in early December 2011, as to progress in these matters.
12. The Trial Chamber will accordingly defer any decision as to whether it should invite the Government of Lebanon either to file written submissions under Rule 106 or to appear in



a further hearing (or both) until it has received the response(s) and any further submission(s).

13. In relation to the third issue before the Trial Chamber, the Defence Office presented oral submissions that the actions of the Pre-Trial Judge in issuing arrest warrants for the apprehension of the four Accused had “led to the Accused being unable or unwilling to appear freely here in accordance with the provisions of the Rules” and “should the Accused hear of the arrest warrants, their only option would be to hide and avoid arrest”.<sup>13</sup> The Trial Chamber, therefore, it argued, “should initiate proceedings aimed at lifting or suspending the arrest warrants” because the existence of the arrest warrants prevented reasonable measures being taken to notify the Accused of the charges. They should be permitted to “appear freely” at the proceedings.<sup>14</sup>
14. The Trial Chamber notes that Rule 79 (A) empowers the Pre-Trial, rather than the Trial Chamber, to issue (and presumably suspend or withdraw) arrest warrants. Additionally, Rule 104 allows Accused persons to waive their rights to attend proceedings, and Rule 105 allows the Pre-Trial Judge or the Trial Chamber to authorise an Accused person to participate in a hearing via video-conference, but provided that his or her counsel attends the hearing in person.
15. On 11 August 2011, the President of the Tribunal made a public statement in “an open letter to the four men accused” informing them, “their families and their close associates, as well as the Lebanese public”, in general terms, of the ambit of Rules 104 and 105.<sup>15</sup> The Trial Chamber is aware that the statement received wide publicity in the Lebanese media but is unaware if it was served personally on the four Accused. The Trial Chamber is of the view that it would be in the interests of justice, at this stage of the proceedings, to instruct the Registrar to request the Lebanese authorities to notify the four Accused, in the same manner that Accused persons would be notified of an indictment or arrest warrant under Lebanese law, of the President’s statement of 11 August 2011, and of the content of Rules 104 and 105.

<sup>13</sup> Transcript, p. 76.

<sup>14</sup> Transcript, p. 78.

<sup>15</sup> Statement of Judge Antonio Cassese, President of the Special Tribunal for Lebanon, Leidschendam, 11 August 2011.



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16. The Trial Chamber informs the Prosecution, the four Accused, and the Defence Office that it may conduct a further hearing once it has received and assessed the relevant outstanding documents and information.

**FOR THESE REASONS** the Trial Chamber:

- (i) **ADJOURNS** its consideration of whether the requirements of Rule 106 have been met to proceed to try the four Accused *in absentia*, pending receipt of responses from the Prosecutor-General of Lebanon to the Prosecution's ten requests for assistance of 11 November 2011, and further written submissions, if any, from the Prosecution, the four Accused and the Defence Office and;
- (ii) **REQUESTS** the Prosecution to file a progress report by Thursday 8 December, 2011;
- (iii) **DEFERS ITS DECISION**, pending receipt and evaluation of the response(s), report and submissions referred to in (i) and (ii), as to whether it will invite, at the Prosecution's request, the Government of Lebanon either to make written submissions or to appear before the Tribunal; and
- (iv) **INSTRUCTS THE REGISTRAR** to take the necessary steps to ensure that the four Accused are notified of the statement of the President of the Tribunal of 11 August 2011, and of the content of Rules 104 and 105.

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

23 November 2011

Leidschendam  
The Netherlands

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Judge Robert Roth, Presiding

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Judge Micheline Braidy

\_\_\_\_\_  
Judge David Re

