

**BEFORE THE APPEALS CHAMBER**

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: 29 March 2012

Original language: English

Type of document: Public

THE PROSECUTOR

v.

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

**Corrected version of
DECISION ON THE PRE-TRIAL JUDGE'S REQUEST PURSUANT TO RULE 68(G)**

Prosecutor:
Mr Norman Farrell

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Mr Eugene O'Sullivan
Mr Emile Aoun

Head of Defence Office:
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Mr John Jones

Counsel for Mr Hussein Hassan Oneissi:
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Mr Yasser Hassan

Counsel for Mr Assad Hassan Sabra:
Mr David Young
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INTRODUCTION

1. The Appeals Chamber of the Special Tribunal for Lebanon (respectively “Chamber” and “Tribunal”) was seized on 2 March 2012 of a request by the Pre-Trial Judge of the Tribunal submitted pursuant to Rule 68(G) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).¹ The request stems from an application he received on 8 February 2012 from the Tribunal’s Prosecutor, seeking leave to amend the indictment² confirmed on 28 June 2011 against Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra.³

2. According to the Pre-Trial Judge, the request for amendment of the indictment “raises questions relating to the applicable law that could not have been submitted to the Appeals Chamber at an earlier stage and consequently were not addressed in the Decision of 16 February 2011”.⁴ The request submits to the Appeals Chamber preliminary questions on the interpretation of Lebanese law relating to the crime of criminal association in Article 335 of the Lebanese Criminal Code. The Pre-Trial Judge avers that in the absence of a clearly defined interpretation of the applicable law for this crime, the Appeals Chamber’s answer to the preliminary questions is necessary in order to ensure a fair and expeditious trial guided by the interest of justice and general principles of law.⁵

PROCEDURAL HISTORY

3. Upon receiving the Pre-Trial Judge’s Order, the President of the Tribunal issued a Scheduling Order on 7 March 2012, requesting the Prosecution and Counsel for the Accused (“the Parties”) to file submissions on whether the Appeals Chamber should hear and determine the request made in the Pre-Trial Judge’s Order and on the merits of the particular questions raised by him. The Head of Defence Office was also invited to make submissions on the general impact of the Pre-Trial Judge’s questions on

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/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 (“Pre-Trial Judge’s Order”).

² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Indictment (Public Redacted Version), 10 June 2011.

³ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, 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 (Public Redacted Version), 28 June 2011.

⁴ Pre-Trial Judge’s Order, para. 6.

⁵ *Id.* para. 9.



the rights of possible suspects or accused. The President appointed Judge Riachy as the Judge Rapporteur in this matter.⁶ Both the Parties and the Head of Defence Office filed submissions by 15 March 2012.⁷

4. On 15 March 2012, the Pre-Trial Judge informed the President that for procedural reasons he had rejected the request of the Prosecutor to amend the indictment.⁸ Consequently, on 16 March 2012, the President stayed the Scheduling Order of 7 March 2012 and directed the Parties and the Defence Office to file further submissions if they so wished on the impact of the Pre-Trial Judge's decision on his request to the Appeals Chamber.⁹ On 20 March 2012, the President convened the Appeals Chamber in its new composition and re-designated Judge Riachy as the Judge Rapporteur.¹⁰ Counsel for Mr Badreddine filed further submissions on 21 March 2012.¹¹

5. On 28 March, the Prosecutor filed a request for leave to respond to the Defence submissions on the Order for Stay.¹² This submission raises two issues: (i) the request for leave; and (ii) the confidential character of this submission. The latter will be addressed below. The former is declined on the basis that the submission was filed after the deadline imposed by the Order for Stay without good cause. The Prosecutor admitted that the arguments to which he sought to respond had previously been advanced by the Sabra and Oneissi Defence. He had elected not to respond by the 21 March deadline. We cannot countenance unnecessary delay. There is no justification to grant leave for a late submission that could

⁶ STL, *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, pp. 3-4.

⁷ STL, *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 ("Sabra Defence Submissions") (filed by the Defence of Mr Sabra but indicating that Counsel for the three other Accused "join and support" the submission, para. 6); Observations of the Defence for Mr Oneissi in Compliance with The President of the Tribunal's Order of 7 March 2012, 13 March 2012 ("Oneissi Defence Submissions"), Observations of the Defence Office, 15 March 2012 ("Defence Office Submissions"); Observations of the Defence for Mr Badreddine in Response to the Order of the President of the Tribunal of 7 March 2012, 15 March 2012 ("Badreddine Defence Submissions"); Prosecution Submissions Pursuant to the President's Scheduling Order of 7 March 2012, 15 March 2012 (filed confidentially and in public redacted format) ("Prosecution Submissions").

⁸ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision Relating to the Prosecution Request of 8 February 2012 for Leave to File an Amended Indictment, 13 March 2012 ("Amendment Decision") (confidential); see also STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order on Urgent Prosecution Request for Clarification With Regard to the Pre-Trial Judge's Decision of 13 March 2012 (confidential).

⁹ STL, *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"), p. 3.

¹⁰ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT, Order Convening the Appeals Chamber and Re-Designating the Judge Rapporteur, 20 March 2012.

¹¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Observations of the Defence for Mr Baddredine in Response to the President's Order of 16 March 2012, 21 March 2012 (filed confidentially and in public redacted format) ("Badreddine Defence Further Submissions").

¹² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Prosecution Request for Leave to Respond to Defence submissions on Order for Stay, 28 March 2012 (filed confidentially and in public redacted format) ("Prosecution's Request for Leave").



have been filed within the timeframe ordered by the President. We add that there is nothing in the submission which would have influenced a different result.

SUBMISSIONS OF THE PARTIES

6. The Defence for Mr Sabra (“Sabra Defence”), joined and supported by Defence for the other Accused, submits that the Appeals Chamber has no jurisdiction to hear and determine the Pre-Trial Judge’s request because, it argues, the application of Rule 68(G) of the Rules is limited to the confirmation of a new indictment and does not cover circumstances where the Prosecutor seeks to amend an existing indictment.¹³ The Sabra Defence also argues that because the case has been assigned to the Trial Chamber, the Prosecutor should have directed his application to amend the indictment to the Trial Chamber rather than to the Pre-Trial Judge.¹⁴ It asks the Appeals Chamber to order the Pre-Trial Judge to remit the Prosecutor’s application to the Trial Chamber, or, in the alternative, to invite the Pre-Trial Judge to hear the Parties on this issue before deciding whether he has jurisdiction in the matter.¹⁵ Because the Sabra Defence has not received copies of the proposed amended indictment and the supporting material, it declines to make submissions on the merits of the preliminary questions submitted by the Pre-Trial Judge.¹⁶

7. Similarly to the Sabra Defence, the Defence for Mr Oneissi (“Oneissi Defence”) argues that the Appeals Chamber is not properly seized of the preliminary questions inasmuch as it does not have jurisdiction to respond to the Order.¹⁷ Counsel submit that the procedure adopted by the Prosecutor, namely an *ex parte* procedure to request an amendment to the indictment, cannot be “implemented” on account of both the Rules and of Article 16 of the Statute.¹⁸ Counsel conclude they are unable to respond to the points of law which are improperly addressed to the Chamber.¹⁹

¹³ Sabra Defence Submissions, paras 8-11, 19.

¹⁴ *Id.*, paras 12-14, 19.

¹⁵ *Id.*, para. 15.

¹⁶ *Id.*, paras. 16-18.

¹⁷ Oneissi Defence Submissions, para. 27.

¹⁸ *Id.*, paras. 11-12.

¹⁹ *Id.*, para 26.



8. The Defence for Mr Badreddine (“Badreddine Defence”), joined by the Oneissi Defence,²⁰ argues²¹ that since the case is assigned to the Trial Chamber, it having ordered trial *in absentia*, the Pre-Trial Judge does not have jurisdiction to submit questions to the Appeals Chamber, which in turn means that the Chamber must dismiss the Pre-Trial Judge’s request.²² Counsel submit that the Pre-Trial Judge disregarded the provisions of Rule 68(G)²³ and that he erred in relying upon the Decision of 16 February 2011.²⁴ Counsel ask the Chamber to declare the Pre-Trial Judge’s request inadmissible and alternatively to reject the request on the basis that it is not in accordance with Rule 68(G) and that it violates the principle of separation of functions. They further seek an order to direct the Prosecutor to refer his application for amendment to the Trial Chamber.²⁵ In its Further Submissions, filed in compliance with the President’s Order of 16 March 2012, the Badreddine Defence requests the Chamber to (i) declare that, in the light of the Pre-Trial Judge’s rejection of the application to amend the indictment, Rule 68(G) can no longer be applied; (ii) decide that for this reason, the Chamber is no longer required to respond to the Pre-Trial Judge’s request; and (iii) declare that Rules 68(G) and 176*bis* are inapplicable when an indictment has been confirmed, and *in absentia* proceedings initiated.²⁶

9. In its submission, the Defence Office takes note of the observations filed by Defence counsel and argues that the Appeals Chamber cannot but declare itself “without jurisdiction” as to the questions raised by the Pre-Trial Judge.²⁷ It calls on the Chamber to reserve the rights of possible suspects and accused to raise all the arguments that they deem useful.²⁸

10. The Prosecutor supports the Defence submissions as to jurisdiction. He argues that, as a result of the Pre-Trial Judge’s decision to reject the request, and in the absence of an “amended indictment”, Rule 176 *bis* proceedings lack jurisdictional basis.²⁹ He submits that Rule 68(G) does not apply to amending

²⁰ Badreddine Defence Submissions, para.3.

²¹ The Badreddine Defence submits that its submissions at this stage are notwithstanding any future arguments on the legality of the Tribunal. See Badreddine Defence Submission, para. 3, p. 13.

²² *Id.*, paras. 4-18.

²³ *Id.*, paras. 24-33.

²⁴ *Id.*, paras. 34-63.

²⁵ *Id.*, p. 13.

²⁶ Badreddine Defence Further Submissions, p. 5.

²⁷ Defence Office Submissions, para. 7.

²⁸ *Id.*, paras. 8 and 10.

²⁹ Prosecution Submissions, para.15.



the indictment under Rule 71(A)(ii).³⁰ The Prosecutor argues in the alternative that the Pre-Trial Judge's request is unnecessary, as the definition of criminal association is sufficiently clear.³¹

11. The Defence and the Defence Office do not refer to the need for an oral hearing. The Prosecutor submits that an oral hearing is not necessary even if the Appeals Chamber were to entertain the Pre-Trial Judge's request.³²

CONFIDENTIALITY

12. We note that some of the documents to which we refer in this decision were filed confidentially. These include the decision of the Pre-Trial Judge to reject the Prosecutor's request for an amendment of the indictment and various filings by the Parties.³³ We are mindful of and emphasize the need for transparency in the proceedings before this Tribunal, especially considering that the accused are entitled to a "fair and *public* hearing" under Articles 16(2) and 20(4) of the Statute. Rules 96 and 136 of the Rules reflect this important principle and permit exceptions only in specific and limited circumstances. Confidential submissions and decisions—although sometimes necessary—by their very nature conflict with this policy of openness. They should be kept to a minimum and can only be justified for exceptional reasons, which may include the protection of victims and witnesses and the safeguarding of a continuing investigation by the Prosecutor.

13. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has consistently held that all decisions and all submissions filed before that Tribunal shall be public unless there are exceptional reasons for keeping them confidential.³⁴ The ICTY Appeals Chamber has

³⁰ *Id.*, para. 16.

³¹ *Id.*, para. 17.

³² Prosecution Submissions, para. 18.

³³ See above fns 7, 8, 11, 12.

³⁴ See e.g., ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Prosecution's Motion for Order Issuing Public Redacted Version of the Appeals Chamber's Reconsideration Decision of 17 January 2012, 22 February 2012, p.1 with further references in fn. 5; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011 ("*Popović* Decision"), para. 28 with further references in fn. 66; ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Transcript of Decision on Closed Session for Witness 646, 9 March 2005, 10192(13-16) – 10193(21-24). We also note the similar case-law of the International Criminal Court. See ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 OA 2, Order on the reclassification as public of documents ICC-01/05-01/08-498-Conf and ICC-01/05-01/08-503-Conf, 24 February 2010, para. 4; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Ordonnance relative aux mesures de protection de certains témoins cités à comparaître par le Procureur et par la Chambre (règles 87 et 88 du Règlement de procédure et de preuve), 9 December 2009, paras. 8-9.



also held that a Judge or Chamber has jurisdiction to lift the confidentiality of a party's filing or of a judicial decision if it is established that confidentiality is not necessary. The Chamber considered that this power belongs to the judiciary, and not to the parties, because only the Judge or Chamber possesses "the intimate knowledge of all the facts, information, and circumstances surrounding the relevant case."³⁵ The ICTY Appeals Chamber further considered that a Judge or Chamber is permitted to make reference to the existence of confidential decisions and to specific parts of such decisions that do not require confidentiality *per se*, unless their very existence needs to be kept confidential.³⁶

14. We determine that this approach should also be adopted before this Tribunal, as appropriate in the circumstances of each specific case, including the extent to which the Judge or Chamber is in fact privy to all information relevant to confidentiality. In appellate proceedings, the Appeals Chamber may confirm or alter the confidential status of decisions issued by the Pre-Trial Judge or the Trial Chamber. This is so because as the maker of an order on confidentiality, a Chamber of first instance, whether the Pre-Trial Judge or the Trial Chamber, has the authority to amend that order. When the Appeals Chamber is seized of the matter, its authority to modify the confidentiality status stems from that of the Chamber appealed from and from its own inherent power.

15. Applying these principles to the present proceedings, we find no reason to keep from the public the *existence* of the Pre-Trial Judge's Decision rejecting the Prosecutor's request to amend the indictment. It is public knowledge—by virtue of the Pre-Trial Judge's request to this Chamber—that the Prosecution had made such an application. Likewise, revealing without more that this application was rejected for procedural reasons, and the Pre-Trial Judge's view that this has no bearing on his request to the Appeals Chamber, does not compromise any protected interests of any Party, including the Prosecutor. We reject the Prosecutor's request to treat his submissions as confidential, as the portions redacted from the public version of his filing of 15 March merely refer to the facts mentioned above. Likewise, confidentiality of the Prosecutor's Request for Leave is lifted, as the specific part of the Pre-Trial Judge's decisions which is quoted in it does not require confidentiality.³⁷

³⁵ ICTY, *Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011 ("*Hartmann Judgment*"), para. 52.

³⁶ See *Popović Decision*, fn. 65; *Hartmann Judgment*, paras 52, 67.

³⁷ We note that the Prosecutor was correct in making the redactions because he was referring to the confidential decisions of the Pre-Trial Judge, as well as their content. We do not lift confidentiality of the Badreddine Defence Further Submissions because the unredacted portions of that submission contain information that at this point should not be made public.



WHETHER THE APPEALS CHAMBER IS PROPERLY SEIZED OF THE REFERRAL ORDERED BY THE PRE-TRIAL JUDGE

16. We must, as a preliminary matter, determine whether the Appeals Chamber is properly seized of the referral ordered by the Pre-Trial Judge. We have noted the Defence's contention that the Prosecutor's application to amend the indictment against the four accused was not properly before the Pre-Trial Judge. The Defence in particular argues that at this stage of the proceedings, the Prosecution should have applied to the Trial Chamber instead for leave to amend the indictment. Consequently, according to the Defence, the Pre-Trial Judge was not properly seized of the matter and so had no jurisdiction to make reference to the Appeals Chamber.³⁸

17. Our answer to this argument results from our inherent jurisdiction to address incidental legal issues which arise as a direct consequence of our Tribunal's procedures.³⁹ In this respect, we disagree with the Defence's contention. Rule 71(A)(ii) of the Rules provides that the Prosecutor may amend the indictment "between its confirmation and the assignment of the case to the Trial Chamber, with the leave of the Pre-Trial Judge." In this case, the indictment was confirmed on 28 June 2011.⁴⁰ The question that follows is whether the case has been assigned to the Trial Chamber. The answer is no.

18. There is no provision in the Rules that specifically sets out when a case is "assigned" to the Trial Chamber. It appears that use of the term "assigned" is simply reflective of the similar Rule 50(A)(i)(b) of the Rules of Procedure and Evidence of the ICTY. Of course, in that Tribunal, the President "assigns" cases to the various Trial Chambers.⁴¹ In our Tribunal, such a procedure is not necessary because there is only one Trial Chamber.⁴²

19. The essential point is that Rule 95(B) of the Rules expressly states that the Trial Chamber "shall be seized of the case" only once it has received the case file from the Pre-Trial Judge pursuant to Rule

³⁸ See Sabra Defence Submissions, paras 12-15; Oneissi Defence Submissions, paras 12-19; Badreddine Defence Submission, paras 4-18, Badreddine Defence Further Submissions, paras 11-13.

³⁹ See STL, *In the matter of El Sayed*, Case No. CH/AC/2010/02, Decision on Appeal of the Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para.45.

⁴⁰ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Baddredine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011.

⁴¹ See Rule 62(A) of the ICTY Rules of Procedure and Evidence.

⁴² We note that Article 2(3)(c) of the Annex to Security Council Resolution 1757 (2007) refers to the possibility of the creation of a second Trial Chamber.



95(A). In the proceedings before us, the transmission of the case file—which includes “any evidentiary material received”⁴³ by the Pre-Trial Judge – has not yet occurred. Yet for the Trial Chamber to make a meaningful ruling on the amendment of an indictment it must be in the possession of the relevant evidence. Consequently, we are satisfied that in these circumstances, and pursuant to Rule 3 of the Rules,⁴⁴ a case is “assigned” to the Trial Chamber under Rule 71(A)(iii) of the Rules only when it becomes “seized of the case” pursuant to Rule 95(B) of the Rules.

20. We are also not persuaded by the argument that the case is “assigned” to the Trial Chamber simply because of its decision to hold a trial *in absentia*.⁴⁵ On the contrary, the Trial Chamber’s decision was delivered within the special procedure set out under Rule 105 *bis* of the Rules, which is narrowly limited to the initiation of proceedings *in absentia* against the four accused and does not extend to “the case” as a whole. When the Trial Chamber stated that it “was seised of the case”,⁴⁶ it referred only to the order of the Pre-Trial Judge in the context of this procedure.⁴⁷ Indeed, the material it received from the Pre-Trial Judge was strictly and necessarily confined to documents relevant for the purpose of determining whether *in absentia* proceedings were appropriate.⁴⁸

21. For these reasons, the Pre-Trial Judge was the proper forum to receive and consider the Prosecutor’s application to amend the indictment. The Pre-Trial Judge’s Order could therefore seize the Appeals Chamber of his request.

⁴³ See Rule 95(A)(ii) of the Rules.

⁴⁴ Rule 3 Interpretation of the Rules:

(A) The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

(B) Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.

⁴⁵ See Sabra Defence Submission, paras 12-13.

⁴⁶ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01-I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012, para. 24.

⁴⁷ See STL, *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.

⁴⁸ *Id* at para. 27.



**THE AUTHORITY OF THE APPEALS CHAMBER TO HEAR AND
DETERMINE THE PRE-TRIAL JUDGE'S REQUEST MADE IN HIS ORDER**

22. We repeat that the Pre-Trial Judge's request arose from an application by the Prosecutor to amend the indictment against the four accused. However, the Pre-Trial Judge rejected the application for procedural reasons.⁴⁹ The issue is therefore whether the Appeals Chamber may exercise authority under Rule 176 *bis*(A) of the Rules. Consequently, we must determine the impact of the Pre-Trial Judge's decision to deny amendment of the indictment on his request to the Appeals Chamber.

I. The impact of the Pre-Trial Judge's decision to reject the Prosecutor's application for an amendment of the indictment on the Appeals Chamber's authority to hear his request

23. Under Rule 68(A) of the Rules, any indictment submitted by the Prosecution is reviewed by the Pre-Trial Judge. Pursuant to Rule 68(G) of the Rules, the Pre-Trial Judge "[m]ay submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment."

24. The Rule therefore links the submission of a particular question to the Appeals Chamber with the Pre-Trial Judge's need to "examine and rule on the indictment." Indeed, the Pre-Trial Judge expressed that need when he submitted his request to the Appeals Chamber.⁵⁰ This situation has now changed. The Pre-Trial Judge has made a ruling on the requested amendments to the indictment when he rejected the Prosecutor's application, albeit for procedural reasons. Prosecution and Counsel for Mr Badreddine⁵¹ argue that as a consequence, the Pre-Trial Judge is no longer seized of the issue and there is no jurisdiction under Rule 68(G) for him to seek guidance from the Appeals Chamber. We agree with their submissions.

25. We observe that the Pre-Trial Judge considered that his decision to reject the Prosecutor's application to amend the indictment had no bearing on the preliminary questions addressed to the Appeals Chamber and that "those questions are still relevant for the purposes of reviewing any indictment concerning criminal association, be it new or amended."⁵² However, this view fails to take into account

⁴⁹ See above para. 4.

⁵⁰ See Pre-Trial Judge's Order, para. 1.

⁵¹ Prosecution Submissions, para. 15; Badreddine Defence Further Submissions, para. 6.

⁵² Amendment Decision, para. 31



that the Pre-Trial Judge cannot submit questions to the Appeals Chamber under Rule 68(G) in a procedural vacuum and regardless of the need to make a ruling on an indictment. The mere possibility that the Prosecutor might renew his application is not sufficient to authorise such a procedure. The Pre-Trial Judge must be called upon to “examine and rule on the indictment” in order for him to make a new request to the Appeals Chamber. That requirement is currently not met. Consequently his current request is inadmissible.

II. The proper scope of Rule 68(G)

26. Both Parties and the Defence Office argue that Rule 68(G) of the Rules is inapplicable in relation to the amendment of an indictment.⁵³ Considering that the Statute requires us “to take strict measures to prevent any action that may cause unreasonable delay,”⁵⁴ we find it appropriate to address this argument as it relates to the Appeals Chamber’s authority. If the Prosecution were to move again for an amendment of the indictment in the future, the Appeals Chamber’s clarification will serve to preserve judicial resources.

A. The purpose of Rule 68(G) of the Rules

27. Rule 68(G) of the Rules sets out a procedure of an exceptional nature. It permits the Pre-Trial Judge to submit to the Appeals Chamber certain preliminary questions in order for him to “examine and rule” on an indictment at a stage when there is no accused. As mentioned in our decision of 16 February 2011,⁵⁵ the Tribunal’s Judges adopted Rules 68(G) and 176 *bis*(A)⁵⁶ to enable the Appeals Chamber to clarify in advance the law to be applied by the Pre-Trial Judge and the Trial Chamber, thereby expediting the process in a manner supported by both the Prosecutor and the Head of Defence Office. In establishing these Rules, the Judges were guided by Articles 21 and 28 of the Tribunal’s Statute, which require the

⁵³ Sabra Defence Submissions, paras. 7-9; Oneissi Defence Submissions, paras. 20-25; Badreddine Further Defence Submissions, para. 8; Prosecution Submissions, para. 16; see also Defence Office Submission, para. 7.

⁵⁴ Article 21(1) of the Statute.

⁵⁵ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (“16 February Interlocutory Decision”), para. 7.

⁵⁶ “The Appeals Chamber shall issue an interlocutory decision on any question raised by the Pre-Trial Judge under Rule 68(G), without prejudging the rights of any accused.”



Tribunal to avoid unreasonable delay in its proceedings and to adopt rules of procedure and evidence “with a view to ensuring a fair and expeditious trial.”⁵⁷

28. We also stated:

[T]here are significant reasons for the normal practice of refraining from giving judgment, even on interpretation of a statute, in the absence of a specific factual context. The experience of the law is that general observations frequently require modification in the light of particular facts, which can provide a sharper focus and trigger a more nuanced response. But the decision whether to adopt Rule 176bis(C) required election between two alternatives: (i) to accept the risk that the Pre-Trial Judge or the Trial Chamber might adopt an interpretation of the law with which this Appeals Chamber ultimately disagrees, unnecessarily delaying the resolution of cases and thereby causing an injustice to the parties and to the people of Lebanon; or (ii) to authorise the Appeals Chamber to pronounce on the applicable law in the abstract, with a view to expediting proceedings in the interests both of potential defendants and the good administration of justice.⁵⁸

29. When considering whether to answer the set of questions submitted to us by the Pre-Trial Judge on 21 January 2011,⁵⁹ we took into account considerations for and against that course, among them the fact that we were pronouncing in abstract and had not seen the indictment, yet also that such pronouncement would expedite the proceedings and that it was also in the interests of both accused and the good administration of justice.

B. Whether Rule 68(G) is applicable to the amendment of a confirmed indictment

30. The Pre-Trial Judge’s current request was not based on an application to confirm a new indictment. Rather, the Prosecution applied for an amendment of the existing indictment against the four accused in this case. But the Rule governing amendments to an indictment is Rule 71 of the Rules. This Rule does not contain a procedure like the one under Rule 68(G). Nor does it contain any reference to

⁵⁷ Article 21 (“Powers of the Chambers”) provides in part: “The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.[...]”

Article 28 (“Rules of Procedure and Evidence”) further states:

1. *The judges of the Special Tribunal shall [...] adopt Rules of Procedure and Evidence* for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.
2. In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, *with a view to ensuring a fair and expeditious trial.*

(Emphasis added.)

⁵⁸ 16 February Interlocutory Decision, para. 9.

⁵⁹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber Pursuant to Rule 68, Paragraph (G) of the Rules of Procedure and Evidence, 21 January 2011.



Rule 68(G). We emphasise that Rule 71(D) states: “Rules 68(J) and 76 apply *mutatis mutandis* to the amended indictment.” It does not import Rule 68(G). The express inclusion of Rules 68(J) and 76 and the significant absence of Rule 68(G) points to an application of the implied exclusion rule *expressio unius exclusio est alterius* – namely that the explicit expression of one entails the implied exclusion of the other. As a matter of strict textual interpretation, Rule 68(G) is thus not applicable when the Pre-Trial Judge is seized with a request to amend a confirmed indictment.⁶⁰ Nor are there policy justifications for adopting a broader interpretation.

31. In the reasons for his Order, the Pre-Trial Judge argues that the rationale of Rule 68(G) is to provide clarification on the applicable law to the Pre-Trial Judge and Trial Chamber with a view to expediting the judicial process.⁶¹ He posits that this rationale is the same in a situation where he is asked to grant leave to amend an indictment pursuant to Rule 71(A)(ii) of the Rules.⁶² We do not agree with this interpretation.

32. The reasoning of the Pre-Trial Judge is based on the premise that there is a lacuna in the Rules, which needs to be filled by extending the applicability of Rule 68(G) to Rule 71(A)(ii). However, for a court to apply by analogy the Rules applicable in one particular situation to different circumstances, requires more than a mere finding that such an application could be useful. It is to be presumed that the drafters of the Rules made a conscious decision to limit the applicability of Rule 68(G) to the confirmation of a new indictment.⁶³

33. We do not find that such a gap exists in the Rules. The procedural context in which the Prosecutor asks the Pre-Trial Judge to amend the existing confirmed indictment is substantially different from the circumstances in which the Prosecutor asks for the confirmation of a new indictment. We have concluded that Rule 68(G) of the Rules applies only in this narrow context and its reach cannot be extended beyond that.

34. We note first and foremost that Rule 176 *bis* (A) allows the Appeals Chamber to issue its decision on the Pre-Trial Judge’s preliminary questions “without prejudging the rights of any accused.” We also

⁶⁰ We note that pursuant to Rule 71(A)(i) of the Rules, unconfirmed indictments may be amended without the leave of the Pre-Trial Judge. They remain subject to the Pre-Trial Judge’s review pursuant to Rule 68. Therefore, Rule 68(G) is applicable in that context.

⁶¹ Pre-Trial Judge’s Order, para. 8, citing to the 16 February Interlocutory Decision.

⁶² Pre-Trial Judge’s Order, para. 8.

⁶³ As mentioned in fn. 60 above, an amendment to an unconfirmed indictment remains subject to Rule 68 in its entirety.



consider that Rules 68(G) and 176 *bis* of the Rules are premised on the absence of counsel representing the person whom the Prosecutor seeks to charge with a crime under the Statute. This is specifically reflected in Rule 176 *bis* (B) of the Rules, which grants a right of audience before the Appeals Chamber only to the Prosecutor and the Head of Defence Office. Applying these Rules with such limitations now, after the confirmation of the indictment and when Counsel have been assigned, would raise serious questions about the fairness of the proceedings.

35. To limit participation in the proceedings arising from the Pre-Trial Judge's preliminary questions to the Prosecutor and the Head of Defence Office and exclude counsel for the Accused would impede the Accused's right to a fair hearing under Article 16(2) of the Statute. They need to be heard before the Appeals Chamber can make fundamental decisions concerning the applicable law of the Tribunal that directly affect their case. To deny them that right would make the proceedings unfair. We note that Rule 176 *bis* (C) allows for the reconsideration of a decision by the Appeals Chamber on the request of the accused. However, this right is based on the absence of counsel prior to the confirmation of the indictment and does not fit within the context of an application to amend the indictment where counsel has already been assigned.

36. To disregard the language of Rule 176 *bis* (B) by granting the Defence the right to be heard in the proceedings before the Appeals Chamber pursuant to Rule 176 *bis* would go some distance to ameliorating the fairness concerns. But the Defence would not have seen the proposed amended indictment nor been in possession of the supporting material. Any legal submissions the Defence would make in those circumstances would have to be made in the abstract and could potentially be harmful to the Accused.

37. Given these considerations, we find that the authority of the Pre-Trial Judge to submit preliminary questions to the Appeals Chamber is limited to the confirmation stage. Once an indictment is confirmed, and the Prosecutor seeks to amend it, the Pre-Trial Judge cannot rely on the procedure set out in Rule 68(G) of the Rules.

C. Conclusion

38. The essential points are that the Pre-Trial Judge is no longer seized of any application with respect to an indictment, and that in any event, the scope of Rule 68(G) of the Rules is limited to the



confirmation of a new indictment. It follows that the Appeals Chamber has no authority to hear and determine the Pre-Trial Judge's request, which in turn is inadmissible.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER;

NOTING the Pre-Trial Judge's Order of 2 March 2012;

NOTING the written submissions by the Parties and the Defence Office;

DECLINES the Prosecutor's request for leave to respond to the Defence Submissions on the Order for stay;

ORDERS the Registrar to lift the confidentiality of the "Prosecution Submissions Pursuant to the President's Scheduling Order of 7 March 2012," filed on 15 March 2012 and of the "Prosecution Request for Leave to Respond to Defence Submissions on Order for Stay," filed on 28 March 2012; and

DETERMINES that the request made by the Pre-Trial Judge in his Order of 2 March is inadmissible.

While concurring in the result, Judge Chamseddine appends a separate opinion to this Decision.

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

Dated this twenty-ninth day of March 2012,

Leidschendam, the Netherlands

David Baragwanath

Presiding



SEPARATE OPINION OF JUDGE CHAMSEDDINE

1. Although I agree with the members of the Appeals Chamber on rejecting the Pre-Trial Judge's request, I consider that an additional basis for the reasoning warranting the dismissal should be adopted.
2. Pursuant to Rule 68(G), the Pre-Trial Judge requests the Appeals Chamber to pronounce on the *applicable law*. The request of 2 March did not relate to the applicable law but to the interpretation of Article 335 of the Lebanese Criminal Code. It may be inferred that the Pre-Trial Judge knows the applicable law to the crime of criminal association but nonetheless requests the Appeals Chamber to interpret this crime, its constituent elements, and the required agreement and compare it with other crimes.
3. If the Appeals Chamber is required to determine the applicable law before the Tribunal, it may do so and decide to go further and interpret a crime as it has done in its Interlocutory Decision of 16 February 2011. But when the purpose of the Pre-Trial Judge's request is the interpretation of an Article of the known law, the matter may be considered to be outside the authority of this Chamber.

Judge Afif Chamseddine

