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

THE APPEALS CHAMBER

Case No.:	**STL-11-01/PT/AC/R176*bis***
Before:	**Judge David Baragwanath, Presiding** **Judge Ralph Riachy** **Judge Afif Chamseddine, Judge Rapporteur** **Judge Daniel David Ntanda Nsereko** **Judge Kjell Erik Björnberg**
Registrar:	**Mr Herman von Hebel**
Date:	**18 July 2012**
Original language:	**English**
Classification:	**Public**

THE PROSECUTOR

v.

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

DECISION ON DEFENCE REQUESTS FOR RECONSIDERATION OF THE APPEALS CHAMBER'S DECISION OF 16 FEBRUARY 2011

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux

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

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

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

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaël Mettraux

HEADNOTE[1]

The ultimate issue before the Appeals Chamber is whether counsel have shown that its Interlocutory Decision on the Applicable Law of 16 February 2011 has caused any injustice to the four Accused they represent, thus warranting reconsideration of the Decision. The Appeals Chamber concludes that counsel failed to show such an injustice.

Pursuant to Rules 176 bis*(C) and 140 of the Tribunal's Rules of Procedure and Evidence, an accused may request reconsideration of a decision rendered on the basis of Rules 176* bis *and 68(G). The Appeals Chamber's Interlocutory Decision, based on these Rules, followed the submission of 15 questions on the applicable law from the Pre-Trial Judge. Counsel for the four Accused have argued that these Rules are* ultra vires *and that the Appeals Chamber provided an incorrect definition of the crime of terrorism in the Interlocutory Decision.*

The Prosecutor argues as a preliminary matter that Defence counsel has no standing in these proceedings. The Appeals Chamber rejects this assertion because making a request for reconsideration under Rule 176 bis*(C) is not a right that may be exercised only by an accused personally, but rather, may also be exercised by counsel as part of their duty to provide full representation of the interests of the Accused as mandated by the Rules. Thus, counsel has standing.*

On the merits the Appeals Chamber holds that to seek reconsideration under Rule 176bis(C), counsel must demonstrate that the Interlocutory Decision has caused an injustice to the Accused. This is because Rule 176 bis*(C) explicitly imports the reconsideration standard under Rule 140. This means that counsel have to demonstrate that the Accused, at a minimum, suffered prejudice.*

In examining the arguments raised by counsel, the Appeals Chamber concludes that their submissions have failed to demonstrate that the Interlocutory Decision caused an injustice.

- *The Appeals Chamber rejects the argument that Rules 68(G) and 176 bis(C) are invalid. These Rules are not in conflict with the Statute, nor do they create any procedural unfairness or violate the Accused's right to an appeal. The powers given to the Pre-Trial Judge and the Appeals Chamber by these Rules have been validly exercised.*

- *Further, no prejudice arises from the definition of the crime of terrorism adopted by the Interlocutory Decision. Article 314 of the Lebanese Criminal Code's definition of terrorism, as interpreted in the Interlocutory Decision, allows for the possibility of considering means other than the ones explicitly spelled out in the article as means liable to create a public danger. However, the particular circumstances of the present case do not warrant an application of this definition. Considering that all four Accused have been charged with participating in the commission of a terrorist act "by means of an explosive device," the Defence's claim that they have suffered a prejudice by the Interlocutory Decision is without merit.*

In sum, counsel have not shown that the Interlocutory Decision has resulted in any prejudice to the interests of the Accused. Therefore, their requests are dismissed.

[1] This Headnote does not constitute part of the decision of the Appeals Chamber. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.

INTRODUCTION

1. The Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, delivered by the Appeals Chamber on 16 February 2011 ("Interlocutory Decision")[2] answered 15 questions of law posed by the Pre-Trial Judge in reliance on Rules 68(G) and 176 *bis* of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon ("Rules" and "Tribunal", respectively). Following the order of the Trial Chamber that four Accused be tried *in absentia*, counsel assigned to represent them applied to the Appeals Chamber for reconsideration of the Interlocutory Decision.[3]

2. They primarily argue:

- Article 28 of the Tribunal's Statute that authorizes the plenary of Judges to create the Rules did not permit the adoption of Rules 68(G) and 176 *bis*, which are therefore invalid and must be disregarded,[4] as must the Interlocutory Decision;[5]
- Alternatively, if these Rules are deemed valid, they do not authorize either the questions of law submitted by the Pre-Trial Judge or the Interlocutory Decision made in reliance on them;[6]
- In any event, the answer given concerning the crime of terrorism is wrong in law;[7]
- Accordingly, the Pre-Trial Judge must reconsider his decision confirming the indictment against all Accused, as it was based on directions of the Appeals Chamber, which were legally unsound.[8]

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[2] STL-11-01/I/AC, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011.

[3] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/R176*bis*. Sabra Motion for Reconsideration of Rule 176*bis* Decision – "International Terrorism", 13 June 2012 ("Sabra Defence Request"); Request by the Oneissi Defence for Reconsideration of the Interlocutory Decision on the Applicable Law of 16 February 2011, 13 June 2012 ("Oneissi Defence Request"); Request for Reconsideration of the Interlocutory Decision on the Applicable Law Rendered by the Appeals Chamber on 16 February 2011, 13 June 2012 ("Badreddine Defence Request"); Defence for Salim Jamil Ayyash's Joinder in the Defence for Mustafa Amine Badreddine's "Requête en réexamen de la décision préjudicielle sur le droit applicable rendue par la Chambre d'appel le 16 février 2011," 13 June 2012 ("Ayyash Defence Request"). Under Rule 176 *bis*(C), Defence counsel was not required to seek leave to make their request.

[4] Oneissi Defence Request, paras 11-26; Badreddine Defence Request, paras 13-18.

[5] Oneissi Defence Request, para. 26.

[6] Oneissi Defence Request, paras 27-44; Badreddine Defence Request, paras 19-28.

[7] Sabra Defence Request, paras 7-17, 35; Oneissi Defence Request, paras 37-70.

3. Contrary to an assertion by the Prosecutor in response, we find that the Defence has standing to bring the present requests. However, we decline to reconsider the Interlocutory Decision at this point because the Defence has failed to show how the Accused suffered an injustice from it. Accordingly, the Defence requests are dismissed. We record that today's decision does not affect the ultimate right of any the Accused who may be convicted to appeal against such conviction under Article 26 of the Statute.

PROCEDURAL HISTORY

4. Rules 68(G) and 176 *bis* were adopted on 10 November 2010 as an amendment of the Tribunal's Rules. They state:

> **Rule 68(G)**
>
> The Pre-Trial Judge may 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.
>
> **Rule 176 *bis***
>
> (A) 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.
>
> (B) Before rendering its decision, the Appeals Chamber shall hear the Prosecutor and the Head of Defence Office in public session.
>
> (C) The accused has the right to request the reconsideration of the interlocutory decision under paragraph A, pursuant to Rule 140 without the need for leave from the presiding Judge. The request for reconsideration shall be submitted to the Appeals Chamber no later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 110(A)(i).

5. Following the Pre-Trial Judge's submission of the questions of law to the Appeals Chamber,[9] the Prosecutor and the Head of Defence Office filed written observations on those questions and made oral submissions during a public hearing.[10]

6. At the stage when the Appeals Chamber issued the Interlocutory Decision, neither the indictment nor the evidence submitted by the Prosecutor in support of its confirmation was disclosed

[8] Sabra Defence Request, para. 37.

[9] 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.

[10] See Interlocutory Decision, para. 1.

to the Appeals Chamber.[11] The Appeals Chamber ruled (in part) that the Tribunal shall apply the law of terrorism in accordance with the provisions of the Lebanese Criminal Code, taking into account applicable international law only as an aid to interpreting these provisions.[12] The Pre-Trial Judge confirmed the indictment on 28 June 2011.[13] After the Trial Chamber decided to hold a trial *in absentia*,[14] the Head of Defence Office assigned counsel to each of the accused in order to protect their interests before the Tribunal.[15]

7. For purposes of requesting reconsideration of an interlocutory decision, Rule 176 *bis*(C) requires the accused to submit a request no later than thirty days after disclosure by the Prosecutor to the Defence of all supporting material and witness statements referred to in Rule 110(A)(i).

8. Following a joint Defence request for an order fixing the time limit to file any reconsideration request, the Appeals Chamber ordered the Defence teams to submit such requests by 13 June 2012.[16] It also ordered the Prosecutor to submit any response within 14 days after receiving the Defence request(s).[17]

9. Counsel for Messrs Sabra, Oneissi and Badreddine each submitted a request for reconsideration of the Interlocutory Decision.[18] Counsel for Mr Ayyash adopted the submissions made by Mr Badreddine's counsel.[19] In his response, the Prosecutor raised the preliminary issue of whether the Defence had standing to seek reconsideration under Rule 176 *bis*(C).[20] In the light of

[11] *Id.* at para. 8.

[12] *Id.* at para. 45.

[13] STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/I/TC, 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 ("Confirmation Decision"). See also STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01-I/PTJ, Indictment, 10 June 2011.

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

[15] STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/I/PTJ, Assignment of Counsel for the Proceedings *In Absentia* Pursuant to Rule 106 of the Rules, 2 February 2012.

[16] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/AC, Order on Time Limit to File Rule 176 *bis*(C) Request, 14 May 2012, para. 29.

[17] *Id* at Disposition (p 10).

[18] See above fn. 3.

[19] See Ayyash Defence Request, para. 2.

[20] See STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/AC/R176*bis*, Prosecution Consolidated Response to the Defence Requests for Reconsideration of the Decision on Applicable Law, 3 July 2012 ("Prosecutor's Response"), paras 2, 6-10.

that argument, the Judge Rapporteur granted leave to the Defence to file a reply relating strictly to the question of standing.[21] The Head of Defence Office also filed a submission on this issue.[22]

SUBMISSIONS OF THE PARTIES

10. Counsel for Messrs Badreddine, Ayyash[23] and Oneissi contend that Rules 68(G) and 176 *bis* lack any legal basis because they are incompatible with the Tribunal's Statute and are *ultra vires*, i.e. beyond the authority vested in the Judges by the Statute.[24] They submit that, even if the rules were made *intra vires*, the Pre-Trial Judge's request to the Appeals Chamber exceeded his authority under Rule 68(G) and that the Appeals Chamber also exceeded its authority when answering the Pre-Trial Judge's questions.[25] Counsel for Mr Badreddine also argues that it is not necessary for Defence Counsel to meet the standard for reconsideration under Rule 140—referred to in Rule 176 *bis*(C)—that reconsideration is necessary to avoid injustice.[26]

11. Counsel for Messrs Oneissi and Sabra argue that the offence of terrorism was incorrectly defined by the Appeals Chamber.[27] The latter submitted that the Appeals Chamber's definition removes a material element of the offence (the requirement of specified and limited means) and has therefore modified the *mens rea* element of the offence, as it is no longer necessary to demonstrate that an accused knew that the act would be committed using the specific means enumerated in the Lebanese Criminal Code.[28] Counsel for Mr Sabra submit that the elimination of this requirement is prejudicial to the Accused, as they could be made subject to charges that might otherwise not have been confirmed.[29] They also argue that this has expanded and broadened the definition of terrorism beyond that which exists under Lebanese law and, as a consequence, the Appeals Chamber has

[21] STL, *Prosecutor v. Ayyash et al.*, Case No STL-11-01/I/PT/AC/R176*bis*, Order by the Judge Rapporteur on Filing of Reply, 4 July 2012. The Defence filed a joint reply on 9 July 2012. See *Prosecutor v. Ayyash et al.*, Case No STL-11-01/I-PT/AC/R176*bis*, Joint Defence Reply to Prosecution Consolidated Response Concerning Standing, 9 July 2012 ("Joint Defence Reply").

[22] STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/I/PT/AC/R176*bis*, Observations of the Defence Office Following the Response by the Prosecution to the Requests for Reconsideration of the Appeals Chamber Decision on the Applicable Law, 9 July 2012 ("Head of Defence Office Submission").

[23] Counsel for Mr Ayyash filed a joinder adopting the arguments of the Badreddine Defence in all aspects. See Ayyash Defence Request, para. 2.

[24] Badreddine Defence Request, paras 12-18; Oneissi Defence Request, paras 11-27.

[25] Badreddine Defence Request, paras 23-31; Oneissi Defence Request, paras 28-37.

[26] Badreddine Defence Request, paras 7-11.

[27] Oneissi Defence Request, paras 38-74; Sabra Defence Request, paras 33-35.

[28] Sabra Defence Request, paras 21, 33.

[29] *Id* at para. 22.

violated the prohibition on subjecting accused persons to *ex post facto* criminal offences (the principle of legality).[30]

12. The Prosecutor seeks dismissal of the Defence's requests.[31] He primarily argues that the Defence lacks standing to challenge the Interlocutory Decision because Rule 176 *bis*(C) grants the right to seek reconsideration solely to the Accused.[32] In the alternative, he contends that the Defence has failed to establish that reconsideration is necessary to avoid injustice as required by Rule 140.[33] Specifically, he asserts that Rules 68(G) and 176 *bis* are consistent with the Statute;[34] that the Appeals Chamber correctly held that the Tribunal must apply Lebanese law on the crime of terrorism;[35] that it was permissible to make reference to international law in interpreting that law;[36] and that this interpretation did not violate the principle of legality.[37]

13. Counsel for the Defence and the Head of Defence Office replied that counsel were entitled and bound to advance whatever submissions might have been advanced by the Accused if they had been present before the Tribunal.[38]

THE STANDING OF DEFENCE COUNSEL

14. The Prosecutor claims that Defence counsel assigned to the Accused in the *in absentia* proceedings lack standing to bring any reconsideration requests under Rule 176 *bis*(C).[39] He argues that this right is a "*personal* right" of the accused, as evinced by the wording of the Rule.[40] The Defence responds that both the Statute and the Rules envisage full representation of an accused by

[30] *Id.* at paras 32-36.
[31] Prosecutor's Response, para. 57.
[32] *Id.* at paras 7-10.
[33] *Id.* at paras 14-18.
[34] *Id.* at paras 22-32.
[35] *Id.* at paras 34-37.
[36] *Id.* at paras 34-51.
[37] *Id.* at paras 52-56.
[38] Joint Defence Reply, paras 2-10; Head of Defence Office Submission, para. 10.
[39] Prosecutor's Response, paras 2, 6-13.
[40] *Id.* at para. 8 (emphasis in original).

the Defence[41] and that denying counsel's standing to file reconsideration requests would "seriously jeopardise the fairness of the proceedings."[42]

15. We are not persuaded by the Prosecutor's arguments. Rule 176 *bis*(C) states the following:

> The accused has the right to request reconsideration of the interlocutory decision under paragraph A, pursuant to Rule 140 without the need for leave from the presiding Judge. The request for reconsideration shall be submitted to the Appeals Chamber no later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 110(A)(i).

As noted by the Defence,[43] Rule 107 explicitly states that the "rules on pre-trial, trial, and appellate proceedings shall apply *mutatis mutandis* to proceedings *in absentia*." While Rule 176 *bis* is not an appeals process, it is placed in the part of the Rules of Procedure and Evidence that regulates "appellate proceedings." Hence, even in the absence of an Accused, assigned Defence counsel have the authority to file requests for reconsideration under this rule on behalf of the Accused.

16. This assertion is also borne out by Article 22(2)(c) of the Statute, which mandates the Tribunal to ensure that counsel is assigned to any accused tried *in absentia*, "with a view to ensuring full representation of the interests and rights of the accused." The Statute thus operates on the premise that Defence counsel have the same powers as the accused they represent, unless there is an explicit provision to the contrary. There is no such provision in Rule 176 *bis*(C). To the contrary, explicit reference to the "Defence" in the second sentence of Rule 176 *bis*(C) demonstrates that the drafters envisaged that the right to seek reconsideration could be asserted by Defence counsel.

17. In this context, we refer to Rule 2 of the Rules, which defines "Defence" as the "[t]he accused/suspect and/or Defence Counsel". The terms "accused" and "Defence" can be used interchangeably. It is certainly true that some provisions in the Rules accord rights to the accused that are to be exercised by the accused personally.[44] But these provisions either require the physical

[41] Joint Defence Reply, paras 3-9.

[42] *Id.* at para. 9

[43] *Id.* at para. 3

[44] See, *e g*, Rule 110(A): "[T]he prosecutor shall make available to the Defence in a language which the accused understands [...].", Rule 144(C): "The accused shall not be compelled to make a solemn declaration [...]."; Rule 153: "A confession by a suspect or accused given during questioning [...] shall be presumed to have been free and voluntary [...]".

presence of the accused[45] or can only be read as according rights to the individual accused, rather than to a party.[46] Rule 176 *bis*(C) is not comparable to these rules because it creates a right that can in fact be discharged by Defence counsel for the accused.

18. Finally, for the purposes of seeking reconsideration under Rule 176 *bis*(C), it is irrelevant that Defence counsel had not been assigned when the Interlocutory Decision was issued.[47] Denying Defence counsel the same powers that the Accused would enjoy under this Rule, were they present, would impair the full exercise of their functions and harm the principles of procedural fairness and equality of arms between the parties. We are not persuaded that these rights should be denied simply because the accused—should they appear—would potentially have the right to challenge the Interlocutory Decision again.[48] The Prosecutor's objection to counsel's standing is therefore dismissed.

STANDARD FOR RECONSIDERATION

19. Rule 176 *bis*(C) enables the Appeals Chamber to reconsider an interlocutory decision made by the Appeals Chamber upon the request of the Pre-Trial Judge under Rule 68 (G). This power is exercised pursuant to Rule 140, which provides: "A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice."

20. Exceptionally, Rule 176 *bis*(C) provides that there is no requirement of prior leave, but leaves all other elements of Rule 140 intact. Thus, we reject the Badreddine Defence argument that reconsideration under Rule 176 *bis*(C) entitles the Defence to an unqualified re-hearing.[49] According to the Badreddine Defence, "the very nature of [the] Rule" makes it unnecessary for the Defence to specifically demonstrate injustice to the Accused, or to argue on the basis of criteria for injustice set

[45] See also Rule 144(A): "The accused may make statements to the Trial Chamber [...]"; Rule 144(C): "The accused shall not be compelled to make a solemn declaration [...]; Rule 153: "A confession by a suspect or accused during questioning by the Prosecutor [...] shall be presumed to have been free and voluntary unless the contrary is proven."

[46] See, *e.g.*, Rules 108(A): "Where the accused [...] appears before the Trial Chamber prior to the conclusion of the *in absentia* proceedings [...]"; Rule 109(A): "Where an accused appears before the Tribunal after a trial *in absentia* [...]; Rule 110(A): "[T]he Prosecutor shall make available to the Defence in a language which the accused understands [...].

[47] Contra Prosecutor's Response, paras 9-11.

[48] Prosecutor's Response, paras 8, 11.

[49] Badreddine Defence Request, para. 7.

out in the jurisprudence of the Tribunal.[50] However, as noted by the Prosecutor,[51] by referring explicitly to Rule 140, Rule 176 *bis*(C) imports the standard of reconsideration established by that rule. It is incumbent on the Defence to establish that reconsideration is necessary to avoid injustice. In other words, reconsideration of a decision taken under Rule 176 *bis* is conditional upon the existence of the injustice required by Rule 140.

21. Contrary to the Badreddine Defence's assertions,[52] there is also nothing in the Interlocutory Decision that would support a different interpretation of Rule 176 *bis*(C). In that Decision, the Appeals Chamber stated that the fact that the accused was not heard will be "a major factor in deciding whether to revisit any of the issues decided herein under Rule 176 *bis*(C)".[53] This statement presumed a challenge that was supported by evidence of injustice.[54]

22. The Appeals Chamber has not previously had occasion to clarify the prerequisites of Rule 140, including the required showing of an "injustice". However, we note with approval the Pre-Trial Judge's holding that "the object and purpose of Rule 140 of the Rules is to give Chambers a discretionary power to reconsider decisions in order to avoid an injustice."[55] We also agree with the Pre-Trial Judge that "recourse to reconsideration should be limited in order to ensure the certainty and finality of the Tribunal's judicial decisions."[56]

23. The interpretation that reconsideration must remain an exceptional remedy also corresponds to the case-law of other international criminal tribunals. Specifically, Rule 140 formalizes a principle that is well-established in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra

[50] *Ibid.*

[51] Prosecution Response, paras 15-16.

[52] Badreddine Defence Request, paras 7-9.

[53] Interlocutory Decision, para. 10.

[54] The Statements made by Judges Cassese and Baragwanath during the hearing of 7 February 2011 must also be viewed in the light of the requirements of Rule 140. See STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Official Public Transcript of the Hearing of 7 February 2011, pp. 5, 37.

[55] STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Decision on the Prosecution's Request for Partial Reconsideration of the Pre-Trial Judge's Order of 8 February 2012, 29 March 2012 ("Pre-Trial Judge Decision of 29 March 2012") para. 22; see also STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Decision relating to the Prosecution Request for Reconsideration of the Decision of 5 April 2012, 4 May 2012, ("Pre-Trial Judge Decision of 4 May 2012"), para 13.

[56] Pre-Trial Judge Decision of 29 March 2012, para. 23.

Leone.[57] Reconsideration is not available as an ordinary remedy to redress imperfections in a decision or to circumvent the unfavourable consequences of a ruling.[58]

24. However, there is one significant difference between procedures of these courts and those of our Tribunal. While under their case-law reconsideration is considered to be available if a clear error of reasoning has been demonstrated *or* if it is necessary to avoid an injustice,[59] Rule 140 only refers to the requirement of "injustice." It follows that a mere allegation of error in a decision does not suffice to support a request for reconsideration. On the contrary, the party seeking reconsideration must show that the decision has resulted in an injustice. What constitutes an injustice is of course dependent on the specific circumstances. At a minimum, it involves prejudice.[60]

[57] ICTY, *Prosecutor v Prlić et al*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("*Prlić* Decision of 3 November 2009"), para. 6; ICTR, *Prosecutor v Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List pursuant to Rule 73 *bis*(E)", 15 June 2004 ("*Bagosora et al.* Decision"), paras 7-10; SCSL, *Prosecutor v. Norman et al*, Case No. SCSL-04-14-T, Decision on Urgent Motion for Reconsideration of the Orders for the Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 7 December 2005, paras 13-14. This principle has also been affirmed in one decision of Trial Chamber I of the International Criminal Court. See ICC, *Prosecutor v Lubanga*, Case No. ICC-01/04-01/06, Decision on the Defence Request to Reconsider the "Order on Numbering of Evidence" 12 May 2010, 30 March 2011, paras 10-18. However, see contra, ICC, *Prosecutor v Ruto et al*, Case No. ICC-01/09-01/11, Decision on the "Defence Request for Leave to Appeal the 'Urgent Decision On The 'Urgent Defence Application For Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence' (ICC-01/09-01/11-260)'", 29 August 2011, para. 18; ICC, *Situation in Uganda*, Case No. ICC-02/04-01/05, Decision on Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification, 28 October 2005, paras 18-19.

[58] Pre-Trial Judge Decision of 29 March 2012, paras 23-24; Pre-Trial Judge Decision of 4 May 2012, para. 13; ICTY, *Prosecutor v Prlić et al*, Case No. IT-04-74-AR73.16, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009, p. 3.

[59] Judicial approaches differ. Some Chambers regard 'injustice' as a separate condition that must be satisfied in addition to 'clear error' (see ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003 ("*Mucić* Judgement"), para. 49). Others allow reconsideration if either criteria are made out (see ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-AR72.1, Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal Concerning Jurisdiction" dated 31 August 2004, 15 June 2006, paras 9, 20).

[60] See ICTY, *Prosecutor v. S Milošević*, Case No. IT-50-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, para 17 (where the Appeals Chamber refused to allow reconsideration on the basis that the impugned decision caused no prejudice to the accused); ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-AR73, Decision on Application by the Prosecution for Leave to Appeal, 14 December 2001, paras 13-15 (where the Appeals Chamber stated that reconsideration involves a consideration of the "specific nature" of prejudice to a party); *Bagosora et al.* Decision, paras 10, 15 (finding that there was no error or law or abuse of power, the Chamber dealt specifically with the question of whether the impugned decision had caused injustice to either party); *Mucić* Judgement, paras 49-52 (holding that reconsideration was fundamentally an exercise of a tribunal's "inherent discretion to prevent injustice" and holding that reconsideration requires an impugned decision be wrong and also have led to an injustice). See also ICTR, *Prosecutor v Barayagwiza et al*, Case No ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 5-7 (referencing the necessity for procedural error to have resulted in "disadvantage" for reconsideration to be warranted).

25. It is not therefore sufficient for the party seeking reconsideration merely to argue in the abstract; the alleged prejudice must be demonstrated on specific grounds.[61] The burden rests on the party seeking reconsideration to demonstrate that prejudice will occur.[62] These grounds may include although are not limited to:

- a decision that is erroneous or that constituted an abuse of power on the part of the Chamber.[63]
- new facts or a material change in circumstances that arises after the decision is made.[64]

26. As we have emphasized, the presence of these grounds is not sufficient per se. The party seeking reconsideration must also show that they resulted in prejudice.

27. In sum, our decision is guided by the principle that, under Rules 176 *bis*(C) and 140, the Defence must show an injustice resulting in specific prejudice in order for us to reconsider the Interlocutory Decision.

THE LEGAL BASIS OF THE INTERLOCUTORY DECISION UNDER RULES 68(G) AND 176 *BIS*

28. In issuing its Interlocutory Decision, the Appeals Chamber explained the origin and purpose of Rules 68(G) and Rule 176 *bis*:

> The Tribunal's Judges adopted Rules 68(G) and 176*bis*(A) 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 justice process in a manner supported by both the Prosecutor and the Head of the Defence Office. In establishing these Rules, the Judges were guided by Articles 21 and 28 of the

[61] Pre-Trial Judge Decision of 29 March 2012, paras 33-35; *Bagosora et al* Decision, para. 7.

[62] See ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Reconsideration or Clarification to Appeal the Trial Chamber's Rule 92 *bis* Decision of 22 September 2011, 25 November 2011 ("*Ngirabatware* Decision"), para. 16, *Prosecutor v Karemera et al* , Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza, 29 September 2008, para 4.

[63] Pre-Trial Judge Decision of 29 March 2012, paras 33, 35; *Ngirabatware* Decision, para. 14; *Bagosora et al.* Decision of 15 June 2004, para. 9; *Mucić* Judgment, para. 49.

[64] Pre-Trial Judge Decision of 29 March 2012, paras 33, 35; *Ngirabatware* Decision, para. 14; *Prlić* Decision of 3 November 2009, para. 18; SCSL, *Prosecutor* v. *Taylor,* Case No. SCSL-03-1-T, Decision on Public with Annex A Defence Motion for Reconsideration of Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of Prosecutor and its Investigators, 3 December 2010, p. 3.

Tribunal's Statute, which require the 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".[65]

29. Counsel for Messrs Oneissi and Badreddine essentially argue that Rules 68(G) and 176 *bis* of the Rules are *ultra vires*, i.e. outside the powers given by the Statute, and that consequently, the Interlocutory Decision should be declared "ill-founded"[66] and should be "annul[led]."[67]

I. The Appeals Chamber's power to decide on the legality of Rules 68(G) and 176 *bis*

30. The Rules are adopted and amended by all the Judges of the Tribunal, sitting in plenary session.[68] However, the Appeals Chamber is entrusted with the authority to decide on the applicability of a rule with respect to a specific case before it. Even though *in their rule-making capacity* the Judges on the Appeals Chamber participated in the drafting of the Rules pursuant to Article 28 of the Statute, *in their judicial capacity* they have the power to decide on the *vires* or operation of the Rules adopted by the plenary.[69]

31. Before deciding the issue of whether or not Rules 68(G) and 176 *bis* are valid, we must first be satisfied that not doing so would result in prejudice.[70] The Prosecutor argues that the Defence has failed to show such prejudice, arguing that it is merely voicing a "disagreement with the legislative choices made by the framers of the Statute and Rules."[71] We disagree. In this case, if indeed these rules were *ultra vires* the Defence would be prejudiced because it would suffer from procedural unfairness that is not merely technical, but would put it at a disadvantage.[72] This is because if the Defence's arguments on the illegality of the Rules were correct, it would have to accept a decision taken without a proper legal basis in the absence of the Defence, by way of departure from the adversarial principles governing proceedings before this Tribunal.

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[65] Interlocutory Decision, para. 7 (footnotes omitted).

[66] Badreddine Defence Request, para. 41.

[67] Oneissi Defence Request, para. 76.

[68] Article 28 STLSt; Rules 1, 5 STL RPE.

[69] See ICTR, *Prosecutor v. Nyiramasuhuko et al*, Case No. ICTR-98-42-A15*bis*, Decision in the Matter of Proceedings under Rule 15*bis*(D), 24 September 2003, para. 9; see also SCSL, *Prosecutor v. Norman et al*, Case Nos SCSL-2003-07-PT, SCSL-2003-08-PT, SCSL-2003-09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003 ("*Norman et al.* Decision of 4 November 2003"), paras 26-27. SCSL, *Prosecutor v. Fofana*, Case No. SCSL-2003-11-PD, Decision on the Urgent Defence Application for Release from Provisional Detention, 21 November 2003 ("*Fofana* Decision"), paras 24-28.

[70] See above, paras 19-27.

[71] Prosecutor's Response, para. 17.

[72] Cf. ICTR, *Barayagwiza v The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, Separate Opinion of Judge Shahabuddeen, paras 4-5.

II. The conformity of Rules 68(G) and 176 *bis* with the Statute

32. Counsel for Messrs Oneissi and Badreddine argue that the procedure set out in Rules 68(G) and 176 *bis* is not in conformity with the Tribunal's Statute.[73] They point to the fact that Article 26 of the Statute refers to the appellate jurisdiction of the Appeals Chamber as "hear[ing] appeals from persons convicted by the Trial Chamber or from the Prosecutor" on certain grounds, but does not mention any power of the Appeals Chamber to answer preliminary questions on the law submitted to it by the Pre-Trial Judge. We hold that this reading of the Statute is too narrow.

33. The Statute is a concise statement of the essential legal framework under which the Tribunal operates. It does not spell out the detail of how this framework is to be put into effect, but, rather, delegates subordinate rule-making authority to the Judges.[74] This is reflected in Article 28, which requires the Judges to "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." Rules 68(G) and 176 *bis* relate to "the conduct of pre-trial [...] and appellate proceedings" in the broader sense but also encompass "other appropriate matters" the Judges are empowered to address. In this sense, the drafters of the Statute gave wide discretion to the Judges to create the procedural framework governing the conduct of proceedings before the Tribunal.

34. In our view, to fall under "other appropriate matters", the Rules must serve to further the overall mission of the Tribunal to administer justice. At the same time, they must not contradict the spirit or the letter of the Statute. In the matter of *El Sayed*, we held that the Appeals Chamber retained the power to entertain appeals on issues that were essential to avoid injustice, even if not foreseen by the Statute or the Rules.[75] With respect to Rules 68(G) and 176 *bis*, we find no harm in the plenary of Judges assigning further, clearly delineated powers to the Appeals Chamber, in addition to the competence to hear appeals against judgments of the Trial Chamber, if this is in furtherance of aims of the Statute and not to the detriment of either party.[76] For instance, the Rules—

[73] Oneissi Defence Request, paras 11-26; Badreddine Defence Request, paras 13-18.

[74] See also *Norman et al* Decision of 4 November 2003, paras 26-27; *Fofana* Decision, para. 25.

[75] STL, *In re: Application of El Sayed*, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 54.

[76] See *Norman et al* Decision of 4 November 2003, para. 27. Here, the Appeals Chamber of the Special Court for Sierra Leone upheld the validity of a rule that referred preliminary motions relating to jurisdiction directly to the Appeals Chamber.

following the practice of other international tribunals—allow interlocutory appeals against certain decisions of the Pre-Trial Judge or the Trial Chamber.[77] Under the Defence argument, this would not be permissible because the Statute does not provide for this power. There is no question, however, that the ability of resolving certain issues during the pre-trial and trial proceedings through the interlocutory appeal mechanism is beneficial to both parties.[78]

35. In a similar vein, obtaining the Appeals Chamber's view on the applicable law of the Tribunal before the confirmation of an indictment by the Pre-Trial Judge has the distinct advantage of avoiding unnecessary delays and providing clarity to the parties in preparing their cases. For that reason, in the Interlocutory Decision, we referred to Article 21 of the Statute, which mandates us to confine all proceedings to "an expeditious hearing" and to "take strict measures to prevent any action that may cause unreasonable delay."[79]

36. We have taken note of the argument that neither Lebanese law nor that of other domestic or international jurisdictions provides a similar procedure to the one provided under Rules 68(G) and 176 *bis*.[80] Contrary to the argument of counsel for Mr Badreddine, however, the Tribunal is not "bound" by the practice of these jurisdictions. Article 28 of the Statute requires the Judges of the Tribunal, when drafting the Rules of Procedure and Evidence, to 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." The Rules reflect these various influences. Even then, it must also be emphasized that the Tribunal is different from domestic courts and other international tribunals. It is unique in the sense that it is a court of an international nature that is applying Lebanese domestic law. Accordingly, the Tribunal must be able to adapt its unique framework to the specific challenges it faces. Thus, considerations of cost and expedition point to permitting, rather than declining, access to the Appeals Chamber.

[77] See, *e.g*., Rules 90, 102, 126 STL RPE.

[78] See ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-AR72.4, Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, 22 November 1996, para. 21 (noting that "Rule 72 [the ICTY's Rule providing for a right to interlocutory appeal] has *broadened* the right to appeal from the very limited right to appeal provided for in the Statute. Rule 72 has thus enhanced and strengthened the judicial rights of the accused (and, consequently, those of the Prosecutor, on account of the principle of 'equality of arms'") [emphasis in the original]). See also ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6.

[79] Interlocutory Decision, paras 7-11.

[80] Badreddine Defence Request, para. 13.

37. Nor is there any procedural unfairness in Rules 68(G) and 176 *bis*. First, Rule 176 *bis*(C) gives the Defence the right to request reconsideration of the Appeals Chamber's decision. The Defence relies on this right in bringing the present request. Moreover, the Defence is not deprived of its right to appeal.[81] As pointed out by the Prosecutor,[82] the right to appeal under international human rights law refers to appeals against conviction and sentence.[83] In the Interlocutory Decision, the Appeals Chamber only pronounced on questions of law. It did so in the abstract and without regard to any specific case or specific facts.[84] It will still be for the Trial Chamber to apply and shape the relevant legal principles in the light of the charges contained in the indictment and the evidence adduced by the parties. This judgment will be subject to an appeal and the Appeals Chamber will revisit any legal issue that might be raised by such an appeal under Article 26 of the Statute.[85]

38. Finally, no unfairness is created by the fact that Rules 68(G) and 176 *bis* apply only before an indictment is confirmed, but not if the Prosecutor requests an amendment of a confirmed indictment.[86] As we stated in our decision of 29 March 2012, the procedural context in each situation is completely different.[87] It is not "absurd"[88] that the Pre-Trial Judge, when amending an indictment, cannot turn to the Appeals Chamber with questions on the applicable law. At the confirmation stage, it is not foreseeable when the accused will actually appear before the Tribunal (or in the case of *in absentia* proceedings, when counsel will be appointed); the plenary of Judges has therefore devised a mechanism for the Appeals Chamber to intervene, upon the request of the Pre-Trial Judge, and clarify the applicable law without argument from Defence counsel. When, instead, an indictment is simply amended, the Defence is already present and thus afforded an opportunity to challenge any amendment in a timely manner by preliminary motion before the Trial Chamber. Since these preliminary rulings are subject to appeal as of right, the Appeals Chamber is still able to intervene should an error occur.

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[81] Contra Badreddine Defence Request, para. 14; Oneissi Defence Request, paras 19-23.

[82] Prosecutor's Response, para. 28.

[83] International Covenant on Civil and Political Rights, 23 March 1976, 999 U.N.T.S. 171, art. 14(5).

[84] Interlocutory Decision, paras 7-8.

[85] For the same reasons, we reject the arguments that "the Appeals Chamber deprives the Trial Chamber of the power to develop its own interpretation of the law." (Oneissi Defence Request, para. 24) and that there has been a "violation of the adversarial principle" (Badreddine Defence Request, paras 38-39)

[86] Contra Oneissi Defence Request, para. 25; Badreddine Defence Request, paras 16-17, both referring to STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012 ("Appeals Chamber Decision of 29 March 2012").

[87] Appeals Chamber Decision of 29 March 2012, para. 33.

[88] Badreddine Defence Request, para. 16.

III. Conclusion

39. We hold that Rules 68(G) and 176 *bis* are in conformity with the Statute and reject the Defence submissions in this regard.[89]

THE APPLICATION OF RULES 68(G) AND 176 *BIS* IN THIS CASE

40. Counsel for Messrs Oneissi and Badreddine argue that even if the procedure allowing the Pre-Trial Judge to submit preliminary questions on the law were to be considered valid, the Pre-Trial Judge and the Appeals Chamber exceeded their powers under these Rules. They claim that the Pre-Trial Judge asked—and the Appeals Chamber answered—questions that fell outside the scope of Rule 68(G).[90] The Badreddine Defence also argues that the Appeals Chamber was limited to giving a decision only for the purposes of allowing the Pre-Trial Judge to rule on the indictment.[91] The Prosecutor did not respond to these particular points. While the Defence has not argued that it suffered any particular prejudice arising from the alleged violations of Rule 68(G), we nevertheless hold that the same principles we stated with respect to the alleged illegality of the Rule itself are valid here. In other words, a violation of Rule 68(G) could potentially constitute a procedural unfairness, which in the particular circumstances of Rule 176 *bis*(C) would amount to prejudice.[92]

IV. The scope of Rules 68(G) and Rule 176 *bis*

41. Rule 68(G) permits the Pre-Trial Judge to 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." Rule 176 *bis*(A) empowers the Appeals Chamber to issue a decision "on any question raised by the Pre-Trial Judge under Rule 68(G)."

42. According to the Defence, this means that the Appeals Chamber should not have answered questions submitted by the Pre-Trial Judge because he could only submit questions pertaining to the

[89] In light of our finding, we do not need to address counsel for Mr Oneissi's request for "removal" of Rules 68(G) and 176 *bis* from the Rules of Procedure and Evidence. Oneissi Defence Request, para. 76.
[90] Oneissi Defence Request, paras 27-36; Badreddine Defence Request, paras 19-28.
[91] Badreddine Defence Request, paras 29-31.
[92] *Id.* at para. 31.

applicability of a particular provision of the Statute.[93] We reject these arguments. Under Rule 176 *bis*, the Appeals Chamber has the authority to provide answers to any question related to the applicable law raised by the Pre-Trial Judge, as succinctly or expansively as necessary. This includes the meaning of the applicable law.[94]

43. We also dismiss the argument that the Appeals Chamber should have "limited [its] reply to that which was necessary for the confirmation or—non-confirmation—of the indictment."[95] As emphasized in the Interlocutory Decision, the Appeals Chamber had neither seen the Indictment nor the evidence supporting it at the time of its Decision. It made legal findings in the abstract and without reference to the case against the four Accused.[96] Insofar as counsel for Badreddine argues that the Decision's authority was limited to the confirmation stage,[97] we find that the Defence has not shown any prejudice warranting further discussion of this issue.[98] In any event, as mentioned above, the Trial Chamber's task of trying the facts on the case and applying the underlying legal principles in light of the evidence is not impacted by the holdings of the Interlocutory Decision.

V. Conclusion

44. We find that the Interlocutory Decision did not exceed the scope of Rules 68(G) and 176 *bis*. The Defence contentions in this regard are rejected.

THE MERITS OF THE INTERLOCUTORY DECISION

45. Defence counsel for Messrs Sabra and Oneissi request reconsideration of the Interlocutory Decision with respect to the Appeals Chamber's definition of the crime of terrorism both under Lebanese law and under international customary law. They specifically criticize the methodology of the Appeals Chamber[99] and argue that the Interlocutory Decision has violated the Statute, the

[93] Badreddine Defence Request, paras 24-28; Oneissi Defence Request, paras 32, 34-35.

[94] We reject counsel for Oneissi's argument that the Appeals Chamber provided "precise legal conclusions on points of law about which it had not been questioned directly." Oneissi Defence Request, para. 35. In the first example cited by the Oneissi Defence, the Appeals Chamber clarified the Pre-Trial Judge's question before providing an answer on the law. Interlocutory Decision, paras 171, 174. Regarding the second example, clarification was required in the light of the questions asked by the Pre-Trial Judge regarding JCE and conspiracy. Interlocutory Decision, para. 201.

[95] Badreddine Defence Request, para. 29.

[96] Interlocutory Decision, para. 8.

[97] Badreddine Defence Request, paras 28-31

[98] We dismiss counsel for Mr. Badreddine's arguments as to the Appeals Chamber's alleged "confusion between legislative and jurisdictional functions" for lack of substantiation. Badreddine Defence Request, paras 35-37.

[99] See also Badreddine Defence Request, paras 32-34.

principle of legality, and the principle of strict interpretation of criminal law and that it referred to a non-existent definition of terrorism.[100]

46. We recall that under Rules 176 *bis*(C) and 140, it is crucial for the Defence to demonstrate an injustice arising from the Interlocutory Decision, meaning that, at a minimum, they suffered prejudice.[101] It is only then that we would reconsider that Decision. We find that they fall short of this required threshold for reconsideration because in advancing their arguments, counsel did not demonstrate how and in what way the Accused were prejudiced by the Appeals Chamber's reasoning.

47. On the contrary, we made clear in the Interlocutory Decision that when interpreting the Statute or the Lebanese Criminal Code, we would choose the interpretation "which is more favourable to the rights of the suspect or accused, in keeping with the general principle of criminal law of *favor rei* (to be understood as 'in favour of the accused')."[102]

48. Article 314 of the Lebanese Criminal Code's definition of terrorism, as interpreted by the Appeals Chamber, allows for the possibility of considering means other than the ones explicitly spelled out in the article as means liable to create a public danger.[103] However, we have clearly stated that the customary international law definition of terrorism identified in the Interlocutory Decision[104] "cannot be *directly* applied by this Tribunal to the crimes of terrorism perpetrated in Lebanon and falling under our jurisdiction",[105] and that international law may be used to interpret Article 314 "provided such interpretation does not run counter to the principle of legality".[106] Finally, "whether

[100] Specifically, they argue that the Appeals Chamber erred by (a) applying customary international law while defining the scope of the Tribunal's jurisdiction *ratione materiae* under Article 2; (b) referring to customary international law although this is not a permissible means of interpretation of Lebanese criminal law, (c) misinterpreting the relevant international conventions and custom, (d) not relying on the definition of "terrorism" in Lebanese criminal law which is sufficiently precise to be applied in the proceedings or, if in any way ambiguous, should have been interpreted using the applicable methods of interpretation known to the Lebanese legal system for penal texts; (e) broadening the definition of the constituent elements of the crime of terrorism under Lebanese law; (f) infringing upon the Accused's right not to be subjected to *ex post facto* criminal law; (g) disregarding the principle of non-retroactivity of criminal law; and (h) erring regarding the legality of the applicable sentence. Sabra Defence Request, paras 7-36 and Oneissi Defence Request, paras 38-74.

[101] See above, paras 19-27.

[102] See Interlocutory Decision, para. 32, and also, paras 211, 263, 264 and 13 of the Disposition, regarding the specific application of the principle of *favor rei* to the modes of responsibility.

[103] This is based on the non-exhaustive list in Article 314 of the Lebanese Criminal Code. See Interlocutory Decision, paras 125-129.

[104] Cf. UK, Court of Appeal (Criminal Division), *R v Mohammed Gul*, [2012] EWCA Crim 280.

[105] Interlocutory Decision, para. 123.

[106] *Id* at Disposition, p. 149.

certain means are liable to create a public danger within the meaning of Article 314 should always be assessed on a case-by-case basis" by the trier of fact on the basis of the submissions of the parties in each specific circumstance.[107]

49. In the instant case the indictment charges the accused with participating in the commission of a terrorist act "by means of an explosive device". In particular, the factual basis for the indictment is the use of a large quantity of explosive materials in a public place (2,500 kg of TNT) to kill Rafik Hariri and others.[108] Therefore, neither the indictment nor the confirmation decision relies on the definition of terrorism as set out in the Interlocutory Decision.

50. This issue also bears upon the arguments raised by counsel for Mr Sabra in relation to the issue of *mens rea*. In asserting that the Appeals Chamber's approach expands the *mens rea* standard of the offence by providing for two alternative standards of intent inapplicable under Lebanese law,[109] the Sabra Defence fails to show how that impacts Mr Sabra's case, especially in the light of the facts pleaded in the indictment. Considering that the 14 February 2005 attack was allegedly committed with an explosive device, the claim that the Appeals Chamber modified the *mens rea* element of the crime is groundless.

51. In conclusion, counsel for Messrs Sabra and Oneissi have not shown that these Accused are prejudiced by the definition of the crime of terrorism under Article 314 of the Lebanese Criminal Code given by the Appeals Chamber in its Interlocutory Decision.[110] Therefore, the Defence requests for reconsideration do not fulfil the necessary requirements to warrant reconsideration of the Interlocutory Decision. They are rejected.

[107] *Id.* at fns 253, 432.

[108] See Confirmation Decision, para. 39; Indictment, paras 67-69, 77-78.

[109] Sabra Defence Request, para. 4.

[110] We therefore need not address counsel for Mr Sabra's request to order the Pre-Trial Judge to conduct the process of confirming the indictment anew. Sabra Defence Request, para. 37. We also reject counsel for Mr Badreddine's arguments concerning alleged flaws in the Appeals Chamber's methodology when determining the correct definition of the crime of terrorism under Lebanese law for failure to show any prejudice arising from the Appeals Chamber's decision. Badreddine Defence Request, paras 32-34. In fact, the Appeals Chamber needed to determine the definition of terrorism under international law to decide what impact—if any—that definition had on the interpretation of the definition under Lebanese law. Interlocutory Decision, para. 62.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

PURSUANT TO Rules 176 *bis*(C) and 140;

NOTING the written submissions of the Parties and the Head of Defence Office;

HOLDS that the Defence has standing to bring requests for reconsideration under Rule 176 *bis*(C);

DISMISSES the Defence requests for reconsideration of the Appeals Chamber's Interlocutory Decision of 16 February 2011.

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

Dated this 18th day of July 2012,
Leidschendam, the Netherlands

David Baragwanath
Presiding

SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN
18 July 2012