

**THE APPEALS CHAMBER**

Case No.: STL-11-01/PT/AC

Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko, Judge Rapporteur
Judge Kjell Erik Björnberg

Registrar: Mr Herman von Hebel

Date: 17 August 2012

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON REQUEST BY DEFENCE FOR MR AYYASH FOR EXTENSION OF
TIME TO FILE APPEAL**

Prosecutor:
Mr Norman Farrell

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

Head of Defence Office:
Mr François Roux

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 Guénaél Mettraux





INTRODUCTION

1. We are seized of a request by Defence counsel for Salim Jamil Ayyash¹ for an extension of time to file an appeal pursuant to Rules 9² and 90(B)(i) and (C)³ of the Rules of Procedure and Evidence (“Rules”).
2. We conclude that counsel seeks to appeal against the Trial Chamber’s “Decision on Reconsideration of the Trial *In Absentia* Decision” of 11 July 2012⁴ (“Reconsideration Decision”). However, we hold that an appeal against the Reconsideration Decision requires certification by the Trial Chamber, which has not been given so far. Thus, the appeal is not properly before the Appeals Chamber. In any event, counsel has failed to show good cause for filing his appeal outside the prescribed time limits.

PROCEDURAL BACKGROUND

3. On 1 February 2012, the Trial Chamber decided to conduct the trial against the four Accused, among them Mr Ayyash, *in absentia*.⁵ Subsequently, the Head of Defence Office assigned counsel to each of the Accused in order to protect their interests before the Tribunal.⁶
4. On 8 May 2012, the Trial Chamber dismissed a request filed by the Defence for Mr Sabra⁷ to obtain an extension of the word limit on the filing of a “preliminary motion” under Rule 90 against the *In Absentia* Decision.⁸ The Trial Chamber stated that counsel for Mr Sabra had failed to specify

¹ STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/AC, Ayyash Request for Extension of Time to File an Appeal Pursuant to Rule 90, 25 July 2012 (“Request”)

² This rule permits enlargement of any time under the Rules on good cause being shown by motion or by the Chamber *proprio motu*, meaning even without such cause being shown.

³ This rule allows for appeals without certification by the Trial Chamber of decisions on preliminary motions that challenge jurisdiction.

⁴ STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/TC, Decision on Reconsideration of the Trial *In Absentia* Decision, 11 July 2012 (“*In Absentia* Decision”)

⁵ STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012.

⁶ 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.

⁷ STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/TC, Sabra Motion for Extension of Page Limit/Word Count In Re Absentia Motion, 4 May 2012.

⁸ STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/TC, Decision on Extension of Word Limits for the Filing of Preliminary Motions Challenging Jurisdiction, 8 May 2012 (“8 May 2012 Decision”).



how such a motion “could fall within Rule 90(A)” and that it “cannot, however, be a preliminary motion—such as a challenge to jurisdiction—under Rule 90(A).”⁹

5. On 16 May 2012, the Defence for Messrs Ayyash and Sabra filed a joint motion, asking for leave to file requests for reconsideration of the Trial Chamber’s 8 May 2012 Decision and of the *In Absentia* Decision.¹⁰

6. The Presiding Judge of the Trial Chamber denied leave to file a motion for reconsideration of the 8 May 2012 Decision, but granted leave with respect to the *In Absentia* Decision pursuant to Rule 140.¹¹ On 24 May 2012, counsel for Mr Ayyash joined counsel for the other Accused and requested for reconsideration of the *In Absentia* Decision.¹²

7. On 11 July 2012, the Trial Chamber issued the Reconsideration Decision denying the Defence requests. On 20 July 2012, Counsel for Messrs Sabra, Badreddine and Oneissi requested the Trial Chamber for certification to appeal that decision. Counsel for Mr Ayyash joined the certification motion by the Sabra Defence.¹³ He stated that he sought certification “to preserve [the] right to appeal the Reconsideration Decision should the Appeals Chamber consider that there is no appeal as of right” but that he would also appeal the Reconsideration Decision “in accordance with Rule 90.”¹⁴

8. On 25 July 2012, Counsel for Mr Ayyash filed before the Appeals Chamber the present Request. The Prosecutor responded on 27 July 2012.¹⁵ The Presiding Judge of the Appeals Chamber designated Judge Nsereko as Judge Rapporteur in this matter pursuant to Rule 36.

⁹ 8 May 2012 Decision, para. 16.

¹⁰ STL, *Prosecutor v Ayyash et al*, Case No STL-11-01/PT/TC, Ayyash and Sabra Motion for Leave to Seek Reconsideration, 16 May 2012.

¹¹ STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/TC, Decision Authorising the Ayyash Defence and the Sabra Defence to File a Request for Reconsideration, 22 May 2012, paras 5-7.

¹² STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/TC, Ayyash Motion Joining Sabra Motion For Reconsideration of the Trial Chamber’s Order to Hold a Trial *In Absentia*, 24 May 2012.

¹³ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Defence for Salim Jamil Ayyash’s Joinder in the Sabra Motion for Certification for Leave to Appeal Decision on Reconsideration of the Trial In Absentia Decision, 20 July 2012 (“Certification Motion”).

¹⁴ Certification Motion, para. 1

¹⁵ STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/AC, Prosecution Response to Ayyash Request for Extension of Time to File an Appeal pursuant to Rule 90, 27 July 2012 (“Response”).



SUBMISSIONS OF THE PARTIES

9. Counsel for Mr Ayyash submits that the Reconsideration Decision effectively affirms the *In Absentia* Decision. He argues that in substance these decisions involve a finding that the Tribunal exercises jurisdiction *ratione personae* over the Accused and that Rule 90 should be applied to enable him to appeal against the Reconsideration Decision as of right.¹⁶ He requests an extension of time to file such an appeal “following resolution of the pending certification motions.”¹⁷

10. The Prosecutor responds that the Request should be rejected.¹⁸ He argues that Mr Ayyash’s counsel has failed to specify which decision of the Trial Chamber he wants to appeal, but that in any case, none of those decisions entitles him to an appeal as of right because they were not rendered pursuant to preliminary motions under Rule 90.¹⁹ The Prosecutor submits that to be able to appeal against those decisions, the Ayyash Defence must seek certification. This process cannot be circumvented by filing an appeal directly before the Appeals Chamber.²⁰ If the Appeals Chamber were to accept the Request, this would result in “nullifying the certification process.”²¹ In any event, even if the Request was properly before the Appeals Chamber, counsel for Mr Ayyash failed to demonstrate good cause for any extension of time to file an appeal.²²

DISCUSSION

11. Counsel for Mr Ayyash does not specify in his Request which decision of the Trial Chamber he intends to appeal. Nevertheless, on reading the Request as a whole,²³ in conjunction with his pending Certification Motion before the Trial Chamber,²⁴ we form the view that he seeks to challenge the Reconsideration Decision. Such a decision is made pursuant to Rule 140. For the

¹⁶ Request, paras 7-8

¹⁷ Request, para. 9.

¹⁸ Response, para. 11.

¹⁹ Response, paras 2-5.

²⁰ Response, para. 8.

²¹ Response, para. 6.

²² Response, paras 1, 10.

²³ See Request, para. 1, where counsel states that though he joined the Sabra motion seeking certification for leave to appeal the Trial Chamber’s Reconsideration Decision, he files this Request with the Appeals Chamber “[t]o preserve the right to appeal pursuant to Rule 90, and to protect the interests of the accused”; see also Request, paras 7-8.

²⁴ Certification Motion, para. 1, where counsel states that “[t]he Defence for Mr. Salim Jamil Ayyash will appeal the Trial Chamber’s *Decision on Reconsideration of the Trial In Absentia Decision* (‘Reconsideration Decision’). The appeal will be filed in accordance with Rule 90” (italics in the original).



Defence to appeal that decision, it is mandatory that they first obtain certification from the Trial Chamber under Rule 126(C). Counsel for Mr Ayyash has sought certification of the Reconsideration Decision and his application is currently pending before the Trial Chamber. Unless certification is granted, counsel for Mr Ayyash cannot seize the Appeals Chamber with any filings relating to an appeal.²⁵

12. Counsel for Mr Ayyash argues that both the *In Absentia* and the Reconsideration Decision “involved a finding that the Tribunal exercises jurisdiction *ratione personae* over the accused”,²⁶ thus making them fall under Rule 90 and, consequently, entitling him to appeal either decision as of right. We are not persuaded by this argument.

13. First, the *In Absentia* Decision was not a decision on a preliminary motion. Rather, it was issued by the Trial Chamber pursuant to the request of the Pre-Trial Judge under Rule 105 *bis*. Similarly, the Reconsideration Motion was issued following requests under Rule 140. The Trial Chamber has twice dismissed attempts by the Defence to consider such requests as preliminary motions, and no attempts were made to seek certification of those decisions. Second, Rule 90(E), which defines what “motions challenging jurisdiction”²⁷ are, does not include a challenge to jurisdiction *ratione personae* or personal jurisdiction.²⁸ In this respect, our understanding of the concept of *ratione personae* is that it determines the jurisdiction of a court based on the identity of a person in question.²⁹ The *In Absentia* Decision did not inquire into whether the Tribunal had jurisdiction to try the four Accused. It simply examined whether the conditions to initiate proceedings *in absentia* exist with respect to them. Personal jurisdiction was never addressed in that decision or in the Reconsideration Decision. Thus, neither decision can be considered to have dealt with a preliminary motion challenging jurisdiction based on Rule 90.

14. In any event, regardless of whether counsel for Mr Ayyash was entitled to appeal the Reconsideration Decision as of right, he failed to show good cause for an extension of time to file

²⁵ If the Trial Chamber grants certification, counsel for Mr Ayyash will have seven days to file an appeal (see Rule 126(E)).

²⁶ Request, para. 7.

²⁷ See Rule 90(B)(i).

²⁸ Rule 90(E) provides that “[f]or the purposes of paragraphs (A) (1) and (B) (i), a motion challenging jurisdiction refers exclusively to a motion that challenges an indictment on the ground that it does not relate to the subject-matter, temporal or territorial jurisdiction of the Tribunal, including that it does not relate to the Hariri attack or an attack of a similar nature and gravity that is connected to it in accordance with the principles of criminal justice.”

²⁹ See, for example, Art. 26 of the Statute of the International Criminal Court.



such an appeal outside the prescribed time limits as specifically required by Rule 9.³⁰ Counsel has advanced no arguments whatsoever why he could not file his appeal within the prescribed ten days pursuant to Rule 90(B)(i), if this Rule had in fact been applicable. We also note with disapproval that counsel filed his Request on the last day of this period. Unless there are exceptional circumstances, requests for extension of time should be filed in a timely manner to allow the opposing party to respond and to provide the Appeals Chamber with an opportunity to rule on such requests *before* relevant time limits will expire.³¹

³⁰ See STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/AC, Decision on Defence Requests for Extension of Word and Time Limits, 6 August 2012, para. 20; STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC/R176bis, Order on Time Limit to File Rule 176 bis(C) Request, 14 May 2012, paras 22-29.

³¹ See ICTY, *Prosecutor v Karadžić*, Case No. IT-95-5/18-PT, 29 May 2009, para. 8 (reminding a party “of the need to submit any requests for extension of time long enough before the relevant expiry date to give the [opposing party] time to respond”); ICTY, *Prosecutor v Gotovina et al*, Case No. IT-06-90-AR65.2, Decision on Prosecution Request for Extension of Time, 15 January 2008, p. 2 (considering that “in seeking an extension of time, a party should file its request so as to allow the Appeals Chamber enough time to determine its merits prior to the expiry of the deadline”).



DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

PURSUANT to Rules 126, 90 and 9 of the Rules;

REJECTS the Request of counsel for Mr Ayyash.

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

Filed this 17th day of August 2012,
Leidschendam, the Netherlands

Judge David Baragwanath
Presiding

