



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No.: STL-11-01/PT/AC/AR126.2

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

Registrar: Mr Herman von Hebel

Date: 29 October 2012

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

ORDER ON DEFENCE REQUEST FOR LEAVE TO FILE A REPLY

Prosecutor:
Mr Norman Farrell

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

Legal Representatives of Victims:
Mr Peter Haynes
Mr Mohammad F. Mattar
Ms Nada Abdelsater-Abusamra

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

Head of Defence Office:
Mr François Roux

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





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1. Counsel for Mr Badreddine have filed an appeal¹ against the decision of the Pre-Trial Judge rejecting counsel's request to "annul" the Indictment because of an alleged absence of authority on part of the Prosecutor.² Counsel for Mr Oneissi sought to "join[] with the appellate brief" of counsel for Mr Badreddine.³ Subsequent to the filing of the Prosecutor's Response,⁴ both counsel now request leave to file a reply.⁵

2. Counsel seek to reply to the following issues: (1) the Prosecutor's argument that absent certification of the Pre-Trial Judge's decision with respect to counsel for Mr Oneissi, his appeal should be dismissed;⁶ (2) the Prosecutor's argument that certification under Rule 126(C) is a discretionary decision of the Pre-Trial Judge or Trial Chamber;⁷ and (3) the onus on an appellant to demonstrate error on appeal.⁸ The Prosecutor does not object to the Defence request with respect to (2) but asks us to deny it with respect to (1) and (3).⁹

3. With respect to (1), we note that counsel for Mr Oneissi did not request certification to appeal the Pre-Trial Judge's decision. Accordingly, the Pre-Trial Judge certified the decision for counsel for Mr. Badreddine only.¹⁰ We emphasize that to challenge an interlocutory decision, the proper procedural avenue is for counsel of each Accused—separately or jointly—to apply for certification. Counsel for Mr Oneissi chose not to do so. Consequently, he cannot "join" the appeal filed by

¹ STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.2, Appellate Brief by the Badreddine Defence against the Decision Dismissing its Motion for the Indictment to be Annulled on the Grounds of Absence of Authority, 27 September 2012. All further references to filings and decisions relate to this case number unless otherwise stated.

² STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Motion by the Defence for Mr Mustafa Badreddine to Have the Indictment of 10 June 2011, Confirmed on 28 June 2011, Annulled on the Grounds of Absence of Authority, 29 August 2012; see also STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Badreddine Defence Motion for Certification to Appeal the Decision of 29 August 2012, 18 September 2012 ("Certification Decision").

³ Joining of the Oneissi Defence with the Appellate Brief of the Badreddine Defence Against the Decision Denying its Application to Annul the Indictment for Absence of Authority, 27 September 2012, para. 1.

⁴ Prosecution Response to the Badreddine Defence Appeal from the Pre-Trial Judge's Decision of 29 August 2012, 16 October 2012 ("Prosecutor's Response to Appeal").

⁵ Motion from the Badreddine and Oneissi Defence Counsel for Leave to File a Reply to the Prosecution Response Relating to the Appeal Lodged Against the Decision of 29 August 2012, 22 October 2012 ("Motion").

⁶ Motion, para. 3.

⁷ Motion, paras 4-5.

⁸ Motion, para. 6.

⁹ Prosecution Response to Badreddine and Oneissi Defence Request for Leave to File a Reply, 24 October 2012 ("Prosecutor's Response"), para. 7.

¹⁰ See Certification Decision, para. 1, Disposition.



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counsel for Mr Badreddine.¹¹ Nor can he file other motions jointly with counsel for Mr Badreddine as he has no standing before us.¹² We therefore reject the request under (1).

4. With respect to the question of whether certification decisions are discretionary or not, this raises the question of whether certification may be denied even if the requirements of Rule 126(C) are met.¹³ To that extent, we hold that this is a new issue and on this basis warrants a reply.¹⁴ Contrary to the submissions of the Defence,¹⁵ the Prosecutor was not barred from asking for clarification in his response brief in this regard. We note that this issue, which the Prosecutor raised before the Pre-Trial Judge,¹⁶ was not addressed by the Pre-Trial Judge and does not affect the decision under appeal. In particular, the Prosecutor states that he “recognizes that the Badreddine Defence Appeal is properly before the Appeals Chamber.”¹⁷ We therefore grant counsel for Mr Badreddine’s request under (2) and allow them four days to file a brief not exceeding 1,000 words. We remind them that this brief must be strictly limited to the issue as set out in the first sentence of this paragraph.

5. Finally, the issue of what an appellant must demonstrate on appeal to show error is not a new issue arising from the Prosecutor’s response. As we have held previously, “[f]ailure to make certain arguments in relation to the issues raised by the appeals or a desire to present them differently does not justify leave to file a reply.”¹⁸ We accordingly reject counsel’s request under (3).

¹¹ See, e.g., ICTY, *Prosecutor v. Haradinaj et al*, Case No. IT-04-84bis-AR73.1, Decision on Idriz Balaj and Lahi Brahimaj’s Requests for Standing Before the Appeals Chamber and/or Joinder on Issues Pending on Appeal which are Central to the Limited Partial Retrial Ordered in this Case, 4 March 2011 (“*Haradinaj Decision*”), pp. 2-3; ICTR, *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.10, Decision on Requests for Extension of Time, 29 August 2007, para. 7; see also *Prosecutor v. Ndayambaje et al*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi’s Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, para. 14 (holding “that to grant an accused, who has not obtained the required certification, the standing to challenge a Trial Chamber decision on appeal in his response to an appeal filed by a co-accused would open the interlocutory appeal process to abuse. Where certification [...] is required, parties must obtain such certification if they intend to appeal a decision”).

¹² See *Haradinaj Decision*, p. 3 (finding that the accused who had not obtained certification did not “have standing before the Appeals Chamber with respect to the Impugned Decision”).

¹³ See Prosecutor’s Response to Appeal, paras 8-9.

¹⁴ See STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/AC/AR126.1, Order on Defence Request for Leave to File a Reply, 8 October 2012 (“*Order on Reply*”), para. 3.

¹⁵ Motion, para. 4.

¹⁶ STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Response to the Request of the Badreddine Defence for Certification to Appeal the “Decision on the Motion by the Defence for Mr. Mustafa Badreddine to have the Indictment of 10 June 2011, Confirmed on 28 June 2011, Annulled on the Grounds of Absence of Authority”, 12 September 2012, para. 4.

¹⁷ Prosecutor’s Response, para. 6.

¹⁸ Order on Reply, para. 3.



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DISPOSITION**FOR THESE REASONS;****THE APPEALS CHAMBER**, deciding unanimously;**PURSUANT** to Rule 8 of the Rules of Procedure and Evidence;**GRANTS** leave to counsel for Mr Badreddine to file a brief in reply by 2 November 2012, 4 pm. This brief must not exceed 1,000 words and must be strictly limited to the question of whether to grant certification is a discretionary decision or not.**DENIES** the remainder of the Motion.

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

Dated 29 October 2012,

Leidschendam, the Netherlands

Judge David Baragwanath
Presiding

