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

**THE APPEALS CHAMBER**

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| **Case No.:** | **STL-11-01/PT/AC/AR126.1** |
| **Before:** | **Judge David Baragwanath, Presiding**<br>**Judge Ralph Riachy**<br>**Judge Afif Chamseddine**<br>**Judge Daniel David Ntanda Nsereko, Judge Rapporteur**<br>**Judge Kjell Erik Björnberg** |
| **Registrar:** | **Mr Herman von Hebel** |
| **Date:** | **1 November 2012** |
| **Original language:** | **English** |
| **Classification:** | **Public** |

**THE PROSECUTOR**

**v.**

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

# DECISION ON DEFENCE APPEALS AGAINST TRIAL CHAMBER'S DECISION ON RECONSIDERATION OF THE TRIAL *IN ABSENTIA* DECISION

**Prosecutor:**
Mr Norman Farrell

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

**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]

*Following the failure of Messrs Ayyash, Badreddine, Oneissi and Sabra to appear before the Tribunal, the Trial Chamber decided to commence trial proceedings in their absence. Defence Counsel appointed to represent each of the four Accused asked the Trial Chamber to reconsider this decision. The Trial Chamber denied their request. Counsel now appeal against the Trial Chamber's decision denying reconsideration.*

*The Appeals Chamber unanimously dismisses the four appeals.*

*The Impugned Decision was a decision on reconsideration under Rule 140. Counsel had to show prejudice resulting from a refusal to reconsider the original* In Absentia *Decision. Because any prejudice arising in these circumstances will be cured if the accused appear and decide to exercise their right to a full retrial, the Appeals Chamber rejects most of the Defence challenges* in limine. *However, the potential prejudice resulting from a violation of the Accused's right to know about the nature of the charges and to participate in the proceedings could not be cured by a retrial. These rights can be effectively guaranteed only if proper notification has occurred. Consequently, only this issue is properly before the Appeals Chamber.*

*The Appeals Chamber holds that the Trial Chamber did not err in formulating the standard of reconsideration under Rule 140. It also concludes that the Trial Chamber did not err in setting out and applying the applicable legal standards with respect to notification. The Appeals Chamber holds that a trial* in absentia *may only be conducted where (i) reasonable efforts have been taken to notify the accused personally, (ii) the evidence as to notification satisfies the Trial Chamber that the accused actually knew of the proceedings against them; (iii) it does so with such degree of specificity that the accused's absence means they must have elected not to attend the hearing and therefore have waived their right to be present. The Trial Chamber must be satisfied that on the basis of all the available evidence before it, these three elements are met; that may be done by inference from all the circumstances of the case. Because of this requirement and the consequences that flow from the decision to proceed* in absentia, *this is necessarily a high evidentiary standard.*

*Given the extent and specificity of the Trial Chamber's review of the evidence with respect to the notification of the Accused in the original* In Absentia *Decision, the Appeals Chamber finds that the Trial Chamber applied the highest evidentiary standards in establishing that the Accused were informed of the charges against them, of their right to participate in the proceedings and of the consequences if they did not appear. These standards are also met by the Trial Chamber's findings, which leave no doubt as to the Trial Chamber's satisfaction that the Accused were properly notified in the specific circumstances of this case. The Defence has failed to demonstrate that the Trial Chamber committed an error in the Impugned Decision when it rejected their requests for reconsideration with regard to notification.*

[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. Following the failure of Messrs Ayyash, Badreddine, Oneissi and Sabra to appear before the Tribunal, the Trial Chamber decided to commence trial proceedings *in absentia*.[2] Defence counsel appointed to represent each of the four Accused[3] asked the Trial Chamber to reconsider this decision.[4] In the Impugned Decision, the Trial Chamber denied their request[5] and counsel now seek to appeal this decision.[6]

2. The Accused have a right to know about the charges against them and must be given the choice to participate in the trial before a decision is made to proceed in their absence. On this basis we hold that the only issues counsel could appeal were those related to the proper notification of the Accused of the proceedings against them. We conclude that the Trial Chamber applied the proper legal standard for notification. We therefore dismiss the appeals.

## SUBMISSIONS OF THE PARTIES

3. Defence counsel raise a number of arguments on appeal. Generally, these relate to:

- the Trial Chamber's decision to limit the scope of its review to issues arising from its application of Rule 106 (A);[7]

[2] STL, *Prosecutor* v *Ayyash et al.*, Case No. STL-11-01/I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012 ("*In Absentia* Decision")
[3] STL, *Prosecutor* v *Ayyash et al*, Case No. STL-11-01/I/PTJ, Assignment of Counsel for the Proceedings Held *In Absentia* Pursuant to Rule 106 of the Rules, 2 February 2012.
[4] STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC: Request of the Defence for Mr Badreddine for Reconsideration of the "Decision to Hold Trial *In Absentia*" Rendered by the Trial Chamber on 1 February 2012, 22 May 2012 ("Badreddine Reconsideration Request"); Sabra Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial *In Absentia*, 23 May 2012 ("Sabra Reconsideration Request"); Request by the Oneissi Defence for Reconsideration of the Decision to Hold Trial *In Absentia* of 1 February 2012 ("Oneissi Reconsideration Request"), 24 May 2012; Ayyash Motion Joining Sabra Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial *In Absentia*, 24 May 2012
[5] 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 ("Impugned Decision")
[6] STL, *Prosecutor* v *Ayyash et al.*, Case No STL-11-01/PT/AC/AR126.1, Appeal of the Oneissi Defence Against the Trial Chamber Decision on Reconsideration of the Trial *In Absentia* Decision, 5 September 2012 ("Oneissi Appeal"); Sabra's Appeal against Decision on Reconsideration of the Trial *In Absentia* Decision, 5 September 2012 ("Sabra Appeal"); Appeal of the Badreddine Defence against the "Decision on Reconsideration of the Trial *In Absentia* Decision", 5 September 2012 ("Badreddine Appeal"); Ayyash Joinder in "Sabra's Appeal against Decision on Reconsideration of the Trial *In Absentia* Decision", 5 September 2012. All further references to filings and decisions relate to this case number unless otherwise stated. We rejected an attempt by counsel for Mr Ayyash to file an appeal without obtaining certification, *see* STL, *Prosecutor* v. *Ayyash et al.*, Case No. STL-11-01/PT/AC, Decision on Request by Defence for Mr Ayyash for Extension of Time to File an Appeal, 17 August 2012
[7] Oneissi Appeal, paras 12-17; Sabra Appeal, paras 13-18, Badreddine Appeal, paras 4, 10, 11



- the standard of reconsideration applied by the Trial Chamber;[8]
- the legality of *in absentia* proceedings in general;[9]
- the availability of a future retrial and the modalities of such a trial;[10]
- the finding that the *In Absentia* Decision was not discretionary;[11]
- the absence of the accused from the *in absentia* proceedings and the effect of the assignment of counsel;[12]
- the meaning and effect of the term "absconded" and whether there was evidence that the accused had absconded;[13]
- the Trial Chamber's finding that it is not necessary to prove that the Accused are alive;[14]
- the Trial Chamber's finding that the Accused were properly notified;[15]

4. In response to each of these arguments, the Prosecutor submitted that the Defence had not shown a) that these issues arose from the Impugned Decision, or b) that the Trial Chamber erred, or c) that the Trial Chamber failed to apply the relevant standard to the evidence before it.[16]

[8] Oneissi Appeal, paras 7-21, 23-41; Sabra Appeal, paras 13-15, 17, 30-34; Badreddine Appeal, paras 4, 10-15.
[9] Badreddine Appeal, paras 10-15.
[10] Badreddine Appeal, paras 16-39; Oneissi Appeal, paras 42-63, Sabra Appeal, para. 57.
[11] Sabra Appeal, paras 53-60.
[12] Sabra Appeal, paras 14(b-d), 19-24, Oneissi Appeal, paras 23-41.
[13] Sabra Appeal, paras 46-48, 50-52; Badreddine Appeal, paras 42-44, Oneissi Appeal, para. 64
[14] Sabra Appeal, paras 25-29.
[15] Oneissi Appeal, paras 64-73, Sabra Appeal, paras 32, 35-44, 49-52, Badreddine Appeal, paras 45-47
[16] Prosecution Consolidated Response to Defence Appeals against "Decision on Reconsideration of the Trial *In Absentia* Decision", 26 September 2012 ("Prosecutor's Consolidated Response"), paras 2, 10-12, 52-68 (in relation to the scope of Trial Chamber's review); paras 4, 13 (in relation to the reconsideration standard); paras 5, 28-34 (in relation to whether the accused is alive); paras 2, 52-68 (in relation to the legality of *in absentia* proceedings); paras 35-40 (in relation to notification measures outside Lebanon); paras 41-43 (in relation to the content of notification); paras 35-40 (in relation to notification measures outside Lebanon); paras 44-49 (in relation to the use of the term "absconded"); paras 14-18 (in relation to the absence of counsel in the process leading to the *In Absentia* Decision); paras 19-27 (in relation to whether the decision to proceed *in absentia* was discretionary); paras 56, 62, 65 (in relation to the right to a retrial). We rejected the Defence request to file a reply to the Prosecutor's Consolidated Response, *see* Order on Defence Request for Leave to File a Reply, 8 October 2012



## STANDARD OF REVIEW ON APPEAL

5. The decision of the Trial Chamber whether to reconsider a previous decision is a discretionary decision[17] to which, if it complies with settled principles, the Appeals Chamber must accord deference. On appellate review, the issue is not whether or not we agree with the impugned decision, but whether the Trial Chamber is shown to have exercised its discretion incorrectly.[18] Accordingly, we will not interfere with an impugned decision unless the Trial Chamber committed a discernible error.[19] Such error exists where the Trial Chamber i) based its decision on an incorrect interpretation of the governing law; ii) made a patently incorrect finding of fact, or iii) reached a decision so unreasonable as to constitute an abuse of the Trial Chamber's discretion.[20]

6. The scope of the Appeals Chamber's inquiry is strictly limited to the decision denying reconsideration and the Appeals Chamber will only examine whether the Trial Chamber correctly exercised its discretion in refusing to reconsider the prior decision.[21]

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[17] Rule 140 STL RPE: "A Chamber *may* [...] reconsider a decision [...] [emphasis added]". We note that, contrary to the recognized standard before international tribunals which we adopt above, in some national jurisdictions, discretionary powers of judges have a broader scope, *see* G Cornu, *Vocabulaire Juridique*, 7ème édition, Presses Universitaires de France, Paris, 2005 where the term *discrétionnaire* (as procedurally applicable to judges) is defined as such

> Se dit du pouvoir d'appréciation du juge dans les cas exceptionnels où celui-ci jouit de la faculté de prendre, en fonction des circonstances (qu'il apprécie librement), une décision qui non seulement échappe au contrôle de la Cour de cassation, comme toute appréciation souveraine de fait, mais, plus spécifiquement, peut se référer, pour motif suffisant, au sentiment d'opportunité du juge (sous réserve, en appel, d'une appréciation différente de l'opportunité).

[18] ICTR, *Bagosora et al v. Prosecutor*, Case No. ICTR-98-41-A, Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction", 2 May 2002, para. 10; ICTR, *Prosecutor v Karemera et al*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008, 30 January 2009 ("*Karemera et al* 2009 Decision") para. 12; 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 et al* Decision") para 6

[19] *Prlić et al* Decision, para. 6; ICTR, *Ngirabatware v Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009 ("*Ngirabatware* Decision") para. 8; *Karemera et al* 2009 Decision, para. 18. These cases refer to case-law relating to appellate review of discretionary decisions in general, *see, e g*, ICTY, *Prosecutor v Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mico Stanišić's Provisional Release, 17 October 2005, ("*Stanišić* Decision"), para. 6; ICTY, *Prosecutor v S. Milošević*, Case No IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, ("*Milošević* Decision on Joinder") paras 4-5; *see also* ICC, *Prosecutor v. Kony et al.*, Case No. ICC-02/04-01/05 OA 3, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009, 16 September 2009, paras 79-81.

[20] *Prlić et al* Decision, para. 6; *Ngirabatware* Decision, para. 8; *Karemera et al* 2009 Decision, para.15. *See also Milošević* Decision on Joinder, paras 4-6; *Stanišić* Decision, para 6.

[21] *Prlić et al* Decision, para. 6.



# DISCUSSION

## I. Preliminary Issues

### *A. The requests for an oral hearing*

7. We note counsel's requests for an oral hearing in this appeal.[22] Under Rule 187 of the Rules of Procedure and Evidence ("Rules") the appeal may be determined entirely on the basis of the written briefs. This Rule is similar to those of the International Criminal Tribunal for the former Yugoslavia ("ICTY"),[23] the International Criminal Tribunal for Rwanda ("ICTR"),[24] and the International Criminal Court ("ICC").[25] The ICTR Appeals Chamber has held that "interlocutory appeals are generally considered on arguments made in briefs without a hearing. A party requesting leave to make oral arguments must demonstrate that the issues on appeal cannot be effectively addressed through written arguments."[26] We adopt this approach in respect of interlocutory appeals before the Tribunal. In this case, the written submissions of the parties have exhaustively addressed the issues on appeal. Counsel have not demonstrated that this is insufficient for the proper disposal of the appeal. We are satisfied that an oral hearing would not be necessary or useful and reject the requests.

### *B. The scope of the appeals*

#### 1. The proper certification standard

8. We have noted the broad extent of the issues raised on appeal in the four Defence briefs. To a certain degree, this reflects the lack of clarity in the Trial Chamber's Certification Decision.[27] Rule 126 requires the Trial Chamber to make a finding that the decision for which certification to appeal is sought "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings." This is a high threshold. The Rule expresses the

[22] Oneissi Appeal, para. 75, Badreddine Appeal, para. 6.
[23] *See* Rule 116 *bis* ICTY RPE.
[24] *See* Rule 117 ICTR RPE.
[25] See Rule 156(3) ICC RPE
[26] ICTR, *Prosecutor v Karemera et al.*, Case No. ICTR-98-44-AR 91, Decision on "Joseph Nzirorera's Appeal From Refusal to Investigate [a] Prosecution Witness for False Testimony" and on Motion for Oral Arguments, 22 January 2009, para. 14; *see also* ICC, *Prosecutor v Ruto et al*, Case No. ICC-01/09-01/11 OA, Decision on the "Request for an Oral Hearing Pursuant to Rule 156(3)", 17 August 2011, para. 10 (holding that the Appeals Chamber "must be furnished with cogent reasons that demonstrate why an oral hearing *in lieu* of, or in addition to, written submissions is necessary.")
[27] STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/TC, Decision Certifying for Appeal the "Decision on Reconsideration of the Trial *In Absentia* Decision, 23 August 2012 ("Certification Decision").



principle that not all interlocutory decisions of the Trial Chamber are subject to automatic appeal. Apart from decisions against which the Rules provide an appeal as of right,[28] only those decisions that fulfil the stringent requirements of Rule 126(C)—or Rule 90(B)(ii) in the case of preliminary motions—may be challenged before the Appeals Chamber before final judgment. Certification must necessarily be the exception.

9. Other international criminal courts and tribunals have similar provisions in their Rules of Procedure and Evidence[29] and we draw guidance from their extensive case-law. These courts have referred to the potentially disruptive nature of interlocutory appeals and the need to limit them to situations where the requirements of the test contained in Rule 126(C) are met.[30] These requirements—the existence of an important issue and the need for immediate resolution by the Appeals Chamber—are cumulative.[31]

10. In its Certification Decision, the Trial Chamber did not elaborate on why it considered that the specific standard required by Rule 126(C) had been met. It merely stated that:

> [T]he issue of whether the Trial Chamber should have reconsidered its decision to proceed to a trial *in absentia* is one that falls squarely within Rule 126(C) in that it would first, significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and, second, materially advance the proceedings if it were immediately resolved by the Appeals Chamber.[32]

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[28] *See* Rules 11(D), 11(F), 17(H), 60 *bis*(L), 81(C), 88(B), 90(B)(i), 92(D), Rule 102(C), 108(C), 116(D), 118(K), 119(D), 135(G), 152(I), 170(C) STL RPE

[29] *See* Rule 73 ICTY RPE; Rule 73 ICTR RPE; Art. 82(1)(d) ICC St

[30] *See, e g*, ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera et al.* 2006 Decision"), para. 17 (holding that "[i]nterlocutory appeals [ .] interrupt the continuity of trial proceedings and so should only be allowed when there is a significant advantage to doing so—that is, when, in the Trial Chamber's judgement, there is an important issue meriting immediate resolution by the Appeals Chamber"); *see also* ICC, *Situation in Uganda*, Case No ICC-02/04-01/05, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, para. 19 We note that the standard of Rule 126(C) also applies to Rule 90(B)(ii).

[31] *See, e.g.*, ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-T, Decision on the Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 13 August 2012, para. 3 (holding that the "purpose of a request for certification to appeal is not to show that an impugned decision is incorrectly reasoned, but rather to demonstrate that the two cumulative conditions set out in Rule 73(B) have been met"); ICTR, *Prosecutor v Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Defence Motion for Certification of the Trial Chamber 12 July 2011 Decision on Defence Motion to Take Judicial Notice of Adjudicated Facts, 8 August 2011, para. 8 (holding that "[c]ertification to appeal may be granted only if both criteria are satisfied"); ICC, *Prosecutor v Banda et al*, Case No. ICC-02/05-03/09, Decision on the Prosecution's Application for Leave to Appeal the "Reasons for the Order on Translation of Witness Statements (ICC-02/0503/09-199) and Additional Instructions on Translation", 1 November 2011, para. 6 (noting that "the requirements [...] are cumulative").

[32] Certification Decision, para. 5.

11. This conclusory finding is insufficient to satisfy the purpose of certification. Faced with the multiple arguments raised by the Appellants, the Trial Chamber was required to explain which precise issue would be significant enough in its view to warrant immediate resolution by the Appeals Chamber. In certifying the whole decision for appeal, without further specificity, the Trial Chamber disregarded the explicit reference to an appealable "issue" in Rule 126(C).[33] Such an approach to certification under Rule 126(C) is against the interests of judicial economy in that it requires the Appeals Chamber to address issues that might better be decided during an appeal against the Trial Chamber's final judgment or—depending on the outcome of the case—might not need to be decided at all. It should therefore be avoided in the future.

### 2. Admissible arguments on appeal

12. Counsel for the four Appellants challenge the Impugned Decision on numerous grounds. The decision addressed counsel's requests for reconsideration of the Trial Chamber's decision to hold a trial *in absentia*. Under Rule 140, Counsel were required to show before the Trial Chamber that failure to reconsider that decision would, as a minimum, result in prejudice to the Appellants.[34] We find that, except for the issue of notification, Defence counsel have not demonstrated that prejudice could conceivably have resulted from refusal to reconsider the *In Absentia* Decision.

13. Article 22 of the Statute and Rule 106 of the Rules permit the Tribunal under specific circumstances to hold trials in the absence of the accused. These provisions impose strict preconditions to proceeding in such a way. They include the requirement for the accused to be formally notified in accordance with the Statute and the Rules and that the notification is effective, allowing the accused to make an election as to whether to waive their right to appear.[35]

14. Accused persons retain the right to a full retrial before this Tribunal when they are apprehended or have decided to appear voluntarily.[36] This right to a retrial applies at all stages of the

[33] Of course a decision could potentially relate to only one issue (*see Karemera et al* 2006 Decision, para. 16). However, this was not the case here.
[34] STL, *Prosecutor* v. *Ayyash et al.*, Case No STL-11-01/PT/AC/R176*bis*, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, 18 July 2012 ("Rule 176 *bis* Reconsideration Decision"), paras 20, 24-25.
[35] *See* below, paras 22-33.
[36] Contrary to Defence assertions (Badreddine Appeal, paras 31-39, Oneissi Appeal, paras 42-63), this right is guaranteed by both the Statute and Rules. As we have made clear in our Decision of 24 October 2012 (STL, *Prosecutor v. Ayyash et al*, Case No STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, para. 31), the United Nations



proceedings. In principle, therefore, any prejudice that could conceivably arise from the Trial Chamber's decision to hold a trial *in absentia* is cured by the availability of a retrial. The Accused's appearance at the Tribunal would terminate the effect of that decision because as soon as they appear, the proceedings would begin anew, unless the Accused decide otherwise.[37]

15. However, an accused has a right to know the nature of the charges and a right to participate in any proceeding against him.[38] The prejudice to the accused resulting from the violation of these rights could not be cured by a retrial. In the context of proceedings *in absentia*, these rights can be effectively guaranteed only if the accused were in fact properly notified, in sufficient detail, to enable them to make a choice whether or not to appear. That is the question which warranted certification.

16. In addition, we consider that Defence counsel possess only those powers that the Accused have, were they present.[39] In this case, to allow all the arguments of the Defence would give counsel more rights than the Accused would have if they were to appear, by affording them access to a remedy not available to the Accused.[40]

17. For the foregoing reasons, we hold that questions pertaining to issues that went beyond the issue of notification were not properly before the Trial Chamber. Consequently, we reject all arguments on appeal that are not related to the issue of whether or not the Trial Chamber erred when it rejected Defence arguments relating to the issue of notification of the Accused.

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Security Council adopted the Tribunal's Statute under Chapter VII of the United Nations Charter, thus issuing a binding decision, *inter alia*, that "[i]n case of conviction *in absentia*, the accused [...] shall have the right to be retried [...] before the Special Tribunal" (Art 22(3) of the Statute), and that this right be effectively respected. The right of retrial is fundamental to the use of Article 22. On this basis, we agree with the Trial Chamber that there is "no reason to believe that this right guaranteed by the Statute will not be respected (Impugned Decision, para 27)." There is no need at this stage to consider how the right to retrial would play out in practice. Further, in light of the clear provisions of Rules 108 and 109, there is no substance to the argument advanced by counsel for Mr Badreddine that the Accused could be found to have *de facto* waived their right to retrial by "accepting counsel" because they have not appeared for trial (Badreddine Appeal, paras 33-34).

[37] *See* Rules 108 and 109 STL RPE.

[38] *See* below, paras 22-33.

[39] Rule 176 *bis* Reconsideration Decision, para. 18.

[40] *See* above, para 14.

## II. The Merits of the Appeals

### *A. Whether the Trial Chamber erred in setting out the standard of reconsideration*

18. Counsel for Mr Oneissi argue that the Trial Chamber's refusal to re-examine the *In Absentia* Decision was founded on an error of interpretation of the reconsideration standard under Rule 140.[41] They contend that this error invalidated the decision and is itself a ground of appeal.[42] Counsel for Messrs Badreddine[43] and Sabra[44] make a similar argument.

19. The standard applicable to requests for reconsideration under Rule 140 of the Rules as set out by the Trial Chamber in the Impugned Decision is worded slightly differently from the one set out by the Appeals Chamber in our Rule 176*bis* Reconsideration Decision. There we emphasized that "a party seeking reconsideration must show that the decision resulted in an injustice" and that such injustice at a minimum "involves prejudice".[45] We also stated that grounds for reconsideration may include "a decision that is erroneous or that constituted an abuse of power on the part of the Chamber" or where there are "new facts or a material change in circumstances that arises after the decision is made".[46] The Trial Chamber used the term "error of reasoning" rather than "erroneous" and did not explicitly state that "abuse of power" is a ground for reconsideration.

20. However, it is not necessarily an error for the Trial Chamber to articulate the test using language that is not precisely the same as that employed by the Appeals Chamber.[47] Here, the Defence has not demonstrated the essential point: how the Trial Chamber's formulation is incompatible with the Appeals Chamber's standard. We note that the Trial Chamber provided a number of grounds on which reconsideration can be sought, emphasizing the "need to avoid injustice." It did not hold that these grounds were exhaustive.[48] What is important is whether the Trial Chamber correctly *applied* the reconsideration standard when addressing the claims of the Defence. We will examine this issue in relation to the matters on appeal.

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[41] Oneissi Appeal, paras 7-17.
[42] Oneissi Appeal, paras 18-21.
[43] *See* Badreddine Appeal, para 4.
[44] Sabra Appeal, paras 13-18.
[45] Rule 176 *bis* Reconsideration Decision, para. 24.
[46] Rule 176 *bis* Reconsideration Decision, para. 25.
[47] *See, e g*, *Karemera et al* 2009 Decision, para. 15 (finding that although it would have been preferable for the Trial Chamber to articulate the test more explicitly, the test had been applied correctly and did not amount to an abuse of discretion by the Trial Chamber).
[48] Impugned Decision, para 6; *see also* para. 7



***B. Whether the Trial Chamber erred in refusing to reconsider its decision with respect to notification***

21. Counsel for Messrs Oneissi and Sabra argue that the Trial Chamber failed to properly address their submission that the Accused were entitled to be actually informed of the charges against them. They submit that the Accused should be provided not only with the specifics of the Indictment[49] but also with particulars of the consequences of their failure to attend the proceedings.[50] Counsel for all four Accused also claim that the Trial Chamber erred when it concluded that all reasonable steps had been taken to inform the Accused of the charges against them. In this regard, they argue that the Trial Chamber erred in not reconsidering its decision to limit its analysis of notification measures to those taken inside Lebanon.[51] In addition, counsel for Mr Sabra contend that the Trial Chamber erroneously failed to make a finding that Mr Sabra was alive. They also submit that the Trial Chamber erroneously included its finding that the Accused had absconded in establishing whether notification had occurred. Accordingly, counsel for all of the accused argue that the relevant standard for notification of accused persons before proceeding *in absentia* has not been met.[52] The Prosecutor argues that the Trial Chamber did not err.[53]

**1. <u>The applicable legal standards for notification</u>**

22. Article 22(1)(c) of the Statute states:

> 1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:
>
> [...]
>
> (c) has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

Rule 106(A)(iii) mirrors this provision.

[49] Oneissi Appeal, paras 66, 73.
[50] Sabra Appeal, para. 32.
[51] Oneissi Appeal, para. 71; Sabra Appeal, paras 32, 35-44, 49; Badreddine Appeal, paras 46-47.
[52] Oneissi Appeal, para 64-73; Sabra Appeal, paras 32, 35–44, 49-52; Badreddine Appeal, paras 45-47
[53] Prosecutor's Consolidated Response, paras 35-44, 50-51.



23. In addition, Article 22(2)(a) creates a separate but complementary notification requirement relating to the service of the indictment on the accused:

> 2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:
>
> (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality.
>
> [...]

Rule 106(B) requires the Trial Chamber to ensure that this requirement is met.

24. Rule 76(B) sets out the applicable standard for formal notification:

> Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment, together with the summons to appear or the arrest warrant.

However, if reasonable attempts have been made to serve these documents and these have failed, the President of the Tribunal may order that service be effected in an alternative manner, including by public advertisement under Rule 76 *bis*.[54]

25. While at first sight it may appear that—absent personal notification or personal service of the indictment—the literal wording of Article 22(2) of the Statute only requires "notice [that has] otherwise been given", both the French and Arabic versions of the Statute make clear that the accused themselves must be notified in all the circumstances described by the Statute.[55] The essential question then is what is sufficient to constitute "notification" to the accused. In this regard, we are mindful of our obligation under Article 28(2) of the Statute to interpret the Rules of Procedure and Evidence as reflecting the "highest standards of international criminal procedure."

26. Under the International Covenant on Civil and Political Rights ("ICCPR"), which Lebanon has ratified, all persons accused of a crime have the right to be tried in their presence and to be notified of

[54] Rule 76(E) STL RPE

[55] *See* Art. 22(2)(a) STLSt. of the French version (« L'acte d'accusation a été notifié ou signifié à l'accusé, ou que *celui-ci en a été avisé* par voie d'insertion dans les médias ou de communication addressée à son État de résidence ou de nationalité ») , *see also* Article 22(2)(a) STLSt. of the Arabic version:

أن المتهم قد أبلغ بقرار الاتهام أو تم تسليمها إليه، أو تم إخطاره بقرار الاتهام عن طريق النشر في وسائط الإعلام أو الاتصال في دولة إقامته أو جنسيته؛

the charges against them.[56] The Human Rights Committee has held that accused persons can, however, waive their right to be present during their trial.[57] Waiver can be inferred from the absence of the accused if a court can "verify that the [accused] had been informed of the pending case."[58] However, to proceed *in absentia*, the court must ensure that the necessary steps have been taken to summon the accused in a timely manner and to request their attendance.[59]

27. While the European Convention on Human Rights[60] does not bind Lebanon or this Tribunal, we have found the case-law of the European Court of Human Rights ("ECtHR") of assistance in assessing the highest standards of international criminal procedure on this point. This Tribunal differs greatly from many of the domestic procedural systems that form the background to the ECtHR's review of cases. The STL Statute and Rules contain safeguards that go beyond those in many of these jurisdictions, including the right to a full retrial,[61] the availability of alternate methods of participating in the trial[62] and the assignment of counsel to represent the accused during *in absentia* proceedings.[63] However, some ECtHR case law is pertinent to the articulation of the standard for the proper conduct of trials *in absentia* given the significant body of case law on this subject.[64]

28. ECtHR case-law endorses the right of the accused to be present at trial. It holds that the accused may waive that right by exercising their own free will, either expressly or tacitly through their conduct, as long as waiver can be established "in an unequivocal manner and [is] attended by

[56] Arts 14(3)(a) and (d) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171("ICCPR").

[57] UN Human Rights Committee, *General Comment No 32 Article 14 Right To Equality Before Courts And Tribunals And To A Fair Trial*, UN Doc CCPR/C/GC/32, 23 August 2007 ("*General Comment No. 32*"), para. 36 (stating that "[p]roceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present")

[58] UN Human Rights Committee, *Maleki v Italy*, UN Doc CCPR/C/66/D/699/1996 (1999), para 9.4; *see also* UN Human Rights Committee, *Mbenge v Zaire*, UN Doc. CCPR/C/OP/2 (1990), para. 14.1 (finding that waiver can be inferred if all the necessary steps have been taken to inform the accused person of the charges and notify them of the proceedings); *General Comment No 32*, para. 36.

[59] *General Comment No 32*, para 36.

[60] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222 ("European Convention").

[61] Art. 22(3) STLSt.; Rules 108, 109, STL RPE.

[62] Rules 103, 104, 105 STL RPE,

[63] Art. 22(2)(c) STLSt.; Rule 105 *bis*(B) STL RPE.

[64] Art. 6 of the European Convention provides a right of an accused to "defend himself in person". We also note that the Tribunal's Statute was drafted in such a way as to "take account of the relevant case law of the [ECtHR], which determined the regularity of trials *in absentia* in full respect for the rights of the accused" (*Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, UN Doc. S/2006/893 (2006), para. 33 [footnote omitted]).

minimum safeguards commensurate to its importance."[65] However, for the accused to waive the right to be present, they must first know of the proceedings against them. Only when there is sufficient evidence that the accused were aware that criminal proceedings existed against them and knew the nature of and reason for those charges could a finding be made that they have elected to waive their right to be present.[66]

29. The ECtHR has held in this regard that notification must be carried out "with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice".[67] This indicates that indirect knowledge of proceedings alone is not sufficient if formal steps have not been taken, even if it results in actual knowledge.[68] States are given wide discretion as to the choice of procedural means necessary to ensure notification. However, these procedural means must be shown to be effective.[69]

30. Moreover, the required knowledge is not limited to the charges in the indictment. Rather, it must also relate to the consequences resulting from the accused's failure to appeal.[70]

31. We have concluded that Article 22 of the Statute and Rule 106 of the Rules, interpreted in light of the international human rights standards, require that *in absentia* trials are possible only where i) reasonable efforts have been taken to notify the accused personally; ii) the evidence as to notification satisfies the Trial Chamber that the accused actually knew of the proceedings against

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[65] ECtHR, *Sejdovic v Italy*, App. No 56581/00, Judgment (GC), 1 March 2006 ("*Sejdovic v Italy*"), para. 86, ECtHR, *Demebukov v Bulgaria*, App. No. 68020/01, Judgment, 28 February 2008 ("*Demebukov v Bulgaria*"), para. 47; *see also* ECtHR, *Colozza v Italy*, App. No. 9024/80, Judgment, 12 February 1985 ("*Colozza v Italy*"), para. 28.

[66] *Sejdovic v Italy*, para. 99.

[67] *Ibid*; ECtHR, *T. v Italy*, App. No. 14104/88, Judgment, 12 October 1992 ("*T v Italy*"), paras 28-29; ECtHR, *Somogyi v Italy*, App. No. 67972/01, Judgment, 18 May 2004 ("*Somogyi v Italy*"), para. 75.

[68] However, contrary to assertions by counsel for Oneissi (Oneissi Appeal, para. 66, Oneissi Reconsideration Request, para. 35) this case-law cannot be read to imply that waiver can only be inferred from the accused's absence if the accused was notified officially and in person. In all three cases (*Sejdovic v Italy*, *T v Italy*, and *Somogyi v Italy*) the official notification was clearly insufficient to constitute effective notification and the State was found to have violated Article 6 of the European Convention. It should also be taken into consideration that the ECtHR makes a general determination on whether a breach has occurred after considering a number of different factors bearing on the decision, including the procedural law of the domestic system. In the above cases, the limited availability of a right to retrial or comprehensive appeal may have been one such factor contributing to a finding of breach.

[69] *See Somogyi v Italy*, para 67, *see also Sejdovic v Italy*, para 83.

[70] *Sejdovic v Italy*, para 87 (holding that "before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be"); *Demebukov v Bulgaria*, para. 48; *see also* ECtHR, *Jones v UK*, App. No. 30900/02, Decision on Admissibility, 9 September 2003. It should be noted that the guaranteed right to a retrial, notwithstanding whether the accused knew about the proceedings available at this Tribunal, provides an additional safeguard of the rights of the accused to that existing in some of the domestic jurisdictions to which the ECtHR cases relate.

them; and that iii) it does so with such degree of specificity that the accused's absence means they must have elected not to attend the hearing and therefore have waived their right to be present.

32. There is no requirement under the Tribunal's Statute or Rules, or under international human rights law that the Trial Chamber must receive positive evidence of the accused's knowledge, or that *notification* must be carried out officially and in person.[71] Rather, the Trial Chamber must be satisfied that the three elements set out above are met on the basis of the available evidence before it. That may be done by inference from the circumstances.

33. Given this requirement and the consequences that flow from a decision to proceed *in absentia*, this is necessarily a high evidentiary standard.

### 2. The application of this standard by the Trial Chamber

#### *a) The Trial Chamber's legal holdings*

34. In the Impugned Decision, the Trial Chamber rejected a challenge by counsel for Mr Oneissi with respect to the notification of the Accused, noting that the Defence had failed to show "that the standard used in assessing the notification did not meet the requirements of international human rights law."[72] However, it did not set out the standard it had applied. We must therefore turn to the original *In Absentia* Decision to determine the Trial Chamber's reasoning in this regard.

35. In that Decision the Trial Chamber referred to Article 22 of the Statute and Rule 106 of the Rules.[73] When assessing that Rule it stated the following:

> The Trial Chamber also need not attempt to define the terms used in Rule 106 (A) (iii), namely, of securing "the appearance before the Tribunal" of an accused, or informing the person of the charges. Both necessarily involve those steps required to notify an accused that he or she has been indicted. Securing an appearance, however, may mean "apprehending" an accused (presumably through an arrest) or alternatively, obtaining their appearance at the Tribunal to participate in a trial other than by being physically present in the court room. The latter requires such notification as to allow an accused person to make an informed choice of whether or not to participate in the trial.[74]

[71] *Contra* Oneissi Appeal, para 66. We note that under Rule 76(A) and (B) STL RPE, State officials effect personal *service* by giving the accused a copy of the indictment and other relevant documents.
[72] Impugned Decision, para. 24.
[73] *In Absentia* Decision, paras 21-22.
[74] *Id* at para 29.

36. The Trial Chamber further explained that "notification allowing an accused person to make an informed choice as to participation (in the circumstances relevant to Rules 104 and 105)[75] will normally require more than the mere formal service of an indictment".[76] In order to further clarify the standard required for it to be satisfied that the Accused have waived their right to be present, the Trial Chamber expressly considered the requirements of the Tribunal's Statute and Rules, international human rights law, and Lebanese criminal procedural law as well as the practices of other international courts and tribunals.[77]

37. It held that, while Lebanese procedural law requires a specific set of formal steps to achieve "notification", the Statute and Rules, read in light of international human rights law and jurisprudence from the international criminal tribunals require in addition proof of effective notification of the indictment to the accused.[78] It held that the applicable standard under human rights law was that:

> The accused must have waived the right to attend the trial by exercising their own free will or through their conduct. The objective is to ensure that the accused can properly exercise the right to appear, or conversely, not to appear at the trial.[79]

The Trial Chamber further considered that:

> The State authorities have a wide discretion as to the method used to properly inform the accused; what counts is the effectiveness of that communication.[80]

38. We are satisfied that, in the *In Absentia* Decision, the Trial Chamber correctly identified the essential legal requirements to proceed with a trial *in absentia*, in particular with regard to the required knowledge on part of the Accused. The Trial Chamber was therefore correct in rejecting reconsideration of its *In Absentia* Decision on this basis.

39. We note that the Trial Chamber's decision does not contain a specific statement on the evidentiary standard it applied when determining whether the accused were in fact notified of the charges against them and the consequences of their failure to appear. But what is important is whether

[75] Rule 104 STL RPE sets out a number of ways an accused can participate in the proceedings without being physically present. Rule 105 STL RPE provides for the participation of an accused in the proceedings by way of video-conference.
[76] *In Absentia* Decision, para. 30.
[77] *Id.* at paras 31-39; *see also* Rule 3 STL RPE
[78] *Id.* at paras 28-39.
[79] *Id.* at para. 32
[80] *Ibid*

the Trial Chamber did in fact apply the required high standard when making its factual findings. We address this issue next.

***b) The Trial Chamber's factual findings***

i) Whether the high evidentiary standard was applied in practice

40. In the Impugned Decision, the Trial Chamber rejected the Defence requests for reconsideration that related to an alleged lack of notification.[81] It did not recapitulate the extensive findings it made in the *In Absentia* Decision. We therefore turn to that Decision in order to establish which standards the Trial Chamber applied.

41. In the *In Absentia* Decision the Trial Chamber determined that it "must consider the steps taken to inform the four Accused of the charges as confirmed by the Pre-Trial Judge in the Indictment."[82] It first interpreted the formal requirements of Rule 76 in the light of Lebanese law and found that these requirements for notification had been met, including all reasonable attempts to serve the relevant documents personally[83] and, exceptionally, through advertisement in the Lebanese media.[84] With regard to the latter, it found that "notification of an indictment in such an alternative manner may satisfy the guarantees provided to an accused in international human rights law to be properly informed of the charges [...]", explicitly referring to ECtHR case-law.[85]

42. The Trial Chamber also noted that it had "reviewed a wealth of material, published in the Lebanese and international print, broadcast and electronic media, connecting the indictment with the names and faces" of the four Accused[86] and found that "[e]ach of the four Accused must have known, from the extent of the media coverage—at least unofficially from 30 June 2011—that he was a possible accused."[87] The Trial Chamber referred to the "near saturation media coverage in Lebanon" connecting the four Accused to the Indictment following the publication of their names.[88] It found that

[81] Impugned Decision, paras 16-19; 24, 35-36.
[82] *In Absentia* Decision, para. 45
[83] *Id.* at paras 45-51. The Trial Chamber explicitly stated that it did not "believe that posting documents in the [Tribunal's] Beirut field office constitutes an *effective* means of informing an accused person of the existence of an indictment or of his or her rights to participate in the trial, and will accordingly not consider this requirement under Lebanese law in determining whether 'all reasonable steps' have been taken", *see In Absentia* Decision, para. 50.
[84] *In Absentia* Decision, paras 52-56.
[85] *Id.* at para. 56.
[86] *Id.* at para. 59.
[87] *Id* at para 63.
[88] *Id* at para 67.

"[t]he evidence of the widespread publication of the indictment and the identifying information is overwhelming. No other conclusion is reasonably available to the Trial Chamber."[89] The Trial Chamber also mentioned the coverage in the Lebanese and international media following the complete unsealing of the Indictment.[90] It again found that "the information connecting Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra with the indictment, and the content of the indictment itself, was of such notoriety in Lebanon by 17 August 2011 that none could have been ignorant of the charges against them."[91]

43. While these findings were primarily directed at the Accused's knowledge of the charges against them, the Trial Chamber also reviewed the evidence as to whether the Accused would have had knowledge of the procedural consequences that would result from failure to appear before the Tribunal. In particular, the Trial Chamber made reference to a statement by the Tribunal's President which was disseminated in Lebanon. In this statement, the President explained the Accused's right to participate in the proceedings and noted that in their absence, Defence counsel would be appointed to represent them.[92] The Trial Chamber was "satisfied that the President's statement was so widely published and broadcast in Lebanon that each of the Accused would have had to have been aware at the time of its publication that they were entitled to participate in a trial in the manner specified in Rules 104 and 105."[93]

44. Finally, the Trial Chamber reviewed in detail the steps taken by the Lebanese authorities to inform each of the Accused of the charges and other relevant documents, including the content of Rules 104 and 105.[94] This included seeking the accused at their potential residences and the residences of their families[95] and—with respect to Messrs Badreddine and Ayyash—at their former places of employment.[96]

45. The Trial Chamber concluded that:

> [i]n the totality of these circumstances it is inconceivable that [the four Accused] could be unaware that they have been indicted. Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra

[89] *Ibid*
[90] *Id.* at paras 71-74.
[91] *Id.* at para. 74.
[92] *Id.* at para. 68; *see also* para. 58.
[93] *Id.* at para. 70
[94] *Id.* at paras 75-104.
[95] *Id.* at paras 107-110; *see also* paras 71-111.
[96] *Id.* at para. 107-108.

have also each been notified according to Lebanese criminal procedural law of the indictment and of various Tribunal documents informing them of their rights to participate in the trial without being physically present in the court room.[97]

46. Given the extent and specificity of the Trial Chamber's review, we find that the Trial Chamber applied the highest evidentiary standards in establishing that the Accused were informed of the charges against them, of their right to participate in the proceedings and of the consequences if they did not appear. These standards are also reflected in the Trial Chamber's findings, which leave no doubt as to the Trial Chamber's satisfaction that the Accused were properly notified in the specific circumstances of this case.

ii) The geographical extent of notification

47. Counsel argue that in the Impugned Decision the Trial Chamber erred by failing to consider whether notification was formally conducted outside Lebanon.[98] In the *In Absentia* Decision, the Trial Chamber did not extend its analysis of notification measures to places outside Lebanon on the basis that "the information available does not suggest that any of [the Accused] has left Lebanon."[99] On reconsideration, the Trial Chamber reaffirmed this position and found that counsel had not presented new facts, or showed any error of reasoning.[100]

48. As pointed out by the Prosecutor, there is no legal requirement for the Trial Chamber to order formal notification to the accused outside of Lebanon.[101] The Trial Chamber's finding in the *In Absentia* Decision that notification measures were not necessary beyond Lebanon was a factual finding made by the Trial Chamber in relation to the evidence before it. On reconsideration, the Trial Chamber was correct in deciding that a mere disagreement with this finding was not sufficient to warrant reconsideration and that the Defence had brought no new evidence undermining it.[102] In particular, the Defence argument rested on the lack of evidence as to the precise whereabouts of the Accused.[103] They repeat this assertion on appeal without bringing evidence that the Accused had left

[97] *Id* at para. 106; *see also* para. 111.
[98] Sabra Appeal, paras 35-44, Oneissi Appeal, paras 71-72; Badreddine Appeal, paras 45-47.
[99] *In Absentia* Decision, para. 25.
[100] Impugned Decision, paras 17-18, 36.
[101] *See* Prosecutor's Consolidated Response, para. 36, referring to Art. 22(2)(a) STLSt.
[102] Impugned Decision, para. 36.
[103] Badreddine Reconsideration Request, paras. 15-18, Sabra Reconsideration Request, paras 43-45; Oneissi Reconsideration Request, para. 43.



Lebanon.[104] This is not sufficient to disturb the Trial Chamber's reasonable finding. We note however, that certain measures were in fact taken outside Lebanon, such as the issuance of international arrest warrants upon confirmation of the indictment.[105]

iii) Determination of whether the accused is alive

49. Counsel for Mr Sabra argue that the Trial Chamber erroneously failed to consider whether Mr Sabra is still alive.[106] They argue that under Articles 1 and 22 of the Statute and Rule 106(A) of the Rules, the Trial Chamber was required to make a positive finding to that effect and that a lack of evidence that an accused is dead is insufficient.[107] The Prosecutor submits that this is not necessary.[108]

50. The Trial Chamber did not address the question whether it had a legal obligation to make a positive finding that an accused is alive before deciding to proceed *in absentia*.[109] Naturally, it is a requirement for a trial that an Accused is alive.[110] However, there is nothing in the Statute, Rules or otherwise that would require the Prosecutor to bring positive proof of this fact at this stage. Were we to suppose such a requirement, this would in effect make the conduct of *in absentia* proceedings impossible, especially in circumstances where an accused has absconded or otherwise cannot be found.[111] On the contrary, on reconsideration all that the Trial Chamber was required to consider was whether information existed that would indicate that the Accused could not have been notified because they were deceased. It noted that the Prosecutor presented official documents from the Lebanese authorities certifying that no death certificates in respect of any of the four Accused have been issued.[112] Therefore, the Trial Chamber did not err in refusing to reconsider its decision.

[104] Badreddine Appeal, paras 45-47; Sabra Appeal, paras 35-42; Oneissi Appeal, para 71.
[105] *See In Absentia* Decision, paras 5 (noting that "the Pre-Trial Judge issued four international arrest warrants and authorised the Prosecutor to request Interpol to transmit 'red notices'"), 59 (noting that the Trial Chamber had "reviewed a wealth of material, published in the Lebanese and international print, broadcast and electronic media"), *see also* above, para. 42.
[106] Sabra Appeal, paras 25-29.
[107] Sabra Appeal, paras 27-28.
[108] Prosecutor's Consolidated Response, paras 28-34
[109] Impugned Decision, para. 35
[110] *See e g*, ICTY, *Prosecutor v S Milošević*, Case No. IT-02-54-T, Order Terminating the Proceedings, 14 March 2006, p. 2 (noting that "in the case of the death of an accused, the proceedings have to be terminated").
[111] It is implicit in the Trial Chamber's findings that the Accused had been notified and had absconded that it regarded them to be alive, *see In Absentia* Decision, para. 111
[112] Impugned Decision, para. 35



iv) Alleged reliance by the Trial Chamber on fact that the Accused have absconded

51. Contrary to the assertion made by Counsel for Sabra, the Trial Chamber did not rely on its finding that the accused had absconded to arrive at the conclusion that effective notification had occurred.[113] Rather, the Trial Chamber separately addressed the question of notification and, having found that the accused had been effectively notified of proceedings, made a factual finding pursuant to Rule 106(A)(iii) that the accused had absconded or otherwise could not be found and all reasonable steps had been taken to secure their appearance before the Tribunal and to inform them of the charges against them.[114]

### *C. Conclusion*

52. The Defence has failed to demonstrate that the Trial Chamber committed an error in the Impugned Decision when it rejected their requests for reconsideration with regard to notification. Consequently, the Defence challenges are rejected.

[113] Sabra Appeal, para. 49.
[114] *See In Absentia* Decision, paras 106, 111.

# DISPOSITION

**FOR THESE REASONS;**

**THE APPEALS CHAMBER**, deciding unanimously;

**DISMISSES** all four appeals.

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

Dated 1 November 2012,
Leidschendam, the Netherlands

Judge David Baragwanath
Presiding