



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER
SPECIAL TRIBUNAL FOR LEBANON

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

Before: Judge Robert Roth, Presiding
Judge Micheline Braidy
Judge David Re
Judge Janet Nosworthy, Alternate Judge
Judge Walid Akoum, Alternate Judge

The Registrar : Mr Daryl Mundis, Acting Registrar

Date: 5 July 2013

Original language: French

Classification: Public

PROSECUTOR

v.

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

**DECISION ON THE REQUESTS FOR CERTIFICATION TO LODGE AN APPEAL
AGAINST THE TRIAL CHAMBER DECISION OF 12 JUNE 2013**

Office of the Prosecutor:
Mr Norman Farrell

Legal Representative of Victims:
Mr Peter Haynes

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

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

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

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



I. Procedural background

1. On 12 April 2013, the Pre-Trial Judge authorised the Prosecution to amend the indictment against Messrs Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, the original version of which was dated 10 June 2011 (“Decision of the Pre-Trial Judge”).¹ On 17 April 2013, the Prosecution filed a signed version of the amended indictment, bearing the date of 6 February 2013 (the “Amended Indictment”).² On 18 April 2013, the Trial Chamber (the “Chamber”) declared moot the preliminary motions concerning the Indictment of 10 June 2011 and called upon Defence Counsel for the four accused to file, should they deem it necessary, all motions relating to the Amended Indictment on the basis of Rule 90 (A) (ii) of the Rules of Procedure and Evidence (respectively the “Order of 18 April 2013” and the “Rules”).³

2. On 2 May 2013, the Sabra Defence filed a consolidated preliminary motion concerning the defects in the form of the Amended Indictment.⁴ The Oneissi Defence did the same on 3 May 2013.⁵ The Badreddine Defence, for its part, filed before the Chamber on the same day a “dual preliminary motion”, concerning, on the one hand, the Decision of the Pre-Trial Judge and, on the other, the Amended Indictment.⁶ The Prosecution responded to the various motions on 24 May 2013.⁷

3. On 12 June 2013, the Chamber dismissed the preliminary motions filed by Counsel for Messrs Badreddine, Oneissi and Sabra (the “Decision of 12 June 2013”).⁸

¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision relating to the Prosecution Requests of 8 November 2012 and 6 February 2013 for the Filing of an Amended Indictment, 12 April 2013. By way of this decision, the Pre-Trial judge declared that the Indictment of 6 February 2013 annulled and replaced the Indictment of 10 June 2011.

² STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Filing of the Signed Version of the Amended Indictment in Compliance with the Pre-Trial Judge’s Decision of 12 April 2013 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention, 17 April 2013, Annex A, confidential, 6 February 2013, with a public redacted version dated the same day.

³ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Order Authorising the Defence to File Preliminary Motions Challenging Defects in the Form of the Amended Indictment of 6 February 2013, 18 April 2013.

⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Consolidated Motion on Form of Indictment, 2 May 2013.

⁵ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Preliminary Motion against the Indictment of 6 February 2013 by the Defence for Mr Oneissi Pursuant to Rule 90 (A) (ii), confidential, 3 May 2013.

⁶ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Dual Preliminary Motion Presented by the Badreddine Defence against the “Decision relating to the Prosecution Requests of 8 November 2012 and 6 February 2013 for the Filing of an Amended Indictment” and the “Amended Indictment”, 3 May 2013.

⁷ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Prosecution Consolidated Response to Preliminary Defence Motions Alleging Defects in the Amended Indictment, 24 May 2013.

⁸ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013

4. On 19 June 2013, the Badreddine Defence filed before the Chamber two requests contained in a single document.⁹ Firstly, it requests that the President of the Chamber authorise the reconsideration of the Decision of 12 June 2013 and, secondly, that the Chamber certify the appeal it intends to lodge against the aforementioned decision.¹⁰ The same day, the Defence for Messrs Oneissi and Sabra filed two requests for the purpose of certifying the appeal they intend to lodge against the Decision of 12 June 2013.¹¹

5. In support of its request for certification, the Badreddine Defence argues that the error of law committed by the Chamber in its Decision of 12 June 2013, on the subject of the alleged abuse of authority of the Pre-Trial Judge, involves an issue which could significantly compromise the fairness and expeditiousness of the proceedings or the outcome of the trial, and that its immediate resolution by the Appeals Chamber could materially advance the proceedings.¹² It is also of the opinion that the errors committed in the consideration of the claims relating to the Amended Indictment cause it prejudice and call for an immediate resolution.¹³

6. According to the Oneissi Defence, the matter of the validity of the indictment does relate to the outcome of the trial; it also has an effect on its fairness and calls for an immediate resolution.¹⁴ The Oneissi Defence also submits that the Decision of 12 June 2013 contravenes Article 131 of the Lebanese Code of Criminal Procedure, which determines the content of the indictment. According to the Defence, the Rules should have been interpreted in light of the provisions of Lebanese procedure, which offer better protection of the rights of the accused.¹⁵

⁹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Requests of the Badreddine Defence for Authorisation of and/or Certification to Appeal the Decision of 12 June 2013 relating to the Preliminary Motions Based on a Defect in the Form of the Indictment, 19 June 2013 (“Badreddine Defence Requests”).

¹⁰ The request for certification to appeal the Decision of 12 June 2013 is filed both as an alternative to the arguments raised principally in the dual preliminary motion of 3 May 2013, should the request for reconsideration be dismissed, and principally with regard to the dismissal of the arguments raised subsidiarily in the same dual preliminary motion. As the request for reconsideration was dismissed on 2 July 2013 (see footnote 24 of this decision), all the arguments are concerned by this decision.

¹¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Request from the Oneissi Defence for Certification of the Appeal of the Trial Chamber Decision on Alleged Defects in the Form of the Amended Indictment, 19 June 2013 (“Oneissi Defence Request”); STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Sabra Defence Request for Leave to Appeal the Decision on Alleged Defects in the Form of the Amended Indictment, 19 June 2013 (“Sabra Defence Request”).

¹² Badreddine Defence Requests, paras 7-9.

¹³ *Id.*, paras 10-12.

¹⁴ Oneissi Defence Request, paras 2-5.

¹⁵ *Id.*, paras 6-16.

7. The Sabra Defence distinguishes three issues which, in its opinion, it must be possible to make subject to an immediate appeal. The first concerns the date of the conspiracy in which Mr Sabra allegedly participated;¹⁶ the second relates to the exact role of Mr Sabra in the recruitment of Abu Addas;¹⁷ the third concerns whether the Chamber was correct in considering Mr Sabra's complaints relating to the vagueness of the Indictment as relating to the consideration of the evidence, and not to the determination of material facts on which the accusation is made.¹⁸

8. On 25 June 2013, the Prosecution filed a consolidated response to the motions of the Defence for Messrs Badreddine, Oneissi and Sabra.¹⁹ With regard to the requests for certification, the Prosecution argues that they fail to satisfy the conditions set forth by case law.²⁰ Furthermore, the Sabra Defence does not demonstrate how the specific issues it identified would significantly affect the fair and expeditious conduct of the proceedings;²¹ the alleged refusal of the Chamber, according to the Badreddine Defence, to consider whether *in concreto* the Indictment enabled Mr Badreddine to understand the criminal acts with which he is charged, does not originate from the contested decision;²² lastly, the Oneissi Defence submits an entirely new argument, drawn from a comparison with the law of Lebanese criminal procedure, which is inadmissible in the context of an appeal.²³

9. By way of the Decision of 2 July 2013, the President of the Chamber refused authorisation to the Badreddine Defence to file a request for reconsideration.²⁴

II. Applicable law and discussion

10. As they were filed within the time limit required by Rule 90 (C) of the Rules, the requests of 19 June 2013 are formally admissible.

¹⁶ Sabra Defence Request, para. 4.

¹⁷ *Id.*, para. 5.

¹⁸ *Id.*, para. 6.

¹⁹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Prosecution Consolidated Response to Defence Motions Requesting Certification to Appeal the Trial Chamber's Decision of 12 June 2013 and Badreddine Defence Request for Reconsideration, 25 June 2013 ("Prosecution Consolidated Response")

²⁰ Prosecution Consolidated Response, paras 9-15

²¹ *Id.*, paras 16-20.

²² *Id.*, para. 22.

²³ *Id.*, paras 23-25.

²⁴ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Decision Refusing Authorisation to the Badreddine Defence to File a Request for Reconsideration, 2 July 2013.

11. The Rules provide that, except for motions challenging jurisdiction [Rule 90 (B) (i)], decisions relating to preliminary motions [Rule 90 (A)] may only be subject to appeal upon certification of the authority which rendered the decision [Rule 90 (B) (ii), which reiterates the general wording of Rule 126 (C)]. The certification of an appeal is subject to two cumulative criteria: firstly, the decision concerned must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; secondly, an immediate resolution by the Appeals Chamber may materially advance the proceedings. In this respect, the Appeals Chamber drew particular attention to two terms of that provision, which confirm its restrictive nature. It emphasised the fact that, in order to justify certification, firstly the fairness and expeditiousness of the proceedings must be affected *significantly* and, secondly, the resolution of the matter in question must be *immediate*.²⁵ According to the Appeals Chamber, it is a matter for the certifying authority to determine in its certification decision which of the matters dealt with in its contested decision warrant an immediate resolution by the Appeals Chamber.²⁶ The Appeals Chamber fails to point out however whether the determination of “specific issues” must be done by the applicant seeking certification, on whom would be placed a further procedural burden or whether – somewhat paradoxically – it is for the authority which rendered the decision to identify those issues itself.

12. The indictment is the “primary accusatory instrument”²⁷ and, thus, any dispute in its regard, in particular involving whether or not the indictment is sufficiently specific and enables the Defence to prepare for trial, is so important that the two aforementioned conditions should be considered as having been met. The Prosecution counters this view with the jurisprudence of the other international tribunals which, according to its interpretation, only restrictively admit the certification of requests concerning defects in the form of an indictment. The Prosecution essentially bases its argument on a Trial Chamber decision of the International Criminal Tribunal for Rwanda (“ICTR”);²⁸ the in-depth

²⁵ STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.1, Decision on Defence Appeals against the Trial Chamber’s Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012 (“*In Absentia* Decision”), paras 8-9; STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.2, Decision on Appeal against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, paras 13-14; STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision relating to the Requests for Certification of the Decisions of 25 October 2012 and 15 November 2012, 19 December 2012, para. 15; Decision on the Motion of the Legal Representative of Victims Seeking Certification to Appeal the Decision of 19 December 2012 on Protective Measures, 30 January 2013, paras 17-18.

²⁶ *In Absentia* Decision para. 11.

²⁷ ICTY, *The Prosecutor v Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 114 (“*Kupreškić et al.* Judgement”); STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/TC, Decision on Defence Motion to Strike Out Part of the Prosecutor’s Pre-Trial Brief, 8 March 2013, para. 13.

²⁸ ICTR, *The Prosecutor v. Gatete*, Case No. ICTR-2000-61-1, Decision on Defence Application for Certification to Appeal the Chamber’s Decision on Defects in the Indictment, 19 August 2009 (“*Gatete* Decision”), para. 8.

examination of that decision leads the Chamber however to the opposite conclusion to that of the Prosecution.

13. According to the Prosecution and the *Gatete* Decision, if an indictment is not sufficiently specific, such a defect in form may be cured by the provision of clear and consistent information, provided in a timely manner to the accused, regarding the facts on which the charges laid against him are based.²⁹ The Trial Chamber of the ICTR relies on the jurisprudence of the Appeals Chambers of the two ad hoc Tribunals and, in particular, on the *Kupreškić et al.* Judgement. However, in the *Kupreškić et al.* case, the Appeals Chamber specifically adopted a very restrictive approach to the circumstances that the Prosecution presents as ordinary. Admittedly, the Appeals Chamber “does not exclude [...] that, in some instances, a (defective) indictment can be cured if the Prosecution provides the accused with timely [...] information (aforementioned)”, but adds that “in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category”.³⁰ The Trial Chamber of the ICTR includes an argument in the *Gatete* case which is perplexing: “Where a defect is found not to be cured, a Chamber cannot base a conviction on it”,³¹ that means that the failure to cure a defect in the indictment as alleged by the Defence would be admissible, with the risk for the Prosecution of an acquittal on account of precisely that defect. It is difficult to follow the logic of the Prosecution’s argument and position in this respect.

14. To bar an appeal at this stage might lead to appeals being lodged *following* the judgment, concerning, in point of fact, a defect in the indictment. The international criminal courts and tribunals were thus confronted with numerous appeals concerning issues such as whether the accused had been properly informed of the charges laid against them or whether the responsibility imputed to them and the role they allegedly played had been accurately described.³² Several of those post-judgment appeals resulted in the annulment of all or part of the judgement. Such situations are inadmissible

²⁹ *Gatete* Decision, para. 9 and Prosecution Consolidated Response, para. 14.

³⁰ *Kupreškić et al.* Judgement, para. 114. See also ICTR, *The Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 21, which sets forth that such defects may thus be cured “in certain limited circumstances”.

³¹ *Gatete* Decision, para. 9.

³² For example : *Kupreškić et al.* Judgement, paras 124, 326 and 361, ICTR, *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, paras 70-71; ICTY, *The Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, para. 74; ICTR, *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008, paras 32, 46-47, 89-101, 112-113, 157-158; ICTR, *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-A, Appeals Judgement, 1 April 2011, paras 129, 138.

with regard to the principle of expeditiousness (Article 21 (1) of the Statute and Rule 90 (B) (ii) of the Rules).

15. The Chamber consequently finds that a request from the Defence seeking to challenge a defect in the form of the indictment meets the two requirements set forth by Rules 90 (B) (ii) and 126 (C) of the Rules and the jurisprudence pertaining thereto, provided that the foregoing request is not manifestly unfounded, in that it might attribute content to the contested decision that it does not contain. In this respect, the criticism levelled by the Prosecution at the Badreddine Defence Requests³³ is not without foundation. However, the Badreddine Defence Requests identify, in paragraph 11, a limited series of points, unrelated to demonstrating an alleged error of reasoning committed by the Chamber and of which the contested decision bears no trace, on which the consideration of the Chamber was requested and which clearly fall under Rule 90 (A) (ii) of the Rules. The Badreddine Defence Requests are therefore not manifestly unfounded. The same is true of the Oneissi Defence Request and the Sabra Defence Request. Consequently, certification must be granted.

16. A separate opinion of Judge Re is attached to this Decision.

³³ *Supra*, para. 8.

FOR THESE REASONS,

THE TRIAL CHAMBER,

Pursuant to Rule 90 (B) (ii) of the Rules,

GRANTS the requests filed by the Defence for Messrs Badreddine, Oneissi and Sabra for certification of the appeal they intend to lodge against the Decision of 12 June 2013.

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

Leidschendam, 5 July 2013

[signature]

Robert Roth, Presiding Judge

[signature]

Micheline Braidy, Judge

[signature]

David Re, Judge

