

**THE APPEALS CHAMBER**

Case No.: STL-11-01/PT/AC/AR90.2

Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko, Judge Rapporteur
Judge Ivana Hrdličková

Registrar: Mr Daryl Mundis

Date: 5 August 2013

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 ALLEGED DEFECTS IN THE FORM OF THE AMENDED
INDICTMENT"**

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

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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 Guénaël Mettraux



INTRODUCTION

1. The Appeals Chamber is seized with three appeals filed by counsel for Messrs Sabra,¹ Badreddine² and Oneissi³ against the Trial Chamber's "Decision on Alleged Defects in the Form of the Amended Indictment."⁴ In that Decision, the Trial Chamber dismissed the Defence challenges to the indictment of 6 February 2013. The Prosecutor responds that the appeals should be rejected.⁵

2. While the appeals were still pending, the Pre-Trial Judge on 31 July 2013 granted leave to the Prosecutor to amend the indictment and ordered that the new amended indictment be filed by 6 August 2013.⁶ The Prosecutor did so on 2 August 2013.⁷ Given that the previous indictment has thereby fallen away, the challenges to it have become moot. We accordingly dismiss the appeals. However, this is without prejudice to the Defence. If counsel wish to raise new preliminary motions with respect to the new amended indictment, they may do so before the Trial Chamber.

BACKGROUND

3. The initial indictment in this case was confirmed by the Pre-Trial Judge on 28 June 2011.⁸ The Defence for Messrs Badreddine, Oneissi and Sabra filed preliminary

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.2, Sabra Defence Appeal of the Decision on Alleged Defects in the Form of the Amended Indictment, 15 July 2013 ("Sabra Appeal") (a corrected version was filed on 16 July 2013). All further references to filings and decisions relate to this case number unless otherwise stated.

² Appellate Brief of the Badreddine Defence against the Trial Chamber Decision of 12 June 2013 relating to the Preliminary Motions based on Defects in the Form of the Indictment, 17 July 2013 ("Badreddine Appeal").

³ Oneissi Defence Appeal of the Decision on the Alleged Defects in the Form of the Amended Indictment, 22 July 2013 ("Oneissi Appeal"). While counsel for Mr Oneissi had filed their appeal initially 17 July 2013 within the time limit provided by Rule 90 (D), their appeal brief exceeded the word limit and the Appeals Chamber ordered them to re-file it in compliance with the applicable Practice Direction on Filing of Documents before the Special Tribunal for Lebanon, STL-PD-2010-01-Rev.2, 14 June 2013 (*see* Order by Judge Rapporteur on Appeal Brief by Counsel for Mr Oneissi and Prosecutor's Response Brief, 19 July 2013).

⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013 ("Impugned Decision").

⁵ Consolidated Prosecution Response to Defence Appeals of the Trial Chamber's Decision on Alleged Defects in the Form of the Indictment, 1 August 2013 ("Prosecutor's Response").

⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, *Décision portant sur la requête du 21 juin 2013 du Procureur en modification de l'acte d'accusation du 6 février 2013*, Confidential, 31 July 2013 ("Amendment Decision"), Disposition (corrected and public redacted versions were issued on 2 August 2013).

⁷ STL, *Prosecutor v. Ayyash et al.*, 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 31 July 2013 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention ("Filing of Indictment"), 2 August 2013.

⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan

motions alleging defects in this indictment on 25 June 2012.⁹ On 17 August 2012, the Prosecutor requested leave of the Pre-Trial Judge to amend the indictment.¹⁰ The Trial Chamber consequently deferred considering the Defence motions pending the decision of the Pre-Trial Judge on the sought amendments.¹¹ On 25 October 2012, the Pre-Trial Judge granted the Prosecutor's request.¹² On 8 November 2012, the Prosecutor filed the amended indictment, but at the same time requested authorization to make further clarifications.¹³

4. Defence counsel for Mr Sabra filed a motion alleging defects in the amended indictment before the Trial Chamber.¹⁴ The Trial Chamber deferred a ruling on this motion pending the Pre-Trial Judge's decision with respect to the clarifications sought.¹⁵ On 6 February 2013, the Prosecutor requested leave to further amend the indictment of 8 November 2012,¹⁶ which the Pre-Trial Judge granted on 12 April 2013.¹⁷ The Prosecutor filed the amended indictment on 17 April 2013.¹⁸ The Trial Chamber next declared the preliminary motions filed in June 2012 moot and ordered the Defence, if they so wished, to

Oneissi & Mr Assad Hassan Sabra, Confidential, 28 June 2011 (a public redacted version was issued on 16 August 2011).

⁹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Sabra's Preliminary Motion Challenging the Form of the Indictment, Confidential, 25 June 2012 (a public redacted version was filed the same day); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Preliminary Motion Submitted by the Defence for Mr. Mustafa Amine Badreddine on the Basis of Rule 90 (A) (ii) of the Rules of Procedure and Evidence, 25 June 2012; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, The Defence for Hussein Hassan Oneissi Preliminary Motion on Defects in the Form of the Indictment, 25 June 2012.

¹⁰ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Prosecution Request for Leave to Amend the Indictment Pursuant to Rule 71(A)(ii), Confidential, 17 August 2012 (a public redacted version was filed on 18 September 2012).

¹¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Interim Decision on Alleged Defects in the Form of the Indictment, Confidential, 12 September 2012.

¹² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Prosecution Request of 17 August 2012 for Leave to File an Amended Indictment, 25 October 2012.

¹³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Filing of the Amended Indictment in Compliance with the Decision of 25 October 2012 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention, Confidential, 8 November 2012.

¹⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Sabra's Second Preliminary Motion Challenging the Form of the Indictment, 26 November 2012.

¹⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Decision on Sabra's Second Preliminary Motion Challenging the Form of the Indictment, 5 December 2012.

¹⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Prosecution Request for Leave to Include Further Amendments to its Proposed Amended Indictment, 6 February 2013.

¹⁷ STL, *Prosecutor v. Ayyash et al.*, 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.

¹⁸ STL, *Prosecutor v. Ayyash et al.*, 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.

file new preliminary motions relating to the amended indictment of 6 February 2013.¹⁹ Defence counsel for Messrs Badreddine, Oneissi and Sabra did so on 2 and 3 May 2013.²⁰

5. The Trial Chamber issued the Impugned Decision on 12 June 2013. It granted certification to appeal on 5 July 2013.²¹ Meanwhile, on 21 June 2013, the Prosecutor sought leave of the Pre-Trial Judge to amend the indictment of 6 February 2013. On 31 July 2013, the Pre-Trial Judge granted the request and ordered that the indictment of 21 June 2013 be filed by the Prosecutor by 6 August 2013.²² The Prosecutor filed the indictment on 2 August 2013.²³ This indictment is now the operative indictment in this case.²⁴

DISCUSSION

I. Preliminary issues

A. Certification

6. At this Tribunal, as at other international courts and tribunals, the decision whether to grant leave or certification to appeal an interlocutory ruling rests with the Judge or Chamber that issued the ruling. The Appeals Chamber will usually not second-guess the decision granting certification. However, if we find that the certification standard is not applied properly we may remind the first-instance Judge or Chamber of their obligations under the Rules.²⁵

7. In this case, it appears that the Trial Chamber certified the whole Impugned Decision for appeal, without identifying the specific issues that required immediate resolution by the

¹⁹ STL, *Prosecutor v. Ayyash et al.*, 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 (“Trial Chamber Decision of 18 April 2013”).

²⁰ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Consolidated Motion on Form of the Indictment, 2 May 2013; STL, *Prosecutor v. Ayyash et al.*, 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), 3 May 2013; STL, *Prosecutor v. Ayyash et al.*, 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.

²¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Decision on the Requests for Certification to Lodge an Appeal Against the Trial Chamber Decision of 12 June 2013, 5 July 2013 (“Certification Decision”).

²² Amendment Decision, Disposition.

²³ Filing of Indictment, Annex A.

²⁴ *Ibid.*

²⁵ See ICTR, *Nyiramasuhuko v. The Prosecutor*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October 2004, para. 5; ICTR, *Nyiramasuhuko v. The Prosecutor*, Decision on Pauline Nyiramasuhuko’s Request for Reconsideration, 27 September 2004, para. 10. We also note that the issue of the scope of certification was raised by counsel for Mr Badreddine (*see* Badreddine Appeal, paras 14-17).

Appeals Chamber.²⁶ However, Rule 90 (B) (ii) of the Rules of Procedure and Evidence (“Rules”) provides that certification should only be granted “upon the basis that the decision 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.” We have previously stated that the Trial Chamber “is required to explain which issue would be significant enough in its view to warrant immediate resolution by the Appeals Chamber.”²⁷ We also held that the certification “requirements are strict and a Chamber must take great care in assessing them.”²⁸

8. According to the Trial Chamber, “any dispute [with regard to the Indictment], 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 [of Rule 90 (B) (ii)] should be considered as having been met.”²⁹ With due respect, this reasoning ignores the clear wording of Rule 90 (B) (ii) and renders the certification process meaningless by, in effect, granting the parties an automatic right of appeal. But Rule 90 (B) provides for an appeal as of right only against decisions on preliminary motions challenging jurisdiction.

9. While we agree with the Trial Chamber that challenges to an indictment should generally be resolved before the trial begins, not all indictment-related issues necessarily qualify for certification. A general assertion that an indictment is invalid without further specifying discrete issues that support that assertion is certainly not sufficient to meet the requirements of Rule 90 (B) (ii). Indeed, such arguments could be raised in each and every case.³⁰

²⁶ Certification Decision, paras 12, 15, Disposition; *but see* Badreddine Appeal, paras 14-17; Prosecutor’s Response, paras 3, 16-17 (disputing the extent to which the Trial Chamber has certified the Impugned Decision).

²⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.1, *Corrected Version* of Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial *in Absentia* Decision, 1 November 2012 (“Trial *in Absentia* Appeal Decision”), para. 11.

²⁸ STL, *Prosecutor v. Ayyash et al.*, 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, para. 15.

²⁹ Certification Decision, para. 12.

³⁰ See ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on Milivoj Petković’s Application for Certification to Appeal Decision on Motions Alleging Defect in Form of Indictment, 19 September 2005, p. 5 (considering that “such an unspecific and general approach would, if accepted, justify a certificate to be issued whenever an accused seeks to appeal a decision in which—in his opinion—his claims in respect of defects in the form of the indictment have not been dealt with to his satisfaction.”); ICTY, *Prosecutor v. Jović*, IT-95-14 & 14/2-R77, Decision on the Defence Application for Certification on Interlocutory Appeal, 3 February 2006, p. 3 (“considering that these arguments could be raised in a similar way in most, if not all, requests for certification when defects in the form of the Indictment are claimed and therefore have no clear value for a determination

10. In this regard, the party requesting certification should identify the specific issues which in its view meet the requirements of Rule 90 (B) (ii). However, even if it fails to do so, it ultimately falls to the Trial Chamber to pinpoint those issues, if any, that in its view would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and whether these issues require immediate resolution by the Appeals Chamber.³¹ This is not “paradoxical”,³² but accords with the normal process of deciding a motion requesting certain relief under the Rules.

11. In the future, parties applying for certification to appeal a decision must take care to ensure that they specify the appealable issues in that decision. The Trial Chamber (or the Pre-Trial Judge, as applicable) is then under the obligation to decide in a reasoned opinion whether these or any other issues meet the strict requirements of the relevant Rule.³³

B. Compliance with the Practice Direction

12. In his Response, the Prosecutor makes reference to the proper content of an appeal brief.³⁴ We recall that proceedings before the Appeals Chamber are governed by the Rules and further regulated by the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Special Tribunal for Lebanon.³⁵ With respect to interlocutory appeals following certification, Article 10 (1) of the Practice Direction sets out clear requirements for the contents of the appeal brief. The contents must include a listing of the grounds of appeal, including “[a]n identification of the challenged finding or ruling of the decision, with specific reference to the relevant paragraph number.” The Practice Direction promotes concise and focused advocacy, allowing the Appeals Chamber to efficiently decide the matters on appeal.

13. The appeal brief filed by counsel for Mr Oneissi does not fully meet these requirements. Its structure does not specify with clarity the alleged errors in the Impugned Decision. In addition, a large part of counsel’s submission appears to simply reiterate the

under Rule 72(B)(ii) of the Rules [the equivalent to Rule 90(B)(ii) STL RPE], and that granting certification on such a basis would defeat the wording and purpose of Rule 72(B)(ii) of the Rules’); ICTR, *Prosecutor v. Gatete*, ICTR-2000-61-I, Decision on Defence Application for Certification to Appeal the Chamber’s Decision on Defects in the Indictment, 19 August 2009, para. 8 (considering “that the Defence cannot merely rely on the argument that since the Impugned Decision concerns issues of sufficient notice in the Indictment, the Accused’s rights, and thus the fair and expeditious conduct of the proceedings, are necessarily affected”).

³¹ Trial *In Absentia* Appeal Decision, para. 11.

³² Certification Decision, para. 11.

³³ Rule 90 (B) (ii), Rule 126 (C).

³⁴ Prosecutor’s Response, paras 20-21.

³⁵ STL/PD/2013/07/Rev.1, 13 June 2013 (“Practice Direction”).

same issues that were litigated before the Trial Chamber without sufficiently linking these issues to the specific error allegedly made by the Trial Chamber.³⁶ Indeed, the whole appeal brief contains only a few references to the Impugned Decision.³⁷

14. We also note the extensive references in the appeal brief filed by counsel for Mr Badreddine to their submissions before the Trial Chamber.³⁸ Counsel state that they have done so “for economy of process.”³⁹ We disapprove of this practice. As is consistently done at other tribunals, we require “appellants to substantiate their arguments in support of appeal in their appeal briefs and not by reference to submissions made elsewhere.”⁴⁰ While the Appeals Chamber is seized of the entire record on appeal, which includes the filings of the parties before the first-instance Judge or Chamber, the parties on appeal must present their arguments in a concise and comprehensive manner in the appeal brief.⁴¹

15. Pursuant to Article 14 of the Practice Direction, we retain the discretion to dismiss a filing that fails to comply with the requirements of the Practice Direction. We do not exercise our discretion in this way in the present case. However, we remind the parties to fully comply with all filing requirements under the Rules and the relevant Practice Directions.⁴² We will not further tolerate violations which run counter to the Tribunal’s mandate to administer justice fairly, efficiently and expeditiously.

II. The merits of the appeal

16. Judge Baragwanath writes separately on this topic. In their preliminary motions before the Trial Chamber, counsel for the Defence challenged the indictment of 6 February 2013 (“the previous indictment”), which was the operative indictment at this point. The Trial Chamber consequently based the Impugned Decision on this indictment, which is also the

³⁶ See Oneissi Appeal, paras 41-53.

³⁷ See Oneissi Appeal, fn. 22 (not alleging an error, however), para. 25 (without providing a reference), para. 35.

³⁸ See, e.g., Badreddine Appeal, para. 22.

³⁹ *Ibid.*

⁴⁰ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009, para. 13.

⁴¹ See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 (OA 6), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, para. 29 (“The arguments of a participant to an appeal must be fully contained within that participant’s filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere. The practice followed by the appellant in this appeal could also lead, in reality, to a circumvention of the page limits that are stipulated in the Regulations of the Court.”)

⁴² See also Practice Direction on Filing of Documents before the Special Tribunal for Lebanon, STL-PD-2010-01-Rev.2.

subject of the appeals. After the Impugned Decision was issued, the Prosecutor sought leave of the Pre-Trial Judge for further amendments to the indictment. The Pre-Trial Judge granted the request after the filing of the appeals in this case. He ordered that the new amended indictment of 21 June 2013 (“the amended indictment”) replaced the previous indictment.⁴³

17. In their appeal, counsel for Mr Oneissi requests the Appeals Chamber to suspend the proceedings in this appeal pending the decision of the Pre-Trial Judge on the Prosecutor’s further request for leave to amend the previous indictment.⁴⁴ Counsel argues that the resolution of the appeal will be impacted if the amendments are allowed.⁴⁵ The Prosecutor responds that the appeal proceedings should not be suspended.⁴⁶ Given that the Pre-Trial Judge has granted the amendments, the issue of suspending or not suspending the appeal proceedings has become otiose.

18. However, we must assess the impact that the decision of the Pre-Trial Judge and the replacement of the previous amendment with the amended indictment have on this appeal. We conclude that we cannot entertain the challenges to the Impugned Decision because it was based on the previous indictment which has now fallen away.

19. An indictment is the primary accusatory instrument in a case before this Tribunal. Rule 90 (A) (ii) allows the Defence to bring preliminary motions alleging defects in the form “of the indictment”. This means the indictment in force at the relevant time, *i.e.* the operative indictment. Rule 71 allows for an indictment to be amended. Rule 71 (D) provides that Rule 68 (J) applies *mutatis mutandis* to the amended indictment. Rule 68 (J) in turn states that “any challenge by the Defence to a ruling on the indictment [...] shall be by preliminary motion under Rule 90 (A).” In other words, once an indictment has been amended challenges to its form must be brought again before the Trial Chamber.

20. In this case, the Trial Chamber decided on the preliminary motions directed at the previous indictment. Its Decision was appealed by the Defence. But we decline to entertain the appeals when their underlying premise—namely the existence of the previous indictment—has been fundamentally altered. Indeed, the appeals are now moot because the previous indictment has been replaced with the amended indictment.

⁴³ See above, paras 3-5.

⁴⁴ Oneissi Appeal, para. 13.

⁴⁵ *Ibid.*

⁴⁶ Prosecutor’s Response, paras 2, 13-15. The Prosecutor does not address the fact that leave to amend the indictment was in fact granted by the Pre-Trial Judge a day before the Prosecutor filed his Response in this appeal.

21. We note in this regard that the Trial Chamber previously took a similar approach. When the initial indictment of 10 June 2011 was amended and replaced by the indictment of 6 February 2013, the Trial Chamber found the Defence preliminary motions that had been filed against the indictment of 10 June 2011 “redundant” and held “that the Chamber cannot rule on preliminary motions challenging the form of an indictment which no longer exists in the same form.”⁴⁷ It consequently ordered the Defence to file new preliminary motions relating to the indictment of 6 February 2013.⁴⁸

22. Our conclusion that we should not entertain the appeals against the Impugned Decision is further supported by the consistent case-law of other international tribunals, which have similar provisions in their Rules of Procedure with respect to the indictment and any challenges to it. For example, a Trial Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) concluded that “les exceptions préjudicielles visées par l’Article 72 du Règlement [the equivalent provision to Rule 90 of our Rules] doivent porter sur un acte d’accusation en vigueur” and that the filing of an amended indictment rendered the preliminary motions filed prior to that moot.⁴⁹ Trial Chambers of the International Criminal Tribunal for the former Yugoslavia have followed a similar approach.⁵⁰

23. In a decision directly on point, the ICTR Appeals Chamber was seized with an appeal against a Trial Chamber decision that had rejected certain challenges to an indictment. After the appeal was filed, the Trial Chamber granted leave to amend the indictment. The Appeals Chamber held that

⁴⁷ Trial Chamber Decision of 18 April 2013, para. 15.

⁴⁸ *Id.* at Disposition.

⁴⁹ ICTR, *Prosecutor v. Renzaho*, ICTR-97-93-I, *Décision sur la requête en exception préjudicielle pour vices de forme de l’acte d’accusation*, 8 April 2005, p. 2; *see also* ICTR, *Prosecutor v. Simba*, ICTR-2001-76-I, Decision on Defence Motion Alleging Defects in the Form of the Indictment, 26 January 2004 (“*Simba* Decision”), para. 5 (explaining that a “Chamber has no jurisdiction to decide motions on Indictments which have been superseded [*sic*]; nor to decide motions in respect of Indictment which did not exist at the time of filing”); ICTR, *Simba v. The Prosecutor*, ICTR-01-76-AR72, Decision on Aloys Simba’s Interlocutory Appeal Regarding Defects in the Form of the Indictment, 24 March 2004 (rejecting Simba’s appeal against the Trial Chamber’s Decision for lack of certification but noting the Trial Chamber’s conclusion that it had no jurisdiction in respect of an indictment that had been superseded); ICTR, *Prosecutor v. Barayagwiza*, ICTR-97-19-I, Decision on the Defence’s Extremely Urgent Motion to Quash the Indictment Against the Accused Person on the Ground of Defects in the Form of the Indictment; on the Defence’s Motion for Measures and Orders Against the Prosecutor to Disclose Evidence, Documents and Witnesses; and, on the Defence’s Motion for Clarification of the Terms and Expressions Used in the Indictment, 14 April 2000, p. 3 (noting that the motions were brought on the basis of a former indictment and consequently “have been overtaken by events and are therefore moot”).

⁵⁰ *See* ICTY, *Prosecutor v. Rajić*, IT-95-12-PT, Order Concerning the Prosecutor’s Motion Seeking Leave to Amend the Indictment, 12 January 2004, p. 2; *see also* ICTY, *Prosecutor v. Popović et al.*, IT-05-88-PT, Order on the Consolidated Amended Indictment, 31 October 2005.

the 18 June Indictment, which is the subject of this interlocutory appeal, has been replaced by the 29 September Indictment [...]. Therefore, the Defence's challenges are to a previous indictment that is no longer operative. In these circumstances, the Appeals Chamber considers that the Appeal is moot and declines to entertain the Appellant's challenges on the specificity and validity of the charges in the 18 June Indictment.⁵¹

It consequently dismissed the appeal.⁵²

24. We also note the practical concerns that would arise if we were to address the appeals. The provisions of an indictment are all inter-related. They cannot be viewed in isolation. Rather, when assessing whether an indictment is defective or not, it must be viewed in its totality.⁵³ In this respect, a review of the amended indictment reveals that various changes have been made throughout the document. Indeed, many modifications are interwoven with the text of the previous indictment and touch on some of the Defence complaints made in the appeals.⁵⁴ The Trial Chamber held that there were no defects in the indictment on the basis of the previous indictment. It might have decided differently—or with different reasoning—had it considered the amended version of the indictment now in force. On the other hand, on appeal, we cannot take the amended indictment into account because it has not been litigated before the Trial Chamber.

25. For these reasons, the appeals are moot and we therefore dismiss them. However, we do this without prejudice to the Defence who are free, if they so wish, to file new preliminary motions before the Trial Chamber directed at the amended indictment.⁵⁵

⁵¹ ICTR, *Nizeyimana v. The Prosecutor*, ICTR-00-55-AR73, Decision on Nizeyimana's Interlocutory Appeal from the Decision on Nizeyimana's Motion to Order the Prosecutor to Conform with a Trial Chamber Decision and Strike Parts of the 18 June Amended Indictment, 14 October 2010 ("*Nizeyimana* Decision"), para. 8.

⁵² *Id.* at para. 9.

⁵³ See, e.g., ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para. 117 ("The indictment must be read in its entirety when determining whether material facts have been pleaded."); ICTR, *Rutaganda v. The Prosecutor*, Judgement, 26 May 2003, para. 304 (noting that indictment paragraphs cannot be read in isolation from the rest of the document).

⁵⁴ See Amendment Decision, paras 24-26.

⁵⁵ See also *Nizeyimana* Decision, para. 8, *Simba* Decision, para. 5.

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rules 68 (J), 71 and 90, 130 (A) and 176 (B) of the Rules;

THE APPEALS CHAMBER, deciding unanimously;

DISMISSES the appeals; and

DECLARES that the Defence, if they wish, may file preliminary motions before the Trial Chamber directed at the amended indictment of 21 June 2013.

Judge Baragwanath appends a Separate Opinion.

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

Filed 5 August 2013

Leidschendam, the Netherlands



Judge David Baragwanath

Presiding

SEPARATE OPINION OF JUDGE BARAGWANATH

1. On my analysis my colleagues advance two grounds for dismissing the appeals. The first is that they are automatically terminated by operation of law as a result of the confirmation of the June indictment which supersedes the February indictment on which the challenged decision of the Trial Chamber was based.⁵⁶ The second is that the addition of new elements to the June indictment means that as a matter of proper process we should decline to deal with the appeals; rather we should await a further consideration of the issues in the light of the new elements.⁵⁷

2. I offer no opinion on the merits of the first ground. In the absence of further argument I would be reluctant to hold that after preparing a decision on one indictment we were deprived of authority to deliver it simply because the Pre-Trial Judge had confirmed an amended indictment, even if it repeated verbatim the passages challenged in its predecessor. While in the *Sun Life* decision the House of Lords held that in private law cases

[...] it is an essential quality of an appeal fit to be disposed of by [a final appellate court] that there should exist between the parties a matter in actual controversy which the [court] undertakes to decide as a living issue⁵⁸

counsel have had no opportunity to deal with the competing principle of the *Salem* case that

in a cause where there is an issue involving a public authority as to a question of public law, [the appellate court has] a discretion to hear the appeal, even if by the time the appeal reaches [that court] there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decision[] [...] in the *Sun Life* case [...] must be read accordingly as limited to disputes concerning private law rights between the parties to the case. The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so [...].⁵⁹

In considering whether the principles of the latter civil authority should apply in the present criminal context, both fairness to the accused, whose appeals could turn upon the decision, and our two statutory dictates—of fairness and expedition—point towards rather than against such conclusion. Since this case is far from concluded the latter authority, which turns on judicial economy in relation to issues which transcend the limits of mere private interest, may be said to apply here with stronger force than in the context in which it was decided.

⁵⁶ See Decision, paras 19-23, 25.

⁵⁷ See Decision, para. 24.

⁵⁸ UK, House of Lords, *Sun Life Assurance v. Jervis* [1944] AC 111.

⁵⁹ UK, House of Lords, *R v. SSHD ex parte Salem* [1999] 1 AC 450.

3. As to the second, the failure of the Trial Chamber to identify specific issues for certification as warranting appeal, coupled with the addition of new elements, together lead me to agree that the appeals should be dismissed but without prejudice to any certified appeal against the June indictment, whether or not it was advanced as a ground of challenge to the February indictment.

4. I do not however agree that the issues are moot. That term is given to issues that are no longer in dispute. Here there is no basis for such conclusion, since the appellants may wish to advance them in a challenge to the June indictment.

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

Filed 5 August 2013

Leidschendam, the Netherlands



Judge David Baragwanath

