



THE TRIAL CHAMBER

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

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

Registrar: Mr. Daryl Mundis, Registrar

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THE PROSECUTOR

v.

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

DECISION ON DEFENCE MOTIONS FOR CERTIFICATION FOR APPEAL OF THE TRIAL CHAMBER'S 13 SEPTEMBER 2013 'DECISION ON ALLEGED DEFECTS IN THE FORM OF THE AMENDED INDICTMENT'

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Counsel for Mr. Assad Hassan Sabra:
Mr. David Young
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INTRODUCTION

1. On 13 September 2013, the Trial Chamber dismissed preliminary motions filed by counsel for Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra alleging defects in the form of the amended indictment of 21 June 2013.¹ Counsel for the three Accused subsequently filed motions requesting certification to appeal the decision.² The Prosecution filed a consolidated response opposing certification, except on one issue.³

PRINCIPLES IN DECIDING MOTIONS FOR CERTIFICATION

2. Rule 90 (B) (ii) of the Rules of Procedure and Evidence provides that a Chamber may certify a decision for appeal on a preliminary motion if two cumulative criteria are satisfied: first, the decision must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and second, that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Special Tribunal's Appeals Chamber recently emphasised that the Party requesting certification must identify the specific issues which in its view meet the requirements of Rule 90 (B) (ii). If the Party fails to do so, the Trial Chamber itself should pinpoint any such issues. For certification, the 'requirements are strict and a Chamber must take great care in assessing them'. The Trial Chamber must thus carefully assess the issues and decide in a reasoned opinion whether these meet the strict requirements of the relevant Rule.⁴

¹ STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013. On 12 June 2013, the Trial Chamber dismissed Defence motions alleging defects in the form of the indictment of 6 February 2013. Following this decision, and in response to Defence requests for certification, the Trial Chamber granted leave to appeal on 5 July 2013. Before the Appeals Chamber made a substantive ruling on the Defence appeals, the Pre-Trial Judge granted the Prosecution leave to amend the indictment. Following the filing of the indictment of 21 June 2013, the Defence filed fresh motions alleging defects in its form, leading to the decision of 13 September 2013.

² STL-11-01/PT/TC, Sabra motion for leave to appeal the Decision on alleged defects in the form of the indictment of 21 June 2013, 18 September 2013 ('Sabra motion'); Requête de la Défense de M. Badreddine aux fins de certification de l'appel de la Décision du 13 septembre 2013 relative aux exceptions préjudicielles fondées sur un vice de forme de l'Acte d'accusation, 23 septembre 2013 ('Badreddine motion'); Requête de la Défense de M. Oneissi aux fins de certification de l'appel de la Décision du 13 septembre 2013 relative aux exceptions préjudicielles fondées sur un vice de forme de l'Acte d'accusation, 23 septembre 2013 ('Oneissi motion').

³ STL-11-01/PT/TC, Prosecution Consolidated Response to Defence Motions Requesting Certification to Appeal the Trial Chamber's Decision of 13 September 2013 on Alleged Defects in the Form of the Amended Indictment, 27 September 2013 ('Prosecution response').

⁴ STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals Against Trial Chamber's 'Decision on Alleged Defects in the Form of the Amended Indictment', 5 August 2013, paras 7-11.

DISCUSSION

3. The three Defence motions have collectively specified ten issues arising from the decision of 13 September 2013 that they seek to have certified for appeal. Counsel for Mr. Badreddine seek certification to appeal the following issues: (i) whether the criteria for assessing the lack of precision of the indictment are applicable in a case based exclusively on circumstantial evidence;⁵ (ii) whether Mr. Badreddine's role in the preparation and perpetration of the attack is sufficiently detailed;⁶ (iii) whether the contradictions and inconsistencies render the indictment imprecise, and therefore defective;⁷ and (iv) whether the material facts which the Prosecution uses to infer the participation of Mr. Badreddine in the preparation and perpetration of the attack are sufficiently clear.⁸
4. Counsel for Mr. Oneissi seek certification to appeal: (i) whether Rule 68 (D) should be interpreted in a manner consistent with Article 131 of the Lebanese Code of Criminal Procedure;⁹ and (ii) whether the indictment, the Prosecution's pre-trial brief and the evidence disclosed to Defence counsel are sufficiently specific to properly inform the Accused of the charges.¹⁰
5. Counsel for Mr. Sabra seek certification to appeal: (i) whether the Prosecution is obliged to provide more clarity in an indictment when proceedings are subsequently held *in absentia*, *and/or* where the evidence is circumstantial;¹¹ (ii) whether the Prosecution may charge a conspiracy based on such an extended date range with so few material facts;¹² (iii) whether Mr. Sabra's actions in recruiting Abu Adass are pleaded with sufficient specificity;¹³ and (iv) whether the Trial Chamber erred in dismissing complaints regarding the vagueness of specific terms in the indictment.¹⁴
6. The Prosecution does not oppose certification in relation to the date range in the conspiracy charge identified by counsel for Mr. Badreddine and Mr. Sabra.¹⁵ In respect of all other identified issues, the Prosecution argues that the 'high threshold' for certification has not been met.¹⁶ In

⁵ Badreddine motion, paras 3-6, re paras 25-27 and 50 of the decision.

⁶ Badreddine motion, paras 7-8, re paras 49-50 of the decision.

⁷ Badreddine motion, para. 9, re paras 35-40 of the decision.

⁸ Badreddine motion, para. 10, re paras 49-50 of the decision.

⁹ Oneissi motion, paras 6-9, re para. 29 of the decision.

¹⁰ Oneissi motion, paras 10-13, re para. 50 of the decision.

¹¹ Sabra motion, para. 4, re para. 26 of the decision.

¹² Sabra motion, para. 5, re paras 38-40 of the decision.

¹³ Sabra motion, para. 6, re paras 46, 48 of the decision.

¹⁴ Sabra motion, para. 7, re para. 50 of the decision.

¹⁵ Prosecution response, paras 3, 14, 17, 20.

¹⁶ Prosecution response, paras 2, 4.

particular, the two issues identified by counsel for Mr. Oneissi merely concern alleged errors in the Trial Chamber's reasoning.¹⁷ Further, the challenge by counsel for Mr. Badreddine and Mr. Sabra in relation to circumstantial evidence would require the Appeals Chamber to make a preliminary finding on the nature of the evidence and is therefore not an issue capable of an immediate resolution by that Chamber.¹⁸ The remaining issues raised by counsel for Mr. Badreddine are overly broad.¹⁹ Finally, counsel for Mr. Sabra's remaining issues fail 'to establish with particularity' that the proceedings would be materially advanced.²⁰

7. Some of the issues for which certification is sought overlap, and the Trial Chamber has distilled from the three motions the following five issues:
- (i) whether Rule 68 (D) of the Rules should be interpreted consistently with the Lebanese Code of Criminal Procedure;
 - (ii) whether an indictment for proceedings held *in absentia* and where the evidence is circumstantial requires greater specificity than an indictment on proceedings held in the presence of the accused;
 - (iii) whether an indictment based substantially (or exclusively) on circumstantial evidence requires greater specificity than an indictment in other cases;
 - (iv) whether the dates pleaded for the conspiracy charged in the amended indictment are too broad; and
 - (v) whether the amended indictment as pleaded is too vague.

First issue: whether Rule 68 (D) of the Rules should be interpreted consistently with the Lebanese Code of Criminal Procedure

8. Counsel for Mr. Oneissi seek to certify for appeal their disagreement with paragraph 29 of the Trial Chamber's decision. The Trial Chamber held that there is no lacuna between Rule 68 (D) of the Special Tribunal's Rules of Procedure and Evidence and the Lebanese Code of Criminal Procedure. In support of this, counsel 'challenge' the Trial Chamber's decision and 'maintain' that the Trial Chamber cannot rely upon international case-law.²¹ Counsel, however, do not

¹⁷ Prosecution response, paras 9-13.

¹⁸ Prosecution response, paras 15, 21.

¹⁹ Prosecution response, para. 16.

²⁰ Prosecution response, paras 19, 21-22.

²¹ Oneissi motion, paras 7, 9.

adequately explain how it falls within the strict requirements of Rule 90 (B) (ii) in that this issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

9. The Trial Chamber does not believe that it falls within the Rule, thus requiring certification. Counsel have the evidence that the Prosecution intends to present at trial and, additionally, a summary of this evidence in the form of the pre-trial brief. Their knowledge of the case against the Accused and the manner in which they have received this information is entirely consistent with both the principles of international criminal law and the Lebanese Code. The Trial Chamber will not certify for appeal an issue that amounts to little more than a mere disagreement with its own decision. But, moreover, there is no issue here that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

Second issue: whether an indictment for proceedings held *in absentia* and where the evidence is circumstantial requires greater specificity than an indictment on proceedings held in the presence of the accused

10. Counsel for Mr. Sabra have posed as an issue whether the very circumstances of a trial held *in absentia* require the Prosecution to provide ‘more clarity’ in an indictment and in circumstances when the evidence is circumstantial (Sabra issue 1). Supporting this request they argue that this would be the first international trial held *in absentia* in over 60 years, and additionally one in which the evidence is circumstantial. Thus, an indictment pleaded with specificity would ‘map a course of action along the right lines so as to provide a safety net for the integrity of proceedings’.²² This would therefore, it is asserted, affect the expeditious conduct of the proceedings. But how this would occur is not specified.
11. The mere fact that an issue is novel, here that the proceedings are for the moment proceeding *in absentia*, does not of itself place it within Rule 90 (B) (ii) for certification for appeal. Counsel must demonstrate how the issue falls within the Rule. They have not done so. Defence counsel have the information necessary to defend their clients and the Trial Chamber is not of the view that the mere contemporary novelty of the issue identified would of itself affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

²² Sabra motion, para. 10.

12. Furthermore, the Appeals Chamber has ruled – in relation to the conduct of proceedings held *in absentia* – that ‘Defence counsel possess only those powers that the Accused have, were they present’ and thus are not entitled to ‘more rights than the Accused would have if they were to appear, by affording them access to a remedy not available to the Accused’.²³ The Trial Chamber therefore declines to certify this issue for appeal.

Third issue: whether an indictment based substantially (or exclusively) on circumstantial evidence requires greater specificity than an indictment in other cases

13. Counsel for Mr. Badreddine submit (Badreddine question 1) that an indictment in a trial where the evidence is *exclusively* circumstantial requires greater specificity. They claim legal error by the Trial Chamber in its defining the criteria for claiming a lack of precision in an indictment. Such an error, it is argued, is therefore likely to significantly affect the fairness of the proceedings, and its expeditiousness, as it might generate issues at trial, particularly ‘as to whether when Prosecution evidence is produced, any matters arise concerning facts which should have been included in the indictment’.²⁴ It is also asserted, but without supporting argument, that this would also affect the outcome of the trial.

14. The Prosecution has disclosed to the Defence the evidence that it intends to present at trial. This evidence supports the material facts and legal allegations pleaded in the amended indictment. Defence counsel have not explained how adding information – from that contained in the evidence already disclosed to them – to the material facts pleaded in the amended indictment, would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Nor has any explanation been given as to how this could affect the outcome of the trial.

15. The Trial Chamber will deal with all evidence related issues – and in particular whether the proposed evidence supports the material facts pleaded in the amended indictment – as they arise during the proceedings. The Trial Chamber is not prepared to attempt to predict now what these issues may be. Moreover, the Trial Chamber is not properly informed as to whether the Prosecution’s evidence will be *exclusively* circumstantial, which is the basis of counsel for Mr. Badreddine’s request for certification. The issue raised by Defence counsel directly concerns the assessment of certain evidence to be presented at trial. As it would be premature to attempt to assess the evidence at this stage of the proceedings, it cannot be a matter that would significantly

²³ STL-11-01/PT/AC/AR126.1, Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial *in absentia* Decision, 1 November 2012, para. 16.

²⁴ Badreddine motion, paras 4-5.

affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Trial Chamber will therefore not certify it for appeal. To the extent that this issue overlaps with that raised by counsel for Mr. Sabra in respect of circumstantial evidence, that request is dismissed for the same reasons.

Fourth issue: whether the dates pleaded for the conspiracy charged in the amended indictment are too broad

16. Counsel for Mr. Sabra seek certification of the issue of the pleading in the amended indictment of the dates of the conspiracy alleged (Sabra issue 2), arguing that greater specificity would assist the Defence to conduct more efficient investigations. Counsel for Mr. Badreddine argue that the dates pleaded in the amended indictment conflict with the material facts pleaded and that it would be unfair to commence a trial without the required specificity in pleading (Badreddine question 3). The Prosecution, but without saying how these requests fall within Rule 90 (B) (ii), does not oppose certifying this issue for appeal.
17. The issue, however, is not one that would *significantly* affect the fair and expeditious conduct of the proceedings *or* the outcome of the trial. The Prosecution has charged the two Accused with participating in a conspiracy between two dates. The amended indictment provides a legal categorisation of the offence charged and pleads the relevant material facts. The pre-trial brief and the evidence disclosed to the Defence supplement these material facts. The complaint made in the Defence motions of an alleged lack of specificity in the amended indictment is an issue of evidence at trial. And outside of the Prosecution giving further particulars to the Defence, it appears that there is nothing more of substance that it can provide to the Defence in relation to these pleaded allegations.
18. The Defence are on notice of the allegations of the existence of a conspiracy within specified dates and, so far as the Trial Chamber is aware, have received from the Prosecution the evidence and material relevant to this charge. This should provide Defence counsel with the information necessary to conduct their own pre-trial investigations. Adding supplementary material *to the amended indictment* will not alter this situation. This issue could thus not significantly affect the fair and expeditious conduct of the proceedings. Moreover, the outcome of the trial will be determined by the evidence presented at trial. Evidence is not pleaded in an indictment, thus adding more information to the amended indictment at this stage cannot affect the outcome of the trial.

19. Counsel for Mr. Badreddine have raised the same issue for certification (Badreddine question 3) and, for the same reasons, it is dismissed.

Fifth issue: whether the indictment is too vague

20. Counsel for Mr. Oneissi seek certification of paragraph 50 of the Trial Chamber's decision where it finds that the amended indictment was not defective by virtue of alleged vagueness in pleading material facts. Counsel 'challenge' the Trial Chamber's 'interpretation', asserting that it is 'highly detrimental to the rights of the accused to have accurate knowledge of the evidence' of the case against him.²⁵ This 'challenge', however, appears to amount to little more than disagreement with the decision, and cannot of itself fall within Rule 90 (B) (ii) as the motion does not specify how this issue would significantly affect the fair and expeditious conduct or the outcome of the proceedings. Moreover, in the circumstances of this case, having 'accurate knowledge of the evidence', is an issue relating to the disclosure of evidence rather than the material facts pleaded in the amended indictment.
21. Counsel for Mr. Sabra have posed a similar issue (Sabra issue 3) of vagueness in the pleading of the alleged recruitment of Abu Adass, arguing that greater specificity would enable the Prosecution and Defence to streamline the evidence to be adduced at trial, thus leading to shorter and more efficient proceedings. Defence counsel, however, have not specified how adding more information of this nature to the amended indictment would significantly affect the fair and expeditious conduct of the proceedings. The necessary material facts are pleaded in the amended indictment and, so far as the Trial Chamber is aware, the Prosecution has already disclosed to the Defence counsel all information necessary to allow both Prosecution and Defence to 'streamline' their respective approaches to presenting and challenging evidence at trial. This issue therefore does not fall within Rule 90 (B) (ii).
22. Counsel for Mr. Badreddine also seek certification on the basis of insufficient precision in defining the role of the Accused in the preparation and attack on Rafiq Hariri, arguing that it relates to 'an aspect of the fundamental right to a fair trial' namely the form of participation of an accused in a crime, it being imperative that the Appeals Chamber resolve the matter now (Badreddine question 2).²⁶ However, the motion argues a general disagreement with the Trial Chamber's decision and counsel do not specify how this issue would significantly affect the fair

²⁵ Oneissi motion, paras 10-11.

²⁶ Badreddine motion, para. 8.

and expeditious conduct or the outcome of the proceedings. They also seek certification of whether the material facts in relation to this issue are sufficiently pleaded (Badreddine question 4), arguing the same grounds as those supporting their first question for certification (re circumstantial evidence).

23. However, again, and for the same reasons, the Trial Chamber dismisses this request for certification; counsel have been provided with all the material necessary to understand the nature of the case against the Accused and have not demonstrated how failing to add more information to the amended indictment would significantly affect the fair and expeditious conduct or the outcome of the proceedings.

DISPOSITION

FOR THESE REASONS the Trial Chamber:

DISMISSES the motions of counsel for Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra seeking certification to appeal the Trial Chamber's decision of 13 September 2013, 'Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013'.

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

Leidschendam
The Netherlands
9 October 2013

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

