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

BEFORE THE TRIAL CHAMBER

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**
Registrar:	**Mr. Herman von Hebel**
Date:	**11 July 2012**
Original language:	**English**
Type of document:	**Public**

THE PROSECUTOR

v.

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

DECISION ON RECONSIDERATION OF THE TRIAL *IN ABSENTIA* DECISION

Office of the Prosecutor:
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Head of the Defence Office:
Mr. François Roux

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

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Mr. John Jones

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Mr. Vincent Courcelle-Labrousse
Mr. Yasser Hassan

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

I. INTRODUCTION

1. On 1 February 2012, the Trial Chamber issued a decision to hold a trial *in absentia* against Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra.[1] Defence Counsel for Mr. Badreddine and Mr. Oneissi have asked the Trial Chamber to reconsider the Decision to proceed to trial *in absentia*,[2] while counsel for Mr. Sabra and Mr. Ayyash ask the Trial Chamber to stay the Decision, or failing that, to clarify several aspects of it.[3]

2. The Prosecution opposes the Defence motions arguing that, as a threshold point, Defence counsel lack standing and that the motions do not meet the standard for reconsideration.[4]

II. THE STANDING OF DEFENCE COUNSEL TO SEEK RECONSIDERATION

3. The Prosecution submits, as a preliminary point, that Defence counsel lack standing to ask the Trial Chamber to reconsider the Decision.[5] The Prosecution argues that the procedure envisaged in Rule 106 of the Tribunal's Rules of Procedure and Evidence does not give standing to any Party to provide submissions on the issue of trials *in absentia*, and that the mandate of the assigned Defence counsel is limited to events occurring after initiating the *in absentia* proceedings. Assigned Defence counsel are therefore not authorised to seek reconsideration of a

[1] STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/I/TC, Decision to Hold Trial *In Absentia*, 1 February 2012.
[2] STL-11-01/PT/TC, Requête de la Défense de M. Badreddine aux fins de réexamen de la «Décision portant ouverture d'une procédure par défaut» rendue par la Chambre de première instance le 1er février 2012, 22 mai 2012; Demande de la défense de M. Oneissi en réexamen de la décision d'ouverture d'une procédure par défaut du 1er février 2012, 24 mai 2012; Décision autorisant la défense de M. Badreddine et la défense de M. Oneissi à déposer une requête en réexamen, 15 mai 2012. On 16 and 22 May 2012 the Trial Chamber rejected requests by the Defence of Mr. Badreddine and Mr. Oneissi to extend the word limit for their motions. STL-11-01/PT/TC, Décision relative à la demande d'augmentation du nombre limite de pages dans le cadre d'une procédure en réexamen déposée par la défense de M. Badreddine, 16 mai 2012; Décision relative à la demande d'augmentation du nombre limite de pages ou de mots dans le cadre d'une procédure en réexamen déposée par la défense de M. Oneissi, 22 mai 2012.
[3] STL-11-01/PT/TC, Sabra Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial in Absentia, 23 May 2012; STL-11-01/PT/TC, Ayyash Motion Joining Sabra Motion for Reconsideration of the Trial Chamber's Order to Hold a Trial in Absentia, 24 May 2012; STL-11-01/PT/TC, Décision autorisant la défense de M. Ayyash et la défense de M. Sabra à déposer une requête en réexamen, 22 mai 2012.
[4] STL-11-01/PT/TC, Prosecution Consolidated Response to the Defence Requests for Reconsideration of the Trial *In Absentia* Decision, 12 June 2012.
[5] Prosecution response, paras 2, 5-11.

decision rendered before their appointment, and, moreover, the Rules do not specifically "grant standing" to any Party to provide submissions under Rule 106.

4. The Trial Chamber, however, in the interests of justice, has interpreted the Tribunal's Rules liberally. Taking advantage of this, the Prosecution made lengthy written and oral submissions on the issue but without then contesting the Trial Chamber's invitation to do so. The Prosecution has thus long waived its right to take this point.

5. Counsel and client speak with one voice; even counsel assigned to act for an absent accused. Any of the four Accused – as a Party to the proceedings – would have the standing to ask the Trial Chamber to reconsider its Decision. Defence counsel seek reconsideration only in the name of the Accused person they represent. Standing in the shoes of the four absent Accused, assigned Defence counsel may therefore seek reconsideration in their names. The Prosecution's challenge to their standing to make the application is accordingly rejected.

III. THE LEGAL PRINCIPLES

6. Rule 140 of the Tribunal's Rules expressly states "a Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice". Additional to the need to avoid an injustice – as specified in Rule 140 – the following principles emerge from the decisions of other international courts and tribunals;[6] an international court or tribunal may reconsider its own decision where there is a clear error of reasoning or where new facts or a change in

[6] See. e.g., International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Jadranko Prlić and others*, IT-04-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, para. 18; International Criminal Tribunal for Rwanda, *Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-A, Judgement, 23 May 2005, para. 203; *Prosecutor v. Edouard Karemera and others*, ICTR-98-44-AR73.10, Decision on Ngirumpatse's Motion for Reconsideration, 5 October 2007, p. 3; Special Court for Sierra Leone, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-2004-16-A, Judgment, 22 February 2008, para. 63, referring to *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, ICTR-99-46-A, Judgement, 7 July 2006, para. 55. The practice of the International Criminal Court varies, see e.g., *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, para. 18.

circumstances emerge after the decision. New arguments can be used to demonstrate a clear error of legal reasoning.[7]

7. Legal certainty and finality is central to the judicial decision-making process and reconsideration is an exceptional remedy. As the ICTY has held, it cannot be used as a "second appellate route",[8] and, as the Pre-Trial Judge has held, it cannot be used to circumvent the Rules of Procedure and Evidence.[9] Reconsideration can only involve reversing or varying a decision to avoid an injustice.

IV. OVERVIEW OF THE FOUR DEFENCE MOTIONS

8. The Trial Chamber, on 1 February 2012, found that the conditions for a trial *in absentia* under Rule 106 (A) (iii) of the Rules had been met, namely that an Accused had "absconded or otherwise cannot be found and all reasonable steps have been taken to secure his appearance before the Tribunal and to inform him of the charges by the Pre-Trial Judge". The Trial Chamber found that Mr. Ayyash, Mr. Badreddine, Mr. Oneissi and Mr. Sabra had absconded and that all reasonable steps had been taken to secure their appearance and to inform them of the charges, concluding,[10]

> The evidence establishes that none of the four Accused has been seen at his last known place of residence since the indictment and arrest warrants were transmitted to the Lebanese authorities on 30 June 2011 and their names were published in the Lebanese media as possible accused persons in the case. The Trial Chamber is therefore satisfied that Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra cannot be found and that each has absconded and does not wish to participate in a trial despite being informed of the charges and the possible ways of participating in the trial. The combination of these circumstances has allowed the Trial Chamber to conclude that the requirements under Rule 106 (A) (iii) to hold proceedings *in absentia* have been met.

[7] STL-11-01/PT/PTJ, Decision on the Prosecution's Request for Partial Reconsideration of the Pre-Trial Judge's Order of 8 February 2012, 29 March 2012, para. 35.
[8] *Prosecutor v Rasim Delić*, IT-04-83-PT, Decision on the Prosecution Motion for Reconsideration, 23 August 2006, p. 5.
[9] STL-11-01/PT/PTJ, Decision on the Prosecution's Request for Partial Reconsideration of the Pre-Trial Judge's Order of 8 February 2012, 29 March 2012, para. 23.
[10] Decision, para. 111.

9. *That finding* under Rule 106 was the basis of the Trial Chamber's Decision. A request to reconsider a decision under Rule 106 (A) (iii) must therefore confine itself to the order made under that rule, and the reasoning of the order. Arguments supporting a reconsideration must relate to (a) whether an Accused had absconded or otherwise could not be found, (b) whether all reasonable steps were taken to secure his appearance, and (c) whether all reasonable steps were taken to inform him of the charges.

10. Speculative arguments or philosophical or in-principle disagreements with *in absentia* proceedings are irrelevant; and a mere disagreement with a decision or its reasoning cannot meet the test for reconsideration under Rule 140. Moreover, arguments relating to the possible conduct of a trial or retrial (which are necessarily *subsequent* to the Decision to hold one *in absentia*) are equally unrelated to the reasoning necessary or used to *make* an order under Rule 106 (A).

11. The Trial Chamber, using these principles and the legal principles in paragraphs 6–7 above, has analysed the four Defence motions, and the relief sought in each, to identify whether they offer new facts, or new arguments showing an error of legal reasoning, or whether there has been a change in circumstances, necessitating it to reconsider its Decision to avoid an injustice.

12. The Trial Chamber, however, cannot find any new facts, or new arguments showing an error of legal reasoning necessitating a reconsideration of its Decision of 1 February 2012 to avoid an injustice to any of the four Accused. Indeed, few of the arguments in the four motions properly address the actual Decision and order made under Rule 106 (A) (iii) or its reasoning.

13. The only change in circumstances appearing in any of the motions appears to be that Defence counsel were appointed to represent the four Accused *after* the Decision was issued on 1 February 2012. But this logically ignores that they could not have been appointed before then because Rule 105 *bis* (B) only permits the Head of the Defence Office to appoint counsel to represent absent accused *after* a decision to proceed *in absentia*. This change in circumstances necessarily procedurally followed the Decision under Rule 106. It cannot lead the Trial Chamber to reconsider a Decision to hold a trial *in absentia*.

A. MOTION OF COUNSEL FOR MUSTAFA AMINE BADREDDINE

14. Counsel for Mr. Badreddine seek four orders. These are; an oral hearing to supplement their written motion, a reconsideration of the Decision itself, the annulling or withdrawing ("de neutraliser") of the warrants of arrest issued by the Pre-Trial Judge, and to provide to Defence counsel all of the material relied upon by the Trial Chamber in its Decision.

15. As the issues have been fully ventilated in the extensive written submissions of the Parties, the Trial Chamber is unconvinced that it need conduct a hearing and declines this request. In relation to annulling or withdrawing the arrest warrants, counsel for Mr. Badreddine ask the Trial Chamber to do something it cannot, as it is yet to be seized of the case. This request is thus dismissed. As for the disclosure of documents on 21 June 2012, Defence counsel were provided with the *ex-parte* material used in the Decision and have filed their supplementary submissions.[11] The Trial Chamber dismisses the fourth request, for reconsideration, for the reasons that follow.

16. Counsel for Mr. Badreddine have made their arguments for reconsideration under two headings, "Insufficiently established ascertainment of the facts" and "The Rule authorising proceedings *in absentia* is incompatible with the fundamental rights and interests of the Accused".[12]

17. Under the first heading, counsel for Mr. Badreddine argue; that the evidence does not irrefutably show that their client has absconded and does not wish to participate in the proceedings, and that the Trial Chamber did not consider that Mr. Badreddine may have left Lebanon through un-official means, or that the charges were sufficiently publicised outside Lebanon.[13] The Trial Chamber, by confining its analysis to whether Mr. Badreddine was properly notified in Lebanon, it is argued, did not properly consider whether he was "notified" of the charges.[14]

[11] STL-11-01/PT/TC, Joint Submission Regarding the Material Relied upon by the Trial Chamber in Its *Absentia* Decision, 27 June 2012; and Prosecution Response to the "Joint Submission Regarding Material Relied upon by the Trial Chamber in Its *Absentia* Decision", 29 June 2012; Order on Ex-Parte Documents used in Decision of 1 February 2012, 21 June 2012.
[12] Respectively, "Constatations de fait insuffisamment établies" and "Le Règlement autorisant les procès par défaut est incompatible avec les droits et intérêts fondamentaux de l'accusé".
[13] Badreddine motion, paras 15-24.
[14] Badreddine motion, para. 19.

18. However, no new facts or evidence suggesting that Mr. Badreddine had left Lebanon before or after 1 February 2012 support this contention. The arguments go no further than disagreeing with the Decision and provide no proper basis to reconsider it.

19. The motion also argues (implicitly) that the Trial Chamber erred by failing to verify that the four Accused had personally and fully understood the implications and legal consequences of the indictment and its notification. But to take their suggested course goes far beyond the requirements of international human rights law. The motion therefore fails to demonstrate a clear error of reasoning.

20. Under its second heading,[15] the motion argues that a trial *in absentia* is incompatible with the establishment and institutional framework and Rules of the Special Tribunal for Lebanon ("de l'institution du Tribunal")[16] and violates the right to an adversarial procedure.[17] Supporting arguments include that the Tribunal's limited mandate is incompatible with a trial *in absentia*, and that the Tribunal's substituting for the Lebanese judicial process breaches international human rights law.[18] These arguments do not properly support a request for reconsideration and simply express an in-principle opposition to trials *in absentia*. They show no error in reasoning necessitating the Trial Chamber to reconsider its Decision to avoid an injustice.

21. Under the sub-heading "Violation of the right to an adversarial trial",[19] Defence counsel submit that Rules 108 (A), Rule 109 (A) and Rule 109 (C) (ii) contradict each other in relation to the statutory right to a retrial. These submissions, however, relate to the conduct of a potential retrial and are unconnected with the reasoning of the Decision to order a trial *in absentia* under Rule 106. Similarly, under the sub-heading "The perverse effect of the assignment of counsel"[20] and "*Non bis in idem*", arguments that assigning counsel violates the right to a retrial, and a judgement rendered *in absentia* violates the principle of *non bis in idem*, fall into the same category. Moreover, it appears that counsel, by posing the argument about the appointment of

[15] Translated as "The Rule Authorising Proceedings *In Absentia* is Incompatible with the Fundamental Rights and Interests of the Accused", paras 25-53.
[16] Under the sub-heading, "L'incompatibilité du jugement par défaut et de l'institution du Tribunal", paras 27-43.
[17] Under the sub-heading, "Incompatibilité du jugement par défaut et d'une procédure de type accusatoire", paras 44-53.
[18] Badreddine motion, paras 25-43.
[19] "Violation du droit à un nouveau procès contradictoire", paras 54-56.
[20] "Effet pervers de la commission d'office d'avocats", paras 57-64.

counsel – apart from its irrelevance to reconsidering a Decision under Rule 106 – have simply misread Rule 104.

22. In conclusion, counsel for Mr. Badreddine have produced no new facts, or arguments demonstrating an error in reasoning, necessitating a reconsideration to avoid an injustice; their request for a reconsideration is dismissed.

B. MOTION OF COUNSEL FOR HUSSEIN HASSAN ONEISSI

23. Defence counsel for Mr. Oneissi ask the Trial Chamber to provide them with the material used to make the Decision and to allow them the chance to consider it and to respond. This has been dealt with above (paragraph 15). They also ask it to halt Mr. Oneissi's prosecution because the procedure mandated in the Statute and Rules for a trial *in absentia* does not permit a fair trial. But, as the Trial Chamber is not yet seized of the case and cannot terminate it, this request is rejected.

24. Reconsideration is then sought on the basis that the Trial Chamber erroneously found that Mr. Oneissi had absconded and did not wish to appear.[21] This is a legitimate head to seek reconsideration of a Decision under Rule 106. Under that heading, "Errors of appreciation of the Chamber regarding the notification and the absconding" counsel submit that the Trial Chamber; erred in concluding that Mr. Oneissi was informed of the charges against him and the different ways he could participate in the process, used an incorrect standard of notification, and wrongly failed to find that the notification was not precise or complete.[22] However, the arguments supporting the submission that the Trial Chamber used a lesser standard in relation to the content of the notification to Mr. Oneissi do not demonstrate an error of reasoning, and the motion does not show that the standard used in assessing the notification did not meet the requirements of international human rights law. Similarly, the submission that the Trial Chamber had insufficient evidence to conclude that Mr. Oneissi had absconded is unsupported by any new facts, or anything evidencing a change in circumstances to the contrary, and merely represents a disagreement with the Trial Chamber's exercise of its fact-finding discretion in the Decision.

[21] "a pris la fuite et ne souhaite pas comparaître", para. 81.
[22] "Erreurs d'appréciation de la Chambre sur la notification et sur la fuite", paras 32-47.

25. Under the heading "The exceptional nature of *in absentia* proceedings" and "The investigative procedural model in which *in absentia* proceedings have been admitted by the ECHR",[23] counsel argue against the *in absentia* regime set out in the Tribunal's Statute and Rules. They cite common law and international legal sources, and submit that the regime breaches some international human rights principles and that it is more suitable for inquisitorial procedures.[24] Submissions under the heading "The absence of guarantees before the Tribunal that allow *in absentia* proceedings" posit four irrelevant arguments, namely, (i) what is described as a lack of fair trial guarantees in the *in absentia* trial regime in the Statute and Rules, e.g. that a suspect cannot participate in the investigations before the indictment, (ii) that the interests of the Accused are not protected by the Decision,[25] (iii) that the defence of the effective rights and interests of the Accused tried *in absentia* is not provided for by the Rules, and (iv) that the Prosecution may modify at any moment the framework of the trial.[26]

26. None of these in-principle disagreements with the Statute or Rules demonstrate an error in the reasoning of the Decision necessitating reconsideration to avoid an injustice. For the same reasons used to dismiss similar arguments in the motion of counsel for Mr. Badreddine (paragraphs 20–21) the submissions under these two headings are irrelevant to reconsidering a Decision under Rule 106.

27. Counsel for Mr. Oneissi also submit that, because of the Tribunal's limited mandate, their client has no guaranteed right to a retrial.[27] This, for the reasons given in relation to counsel for Mr. Badreddine's similar arguments (paragraph 21) is unconnected to any error of reasoning in the Trial Chamber's determination under Rule 106 (A) (iii) that it *could* order a trial *in absentia.* Moreover, the Trial Chamber underlines that Article 22 (3) of the Statute provides that an Accused "shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement". The Trial Chamber has no reason to believe that this right guaranteed by the Statute will not be respected. Defence counsel have presented no new

[23] "Le caractère exceptionnel de la procédure par défaut" and "Le modèle procédural de type inquisitoire dans lequel une procédure par défaut a été admise par la CEDH", paras 4-20.
[24] Oneissi motion, paras 4-20.
[25] "ne sont pas représentés lors de la décision", paras 27-51.
[26] "La défense des droits et intérêts effective des intérêts de l'accusé jugé par défaut n'est pas assurée par le Règlement", "Le Procureur peut modifier à tout moment le cadre qu'il fixe au procès", paras 52-61.
[27] Oneissi motion, paras 62-78.

facts, or arguments showing an error of reasoning necessitating a reconsideration to avoid an injustice. The request for reconsideration is dismissed.

C. MOTION OF COUNSEL FOR ASSAD HASSAN SABRA

28. Counsel for Mr. Sabra have submitted two requests in their motion, one seeking access to the *ex-parte* material used in making the Decision (which has been granted and the material provided to them) and a second directed towards reconsideration.

29. The request for reconsideration seeks seven forms of relief, the primary one being an unspecified stay of the Decision; and four alternative forms of relief are requested if the stay is refused. The motion does not specify what type of stay is sought, e.g. whether it is permanent, temporary or conditional, so the intention or legal effect of the stay is uncertain. A conditional or temporary stay, for example, would end upon a particular event occurring, such as, say, receiving further information on a specified point, while a permanent stay may effectively end the proceedings.

30. The Trial Chamber has been unable to find any precedents in the case-law of the other international tribunals and courts in which a stay has been either sought or granted as a part of a request styled as one for reconsideration, but considers that such an order could be possible. The Trial Chamber will therefore treat the motion as asking it to reconsider *and* stay its Decision.

31. The seven forms of relief sought are; (1) to correct all the errors identified (2) to stay the Decision (3) to request the President of the Tribunal to seek an amendment of the Statute of the Tribunal (4) to request the Lebanese authorities to establish whether Mr. Sabra is still alive (5) to order notice inside and outside of Lebanon of the existence of the charge, the right to attend trial and the consequences of failing to attend (6) to verify that the Defence can properly defend their client and, (7) to clarify that no finding has been made that Mr. Sabra had waived his right to a trial such as to lose his right to a retrial. The substantive relief thus appears to demand a stay of the Decision but by the Trial Chamber first rewriting it to vary its reasoning.

32. The four alternative forms of relief sought to implement "minimum human rights guarantees" if the Trial Chamber does not stay the Decision, are expressed as; (a) an unambiguous clarification that Mr. Sabra is entitled to a retrial (b) confirmation that a retrial would meet relevant international human rights law guarantees (c) an explanation as to why the Decision was

reasonable and (d) a clarification that the Accused has not waived his right to a retrial. Thus the motion seeks – as an alternative to the unspecified type of stay – clarification of its reasoning. This, however, misconstrues the function of Rule 140, which is not to clarify an earlier decision, but rather to reconsider one to avoid injustice.

33. Of the eleven forms of relief posited, only two, requests (4) and (5) (whether Mr. Sabra is alive and was properly notified), properly support a request for reconsideration; they are dealt with in paragraphs 35-37 below. For convenience – as the arguments in the motion do not sequentially match the relief sought in the conclusion – the remaining requests are dealt with shortly.

34. Request number (3) (asking the President to contact the Security Council) has no place in a motion for reconsideration, and is summarily dismissed. Request (6) (verifying that the Defence can properly defend their client) is irrelevant to a request to reconsider a Decision to hold a trial *in absentia* and is also rejected as it relates to the conduct of the trial instead of the Decision to order one. The orders sought in relation to a possible retrial, namely request 7 and alternatives (a), (b) and (d) are irrelevant to reconsidering a Decision under Rule 106 and for the same reasons in paragraphs 21 are likewise rejected. Alternative (c) (asking the Trial Chamber to explain why its Decision was reasonable) is unwarranted, and is likewise dismissed.

35. In request (4) the motion suggests that the Trial Chamber failed to consider whether Mr. Sabra is still alive and ask the Trial Chamber to request the Lebanese authorities to verify whether he is, and to stay the proceedings until this is established.[28] But no new facts or evidence are presented to suggest that he is not, and, moreover, the Prosecution has now provided certified official information from the Lebanese Government stating that no death certificates have been filed in respect of any of the four Accused.[29] As there are no new facts, nor any new arguments revealing an error in legal reasoning, the Trial Chamber has nothing to reconsider.

36. Request number (5) asks the Trial Chamber to "order adequate and effective notice inside and outside Lebanon of (i) the existence of the charges and (ii) the right of the accused to be present at his trial and (iii) consequences of a failure to attend".[30] Under the umbrella heading of "The Trial Chamber failed to verify that its Decision was consistent with relevant human rights

[28] Sabra motion, paras 12-17.
[29] STL-11-01/PT/TC, Prosecution Report Regarding Rule 106 Proceedings, 25 June 2012.
[30] Sabra motion, para. 48 (v).

standards" the motion asserts that the Trial Chamber relied on a "fiction" (namely, that "the accused must have remained at all relevant times in Lebanon") in reaching its Decision.[31] This argument disagrees with the Trial Chamber's fact-finding, which was based on the evidence available to it, but without presenting any new facts, or showing any error of reasoning in the fact-finding. It thus does not necessitate a reconsideration to avoid an injustice.

37. The motion also argues that the Trial Chamber wrongly used the word "absconding"; according to Defence counsel this term should only be used where an accused person *has been arraigned* but later escapes or fails to appear. For this reason, they argue, the Trial Chamber should "set aside" its finding.[32] This assertion, however, is misconceived; "abscond" is undefined in Article 22 (1) (c) and Rule 106, and moreover, one of the principal decisions of the European Court of Human Rights on *in absentia* trials has held otherwise.[33] The motion also disregards how the Trial Chamber actually used the term in the conclusion to its Decision, extracted in paragraph 8 above. No error of reasoning leading to an injustice can thus be identified.

38. Under the broad heading, "The Trial Chamber failed to verify that its Decision was consistent with relevant human rights standards",[34] the motion makes submissions mainly of a philosophical and doctrinal opposition to the *in absentia* regime specified in Article 22 of the Statute and Rules 105 and 106. None of the arguments support an error of reasoning leading to an injustice and, for the same reasons in paragraphs 20–21 and 26–27 in relation to the motions of Mr. Badreddine and Mr. Oneissi, do not support a reconsideration.

39. The motion also submits, under the heading "No valid waiver of Mr. Sabra's right to be tried in his presence", that the Trial Chamber's Decision *may* have implied that Mr. Sabra had "unequivocably and validly waived his right to be present and thereby renounced his right to a retrial".[35] But the Decision neither states nor implies this. Additionally, it ignores that under the Statute the right to request a retrial is unconditional. The express wording of Rule 109 permits a convicted Accused, who had waived his right to be present at trial, to request a retrial. The clear wording of Rule 104, Rule 106 (A) (i), Rule 108 and Rule 109 require that a waiver of an

[31] Sabra motion, paras 43-45.
[32] Sabra motion, paras 3-11.
[33] See ECHR, *Colozza v Italy*, 12 February 1985, Series A No. 89 paras 19-20, 28.
[34] Sabra motion, paras 29-47.
[35] Sabra motion, para. 18.

Accused's presence at trial, retrial or appeal be either "expressly and in writing" or "in writing". No new facts, or arguments leading to an error in legal reasoning, have thus been shown.

40. Under "assignment of counsel and effective representation" it is submitted that the Trial Chamber should verify the co-operation of the Lebanese authorities, that potential information providers are co-operating with the Defence, that they will have enough time and resources to prepare an effective defence and, under four sub-headings relating to the work of the Prosecution, a request for verification that the Prosecution fully "understands its own case"[36] (described by the Prosecution as an "improper request").[37] All of the matters listed under this heading relate to issues of case management and the rights of an Accused, potentially arising during the pre-trial and trial stages of case; they are premature and unconnected with a proper request to reconsider a Decision to proceed to trial *in absentia*.

41. Under the heading "Failure to provide a reasoned opinion on the exercise of the discretion to order that the trial should proceed *in absentia*" counsel submit ten arguments asking the Trial Chamber to "consider and address" each. This is apparently asking the Trial Chamber to *rewrite* the reasoning of its Decision rather than to reverse or vary it. But not one of the ten arguments actually supports a proper request for reconsideration of a decision (a reversal or variation – or even a stay) and some appear to be no more than debating points.[38] These points represent a disagreement with the Trial Chamber's written expression rather than showing a genuine error of reasoning leading to an injustice.

42. These arguments are also incorrectly premised on the basis that the Trial Chamber's Decision to order a trial *in absentia* was discretionary. This is legally incorrect; once the Trial Chamber had exercised its discetionary fact-finding powers to find that pre-conditions set out in Rule 106 (A) (iii) were met, it had no discretion to refuse to order a trial *in absentia*. The motion has confused

[36] Sabra motion, para. 40.
[37] Prosecution response, paras 24-25.
[38] Sabra motion, para. 47. The headings (i) to (x) are; "*Absentia* proceedings have been acknowledged to be unsuited for international proceedings", "Adversarial Proceedings are un-suited to *absentia* trials", "The possibility of a fair international trial in the absence of the accused is highly questionable", "The reliability and credibility of the record of proceedings will be significantly undermined by the accused's absence from the proceedings", "The duty of potential information-providers is narrow and for the most part unenforceable", "*absentia* trials are likely to undermine the credibility of an international Tribunal", "There are clear uncertainties as regard the possibility of a re-trial for any accused tried *in absentia* before the Tribunal", "Trying a case in the absence of the accused would render 'effective representation' a more theoretical, than realistic guarantee", "No transfer of Lebanon's duty to arrest onto the defendants", and "Ability of the Tribunal to guarantee the publicity of proceedings in an *absentia* trial".

the exercise of discretionary powers in fact-finding with the (non-discretionary) obligation to proceed to trial *in absentia*.

43. Counsel for Mr. Sabra have not met the test for a reconsideration in their motion asking for a stay of the Decision. They have failed to provide any new facts or to mount any new arguments showing an error of reasoning necessitating the Trial Chamber reconsidering (here, by staying) its Decision to avoid an injustice. The motion is dismissed.

D. MOTION OF COUNSEL FOR SALIM JAMIL AYYASH

44. Counsel for Mr. Ayyash support the motion filed by counsel for Mr. Sabra, seeking the same relief, namely an unspecified stay of the Decision. Additionally, they emphasise first, that the requirements of Article 22 (1) (c) were not met, as the Trial Chamber appeared not to have properly investigated whether Mr. Ayyash was living outside of Lebanon or was even alive, and, second, but without saying more, that the Decision was deficient in addressing the rights to legal representation. The first argument is addressed in relation to Mr. Sabra's motion while the second is a simply a statement. The motion of Defence counsel for Mr. Ayyash has not met the test for a reconsideration and the motion, for the same reasons noted in relation to the motion filed by Mr. Sabra, is dismissed.

E. SUPPLEMENTARY SUBMISSIONS

45. Defence counsel, after receiving and analysing the *ex-parte* material used by the Trial Chamber to order a trial *in absentia* filed a joint supplementary submission.[39] The joint Defence submission adds nothing substantive to the four motions and merely observes that these documents provide "no (credible) evidence" relating to the Decision. These observations appear

[39] STL-11-01/PT/TC, Order on *Ex-parte* Documents Used in Decision of 1 February 2012, 21 June 2012; Joint Submission Regarding Material Relied upon by the Trial Chamber in Its *Absentia* Decision, 27 June 2012; Prosecution Response to the "Joint Submission Regarding the Material Relied Upon by the Trial Chamber in its *Absentia* Decision", 29 June 2012. On 25 June 2012, in response to a Defence request for a short extension of time in STL-11-01/PT/TC "Urgent Defence Motion for an Extension of Time", 22 June 2012, the Trial Chamber – by email from a Trial Chamber legal officer to Defence counsel – authorized the Defence Counsel to file their joint submission by 27 June 2012. In this submission (at para. 15), Defence Counsel suggest that the disclosure of documents supporting the *in absentia* Decision – comprising three Lebanese Prosecutor-General reports and nine responses to Prosecution requests for assistance – was "incomplete". Another seven documents – comprised of six Lebanese Prosecutor-General reports and one response to a Prosecution request for assistance – were not disclosed earlier due to an administrative oversight. These additional documents are merely cumulative to those already disclosed and could not alter either the Defence Supplementary Submissions or this Decision. The Trial Chamber is in the process of disclosing these.

to express nothing more than disagreement with the Decision, and present no new facts or arguments showing an error of reasoning necessitating a reconsideration to avoid an injustice.

46. One point however must be made in relation to an argument where, citing to paragraph 115 of the Decision, the supplementary submission "notes that the Tribunal, acting *proprio motu*, collected information which, in turn it relied upon to render its *Absentia* Decision".[40] This assertion is misleading. The information referred to in paragraph 115 related only to the *procedural* issue of whether the Trial Chamber should have sought submissions from the Government of Lebanon on whether the test in Rule 106 (A) (iii) had been met, and not to the Decision itself. This submission is irrelevant to reconsideration of the Rule 106 Decision. Moreover, the Trial Chamber may, by referring to public material, inform itself on such matters.

FOR THESE REASONS the Trial Chamber:

DISMISSES

(i) the motions of counsel for Mr. Mustafa Amine Badreddine and Mr. Hussein Hassan Oneissi asking the Trial Chamber to reconsider its Decision to Hold Trial *In Absentia* of 1 February 2012, and

(ii) the motions of counsel for Mr. Salim Jamil Ayyash and Mr. Assad Hassan Sabra seeking a stay of the Decision.

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

11 July 2012,
Leidschendam
The Netherlands

Judge Robert Roth, Presiding

Judge Michelline Braidy

Judge David Re

[40] Joint Submissions Regarding the Material Relied upon by the Trial Chamber in its Absentia Decision, 27 June 2012, para. 12.