



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

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

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

Registrar: Mr. Daryl Mundis

Date: 31 March 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON CERTIFICATION OF ‘DECISION ON TRIAL
MANAGEMENT AND REASONS FOR DECISION ON JOINDER’**

Office of the Prosecutor:

Mr. Norman Farrell, Mr. Graeme Cameron
& Mr. Alexander Milne

Victims’ Legal Representatives:

Mr. Peter Haynes, Mr. Mohammad F. Mattar
& Ms. Nada Abdelsater-Abusamra

Counsel for Mr. Salim Jamil Ayyash:

Mr. Eugene O’Sullivan, Mr. Emile Aoun
& Mr. Thomas Hannis

Counsel for Mr. Mustafa Amine Badreddine:

Mr. Antoine Korkmaz, Mr. John Jones
& Mr. Iain Edwards

Counsel for Mr. Hassan Habib Merhi:

Mr. Mohamed Aouini, Ms. Dorothée Le Fraper
du Hellen & Mr. Jad Khalil

Counsel for Mr. Hussein Hassan Oneissi:

Mr. Vincent Courcelle-Labrousse, Mr. Yasser
Hassan & Mr. Philippe Larochelle

Counsel for Mr. Assad Hassan Sabra:

Mr. David Young, Mr. Guénaél Mettrich
& Mr. Geoffrey Roberts



INTRODUCTION

1. The defence of the Accused, Mr. Hassan Habib Merhi, has sought certification to appeal the Trial Chamber's decision joining his case to that of the other four Accused in this case. The Trial Chamber has certified for appeal one issue relating to the cumulative nature of the judicial case management measures ordered in conjunction with joinder. The Head of the Defence Office simultaneously sought to appeal the same decision, but his motion has been dismissed as he lacks the standing to appeal the decision.

PROCEDURAL HISTORY

2. On 18 December 2013, the Prosecutor notified his intention to join the case of *Prosecutor v. Hassan Habib Merhi* (STL-13-04/PT/PTJ) with the case of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra* (STL-11-01/T/TC) under Rule 70 (B) of the Special Tribunal's Rules of Procedure and Evidence. He requested the Pre-Trial Judge to refer the issue of joinder to the Trial Chamber, under Rule 89 (E),¹ and then, on 30 December 2013, filed a motion for joinder before the Trial Chamber.² The Pre-Trial Judge referred the issue of joinder to the Trial Chamber on 2 January 2014.³

3. On 13 January 2014, counsel for Mr. Ayyash, Mr. Badreddine, and Mr. Oneissi filed responses to the Prosecution motion for joinder.⁴ The Trial Chamber heard preliminary submissions from the Prosecution and counsel for Mr. Merhi on the issue of joinder on 14 January 2014 and extended the deadline for counsel for Mr. Merhi to file a response to the Prosecution motion for joinder to 31 January 2014.⁵ Counsel for Mr. Merhi filed their response on 30 January 2014, acknowledging that the objective criteria of Rule 70 (B) had been fulfilled and that the interests of justice militated in favour of joinder, but raising the issue of the possible consequences for Mr. Merhi's rights of a joinder.⁶

¹ STL-13-04/I/PTJ, Prosecution Request for Rule 89 (E) Referral of the Matter of Joinder, 18 December 2013. A more complete procedural history can be found in STL-11-01/T/TC, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014.

² STL-11-01/PT/TC, Prosecution Motion for Joinder, 30 December 2013.

³ STL-13-04/I/PTJ, Decision Referring the Matter of Joinder of Cases to the Trial Chamber, 2 January 2014.

⁴ STL-11-01/PT/TC, Ayyash Defence Response to Prosecution Motion for Joinder, 13 January 2014; Badreddine Defence Response to Prosecution Motion for Joinder, 13 January 2014; Response from Mr. Oneissi's Defence Counsel to the 'Prosecution Motion for Joinder', 13 January 2014.

⁵ STL-13-04/PT/TC, Order on Varying Time-Limits for Submissions on Joinder, 15 January 2014.

⁶ STL-13-04/PT/TC, Réponse de la Défense de M. Merhi à la requête du Procureur aux fins de jonction des affaires *Merhi et Ayyash et al.*, 30 January 2014, para. 8.

4. As the *Ayyash* trial was scheduled to commence on 16 January 2014,⁷ joinder was a live issue in that case. At a pre-trial conference in the *Ayyash* case on 9 January 2014, the Head of the Defence Office asserted that the Defence Office was the ‘sole entity’ to represent the interest of Mr. Merhi in the *Ayyash* case.⁸ On 20 January 2014, before the opening statements of the Defence, he repeated this in court.⁹ The Trial Chamber had, however, pursuant to its general powers under Rules 130 and 131, already invited counsel for Mr. Merhi to be present in the *Ayyash* trial as observers.¹⁰ Defence counsel declined the invitation arguing that it was not in their interests to raise any procedural or substantive matter while they were not a ‘Party’ to the *Ayyash* case.¹¹

5. Before the opening statements of Defence counsel in the *Ayyash* trial on 20 January 2014, the Trial Chamber permitted the Head of the Defence Office to make submissions on the potential prejudices for Mr. Merhi.¹² The Trial Chamber also considered a ‘Request to end the violation of Mr. Merhi’s rights’ in that trial’, in which the Head of the Defence Office incorrectly complained that he not been allowed to address the Trial Chamber *in limine litis* on possible prejudice to Mr. Merhi flowing from the start of the *Ayyash* trial.¹³ Specifically, the Head of the Defence Office opposed the start of a trial which, that while formally against only four Accused, necessarily implicated Mr. Merhi, who was not then a Party in the proceedings.¹⁴

6. On 24 January 2014, counsel for Mr. Merhi requested the Trial Chamber to grant the Head of the Defence Office’s request.¹⁵ On 5 February 2014, the Prosecution replied that the Head of the

⁷ The Pre-Trial Judge scheduled 13 January 2014 as the tentative date for the start of the *Ayyash* trial: STL-11-01/PT/PTJ, Order Setting a New Tentative Date for the Start of Trial Proceedings, 2 August 2013. The Trial Chamber later modified the commencement date to 16 January 2014: STL-11-01/PT/TC, Scheduling Order, 10 December 2013.

⁸ STL-11-01/PT/TC, transcript of 9 January 2014, pp. 9-10.

⁹ STL-11-01/T/TC, transcript of 20 January 2014, pp. 7-12.

¹⁰ STL-13-04/PT/TC, transcript of 14 January 2014, pp. 44-45; STL-11-01/T/TC, transcript of 16 January 2014, pp. 37, 108; transcript of 20 January 2014, pp. 58-59 (stressing that ‘nothing prevents counsel for Mr Merhi from seeking to intervene or to file observations in these proceedings in relation to any matter which they believe may affect the rights of their client’). See also STL-11-01/T/TC, transcript of 24 January 2014, p. 43 (noting that counsel for Mr Merhi was present in the public gallery to observe proceedings on 22, 23, and 24 January).

¹¹ E-mails of Mr. Aouini to the Trial Chamber’s Legal Officer of 16 January 2014 and 21 January 2014 (cited in STL-13-04/PT/TC, Position de la Défense de M. Merhi sur l’invitation à participer à l’affaire *Ayyash et al.* en vertu des articles 130 et 131 du Règlement, 24 January 2014).

¹² Transcript of 20 January 2014, pp. 4-12.

¹³ STL-11-01/T/TC and STL-13-04/PT/TC, Requête du Bureau de la Défense afin de faire cesser la violation des droits de l’accusé M. Merhi dans le cadre de l’affaire *Ayyash et autres*, 22 January 2014 (‘Defence Office Motion’), especially paras 7-8, 16-17.

¹⁴ Defence Office Motion, paras 18-19.

¹⁵ STL-13-04/PT/TC, Position de la défense de M. Merhi sur l’invitation à participer à l’affaire *Ayyash et al.* en vertu des Articles 130 et 131 du Règlement, 24 January 2014.

Defence Office had no rights of audience in such matters and that, in any event, the Head of the Defence Office had failed to show the Mr. Merhi's rights were violated in the *Ayyash* trial.¹⁶

7. On 11 February 2014, the Trial Chamber held a joint hearing in the two cases to hear submissions on the possible joinder of the two cases. That day, after hearing the arguments of the Parties, the Trial Chamber orally ordered that the cases be joined, reserving written reasons.¹⁷ In making this order, the Trial Chamber was aware that it could only order joinder in conjunction with measures aimed at counterbalancing any possible prejudice to the five Accused, and in particular to Mr. Merhi.¹⁸ The Trial Chamber therefore requested the Parties to make further focused submissions on how to prevent prejudice.¹⁹

8. The Trial Chamber, on 12 February 2014, heard the submissions and observations from counsel for the five Accused, the Legal Representatives of Victims, the Prosecution, the Registrar and the Head of the Defence Office. The Trial Chamber also made several orders on judicial case management for the newly joined trial.²⁰ The Trial Chamber issued its written reasons for joinder and further orders on trial management on 25 February 2014.²¹

9. On 4 March 2014, counsel for Mr. Merhi and the Head of the Defence Office separately requested certification to appeal the 'Decision on Trial Management and Reasons for Decision on Joinder' under Rule 126 (C).²² The Prosecution responded, opposing the requests by the Defence Office and by counsel for Mr. Merhi.²³ The Prosecution specifically opposed the standing of the Head of the Defence Office to seek certification for appeal.

¹⁶ STL-11-01/T/TC, Prosecution Response to 'Requête du Bureau de la Défense afin de faire cesser la violation des droits de l'accusé M. Merhi dans le cadre de l'affaire *Ayyash et autres*', 5 February 2014.

¹⁷ Transcript of 11 February 2014, pp. 91-96.

¹⁸ STL-11-01/T/TC, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014, *especially* paras 17, 33, 53, 109, and 116.

¹⁹ Transcript of 11 February 2014, pp. 91-96.

²⁰ Transcript of 12 February 2014, *especially* pp. 120-121.

²¹ Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014.

²² STL-11-01/T/TC, Requête de la défense de M. Merhi en certification de l'appel de la décision sur la jonction et la gestion du procès, 4 March 2014 ('Defence Motion'); STL-11-01/T/TC, Demande de Certification d'appel de la décision sur la jonction, 4 March 2014 ('Defence Office Request').

²³ STL-11-01/T/TC, Prosecution Response to « Requête de la Défense de M. Merhi en certification de l'appel de la décision sur la jonction et la gestion du procès », 19 March 2014 ('Prosecution Response to Merhi Motion'); Prosecution Response to « Demande de certification d'appel de la décision sur la jonction – Version corrigée », 19 March 2014 ('Prosecution Response to Defence Office Request'). Counsel for Mr Merhi filed a reply on 25 March 2014, Réplique de la Défense de Merhi à la "Prosecution Response to 'Requête de la défense de Merhi en certification de l'appel de la décision sur la jonction et la gestion du procès'" ('Defence Reply').

CERTIFICATION TO APPEAL – THE LEGAL PRINCIPLES

10. Rule 126 (C), ‘Motions Requiring Certification’, allows the Trial Chamber to certify a decision for interlocutory appeal:

if 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.

11. The Trial Chamber must be satisfied that an issue for certification meets the *strict* requirements of the Rule.²⁴ This is a high threshold, and certification is exceptional.²⁵ A request for certification is not concerned with whether a decision was correctly reasoned, and the Trial Chamber’s analysis is confined to determining whether the challenged decision involves an issue, with an adequate legal or factual basis, that meets the two cumulative requirements of Rule 126 (C).²⁶ The Appeals Chamber has held that it will not ‘tolerate the filing of appeals’—or motions seeking certification to appeal—‘that lack any serious legal or factual basis’.²⁷ Such applications may even be considered frivolous.²⁸ Once the two criteria are met, however, the Trial Chamber has no discretion in certifying ‘the decision for appeal with respect to that issue’.²⁹

²⁴ STL-11-01/PT/AC/AR126.5, Decision on Appeal by Counsel for Mr. Sabra against Pre-Trial Judge’s “Decision on Sabra’s Tenth and Eleventh Motions for Disclosure”, 6 November 2013 (‘Disclosure Appeal Decision’), para. 7; 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, para. 11; 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 (‘Authority Appeal Decision’), para. 15. *See also* STL-11-01/PT/TC, 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’, 9 October 2013, para. 2; STL-11-01/T/TC, Decision on Request for Certification to Appeal Orders Concerning Five Defence Motions on State Cooperation, 27 January 2014, para. 10. For the discretion of trial chambers in this respect, *cf. also* ICTY, *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, IT-04-84bis-T, Decision on Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65^{ter} Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92^{ter}, 15 March 2012, para. 9, *citing* *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, Case No. IT-04-84bis-T, Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65^{ter} Number 03003 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie, 27 February 2012, para. 13.

²⁵ Authority Appeal Decision, para. 11.

²⁶ Authority Appeal Decision, paras 13 and 22; Disclosure Appeal Decision, para. 7; Decision on Request for Certification to Appeal Orders Concerning Five Defence Motions on State Cooperation, para. 10. *See also* transcript of 4 February 2014, p. 30 (requesting the Parties to provide ‘highly focused submissions on Rule 126 (C)’).

²⁷ Authority Appeal Decision, para. 22.

²⁸ Rule 126 (G); STL-11-01/PT/AC, Decision on Application by Counsel for Messrs Badreddine and Oneissi against President’s Order on Composition of the Trial Chamber of 10 September 2013, 25 October 2013, para. 17.

²⁹ Authority Appeal Decision, para. 12.

DISCUSSION

The Head of the Defence Office's lack of standing to seek certification for appeal

12. Two motions seeking certification for appeal are before the Trial Chamber—filed simultaneously but separately by both counsel for Mr. Merhi and the Head of the Defence Office. As a Party to the proceedings, counsel for Mr. Merhi may request certification to file an interlocutory appeal, but does the Head of the Defence Office have the standing to do so?

13. Rule 126 (C) provides the basis for standing to request certification to appeal decisions for which no appeal lies as of right. It does not explicitly state that only parties may apply for certification, but Rule 126 (E) clarifies that once certification is granted *only a party* may actually appeal. Rule 2 defines a 'party' as 'the Prosecutor' and the 'Defence'. 'Defence' is separately defined as 'the accused/suspect and/or Defence counsel'.

14. The Head of the Defence Office, under Rule 2, is not a party to the proceedings. Despite this, he submits that he has standing to apply for certification related to a decision dismissing his request to put an end to the violation of the rights of Mr. Merhi. He relies upon Rule 57 (C), which specifies that he 'shall, for all purposes connected with pre-trial, trial and appellate proceedings, enjoy equal status with the Prosecutor in respect of rights of audience and negotiations *inter partes*',³⁰ and Rule 57 (F) which grants him rights of audience in relation to matters of general interest to defence teams, the fairness of the proceedings or the rights of a suspect or accused.³¹

15. Procedurally, he adds that he alone may assess whether a request from the Defence relates to matters listed in Rule 57 (F).³² He contends that the decision on joinder involves issues concerning the admission of evidence in violation of the fundamental rights of the accused and that an appeal is necessary, as the judicial process would be undermined without an appeal.³³ On the substance of the potential appeal, he raises arguments related to the fairness of the proceedings for Mr. Merhi as a consequence of joinder,³⁴ adding that a decision by the Appeals Chamber on the legality of the proceedings in the *Ayyash* case and on the possible admission of new evidence requires immediate resolution.³⁵

³⁰ Defence Office Request, fn. 24.

³¹ Defence Office Request, para. 18. *See also* discussion at paras 14-17.

³² Defence Office Request, paras 15-16.

³³ Defence Office Request, para. 35.

³⁴ Defence Office Request, *especially* paras 22-33.

³⁵ Defence Office Request, paras 36-37.

16. The Prosecution responded, submitting that competent defence counsel have been assigned to Mr. Merhi and have filed their own motion for certification on essentially the same issues. The Defence Office therefore has no standing to seek certification to appeal.³⁶ Rule 57 (C), when interpreted in light of Rule 2, cannot provide the Defence Office with standing to seek certification on any matter listed in Rule 57 (F).³⁷ The Defence Office's role under Article 13 is clear—it may only act in a supportive role to Defence counsel.³⁸ The Prosecution further argues that the Head of the Defence Office has sought to certify issues that do not arise from the Trial Chamber's decision, such as those relating to decisions taken before the decision under challenge.³⁹ The Defence Office replied arguing that the fact that an appeal can be filed by a defence team does not prevent the Head of the Defence office from filing his own appeal, since his appeal would relate to the decision of the Trial Chamber to reject his request to put an end to the violation of the rights of Mr. Merhi in the *Ayyash* proceedings.⁴⁰

17. According to the Appeals Chamber, standing to appeal 'relates to the right of a person allegedly aggrieved by the violation of a legal rule to seek relief for any damage he may have suffered.'⁴¹ This finding primarily concerns the Prosecutor, suspects, accused, and victims—although in exceptional circumstances it could encompass individuals who are not parties to the proceedings.⁴²

18. The Appeals Chamber has also found that 'Rule 126 (E) makes it clear that only a "Party" may appeal to the Appeals Chamber once certification is given' and that 'Rule 126 (E) therefore does not make provision for an appeal' by the Legal Representatives of Victims.⁴³ There, the Appeals Chamber did exceptionally recognise a limited right of appeal by the Legal Representatives of Victims because 'it would be unjust to deny' 'access to the Appeals Chamber if, for instance, their rights under Article 17 of the Statute were not given full effect or were unduly limited by the Pre-Trial Judge or the Trial Chamber.'⁴⁴

³⁶ Prosecution Response to Defence Office Request, paras 2, 6-7.

³⁷ Prosecution Response to Defence Office Request, paras 3, 9-10.

³⁸ Prosecution Response to Defence Office Request, paras 9-10.

³⁹ Prosecution Response to Defence Office Request, paras 16-21.

⁴⁰ STL-11-01/T/TC, Réplique du Bureau de la Défense à la réponse du Procureur sur la demande de certification d'appel de la décision sur la junction, 25 March 2014 ('Defence Office Reply'), paras 5 and 10.

⁴¹ CH/AC/2010/02, *El Sayed*, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010 (*El Sayed* Decision), para. 60.

⁴² *El Sayed* Decision, para. 61.

⁴³ STL-11-01/PT/AC, Decision on Appeal by Legal Representative of Victims against Pre-Trial's Decision on Protective Measures, 10 April 2013 ('Appeal Decision on Protective Measures'), para. 9.

⁴⁴ Appeal Decision on Protective Measures, para. 14. This point of law was decided by majority. Two Judges would have not afforded *any right* of appeal to the Legal Representatives of Victims.

19. Here, however, the Head of the Defence Office is not seeking a remedy against a decision affecting his rights.⁴⁵ Rather, he is seeking to protect the rights of Mr. Merhi, who is already fully represented by counsel whom he assigned on 20 December 2013, and who have made their own extensive submissions to the Trial Chamber in relation to joinder and, additionally, have now sought to have the decision certified for appeal.

20. Rule 57 (C) specifies that the Head of the Defence Office ‘shall enjoy, for all purposes connected with pre-trial, trial and appellate proceedings, equal status with the Prosecutor in respect of rights of audience and negotiations *inter partes*’. His right of audience—which the Trial Chamber understands to mean the right to appear and to make oral or written submissions before a chamber—is recognized. But having such a right of audience does not provide a general right of participation in the proceedings in the same manner as that of a Party or a participating victim, including to appeal decisions or a judgment.

21. Nothing in Rule 57 (C) suggests that the Head of the Defence Office has standing to file appeals or requests for certification to appeal.⁴⁶ The Head of the Defence Office here appears to conflate his right of audience with that of standing to appeal a decision, and, most specifically, to request certification to appeal. The two, however, are different legal concepts. A right of audience does not of itself confer a right of appeal. Nowhere in the Statute or Rules is the Head of the Defence Office given a right to appeal *any* decision—either with or without certification.

22. The Trial Chamber’s interpretation of Rule 57 (C) is consistent with the decisions of the Appeals Chamber referred to above. Participants other than Parties may exceptionally be granted a right to appeal to seek a remedy when their own rights ‘were not given full effect or were unduly limited’.⁴⁷ This interpretation accords with the Appeals Chamber’s approach that standing to appeal requires a ‘causal link’ between the actions of the Chamber in the challenged decision and the

⁴⁵ He was allowed to seek remedy, for instance, in the administrative case litigated before the President and concluded with the STL-11-01/PT/PRES, Decision on the Head of Defence Office Request for Review of the Registrar’s Decision relating to the Assignment of a Local Resource Person, 21 December 2012. That case was of course unlike a proper appeal in many respects, but demonstrates the existence of a right to remedies even for the Head of the Defence Office.

⁴⁶ See, for instance, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 20, Decision on the “Registrar’s Submissions under Regulation 24 *bis* of the Regulations of the Court In Relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800” of 5 October 2011, 21 November 2011, para. 14. Regulation 24 *bis* (1) of the Regulations of the Court provides that the Registrar, when necessary for the proper discharge of his or her functions, in so far as they relate to any proceedings, may make oral or written submissions to a Chamber with notification to the participants. The Appeals Chamber, however, found that this provision does not provide a legal basis for the Registrar to seek appellate review of judicial decisions.

⁴⁷ Decision on Appeal by Legal Representative of Victims Against Pre-Trial’s Decision on Protective Measures, 10 April 2013, para. 14.

infringement of the applicant's rights.⁴⁸ The Head of the Defence Office here seeks not a remedy against a decision affecting his rights,⁴⁹ but rather to protect the rights of Mr. Merhi who is of course already represented by three assigned counsel.⁵⁰

23. The Appeals Chamber has also affirmed the presumption in Article 22 (2) (c) of the Statute under which counsel assigned by the Defence Office are entrusted with ensuring the *full* representation of the interests and right of an accused *in absentia*. Additional litigants will only exceptionally be accepted. The approach of the Appeals Chamber has been strict, even barring from participating in an appeal hearing third parties whose participation had been specifically requested by counsel for an Accused.⁵¹

24. This position is consistent with that other international courts and tribunals, for example, on the right of appeal of the Office of the Public Counsel for the Defence (OPCD) at the International Criminal Court (ICC) and the Defence Office, headed by the Principal Defender, at the Special Court for Sierra Leone.⁵² At the ICC, the OPCD has successfully sought leave to appeal only in circumstances where defence counsel have not yet been assigned, and they are representing and protecting the rights of the defence⁵³ during the initial stages of an investigation,⁵⁴ and acting when appointed as duty counsel,⁵⁵ or as defence or standby counsel.⁵⁶

⁴⁸ Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010, paras 59-60. The circumstances in that appeal can be distinguished from the present case as the applicant in that case, Mr. El Sayed, while not a party, was 'under the authority and jurisdiction of the Tribunal' and had only been released from prison on the basis of the Pre-Trial Judge's order.

⁴⁹ He was allowed to appeal, for instance, in the administrative case litigated before the President and concluded with STL-11-01/PT/PRES, Decision on the Head of Defence Office Request for Review of the Registrar's Decision relating to the Assignment of a Local Resource Person, 21 December 2012.

⁵⁰ Defence Office Request, para. 19 and Defence Office Reply, para. 5.

⁵¹ The Appeals Chamber actually denied right of audience to a law professor who had been invited to make pleadings by counsel for Mr. Badreddine during an appeal hearing because the Accused was already represented by counsel appointed by the Defence Office and no good cause had been shown to allow her to address the Chamber during the hearing *in addition to* counsel; STL-11-01/PT/AC/AR90.1, Decision on the Badreddine Defence Request for a Right of Audience to be Granted to Professor Maison, 20 September 2012, para. 3.

⁵² SCSL case law on this issue is not relevant, since the Defence Office in that institution 'does not enjoy institutional autonomy and independence as a separate organ of the Court'. SCSL, *Prosecutor v. Sesay, Kallon, and Gbao*, SCSL-04-15-T, Written Reasons for the Decision on Application by Counsel for the Third Accused to Withdraw from the Case, 19 June 2006, para. 40.

⁵³ ICC, *Situation in Darfur, Sudan*, ICC-02/05, Decision on Request for Leave to Appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", 23 January 2008; ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04, Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation, 6 February 2008.

⁵⁴ Regulation 77 (3)(a), ICC Regulations of the Court.

⁵⁵ Regulation 73 (4), ICC Regulations of the Court.

⁵⁶ Regulation 76 (3), ICC Regulations of the Court.

25. The ICC's Appeals Chamber has also ruled on whether its Registrar, who has a position analogous to the Special Tribunal's Head of the Defence Office (in respect of having overall administrative supervisory responsibility for assigning defence counsel and supervising the activities of an in-house legal aid office),⁵⁷ may make oral and written submissions and has a right to seek leave to appeal. It has found that the right of the Registrar to initiate an appeal, even if the challenged decision affects the discharge of the Registrar's functions, goes beyond the scope of the relevant legal provisions. However, the Registrar may make submissions in the context of a pending appeal.⁵⁸

26. The Trial Chamber, without purporting to establish an exhaustive test, finds that the request by the Head of the Defence Office does not involve an attempt to seek remedy for a decision (i) related to his own 'personal interests', as required by the Appeals Chamber's case-law. Further, it does not involve a situation (ii) where an accused is not (yet) represented by counsel, or (iii) where an issue of effective representation is raised, that is, cases in which it might be in the interests of justice to allow the Defence Office exceptionally to act under Article 13 (2) in the role of a public defender or as set out in Rule 57 (H) (competence of defence counsel). His motion to certify for appeal is therefore dismissed.

27. The Trial Chamber took certain measures to avoid prejudice to Mr. Merhi in the *Ayyash* case before the joinder when Mr. Merhi was not a party to those proceedings. However, no injustice to Mr. Merhi can flow from disallowing the Head of the Defence Office from requesting certification in relation to any of these measures, as counsel for Mr. Merhi have themselves raised these issues.⁵⁹ This actually underlines that they regard themselves as competent to challenge the Trial Chamber's regime of judicial case management both before and after the joinder.

⁵⁷ See, in particular, Article 43, ICC Statute; Rules 20-21, ICC Rules of Procedure and Evidence; Regulation 77, ICC Regulations of the Court and Regulations 143-144, Regulations of the Registry.

⁵⁸ ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06 OA 20, Decision on the "Registrar's Submissions under Regulation 24bis of the Regulations of the Court In Relation to Trial Chamber I's Decision ICC-01/04-01/06-2800" of 5 October 2011, 21 November 2011, para 17. See Regulation 24 bis, ICC Regulations of the Court. Acknowledging the Registrar's concern that the decision may have affected the discharge of her functions, the Appeals Chamber held that this does not, however, allow the Appeals Chamber to circumvent its jurisdictional limits. It further found that Regulation 24 bis (1) merely serves the purpose of enabling the Registrar to make submissions to the relevant Chamber when necessary for the discharge of her functions.

⁵⁹ Defence Motion, paras 12 (arguments as to the alleged errors during the hearing of 11 February 2014 before joinder) and 20 (arguments on the status of 'observer' granted to counsel for Mr Merhi before joinder).

The merits of the request for certification filed by Defence counsel

28. Counsel for Mr. Merhi have purported to identify three issues related to joinder that would significantly affect the fair and expeditious conduct of the proceedings.⁶⁰

29. First, they argue that the Trial Chamber erred in ordering the joinder ‘at a stage where it was no longer possible to do so’ posing the question for certification as ‘**Did the Trial Chamber err by ruling on the joinder of the cases at too late a stage in the case of *Ayyash*?**’⁶¹ They contend that their position was further compromised as counsel for Mr. Merhi had been assigned ‘only two weeks’ before they had to express a position on joinder.⁶² They argue that the proceedings in *Ayyash* progressed considerably during the debate on joinder, which further compounded the prejudice. In particular, they point to the admission of 60 oral and written witness testimonies, and the admission into evidence of 7,369 pages of written documents, and that the *Ayyash* case includes almost 450 orders and decisions.⁶³

30. Moreover, they allege that the Trial Chamber erred in not hearing submissions on 11 February 2014 on questions relating to the possible prejudice caused to the Accused by continuing the proceedings in the *Ayyash* case, and the time required by counsel for Mr. Merhi to prepare their case for trial.⁶⁴

31. The Prosecution responded by arguing that Defence counsel did not object to the joinder before the Trial Chamber, but instead acknowledged that it was in the interests of justice and judicial economy, and that the Rule 70 (B) requirements were met.⁶⁵ The Trial Chamber should therefore consider the issue as waived.⁶⁶ Moreover, the ‘blanket assertion’ of error in ordering joinder is speculative and does not meet the strict requirements of Rule 126 (C).⁶⁷ Counsel for Mr. Merhi replied that they never waived their right to appeal joinder, which was always conditioned on respecting the Accused’s rights, and that in any event an interlocutory appeal is the appropriate way to oppose an incorrect decision.⁶⁸

⁶⁰ Defence Motion, para. 8.

⁶¹ Defence Motion, para. 9.

⁶² Defence Motion, para. 10, citing Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014, paras 3, 108.

⁶³ Defence Motion, para. 11.

⁶⁴ Defence Motion, para. 12.

⁶⁵ Prosecution Response to Defence Motion, paras 8-11.

⁶⁶ Prosecution Response to Defence Motion, paras 3, 9

⁶⁷ Prosecution Response to Defence Motion, para. 12.

⁶⁸ Defence Reply, para. 2.

32. The Trial Chamber's decision ordering joinder was necessarily predicated on a procedural regime of measures aimed at counterbalancing any possible prejudice to the five Accused, and in particular to Mr. Merhi.⁶⁹ For that reason, it issued an oral order joining the two cases and then immediately, the day afterwards, requested detailed and focused submissions from the Parties and the Legal Representatives of Victims, the Registry, and the Defence Office on these issues.⁷⁰ For this reason, too, the written reasons for joinder were added to a decision on the judicial case management of the newly joined trial.⁷¹

33. Here, however, counsel for Mr. Merhi have attempted to artificially separate the joinder from its modalities, that is the judicial case management measures. This does not reveal a discrete certifiable issue under Rule 126 (C). As counsel for Mr. Merhi acknowledged during the hearing of 11 February 2014, joinder was 'the least prejudicial [course] to the accused when compared with the alternative, holding a separate trial.'⁷² The issue was—and remains—the *modalities* of joinder. Given the 'lack of merit in the application' on behalf of Mr. Merhi, the issue cannot be certified for appeal as a single discrete issue.⁷³

34. Further, the Trial Chamber adds that the Defence motion overstates the extent of the evidence heard by the Trial Chamber between 23 January and 10 February 2014. In that period, 189 exhibits were admitted into evidence comprising approximately 7,345 pages, of which more than 6,000 pages, (or 80%) are photographs. Another 600 to 700 pages are extracts from the Lebanese investigation case file, including witness statements; including English translations. The remainder are mainly videos and records relating to victims of the explosion or the recovery of evidence at the crime scene, or witness statements admitted into evidence under Rule 155. Fifteen witnesses have testified, seven were victims or their family members, the remaining eight were Lebanese officials who assisted in collecting materials at the scene of the explosion, a fire-fighter, a British counter-terrorist police officer, and a Prosecution investigator.⁷⁴

35. As a second issue for certification is the question '**Did the Chamber err by depriving Merhi of the pre-trial phase because of the late joinder?**' Defence counsel argue that the Trial

⁶⁹ Decision on Trial Management and Reasons for Decision on Joinder, *especially* paras 17, 33, 53, 109, and 116.

⁷⁰ Transcript of 11 February 2014, pp. 91-96

⁷¹ Decision on Trial Management and Reasons for Decision on Joinder, para. 1.

⁷² Transcript of 11 February 2014, p. 47.

⁷³ Compare 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. 23.

⁷⁴ 163 documents, records, and collections have been ruled admissible under Rule 154—such as images of the scene of the explosion, video footage, maps, 3-D models, records of victim interviews, compilations of death certificates and medical or similar records.

Chamber erred in depriving the defence ‘de facto of an independent and fair pre-trial phase’. What is meant by an ‘independent and fair’ is left both unexplained and undefined, but the motion asserts that this phase is necessary for them to adequately prepare for trial.⁷⁵ Counsel for Mr. Merhi submit that the pre-trial and trial phases are ‘two successive stages which cannot be superimposed’ and that the Trial Chamber confused ‘the issue of the allocation of functions of the Pre-Trial Judge and of the Chamber’ with that ‘of the nature of the successive procedural phases of the pre-trial and trial phase’.⁷⁶

36. The Prosecution’s response was that the joinder decision does not deprive counsel for Mr. Merhi of a phase to prepare their case because the Trial Chamber adjourned the trial proceedings for this purpose and addressed in detail the issues of the adequacy of time and resources required for them to prepare for trial.⁷⁷ Counsel for Mr. Merhi replied stating that the issue they identify in this respect rather relates to the *nature* of the pre-trial procedure and to the substantial elimination of the pre-trial phase by the Trial Chamber.⁷⁸

37. The Trial Chamber cannot find in the arguments of counsel for Mr. Merhi a certifiable issue under Rule 126 (C) consistent with the Appeal’s Chamber’s case-law. Counsel have merely reiterated the arguments made before the Trial Chamber as to their preference for a pre-trial phase, although they now paradoxically concede—arguing against their own submission—that it is ‘of little import *who* performs the pre-trial functions’.⁷⁹ Defence counsel’s mere disagreement with the Trial Chamber’s finding does not identify a certifiable issue for appeal.

38. The wording of Rule 70 (C) is clear, and Defence counsel do not explain how the Trial Chamber impermissibly departed from its requirements, or what *specifically* Mr. Merhi would gain from a pre-trial phase before the Pre-Trial Judge that he cannot receive during the adjournment of the trial ordered by the Trial Chamber. As counsel’s arguments do not identify specific prejudice, their arguments are essentially speculative in nature. Counsel for Mr. Merhi, therefore, cannot show that the Trial Chamber’s decision significantly affects the fair and expeditious conduct of the proceedings as defined by the Appeals Chamber.

39. Third, counsel for Mr. Merhi argue as a question for certification for appeal **‘Do the compensatory measures which have been granted constitute appropriate reparation which**

⁷⁵ Defence Motion, para. 15.

⁷⁶ Defence Motion, para. 16.

⁷⁷ Prosecution Response to Defence Motion, para. 13.

⁷⁸ Defence Reply, para. 3.

⁷⁹ Defence Motion, para. 16 (emphasis added).

would allow the joint trial to continue?’ They argue that the compensatory measures that the Trial Chamber granted to mitigate any possible prejudice are ineffective, prejudicial, and intrusive.⁸⁰ The Trial Chamber erred by claiming that it had attempted to mitigate the prejudice for Mr. Merhi through the counterbalancing measures it took following the written filings and the hearings on 11 and 12 February 2014.⁸¹

40. Specifically, the following errors are alleged. First, the Trial Chamber’s decision to grant counsel for Mr. Merhi ‘observer’ status in the *Ayyash* case between 16 January 2014 and 10 February 2014 was insufficient to safeguard Mr. Merhi’s rights over that time period.⁸² Furthermore, the Trial Chamber erred in its assessment of the time required for counsel to prepare Mr. Merhi’s defence, and in foreshadowing a staggered resumption of trial prior to May 2014 without the Defence having conducted investigations.⁸³ Defence counsel also allege that the possibility granted to them to request reconsideration of decisions filed in the *Ayyash* case would force the defence team to divide its resources, which should now be all focused on pre-trial preparations.⁸⁴ Finally, the supervisory role assumed by the Trial Chamber, consisting of continual monitoring of the ‘composition of the team and its strategic analysis of the evidence’ through weekly and bi-weekly meetings, exceeds the Trial Chamber’s neutral role and is prejudicial to Mr. Merhi, thus infringing the fairness of the proceedings.⁸⁵ Here, the Trial Chamber notes that, on 14 and 21 February 2014, it held meetings with counsel for Mr. Merhi, in the presence of Prosecution counsel and representatives of the Registry, on the issue of whether the Defence of Mr. Merhi was adequately resourced to prepare for trial.⁸⁶ Representatives of the Head of the Defence Office attended the latter meeting.

41. Counsel for Mr. Merhi allege that these issues deserve a decision on appeal as they affect the fair and expeditious conduct of the proceedings, and a decision by the Appeals Chamber would materially advance the proceedings, and avoid the ‘irreparable prejudice’ that would ensue if the joint trial was to continue.⁸⁷

42. The Prosecution responds that the compensatory measures established by the Trial Chamber merely establish a framework for addressing any potential impact on counsel’s ability to prepare,

⁸⁰ Defence Motion, para. 19.

⁸¹ Defence Motion, para. 20.

⁸² Defence Motion, para. 20.

⁸³ Defence Motion, para. 21. *See also* Decision on Trial Management and Reasons for Decision on Joinder, paras 90, 102-116.

⁸⁴ Defence Motion, para. 22.

⁸⁵ Defence Motion, para. 23.

⁸⁶ STL-11-01/T/TC, Minutes of Proceedings Dated 21 February 2014, 31 March 2014.

⁸⁷ Defence Motion, paras 24-25.

which cannot affect the fair and expeditious conduct of the proceedings or their outcome and does not prejudice counsel for Mr. Merhi.⁸⁸ In particular, the appropriate recourse against deadlines considered unfair is a variation of a time limit or reconsideration before the Trial Chamber, pursuant to Rules 9 and 140, and not a request for certification.⁸⁹

43. The single sub-issues identified by counsel for Mr. Merhi might not necessarily individually rise to the level of certifiable issues under Rule 126 (C) and the Appeals Chamber's case-law. However, the issue of the modalities of the joinder ordered by the Trial Chamber as a whole would significantly affect the fair and expeditious conduct of the proceedings.

44. The Trial Chamber based its decision on joinder, among other factors, on recognising that after a joinder each Accused person must be given the same rights as if they were tried separately.⁹⁰ Thus put, the measures taken by the Trial Chamber when ordering joinder and ensure a fair trial may be said to significantly affect the fair and expeditious conduct of the proceedings.⁹¹

45. But whether they may meet the second limb of the test under Rule 126 (C) in that an immediate resolution by the Appeals Chamber *may* materially advance the proceedings is less clear-cut. On one hand it is evident that a late finding by the Appeals Chamber that the Trial Chamber took inadequate measures to attempt to safeguard the rights of all five Accused after joinder could have very serious consequences for the Accused and for the whole trial. An immediate resolution of this issue *may* therefore materially advance the proceedings.

46. However, on the other hand, the Trial Chamber has not yet made a decision as to a date for the resumption of trial and will do so only hearing further submissions from the Parties. Moreover, a decision on that date may be varied, or the trial could be staggered to hear evidence in stages. It is thus arguable whether this issue—which is at the heart of the Defence motion for certification for appeal and is effectively the principal complaint—falls within the second limb of Rule 126 (C) in requiring immediate resolution by the Appeals Chamber, as it may be premature to appeal a non-decision.

⁸⁸ Prosecution Response to Defence Motion, para. 14.

⁸⁹ Prosecution Response to Defence Motion, para. 15.

⁹⁰ Decision on Trial Management and Reasons for Decision on Joinder, para. 33, referring to the Rules of other international tribunals.

⁹¹ Compare, for instance, ICTY, *Prosecutor v. Popović et al.*, IT-02-57-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 6 October 2005, para. 11.

47. On balance, however, and only because the issues are *cumulatively* fundamental to the fair and expeditious conduct of the proceeding, and should be resolved at an early stage, the Trial Chamber will exercise the benefit of the doubt in the favour of the Accused. On the basis of the arguments of counsel for Mr. Merhi about the compensatory measures that the Trial Chamber granted to mitigate any possible prejudice to Mr. Merhi's rights following joinder, the Trial Chamber will therefore certify for appeal the following issue:

Whether the Trial Chamber erred in ordering joinder *and* in taking measures to ensure a fair trial to Mr. Hassan Habib Merhi, including:

- (i) inviting counsel for Mr. Merhi to participate, though not as a party, in the *Ayyash* proceedings and to raise any issue of substance and procedure before joinder;⁹²
- (ii) allowing the Head of the Defence Office to raise issues related to the fairness of the proceedings for Mr. Merhi before the opening statements of the Defence in the *Ayyash* proceedings, but after the Prosecution and the Legal Representatives of Victims, and thereafter—both in writing and orally;⁹³
- (iii) ordering an adjournment of the trial until at least early to mid-May 2014 with the possible exception of hearing the evidence identified in paragraph 110 of its Decision of 25 February 2014;⁹⁴
- (iv) holding several meetings with counsel for Mr. Merhi to ensure trial preparation;⁹⁵ and
- (v) setting deadlines, which counsel for Mr. Merhi considers premature, to file any requests to re-call previously heard witnesses for cross-examination, and any requests for the exclusion of previously heard or admitted evidence and to file any submissions requesting variation of the Trial Chamber's directions on the conduct of proceedings, made under Rule 130.⁹⁶

48. The Trial Chamber emphasises that it is not certifying the issue of *joinder alone* for appeal; its certification is based on the cumulative nature of the decisions—that is, joinder with the

⁹² Decision on Trial Management and Reasons for Decision on Joinder, para. 58.

⁹³ Decision on Trial Management and Reasons for Decision on Joinder, paras 8, 12, 16, 18, 58.

⁹⁴ Decision on Trial Management and Reasons for Decision on Joinder, para. 110.

⁹⁵ Decision on Trial Management and Reasons for Decision on Joinder, paras 100-101.

⁹⁶ Decision on Trial Management and Reasons for Decision on Joinder, para. 38.

modalities ordered as a part of the Trial Chamber's judicial case management function—rather than any single decision. In reaching this decision, the Trial Chamber underscores that even when the parties do not identify a certifiable issue, the Trial Chamber may itself identify such an issue.⁹⁷

DISPOSITION

FOR THESE REASONS, the Trial Chamber certifies for appeal the following issue:

Whether the Trial Chamber erred in ordering joinder *and* in taking measures to ensure a fair trial to Mr. Hassan Habib Merhi, including:

- (i) inviting counsel for Mr. Merhi to participate, though not as a party, in the *Ayyash* proceedings and to raise any issue of substance and procedure before joinder;
- (ii) allowing the Head of the Defence Office to raise issues related to the fairness of the proceedings for Mr. Merhi before the opening statements of the Defence in the *Ayyash* proceedings, but after the Prosecution and the Legal Representatives of Victims, and thereafter—both in writing and orally;
- (iii) ordering an adjournment of the trial until at least early to mid-May 2014 with the possible exception of hearing the evidence identified in paragraph 110 of its Decision of 25 February 2014;
- (iv) holding several meetings with counsel for Mr. Merhi to ensure trial preparation; and
- (v) setting deadlines, which counsel for Mr. Merhi considers premature, to file any requests to re-call previously heard witnesses for cross-examination, and any requests for the exclusion of previously heard or admitted evidence and to file any submissions requesting variation of the Trial Chamber's directions on the conduct of proceedings, made under Rule 130.

⁹⁷ 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, para. 10: where the party requesting certification fails to identify any specific issues, as here, '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.' *See also*, for instance, ICTY, *Prosecutor v. Krajišnik*, IT-00-39-T, Decision on Defence Application for Certification to Appeal the Decision on Scheduling of 18 November 2005, 2 December 2005, p. 2 ('the Defence has not argued, in its Application, and *the Trial Chamber does not find*, that the Amendment raises any issue....') (emphasis added).

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

Dated 31 March 2014

Leidschendam

The Netherlands

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

