



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:** 25 February 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 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  
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Mr. Eugene O'Sullivan  
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Mr. Iain Edwards

**Counsel for Mr. Hassan Habib Merhi**

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

**Counsel for Mr. Hussein Hassan Oneissi**

Mr. Vincent Courcelle-Labrousse  
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**Counsel for Mr. Assad Hassan Sabra:**

Mr. David Young  
Mr. Guénaél Mettraux  
Mr. Geoffrey Roberts



## INTRODUCTION

1. On 11 February 2014, having heard the Parties, the Legal Representatives of Victims and the Defence Office, the Trial Chamber ordered the joinder of the cases of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra* and *Prosecutor v. Hassan Habib Merhi*, with reasons to follow.<sup>1</sup> The Trial Chamber now issues those reasons and further orders concerning trial management.

## PROCEDURAL HISTORY AND SOME OBSERVATIONS

2. On 28 June 2011, the Pre-Trial Judge of the Special Tribunal for Lebanon confirmed an amended indictment in the case of *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra* for their alleged role in the explosion of 14 February 2005 in downtown Beirut that resulted in the death of twenty-two people, including the former Lebanese Prime Minister Rafik Hariri, and in injuries to over 200 others.<sup>2</sup> The Trial Chamber ordered a trial *in absentia* against these four Accused on 1 February 2012.<sup>3</sup> On 21 June 2013, the Prosecutor filed an amended indictment which charges the four Accused with nine counts of conspiracy to commit a terrorist act, committing a terrorist act by using explosive materials, the premeditated intentional homicide of Rafik Hariri and 21 others, the premeditated intentional attempted homicide of 231 people by using explosives, and as accomplices to the latter four of these charges.<sup>4</sup>

3. On 8 February 2012, the former Prosecutor, Mr. Daniel Bellemare, sought leave from the Pre-Trial Judge to amend the indictment in the *Ayyash* case to add Mr. Merhi as a fifth co-accused.<sup>5</sup> On 13 March 2012, the Pre-Trial Judge denied the request on the technical basis that adding an accused person required a separate indictment.<sup>6</sup> It was only on 8 October 2012 that the Prosecutor filed an indictment and supporting material against Mr. Merhi alleging his involvement in the same events of 14 February 2005. The Prosecutor withdrew it, on 7 December 2012, after the Pre-Trial Judge raised some issues in respect of the new indictment.<sup>7</sup> Six months later, on 24 June 2013, the Prosecutor filed another indictment, signed 5 June 2013, against Mr. Merhi. The Pre-Trial Judge

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<sup>1</sup> *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, STL-11-01/T/TC, and *Prosecutor v. Merhi*, STL-13-04/PT/TC, Joint Hearing, transcript of 11 February 2014, pp. 91-96.

<sup>2</sup> STL-11-01/I/PTJ, Decision relating to the Examination of the Indictment of 10 June 2011 issued Against Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi, & Mr. Assad Hassan Sabra, 28 June 2011; STL-11-01/I/PTJ, Public Redacted Version, Indictment, 10 June 2011. The initial *Ayyash* indictment and supporting material were filed with the Pre-Trial Judge on 17 January 2011.

<sup>3</sup> STL-11-01/I/TC, Decision to Hold Trial *in Absentia*, 1 February 2012.

<sup>4</sup> STL-11-01/PT/PTJ, Amended Indictment, 21 June 2013.

<sup>5</sup> See STL-13-04/I/PTJ, Public Redacted Version of the 'Decision Relating to the Examination of the Indictment of 5 June 2013 against Mr. Hassan Habib Merhi' Dated 31 July 2013, 11 October 2013, paras 5-6.

<sup>6</sup> See Decision Relating to the Examination of the Merhi Indictment, para. 6.

<sup>7</sup> See Decision Relating to the Examination of the Merhi Indictment, paras 7-9.

confirmed that indictment on 31 July 2013,<sup>8</sup> and made it public on 10 October 2013.<sup>9</sup> On 20 December 2013, after being seised of the issue on 25 November 2013, the Trial Chamber decided that the case against Mr. Merhi should also proceed to trial *in absentia*.<sup>10</sup> On that same day, the Head of the Defence Office assigned Mr. Mohamed Aouini, of the bar of Tunis, as lead counsel for Mr. Merhi<sup>11</sup> and, on 30 December 2013, assigned two co-counsel.<sup>12</sup> According to Mr. Aouini, as of 14 January 2014, Mr. Merhi's defence team was constituted.<sup>13</sup>

4. On 2 August 2013, the Pre-Trial Judge scheduled 13 January 2014 as the tentative date for the start of the *Ayyash* trial.<sup>14</sup> The Trial Chamber later modified the commencement date to 16 January 2014.<sup>15</sup> On 25 October 2013, the Pre-Trial Judge completed his report under Rule 95 (A) (vii) and referred the case file to the Trial Chamber.<sup>16</sup> That referral provided the Trial Chamber with the jurisdiction to try the case and gave the Trial Chamber eleven weeks to familiarise itself with the case and to make any necessary pre-trial evidentiary decisions.

5. Against this procedural background, it was only on 18 December 2013—some four and a half months after the trial date in the *Ayyash* case was provisionally set for 13 January 2014—that the Prosecutor expressed his intention to seek joinder of the two cases under Rule 70 (B) of the Special Tribunal's Rules of Procedure and Evidence. He did this by asking the Pre-Trial Judge to refer it to the Trial Chamber under Rule 89 (E) for determination.<sup>17</sup> The motion for joinder was actually filed before the Trial Chamber on 30 December 2013.<sup>18</sup> On 2 January 2014—only 14 days before the commencement of trial—and after receiving submissions on the question from counsel for Mr. Merhi and the Head of the Defence Office,<sup>19</sup> the Pre-Trial Judge referred the issue of joinder to the Trial Chamber.<sup>20</sup> Counsel for Mr. Ayyash, Mr. Badreddine, and Mr. Oneissi filed generally worded

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<sup>8</sup> See Decision Relating to the Examination of the Merhi Indictment, paras 10-11.

<sup>9</sup> STL-13-04/I/PTJ, Order on Partially Lifting the Confidentiality of the Indictment against Mr. Hassan Habib Merhi, 10 October 2013.

<sup>10</sup> STL-13-04/I/TC, Decision to Hold Trial *In Absentia*, 20 December 2013.

<sup>11</sup> STL-13-04/I/PTJ, Assignment of a Counsel for the *In Absentia* Proceedings Held Pursuant to Rule 106 of the Rules, 20 December 2013.

<sup>12</sup> STL-13-04/I/PTJ, Commission d'Office de Co-Conseils, 30 December 2013.

<sup>13</sup> STL-13-04/PT/TC, transcript of 14 January 2014, p. 9.

<sup>14</sup> STL-11-01/PT/PTJ, Order Setting a New Tentative Date for the Start of Trial Proceedings, 2 August 2013.

<sup>15</sup> STL-11-01/PT/TC, Scheduling Order, 10 December 2013.

<sup>16</sup> STL-11-01/PT/PTJ, The Pre-Trial Judge's Report Prepared Pursuant to Rule 95 (A) of the Rules of Procedure and Evidence, 25 October 2013.

<sup>17</sup> STL-13-04/I/PTJ, Prosecution Request for Rule 89 (E) Referral of the Matter of Joinder, 18 December 2013.

<sup>18</sup> STL-11-01/PT/TC, Prosecution Motion for Joinder, 30 December 2013.

<sup>19</sup> STL-13-04/I/PTJ, Observations de la défense relatives à la requête du Procureur aux fins de transfert à la Chambre de première instance de la question de la jonction, 30 December 2013; STL-13-04/I/PTJ, Observations du Bureau de la défense relatives à la requête du Procureur aux fins de transfert à la Chambre de première instance de la question de la jonction, 23 December 2013.

<sup>20</sup> STL-13-04/I/PTJ, Decision Referring the Matter of Joinder of Cases to the Trial Chamber, 2 January 2014.

responses on 13 January 2014, none of which actually opposed the joinder as such.<sup>21</sup> The Trial Chamber was therefore hearing submissions and ruling on joinder in the days immediately preceding the commencement of the *Ayyash* trial, while simultaneously attempting to decide pre-trial motions in that case. These included submissions related to alleged non-cooperation by states and disclosure, referred to the Trial Chamber by the Pre-Trial Judge in his transfer of the case file on 25 October 2013.

6. On 10 January 2014, the Trial Chamber scheduled a hearing for 14 January 2014 to hear preliminary submissions from the Prosecution and counsel for Mr. Merhi on the possible joinder of the two cases. After this preliminary hearing, the Trial Chamber extended to 31 January 2014 the deadline for counsel for Mr. Merhi to file a response to the Prosecution's motion for joinder.<sup>22</sup>

7. At a pre-trial conference in the *Ayyash* case on 9 January 2014, the Head of the Defence Office stated that the Defence Office was the 'sole entity' to represent the interests of Mr. Merhi in the *Ayyash* case,<sup>23</sup> a point he repeated on 20 January 2014 after the Prosecutor's and Legal Representatives of Victims' opening statements in the *Ayyash* case.<sup>24</sup> However, at the same time he stated, somewhat paradoxically, that it was not his role to respond on behalf of counsel for Mr. Merhi to the Prosecutor's opening statement because 'I don't have any knowledge of the merits of the case file.'<sup>25</sup>

8. The Trial Chamber, applying the Statute and the Rules, decides who will appear before it and in what capacity. Despite the provisions of Rule 57 (F), the Trial Chamber does not agree that Mr. Merhi's interests required the intervention of the Head of the Defence Office in that manner as 'sole entity' *after* he had appointed three counsel to represent Mr Merhi at trial. Moreover, the Trial Chamber repeatedly invited counsel for Mr. Merhi to be present' in the *Ayyash* proceedings as 'observers, and they chose to observe the proceedings from the court's public gallery during the opening of the case, and for the first three days of evidence. This was despite the Trial Chamber's invitation for them to sit in the court room. Doing so could have enabled them to raise any concerns or reservations—not as a Party, as no joinder had been ordered—but by through the Trial Chamber's general powers under Rules 130 and 131 to control its proceedings and ensure that they remain fair,

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<sup>21</sup> See 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.

<sup>22</sup> STL-13-04/PT/TC, Order on Varying Time-Limits for Submissions on Joinder, 15 January 2014.

<sup>23</sup> STL-11-01/PT/TC, transcript of 9 January 2014, pp. 9-10.

<sup>24</sup> STL-11-01/T/TC, transcript of 20 January 2014, pp. 7-12.

<sup>25</sup> Transcript of 20 January 2014, p. 10.

impartial, and expeditious.<sup>26</sup> Counsel however declined this invitation, arguing that it was not in the interests of Mr. Merhi for them to raise any procedural or substantive matter while not a ‘Party’ in the *Ayyash* case.<sup>27</sup> Moreover, as the Trial Chamber noted on 9 January 2014,<sup>28</sup> following the decision to set 16 January 2014 as the start of trial,<sup>29</sup> neither counsel nor the Defence Office had filed any request to adjourn the start of the *Ayyash* case.<sup>30</sup> Nevertheless, the Trial Chamber heard the Head of the Defence Office.

9. The Head of the Defence Office also argued that the frequent naming of Mr. Merhi as a co-conspirator during the Prosecution’s opening statement in the *Ayyash* case created prejudice to Mr. Merhi, who could not defend himself against these serious accusations.<sup>31</sup> This argument is discussed and rejected at paragraph 59.

10. On 22 January 2014, the Head of the Defence Office filed a ‘Request to end the violation of Mr. Merhi’s rights’ in the *Ayyash* case complaining that he had not been given the opportunity to address the Trial Chamber *in limine litis*<sup>32</sup>—before the Prosecution’s opening statement—on possible prejudice to Mr. Merhi flowing from the start of the *Ayyash* trial.<sup>33</sup> Specifically, the Head of the Defence Office opposed the start of a trial which, while formally against only four Accused, necessarily implicated Mr. Merhi, who was not then a Party in the proceedings and thus unable to cross-examine witnesses and respond to allegations implicating him.<sup>34</sup>

11. The Defence Office’s request, however, was filed *after* the *Ayyash* trial had commenced. The Prosecution responded on 5 February 2014, arguing that the Head of the Defence Office has no right of audience in these matters and that, in any event, he failed to show that Mr. Merhi’s rights were violated in the *Ayyash* proceedings.<sup>35</sup> In circumstances where competent counsel have been assigned

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<sup>26</sup> See 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).

<sup>27</sup> 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).

<sup>28</sup> Transcript of 9 January 2014, p. 53, lines 8-11.

<sup>29</sup> Scheduling Order, 10 December 2013.

<sup>30</sup> See transcript of 9 January 2014, p. 53; transcript of 20 January 2014, p. 12 (clarifying that no motion for adjournment was before the Trial Chamber).

<sup>31</sup> Transcript of 20 January 2014, pp. 9-10.

<sup>32</sup> Literally meaning ‘from the start of the process’.

<sup>33</sup> 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, *especially* paras 7-8, 16-17.

<sup>34</sup> Defence Office Motion, paras 18-19.

<sup>35</sup> 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.

to represent the interests of an Accused, and are able to do so, the Trial Chamber doubts that an intervention by the Head of the Defence Office on matters specifically related to a particular case is appropriate. This concern is especially germane in the particular circumstances here, namely, that counsel for Mr. Merhi had been invited to participate in the proceedings.

12. In any event, as the Prosecution submitted, the Head of the Defence Office's 'request' sought no specific form of relief and said nothing that counsel for Mr. Merhi, once assigned in December 2013, had not already submitted or was capable of saying. In this respect, the 'request' does not assist the Trial Chamber's joinder determination and is therefore dismissed. Moreover, even though the Head of the Defence Office has no particular right to address the Trial Chamber *in limine litis* on the first day of trial—*before* the Prosecutor's opening statement—the Trial Chamber nonetheless permitted him to address the Trial Chamber on 20 January 2014, immediately before defence counsel made their opening statements.<sup>36</sup> His complaint of not being permitted to address the Trial Chamber is therefore unfounded. Moreover, the Trial Chamber decides the order in which Parties and others will be heard in court.<sup>37</sup>

13. On 24 January 2014, counsel for Mr. Merhi also filed a submission requesting the Trial Chamber to grant the request filed by the Head of the Defence Office on 22 January 2014.<sup>38</sup> For the same reasons in paragraph 12, counsel's submission in this respect is rejected and the motion is dismissed.

14. Counsel for Mr. Merhi responded to the Prosecution motion for joinder on 30 January 2014, acknowledging that joinder would be in the interests of justice, but raising the consequences for Mr. Merhi's rights of a joinder at this stage of the trial.<sup>39</sup>

15. The Legal Representatives of Victims and the Registrar filed written submissions on 4 February 2014.<sup>40</sup> Defence counsel for Mr. Ayyash, Mr. Badreddine, Mr. Oneissi, and Mr. Sabra did not file additional submissions to the motion on joinder. On 4 February 2014, the Head of the

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<sup>36</sup> For just under 21 minutes: *see* transcript of 20 January 2014, pp. 4-12. This was fifteen minutes longer than the time previously advised: transcript of 14 January 2014, p. 44 ('I'll need five minutes, Your Honour, max').

<sup>37</sup> At least two employees of the Defence Office have been present in the court room each day since the commencement of the trial on 16 January 2014, for reasons that are not entirely apparent to the Trial Chamber.

<sup>38</sup> 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.

<sup>39</sup> *See* 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; transcript of 11 February 2014, pp. 47-48.

<sup>40</sup> *See* STL-11-01/T/TC, Observations of the Legal Representative of Victims Regarding the 22 January 2014 Request of the Defence Office and the Question of Joinder of the *Merhi* and the *Ayyash et al.* Cases, 4 February 2014; STL-11-01/T/TC and STL-13-04/PT/TC, The Registrar's Submission Pursuant to Rule 48(C) in Response to the Scheduling Order for Joint Hearing on Joinder, Dated 27 January 2014, 4 February 2014.

Defence Office submitted observations, stating that he considers that Mr. Merhi has the right to have his trial ‘prepared’ by the Pre-Trial Judge.<sup>41</sup>

16. On 11 February 2014, the Trial Chamber held a joint hearing in both cases on the issue of possible joinder. That day, after hearing extensive argument from the Parties, the Legal Representatives of Victims, and receiving submissions from the Head of the Defence Office, the Trial Chamber issued an oral order joining the two cases (while reserving written reasons) and requesting the Parties to present further submissions focused on how to prevent any prejudice to any of the five Accused in the newly joined case.<sup>42</sup> This order seised the Trial Chamber with the jurisdiction to jointly try the case of the five Accused.

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. Ordering joinder at the end of the hearing on 11 February 2014 allowed the Parties to focus their submissions as soon as practicable (*i.e.*, the following day) on the measures necessary to ensure the fairness and expedition of the newly joined proceedings.<sup>43</sup> The fact that joinder was already a reality was intended to direct and facilitate the Parties to make pragmatic rather than general, abstract or philosophical submissions. None of the Parties objected to this course.

18. On 12 February 2014, counsel for the five Accused, the Legal Representatives of Victims and the Prosecution, and the Registrar and the Head of the Defence Office, made submissions and observations on the continuation of the trial in the newly joined case. During the hearing, the Trial Chamber issued orders for the further management of trial proceedings.<sup>44</sup> The Trial Chamber ordered:

- **the Parties** to file any further written submissions concerning the time before the resumption of the trial by 17 February 2014 (only counsel for Mr. Merhi did so);<sup>45</sup>
- **the Prosecution** to file a notice updating the Trial Chamber on any requests by counsel for Mr. Merhi to inspect unused expert reports by 18 February 2014,<sup>46</sup> and a consolidated indictment and witness and exhibit lists by 7 March 2014;

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<sup>41</sup> STL-13-04/PT/TC, Observations du Chef du Bureau de la Défense relatives au maintien de la procédure de mise en état de l'affaire *Merhi* devant le Juge de la mise en état, 4 February 2014. The Trial Chamber had not invited these written submissions.

<sup>42</sup> Transcript of 11 February 2014, pp. 91-96.

<sup>43</sup> Transcript of 11 February 2014, pp. 96-99.

<sup>44</sup> See STL-11-01/T/TC, transcript of 12 February 2014, *especially* pp. 120-121.

<sup>45</sup> Counsel for Mr. Merhi filed their additional observations concerning the time necessary to the preparation of Mr. Merhi's defence on 17 February 2014: STL-11-01/T/TC, Observations additionnelles concernant le temps nécessaire à la préparation de la Défense des intérêts de M. Merhi, 17 February 2014. The Prosecution informed the Trial Chamber and the Parties by e-mail on 17 February 2014 that it would not file any further written submissions.

- **counsel for Mr. Merhi** to file any submissions requesting variation of the Trial Chamber's directions on the conduct of proceedings issued under Rule 130 by 21 February 2014,<sup>47</sup> submissions as to whether any further order is required to confirm the status of the participating victims in the newly joined case by 27 February 2014,<sup>48</sup> and any requests to recall previously heard witnesses for cross-examination, or any requests to exclude previously heard or admitted evidence, by 14 March 2014;<sup>49</sup> and
- **the Legal Representatives of Victims** to file any revised witness and exhibit list by 7 March 2014.

### **THE DECISION TO JOIN THE TWO CASES**

#### **1. The requirements of Rule 70 (B)**

19. Rule 70 (B) authorises the joinder of proceedings related to several accused persons and provides that:

[p]ersons accused of the same or different crimes falling within Article 1 of the Statute may be jointly charged and tried.

20. The principle underlying this Rule is similar to the corresponding provision of the Lebanese Code of Criminal Procedure, according to which,

[i]f more than one person participated in the commission of a single felony or several connected felonies, and separate indictments were issued against them or against some but not

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<sup>46</sup> The Prosecution has now stated that it is not in receipt of any request from counsel for Mr. Merhi, under Rule 110 (B) or otherwise, to inspect any expert reports on which the Prosecution does not intend to rely at trial: *see* STL-11-01/T/TC, Prosecution Submission on Inspection by the Merhi Defence of Expert Reports Not Relied Upon, 18 February 2014. Counsel for Mr. Merhi have since requested the Trial Chamber to make a further order to the Prosecution to provide a list of any expert reports on which the Prosecution does not intend to rely at trial, and to declare that the question of inspection of such materials is premature: *see* STL-11-01/PT/TC, Réponse de la Défense aux conclusions du Procureur sur l'inspection des rapports d'experts non utilisés, 24 February 2014.

<sup>47</sup> On 20 February 2014, counsel for Mr Merhi informed the Trial Chamber by email that they would not file any such submissions.

<sup>48</sup> Counsel for Mr. Merhi filed a submission stating their view that the Pre-Trial Judge has the sole competence to formalise the status of the participating victims in the case against Mr. Merhi: *see* STL-11-01/PT/TC, Position de la Défense sur l'extension de la participation des victimes à la procédure concernant M. Merhi, 21 February 2014.

<sup>49</sup> On 19 February 2014, counsel for Mr Merhi filed a motion seeking reconsideration of this decision, or alternatively, certification for appeal: *see* STL-11-01/PT/TC, Requête urgente en autorisation aux fins de réexamen et/ou en certification de l'appel de l'ordonnance du 12 février 2014 concernant la preuve admise avant la jonction', 19 February 2014.



others, the Presiding Judge of the Court may order the indictments to be joined in a single case.<sup>50</sup>

21. In deciding whether several accused should be jointly tried, the Trial Chamber must first satisfy itself that (i) different persons; (ii) are accused of the same or different crimes falling within Article 1 of the Statute. As the Prosecution suggests,<sup>51</sup> a decision on joinder is thus primarily based on the factual allegations contained in the respective indictments and related submissions.<sup>52</sup>

22. In its motion for joinder, the Prosecution submits that all five Accused, Mr. Ayyash, Mr. Badreddine, Mr. Oneissi, and Mr. Sabra, in one indictment, and Mr. Merhi, in the other, are alleged co-conspirators and are charged with the same five offences, and the facts of the cases are therefore inextricably linked.<sup>53</sup> Each Accused is an alleged co-perpetrator in the same conspiracy to commit a terrorist act.<sup>54</sup> Mr. Merhi, Mr. Oneissi and Mr. Sabra are charged as accomplices to four other offences, each of which was allegedly co-perpetrated by Mr. Badreddine and Mr. Ayyash.<sup>55</sup> The charges all relate to the explosion of 14 February 2005, and thus undoubtedly fall ‘within Article 1 of the Statute’.<sup>56</sup> Counsel for Mr. Merhi agree that the requirements of Rule 70 (B) are indeed met.<sup>57</sup>

23. The Trial Chamber is satisfied that, on the face of the two operative indictments in the two cases, both alleging a conspiracy related to the explosion of 14 February 2005, the requirements of Rule 70 (B) are met.

24. The analysis required by Rule 70 (B), however, does not stop here. According to that Rule, if two cases are eligible to be jointly tried, the Trial Chamber *may* order joinder. The case-law of other international criminal courts and tribunals—which all share provisions similar to Rule 70 (B)<sup>58</sup>—

<sup>50</sup> Lebanon, Code of Criminal Procedure, Art. 240. The draft translation on the Special Tribunal’s website erroneously reads ‘shall order the indictments to be joined’, which does not reflect the Arabic original. Article 133 also provides a non-exhaustive list of reasons for connectedness, including ‘(a) Offences committed by several persons jointly at one time; (b) Offences committed by a number of persons at different times and in different places by common accord; (c) Offences committed to prepare, facilitate or execute other offences, to eliminate the traces of the offences, or to prevent the perpetrators from being prosecuted; (d) Offences where several persons are involved in concealing evidence of the offence, wholly or in part’.

<sup>51</sup> Transcript of 14 January 2014, pp. 17-18.

<sup>52</sup> ICTY, *Prosecutor v. Popović*, IT-02-57-PT, Decision for Motion for Joinder, 21 September 2005, para. 8. *See also* *Prosecutor v. Meakić, Gruban and Knežević*, IT-95-4-PT, Decision on the Prosecution’s Motion for Joinder of Accused, 17 September 2002, para. 23; *Prosecutor v. S. Milošević*, IT-99-37-PT, Decision on Prosecution’s Motion for Joinder, 13 December 2001, para. 37; *Prosecutor v. Blagojević, Obrenović and Jokić*, IT-02-56-PT, Decision on Prosecution’s Motion for Joinder, 17 May 2002, para. 13.

<sup>53</sup> Joinder motion, para. 13.

<sup>54</sup> Joinder motion, para. 3; *Ayyash* indictment, paras 53-54; *Merhi* indictment, paras 53-54.

<sup>55</sup> Joinder motion, paras 5-6, 9; *Ayyash* indictment, paras 55-70; *Merhi* indictment, paras 55-62.

<sup>56</sup> Joinder motion, para. 9.

<sup>57</sup> *Merhi* Joinder response, paras 8-9; transcript of 11 February 2014, p. 47.

<sup>58</sup> The Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL) all have similar

suggests that in reaching such a decision a Chamber should consider several discretionary factors, and in particular (i) the interests of justice; (ii) the rights of the accused; and (iii) any conflicts of interest that might cause serious prejudice to any of the accused.<sup>59</sup>

## 2. The interests of justice

25. The Trial Chamber recognises that the discretionary assessment of joinder requires an analysis of additional considerations, including what other international criminal courts and tribunals have termed the ‘interests of justice’. Ensuring fairness of the criminal proceedings requires consideration of the rights of the defence, the interests of the public and of the victims and, where necessary, the rights of witnesses.<sup>60</sup> The Prosecution and counsel for Mr. Merhi have made submissions, and largely agree on these additional considerations.

### A. Good administration of justice

26. The first factor that the Trial Chamber may consider is judicial economy, or the good administration of justice. The Statute of the Special Tribunal specifically mandates that ‘[t]he Special Tribunal shall confine the trial [...] proceedings strictly to an expeditious hearing of the issues raised by the charges [...] It shall take strict measures to prevent any action that may cause unreasonable delay.’<sup>61</sup> In deciding the issue of joinder, the Trial Chamber is therefore bound to take into account the best way to ensure an expeditious hearing of the charges before it in both cases.

27. The other international criminal courts and tribunals have generally accepted that the fact that joinder may enhance judicial economy supports the joinder of indictments and accused persons.<sup>62</sup> Considerations include the number of witnesses the Prosecution would have to call in a joint trial, as compared to in separate trials,<sup>63</sup> and the length of a joint trial relative to the cumulative length of separate trials.<sup>64</sup> Domestic courts also routinely treat joinder decisions as discretionary,<sup>65</sup> and

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provisions allowing joinder where persons are accused of the same or different crimes committed in the course of the same transaction: *see* ICTY Rule 48, ICTR Rule 48, SCSL Rule 48. *See also* ICC Statute, Article 64; ICC Rule 136.

<sup>59</sup> *See, e.g.*, ICTY, *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero and Pandurević*, IT-05-88-T, Decision on Motion for Joinder, 20 July 2007, paras 28-30.

<sup>60</sup> *See, e.g.*, ECtHR, *Gäfgen v. Germany*, 22978/05, Judgment GC, 1 June 2010, para. 175; *Doorson v. Netherlands*, 20524/92, Judgment, 26 March 1996, para. 70.

<sup>61</sup> Statute, Art. 21 (1).

<sup>62</sup> *See, e.g.*, ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, p. 8; *Popović* decision of 21 September 2005, para. 20; SCSL, *Prosecutor v. Norman*, SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, paras 29 (a), 29 (f); SCSL, *Prosecutor v. Sesay*, SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004, paras 42 (a), 42 (f).

<sup>63</sup> *See, e.g.*, *Popović* decision of 21 September 2005, para. 21; ICTY, *Prosecutor v. Martić*, IT-95-11-PT, Decision on Prosecution Motion for Joinder, 10 November 2005, paras 38-41.

<sup>64</sup> *See, e.g.*, *Popović* decision of 21 September 2005, para. 21; ICTY, *Prosecutor v. Gotovina*, IT-01-45-PT, Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006, para. 76.

therefore may have regard to such factors among others. The Prosecution submits that the evidence to be presented in the two cases is ‘virtually identical’, as is the vast majority of witnesses to be called.<sup>66</sup> A comparison of the two indictments and the Prosecution pre-trial briefs in the *Ayyash* and *Merhi* cases, and the respective witness and exhibit lists, reveals that the two cases are complementary and share almost all of the same evidence.<sup>67</sup>

28. One risk of separate trials—highlighted by the Prosecution and counsel for Mr. Merhi—is that the evidence supporting the same factual allegations may be adduced differently at the second trial and could ultimately result in a conflicting assessment by the Trial Chamber.<sup>68</sup> The ICTY has indeed emphasized that ‘nothing could be more destructive to the pursuit of justice than to have inconsistent results in separate trials based upon the same facts.’<sup>69</sup> A joint trial may ensure a consistent approach in the evaluation of evidence, factual findings, verdicts and sentences if the accused persons are convicted.<sup>70</sup> Thus, unless there is a conflict of interests which might cause serious prejudice to an accused, or separate trials are otherwise necessary to protect the interests of justice, the most effective manner to achieve such consistency is having all the accused tried before the same Trial Chamber and on the same evidence.<sup>71</sup>

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<sup>65</sup> For similar provisions referring to the *possibility* of joinder in different jurisdictions, *see also, e.g.*: France, Code of Criminal Procedure, Art. 285 (‘Lorsqu’à raison d’un même crime plusieurs arrêts de renvoi ont été rendus contre différents accusés, le président peut, soit d’office, soit sur réquisition du ministère public, ordonner la jonction des procédures’); Belgium, Code of Criminal Procedure, Art. 257; United States of America, Federal Rules of Criminal Procedure, Rule 13 (relying on case-law dating back at least to *Logan v. United States*, 144 U.S. 263 (1892)). In Lebanon, although joinder is in principle discretionary and based on the court’s assessment of the interests of justice in each case, legal scholars agree that it should be considered mandatory when there is an advanced degree of connectedness (‘indivisibilité’ or ‘connexité renforcée’). *See, e.g.*, Raad, Nabil Chdid el-Fadel, *The Procedural Motions in the Code of Criminal Procedure*, Vol. II, Beirut. 2005, at 781-783. *See further* Lebanon, Code of Criminal Procedure, Art. 240; Criminal Court of Cassation, 3<sup>rd</sup> Chamber, Decision No. 76, dated 19 March 2003; Criminal Court of Cassation, 6<sup>th</sup> Chamber, Decision No. 41, dated 13 February 2006 (referring to the principle of good administration of justice).

<sup>66</sup> Joinder motion, paras 17-19. *See also* Merhi Joinder response, para. 10.

<sup>67</sup> Compare Merhi indictment and STL-13-04/PT/PTJ, Prosecution’s Submission Pursuant to the Pre-Trial Judge’s Order of 24 December 2013, 8 January 2014, with Ayyash indictment, STL-11-01/PT/PTJ, Prosecution’s Submission of Updated Pre-Trial Brief pursuant to Rule 91 (G) (i) and the Pre-Trial Judge’s Order of 7 August 2013 and Decision of 16 August 2013, 23 August 2013, and STL-11-01/PT/TC, Prosecution Submission Pursuant to Rule 91 (G) (iii), 14 January 2013.

<sup>68</sup> Joinder motion, para. 23; Merhi Joinder response, para. 10.

<sup>69</sup> ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 31.

<sup>70</sup> *Gotovina* decision, para. 79. *See also* ICTY, *Prosecutor v. Šešelj and Margetić*, IT-95-14-R77.3, Decision on Motion for Joinder, 31 May 2006, para. 37; ICTR, *Prosecutor v. Kayishema*, ICTR-95-1-T, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996, p. 3; ICTR, *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, Decision on Request for Severance of Three Accused, 27 March 2006, para. 3; *Norman* decision, para. 29 (c), 31 (h); *Sesay* decision, paras 42 (c), 44 (h); *Katanga* decision, p. 8.

<sup>71</sup> *Brđanin* decision, para. 31. *See also* *Gotovina* decision, para. 79.

29. The Registrar also submitted information detailing the considerable financial and logistical impact that two trials would have on the Special Tribunal's resources.<sup>72</sup> At the hearing of 11 February 2014, he quantified the cost of a second trial running simultaneously with the *Ayyash* trial as between 5 and 10 million euros, while a second trial held after the end of the *Ayyash* case would considerably extend the lifespan of the Special Tribunal.<sup>73</sup>

30. The Trial Chamber finds that, under the present circumstances, the good administration of justice overwhelmingly favours joinder. Joinder would eliminate the risk of inconsistent findings of fact based on essentially the same evidence against the five individuals presently accused in relation to the same explosion of 14 February 2005. Joinder would further enhance judicial economy by saving the resources associated with trying twice what—according to the allegations by the Prosecution—is essentially the same case.

#### *B. Impact on victims and witnesses*

31. Joinder further promotes the efficient administration of justice by ensuring better protection of the victims and witnesses' physical and mental safety, eliminating the need for them to make several journeys and or to repeat their testimony.<sup>74</sup> Moreover, the need for a witness to give potentially traumatic testimony more than once over several years is generally considered more burdensome than consecutive cross-examinations in a single trial.<sup>75</sup> The Prosecution, the Legal Representatives of Victims, and counsel for Mr. Merhi agree that a joint trial would further minimise the trauma and hardship to victims and witnesses, and any risk of loss of witnesses for a second trial, as it would prevent them from being called multiple times.<sup>76</sup> Further, a joint trial would minimise the risk of exposure for witnesses.<sup>77</sup>

32. The Trial Chamber therefore finds that victims and witnesses' interests—referred to in Articles 12 (4) and 17 of the Statute—would be best served by a joint trial of all five Accused.

### **3. The rights of the Accused**

33. The Trial Chamber, under Article 16 (4) of the Statute, must satisfy itself at all times that all the rights of accused persons are respected, and in particular the right to have adequate time and

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<sup>72</sup> Registrar's Submission, paras 5-18.

<sup>73</sup> Transcript of 11 February 2014, p. 46.

<sup>74</sup> See *Kayishema* decision, p. 3; ICTR, *Prosecutor v. Ntagerura*, ICTR-96-10-I, Decision on the Prosecutor's Motion for Joinder, 11 October 1999, para. 49; *Norman* decision, paras 29 (e), 31 (f); *Sesay* decision, paras 42 (e), 44 (f); *Katanga* decision, p. 8; *Popović* decision of 21 September 2005, para. 25.

<sup>75</sup> *Popović* decision of 21 September 2005, para. 25.

<sup>76</sup> Joinder motion, paras 21-22; Merhi Joinder response, para. 10 ; Observations of Legal Representatives of Victims, para. 2.

<sup>77</sup> Joinder motion, paras 20-21; Merhi Joinder response, para. 10.

facilities to prepare their defence.<sup>78</sup> Additionally, Rule 3 mandates the Trial Chamber to interpret the Rules in a manner consistent with the spirit of the Statute, international standards of human rights, and the general principles of international criminal law and procedure. Rule 82 (A) of the Rules of Procedure and Evidence of the ICTY, ICTR, SCSL, and Rule 136 (2) of the ICC's Rules of Procedure and Evidence explicitly provide that in joint trials each accused person must be given the same rights as if they were separately tried.<sup>79</sup> The paramount discretionary factor when considering joinder is therefore the right of all accused persons to a fair trial in joint proceedings.

34. The Prosecution notes that none of the five Accused is in detention. Any concerns about delays in relation to the four Accused already in trial can thus be addressed more easily than in cases of detained accused.<sup>80</sup> It further suggests that joinder would actually promote Mr. Merhi's right to an expeditious trial.<sup>81</sup>

35. The situation before the Trial Chamber is complicated by the fact that the trial has started in the *Ayyash* case, while Mr. Merhi's case at the point of his joinder was in its pre-trial phase. After joinder, counsel for Mr. Merhi requires adequate time to prepare for trial, which might in turn cause delays for the other four Accused. However, the circumstances facing the counsel for the initial four Accused and those now confronting counsel for Mr. Merhi are very different because counsel for Mr. Merhi were assigned at a point when almost all of the pre-trial litigation in the *Ayyash* case was complete.

36. A review of the ICTY's practice shows that it is not possible to make a general, abstract assessment of the impact of joinder on the rights of an accused person. Rather, each case must be carefully and individually assessed. To illustrate, in *Popović*, the ICTY found that the right of one of the accused (still in the pre-trial phase) to have adequate time for preparation would be violated if his case were joined to a case where 109 witnesses had already been called by the Prosecution, one defence witness had testified and a considerable amount of documentary evidence had been tendered.<sup>82</sup> In *Kvočka*, on the other hand, the case of a newly arrested accused was joined after the trial against the other four accused had begun, and two accused had testified at the beginning of their

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<sup>78</sup> See also ECtHR, *De Haes and Gijssels v. Belgium*, 19983/92, Judgment, 24 February 1997, para. 53 (each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent).

<sup>79</sup> See also Merhi Joinder response, para. 12.

<sup>80</sup> Joinder motion, para. 25.

<sup>81</sup> Joinder motion, para. 26.

<sup>82</sup> *Popović* decision of 20 July 2007, paras 33, 40.

own trial.<sup>83</sup> The overall scale of an alleged conspiracy, or the common criminal plan pleaded in a joint criminal enterprise, is thus an important factor in assessing the potential unfairness to an accused whose case may be joined. So, whereas the joint criminal enterprise alleged in *Popović* was extremely broad, in *Kvočka* it was much more geographically and temporally confined.

37. Counsel for Mr. Merhi submitted that a joinder could only have been ordered if the Trial Chamber was satisfied that any resulting prejudice to Mr. Merhi would be minimal.<sup>84</sup> In particular, they argue that the Prosecution's delay in the filing of an indictment against Mr. Merhi has increased the inequality of arms between the two parties.<sup>85</sup>

38. The Trial Chamber agrees that the Prosecutor should have filed the indictment against Mr. Merhi in a more timely manner. However, this argument does not directly relate to the issue of whether or not joinder is appropriate in circumstances where counsel for Mr. Merhi do not actually oppose joinder. Rather, it is relevant to the conditions necessary to ensure a fair trial to Mr. Merhi *after* joinder.

39. Counsel for Mr. Merhi further argue that Mr. Merhi's rights are directly affected each time his name is cited in the case against the other four Accused, since there is (or rather there *was*) no party in the *Ayyash* case able to intervene to defend his rights, except for the Defence Office.<sup>86</sup> Moreover, counsel suggest, prejudice ensues each time an important decision is taken in the *Ayyash* case in Mr. Merhi's absence, if the two cases are to be joined.<sup>87</sup> They request the Trial Chamber to take measures in the *Ayyash* case to prevent irreparable prejudice to Mr. Merhi, including allowing Mr. Merhi to re-argue any point of procedure and substance after joinder.<sup>88</sup> The Head of the Defence Office supports these contentions.<sup>89</sup> The specific measures that the Trial Chamber has adopted are outlined at paragraph 92.

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<sup>83</sup> See *Popović* decision of 20 July 2007, para 33; *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero and Pandurević*, IT-05-88-T, Prosecution's Motion for Joinder of Accused, 6 June 2007, para. 16 (citing closed session material in *Prosecutor v. Kvočka, Kos, Radić and Žigić*, IT-98-30-T, transcripts of 29 February 2000-6 March 2000, pp. 676-1070, in which all of the accused consented to the joinder: see 7 March 2000, pp. 19-22, 22 March 2000, p. 42). In its decision joining the fifth accused, Dragoljub Prcać, the Trial Chamber explained that the five 'are accused of crimes committed in the course of the same transaction, in the Omarska camp between 31 May 1992 and 31 December 1992; that the trial of the accused Kvočka, Kos, Radić and Žigić commenced on 28 February 2000 with the testimonies of the accused Kvočka and Radić and was suspended at the end of those testimonies', *Prosecutor v. Kvočka, Kos, Radić, Žigić and Prcać*, IT-98-30-T, Decision on Prosecution motion to join trials, 14 April 2000; the trial was suspended for eight weeks with the consent of the other accused to allow counsel for the fifth accused to prepare for trial.

<sup>84</sup> Merhi Joinder response, para. 11.

<sup>85</sup> Merhi Joinder response, para. 16.

<sup>86</sup> Merhi Joinder response, para. 26.

<sup>87</sup> Merhi Joinder response, para. 26.

<sup>88</sup> Merhi Joinder response, paras 27-28.

<sup>89</sup> See Defence Office Observations on the Pre-Trial Stage.

40. Counsel for Mr. Merhi also suggest that a pre-trial phase after joinder, which they did not consider themselves ready to quantify in terms of time, may remedy the imbalance created by the Prosecution and allow them to prepare an effective defence. This would also take into account the time allowed to the defence of the other four Accused and the complex and technical nature of the charges.<sup>90</sup> This pre-trial phase, they contend, should be conducted by the Pre-Trial Judge, as the Special Tribunal's specialised organ created for this purpose, to protect Mr. Merhi's rights as if he were being tried separately.<sup>91</sup> More specifically, they submit that if the two cases are joined, the whole pre-trial procedure of filing of pre-trial briefs and lists of witnesses and exhibits would have to take place anew, and that this should be done before the Pre-Trial Judge.<sup>92</sup>

41. Why this was argued in circumstances in which the Prosecution's pre-trial brief, witness and exhibit lists in the *Merhi* case have already been filed—and, at the order of the Pre-Trial Judge—is unclear. The Trial Chamber can see no reason that would justify the Pre-Trial Judge duplicating the orders he has already issued.

42. Moreover, the circumstances facing counsel for Mr. Merhi are very different to those facing counsel for the other four Accused when the pre-trial phase commenced in the *Ayyash* case. To illustrate, all initial disclosures are now complete,<sup>93</sup> and counsel have—from almost the outset—had the Prosecution pre-trial briefs, witness and exhibit lists. In the normal course of events they should thus require much less time in a preparatory phase than required by counsel for the other four Accused.

43. Counsel for Mr. Merhi also submitted that the Pre-Trial Judge's 'independent' status would allow him to play a more active role in preparing the case for trial and examining the evidentiary material; this would benefit Mr. Merhi at a stage of the proceedings when the Trial Chamber is already dealing with four Accused at a much more advanced stage. They also submitted that 'the question of contamination by contact with the evidence would be worrying were the Chamber, which has already started hearing the prosecution evidence [...] to decide itself to conduct the pre-trial phase in the case of *Merhi* by virtue of Rule 70 (C).'

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44. There are two obvious difficulties with these arguments. First, the Pre-Trial Judge, having reviewed all the supporting material against both the Accused in the *Ayyash* case and Mr. Merhi in confirming the indictment—a lot of which will not even be used as evidence at trial—is thus

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<sup>90</sup> Merhi Joinder response, paras 17-18. See also transcript of 12 February 2014, especially pp. 73-74.

<sup>91</sup> Merhi Joinder response, paras 19, 24.

<sup>92</sup> Transcript of 11 February 2014, pp. 55, 59-60, 102-103; transcript of 12 February 2014, pp. 50-54.

<sup>93</sup> See para. 108.

<sup>94</sup> Merhi Joinder response, para. 21.

arguably more ‘contaminated’ by his dealing with the evidence than the Trial Chamber will ever be. Further, like judges everywhere in the world who admit documents into evidence during a trial, the Trial Chamber judges must review proposed evidence *before* deciding whether it should be admitted. By logical extension of counsel’s argument, all such judges would irreparably ‘contaminate’ themselves. This cannot be correct.

45. Second, in the particular circumstances of this five-accused trial, the Trial Chamber, pending a further scheduling order, has adjourned the case against all five. This will permit the Trial Chamber to play as active a role as necessary in any matters preparatory to the resumption of the trial, including issuing orders ensuring that counsel for Mr. Merhi have the necessary time and resources to prepare for trial.<sup>95</sup>

46. Counsel for Mr. Merhi also interpret Rule 70 (C) as only allowing the Trial Chamber to deal with *certain* matters and asserts that, on the contrary, he would benefit from a single decision-maker, rather than having some matters decided by the Pre-Trial Judge and others by the Trial Chamber.<sup>96</sup> The logic of this argument, however, is self-defeating. After joinder to a case already before the Trial Chamber, Rule 70 (C) envisages a single decision-maker in the form of the Trial Chamber, assisted where necessary by the Pre-Trial Judge. As the case has been joined and is in trial, dividing the pre-trial responsibilities between the Trial Chamber, which is now seised of the five-accused trial, and the Pre-Trial Judge, who is not, would actually be contrary to the submission that only a single-decision maker should decide. Otherwise, two decision-makers would be making decisions in respect of the same adjourned trial but one decision-maker, the Pre-Trial Judge, would have the jurisdiction only to issue decisions in respect of *one* of the five Accused. That scenario, with some exceptions referred to in paragraphs 72-75, would be contrary to advancing the interests of justice.

47. The Legal Representatives of Victims submit that, after joinder, counsel for Mr. Merhi should be allowed to make an opening statement at a time of their choosing and to indicate which, if any, of the witnesses who have thus far testified they wish to have recalled.<sup>97</sup> At the hearing, he stated that he did not have any submission to make on legal impediments for joinder.<sup>98</sup> The Trial Chamber accepts these submissions.

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<sup>95</sup> In the context of counsel’s argument as to the ‘independent’ nature of the Pre-Trial Judge, the Trial Chamber notes Article 9 (1) of the Statute, which provides that all Judges ‘shall be independent in the performance of their functions and shall not accept or see instructions from any Government or any other source’.

<sup>96</sup> Merhi Joinder response, para. 24. *See also* transcript of 11 February 2014, p. 89 (Head of Defence Office’s submissions recalling that he had opposed the addition of Rule 70 (C)); transcript of 12 February 2014, pp. 19-28 (Prosecution position on the roles of the Pre-Trial Judge and the Trial Chamber).

<sup>97</sup> Observations of Legal Representatives of Victims, para. 4.

<sup>98</sup> Transcript of 11 February 2014, p. 45.



48. In conclusion, counsel for the Accused in the two cases do not oppose joinder; rather, some raise the issue of the measures that should be undertaken to mitigate any risk for the rights of Mr. Merhi and, to a lesser extent, of the four Accused in the *Ayyash* case.

#### **4. Conflict of interests**

49. The Trial Chamber will also take into account any ‘concrete allegations’—as the case-law of other international criminal tribunals suggests—showing that joinder would lead to conflicts of interest that might cause serious prejudice to any of the five Accused.<sup>99</sup> The mere *possibility* of mutually antagonistic defences, however, does not constitute a conflict of interest capable of causing serious prejudice where judges, rather than lay jurors, are involved.<sup>100</sup>

50. Here, the Prosecution sees no apparent conflict of interest between Mr. Merhi and the other four Accused amounting to prejudice that would render joinder ‘improper’.<sup>101</sup> Counsel for Mr. Merhi, though reserving the right to make submissions on a future severance of proceedings, do not identify any existing conflict of interest.<sup>102</sup> Counsel for Mr. Badreddine also elaborated on the legal conditions for severance pursuant to Rule 141,<sup>103</sup> but did not argue that these are met in the current situation.

51. No counsel has submitted that there is any present conflict between the defences of the five Accused. In the absence of any positive evidence of conflict or anything suggesting that it may occur in the future, the Trial Chamber can find no conflict of interest that would prevent joining the two cases. The Trial Chamber will continue to carefully monitor this issue.

#### **5. Conclusions as to joinder**

52. The Trial Chamber agrees with the submission of the Parties and the Legal Representatives of the Victims that joinder is desirable under the present circumstances, as long as the appropriate measures are taken to ensure fairness. All submissions received on this issue suggest that the disadvantages of separate trials would outweigh the disadvantages of a joined trial. There is no disagreement that the good administration of justice favours joinder in the present circumstances. Differences of opinion, rather, relate only to the measures that the Trial Chamber should take to ensure a fair trial for Mr. Merhi after the cases are joined.

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<sup>99</sup> See, e.g., *Šešelj* decision, para. 41; *Popović* decision of 21 September 2005, para. 30.

<sup>100</sup> See, e.g., *Martić* decision, para. 46; *Popović* decision of 21 September 2005, para. 33; *Bagosora* decision, para. 5.

<sup>101</sup> Joinder motion, paras 27-28; transcript of 11 February 2014, p. 18.

<sup>102</sup> Merhi Joinder response, para. 15; transcript of 11 February 2014, pp. 48, 54-55, 69-71.

<sup>103</sup> Transcript of 11 February 2014, pp. 74-76.

53. The Trial Chamber therefore concluded that joining the two proceedings (*Ayyash* and *Merhi*) would better protect the rights of all five Accused to a fair and expeditious trial, provided that certain measures were taken. Being determined to take the necessary measures to minimise the risks of prejudice after joinder, the Trial Chamber immediately convened a further hearing after the joinder decision to hear the Parties and the Legal Representatives of Victims to ascertain the proper course of action. Joinder was therefore ordered on the basis that the Trial Chamber would take—and will continue to take, as necessary—all the measures required to ensure a fair trial for all five Accused.

54. The Trial Chamber has been seised of the trial of the five Accused since it ordered the joinder on 11 February 2014. It therefore has the jurisdiction under Rule 70 (C) to determine whether it should assume any of the statutory roles that the Rules allocate to the Pre-Trial Judge in relation to Mr. Merhi before the resumption of the trial. This includes dispensing with the formal requirement in Rule 95 of the Pre-Trial Judge submitting to the Trial Chamber a complete file, including a detailed report.

#### **6. Management of the trial after joinder, including measures to address any prejudice to counsel for Mr. Merhi**

55. The Trial Chamber emphasises that each Accused in joined proceedings is entitled to a fair trial, in respect of all the rights enshrined in the Statute, and in particular the right to have adequate time and facilities to prepare.

56. At the outset, the Trial Chamber underscores its appreciation of the complex situation facing counsel for Mr. Merhi and, to a certain extent, counsel for the four other Accused, caused by the late submission of the *Merhi* indictment and the consequent delayed request for joinder.<sup>104</sup> At the time joinder was ordered (11 February 2014), the trial had already started in the *Ayyash* case, although it was in its initial phase, namely;

- The Trial Chamber heard the opening statements of the Prosecution, the Legal Representatives of Victims, and counsel for Mr. Badreddine and Mr. Oneissi, starting on 16 January 2014;
- The Trial Chamber, in the course of 12 trial days between 22 January 2014 and 10 February 2014, heard the evidence of 15 Prosecution witnesses and admitted into evidence 180 Prosecution exhibits, 7 Defence exhibits and one exhibit for the Legal Representatives of Victims. This evidence relates to part—but not the entirety—of the first section of the

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<sup>104</sup> See transcript of 9 January 2014, p. 52 (counsel for Mr. Badreddine's request to allow counsel time 'to gain an understanding of the Merhi case' if joinder is ordered).

Prosecution's case, which focuses on what happened in and around the area of the explosion on 14 February 2005, detailing the effect of the explosion on the victims and the results of forensic investigations into its cause;<sup>105</sup> and

- Several procedural rulings have also been made in the *Ayyash* case which could now affect Mr. Merhi's interests, such as decisions declaring admissible written statements tendered under Rule 155.<sup>106</sup>

57. The evidence called by the Prosecution in this initial phase of the trial has been largely uncontested by counsel for the four Accused. In this context, and that of its duty to ensure a fair trial, the Trial Chamber will address some preliminary matters concerning the management of the newly joined trial. These relate to the efforts taken to mitigate any possible prejudice that Mr. Merhi sustained by the conduct of the *Ayyash* proceedings to date, the pre-trial measures which must be undertaken in respect of Mr. Merhi, the additional measures requested by counsel for Mr. Merhi to cure any possible prejudice, and providing adequate time and resources for counsel to prepare for the resumption of the trial.

*A. Efforts to mitigate any possible prejudice that Mr. Merhi has sustained by the conduct of the Ayyash proceedings so far*

58. Mindful of any possible prejudice to Mr. Merhi's rights,<sup>107</sup> the Trial Chamber has from the start of the *Ayyash* proceedings offered counsel for Mr. Merhi the opportunity to participate as an observer and to make submissions.<sup>108</sup> Moreover, as already explained, it exceptionally accepted submissions by the Head of the Defence Office in relation to alleged violations of Mr. Merhi's rights in the *Ayyash* case.<sup>109</sup>

59. Contrary to the Defence Office's submissions, however, the mere mention of Mr. Merhi's name in the course of the Prosecution's opening statement—which is not evidence—cannot have

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<sup>105</sup> STL-11-01/PT/TC, transcript of 29 October 2013, p. 8.

<sup>106</sup> STL-11-01/PT/TC, First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013; STL-11-01/T/TC, Second Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 30 January 2014.

<sup>107</sup> See transcript of 20 January 2014, pp. 9-10; Defence Office motion, *especially* paras 7-8, 16-17 (arguing that Mr. Merhi might be prejudiced as a result of not being party in the courtroom from the outset of the *Ayyash* case). The Trial Chamber considers this concern raised by the Head of the Defence Office in fact to be a further argument favouring joinder as soon as possible, in order to mitigate any negative effect, or perceived negative effect, that separate proceedings might have.

<sup>108</sup> Transcript of 14 January 2014, pp. 44-45; 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').

<sup>109</sup> See transcript of 20 January 2014, pp. 5-12; Defence Office motion; Defence Office Observations on the Pre-Trial Stage. See also transcript of 11 February 2014, pp. 4-16, 89-91 (Prosecution), 72-74 (counsel for Mr. Badreddine), 78-80 (counsel for Mr. Oneissi), 82-87 (Head of Defence Office).

prejudiced any of his rights to a fair trial. Conversely, naming co-conspirators in indictments and related material, when possible, is necessary to ensure adequate notice to an accused person.<sup>110</sup> Further, the Trial Chamber considers that it was necessary to contrast the role of Mr. Merhi, who is an alleged co-conspirator, with those alleged to be unindicted conspirators. The Head of the Defence Office has not cited any legal authority supporting his arguments to the contrary. His arguments are without legal foundation and are rejected.

60. The Head of the Defence Office has also complained that the Trial Chamber forbade him from assigning counsel for Mr. Merhi until a relatively late stage.<sup>111</sup> The Trial Chamber reiterates<sup>112</sup> that its decision of 11 October 2013, regarding the assignment of counsel, turned on the fact that counsel simply could not be assigned under Rule 105 *bis* (B) when none of the requirements of Rule 106 had been met.<sup>113</sup> The Trial Chamber had previously applied the same principle in a decision almost two years before.<sup>114</sup> Moreover, the Head of the Defence Office has implicitly accepted its correctness under the existing Rules by recently proposing to the Special Tribunal's Rules Committee a change to Rule 57, expressly allowing him to do this. Additionally, the Head of the Defence Office has never been prevented from taking any alternative action within his competence as may have been thought necessary, including but not limited to, making submissions to the Pre-Trial Judge, who was then the competent judge, as to why counsel should have been appointed, for instance as *amicus curiae*, under different provisions of the Rules.<sup>115</sup>

#### *B. Supervision of pre-trial functions by the Trial Chamber*

61. Both counsel for Mr. Merhi and the Head of the Defence Office submitted that Mr. Merhi has the 'right' to have a pre-trial phase before the Pre-Trial Judge.<sup>116</sup> Counsel for Mr. Merhi do, of course, have the right to properly prepare for trial, including having the necessary time and facilities

<sup>110</sup> See, e.g., ICTR, *Prosecutor v. Karemera*, ICTR-98-44-R72, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19; ICTY, *Prosecutor v. Gotovina*, IT-06-90-PT, Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Form of the Joinder Indictment, 19 March 2007, paras 9, 14.

<sup>111</sup> Transcript of 12 February, p. 104.

<sup>112</sup> Transcript of 12 February, p. 105.

<sup>113</sup> STL-13-04/I/TC, Order to the Defence Office Regarding Assignment of Counsel to Hassan Habib Merhi, 11 October 2013, para. 7 ('The proceedings against Mr. Merhi are currently at that stage under Rule 76 (E) during which service of the indictment is being effected in "an alternative manner, including procedures of public advertisement". If, within thirty days starting from the advertisement, Mr. Merhi is not under the Tribunal's authority, the Pre-Trial Judge, acting pursuant to Rule 105 *bis* (A), "shall ask the Trial Chamber to initiate proceedings *in absentia*". Rule 105 *bis* (B) provides that "after the Trial Chamber ensures that the requirements of Rule 106 have been met, the Pre-Trial Judge shall request the Head of the Defence Office to assign Counsel to the accused who fails to appoint one [...]").

<sup>114</sup> STL-11-01/I/TC, Corrected Version of the Decision Relating to the Assignment of 'Duty Counsel' by the Head of Defence Office, 2 November 2011.

<sup>115</sup> Order to Defence Office Regarding Assignment of Counsel, para. 10 (the order was meant to 'preserve the *status quo* pending proper legal submissions from any organ of the Tribunal that may have an interest in this matter').

<sup>116</sup> Merhi Joinder response, paras 19-24; Defence Office Observations on the Pre-Trial Stage, para. 24 (referring to a 'right to be judged according to the procedural rules originally envisaged by the Statute').

to prepare Mr. Merhi's defence. The Trial Chamber, however, is not persuaded by any contention that there is a *right* to have a trial specifically and exclusively 'prepared' by the Pre-Trial Judge—principally because neither the Statute nor the Rules provide that the Pre-Trial Judge actually 'prepares' a case for trial in the sense that counsel and the Head of the Defence Office seem to contend.

#### The role of the Pre-Trial Judge

62. The role of the Pre-Trial Judge is regulated by the Statute and Rules. Under Article 18 (2) of the Statute, the Pre-Trial Judge has the specific statutory role of reviewing the indictment and 'may, at the request of the Prosecutor, issue such orders and warrants for the arrest or transfer of persons, and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial.' He also has several unique functions under Rules 93, 117 and 118.

63. The Pre-Trial Judge, however, has neither the role nor the powers of an investigating judge.<sup>117</sup> Rather, Section 4 of Part 5 of the Rules, and the other provisions setting out the functions of the Pre-Trial Judge—which must always be read according to the Statute—explain the Pre-Trial Judge's role as assisting the Parties to prepare for trial 'quickly and efficiently',<sup>118</sup> so that the 'public interest in fair and expeditious justice' is 'bolstered'.<sup>119</sup>

64. A dedicated pre-trial chamber composed of a single Pre-Trial Judge is something of an innovation in international criminal law proceedings. At the ICTY, for example, although a 'reviewing Judge' is nominated to review and confirm an indictment,<sup>120</sup> a member of the Trial Chamber that is subsequently allocated the case is designated as a 'pre-trial Judge' responsible for pre-trial proceedings—but 'under the authority and supervision of the Trial Chamber'.<sup>121</sup> The ICTY pre-trial Judge is obliged to keep the Trial Chamber 'regularly informed' and the Trial Chamber may, *proprio motu*, exercise any of the functions of the pre-trial Judge.<sup>122</sup> Likewise, the SCSL had a 'Designated Judge' confirming indictments and performing limited pre-trial functions for cases not assigned to a Trial Chamber.<sup>123</sup> The ICTR is substantially similar, with a 'Duty Judge' to review and

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<sup>117</sup> Evidence before the Special Tribunal is generally submitted by the Parties, and never through a case file prepared by the Pre-Trial Judge. While the Judges may choose to start questioning witnesses before the Parties do, the Rules provide that the Parties generally call their own witnesses and present their own evidence. *See* Rules 145 (A), 146 and 165; *see also* Explanatory memorandum by the Tribunal's President, 25 November 2010, para. 11.

<sup>118</sup> Explanatory memorandum, para. 4.

<sup>119</sup> Explanatory memorandum, para. 14.

<sup>120</sup> ICTY Rules 28, 47.

<sup>121</sup> ICTY, Rule 65*ter* (A), (B), (C).

<sup>122</sup> ICTY, Rule 65*ter* (J), (M).

<sup>123</sup> SCSL, Rules 28, 47.

confirm indictments and address other matters not assigned to a Chamber.<sup>124</sup> At both the ICTR and SCSL, once a Trial Chamber is seised of a case, ‘the Trial Chamber or a Judge designated from among its members’ supervises pre-trial matters.<sup>125</sup> Finally, at the ICC, the Pre-Trial Chamber is competent to adjudicate all matters up to and including the confirmation of charges, but thereafter a Trial Chamber is ‘responsible for the conduct of subsequent proceedings’ in order to get the case trial-ready.<sup>126</sup> The Trial Chamber ‘may’ refer preliminary issues to the Pre-Trial Chamber or a judge of the Pre-Trial Division, but is equally empowered to ‘[e]xercise any functions of the Pre-Trial Chamber’ relevant and applicable to the business of ensuring a case is prepared for trial.<sup>127</sup>

65. It would be irrational to interpret the innovation of a dedicated Pre-Trial Judge at the Special Tribunal—meant to promote speedy and efficient case management—as a shackle upon the fair and expeditious conduct of trial proceedings, or the Trial Chamber’s management of the case before it. A plain reading of the Rules suggests that the Pre-Trial Judge and Trial Chamber may work together in the particular circumstances of any case. For example, Rule 89 (E) permits the Pre-Trial Judge to refer any matter to the Trial Chamber for determination; this he did three times in the *Ayyash* case in 2013,<sup>128</sup> and once in the *Merhi* case.<sup>129</sup> The Trial Chamber also received from the Pre-Trial Judge, with the transfer under Rule 95 of the *Ayyash* case file on 28 October 2013, some twelve undecided matters: six Defence motions relating to Lebanon’s alleged non-cooperation with the Special Tribunal, five motions relating to evidence disclosure and redactions, and a motion seeking to stay the proceedings. The case was at that time then scheduled to commence on Monday 13 January 2014.

66. Furthermore, a trial of this size and complexity *cannot* commence without preparatory decisions by the Trial Chamber which will actually hear the evidence, such as whether particular witnesses must testify live or whether their evidence may be admitted under Rule 155 or Rule 156. A Pre-Trial Judge cannot make these evidentiary decisions, since it is the Trial Chamber that must regulate the admission of evidence and assess it once admitted. Some such decisions must be made *before* the trial begins so as to facilitate the necessary practical, logistical and administrative steps.

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<sup>124</sup> ICTR, Rules 28, 47.

<sup>125</sup> ICTR, Rule 73*bis*; SCSL, Rule 73*bis*.

<sup>126</sup> See ICC, Statute, Arts. 61 (11), 64 (3).

<sup>127</sup> See ICC, Statute, Arts. 61 (11), 64 (4), (6).

<sup>128</sup> STL-11-01/PT/PTJ, Order in Relation to Rule 161 Notices on Expert Witnesses, 18 June 2013; STL-11-01/PT/PTJ, Decision in Relation to Rule 161 Notices on Expert Witnesses, 28 February 2013; STL-11-01/PT/PTJ, Decision on the Motion of the Defence for Mr. Badreddine Seeking an Order to Strike Out Certain Sections of the Prosecutor’s Pre-Trial Brief, 7 February 2013; STL-11-01/PT/PTJ, Decision on the Prosecution’s Motion to Refer to the Trial Chamber the Requests to Admit the Written Statements of Witnesses Pursuant to Rules 89(E) and 155 of the Rules of Procedure and Evidence, 15 April 2013.

<sup>129</sup> STL-13-04/I/PTJ, Decision Referring the Matter of Joinder of Cases to the Trial Chamber, 2 January 2014.

For example, in a case of the size and complexity of the *Ayyash* case—now with five Accused, featuring up to 540 intended Prosecution witnesses (including 137 experts, authoring some 289 expert reports) and thousands of exhibits detailed in a 695-page list<sup>130</sup>—the Trial Chamber needs a realistic period of time before the commencement of trial to make the necessary informed evidentiary decisions regarding the admission of evidence. Immediately upon gaining the necessary jurisdiction, on 29 October 2013, the Trial Chamber ordered the Prosecution to file its first list of intended Rule 155 witnesses by 15 November 2013.<sup>131</sup>

67. This illustrates that there is no neat or even obvious division between the period of pre-trial preparation within the jurisdiction of the Pre-Trial Judge and that of the Trial Chamber. Unless there is a very early transfer of the case-file to the Trial Chamber, some overlap is inevitable. The experience of other international criminal courts and tribunals has shown that some matters that may appear to be ‘pre-trial’ issues—such as, for example, state cooperation and *inter partes* disclosure—are nonetheless fundamental to the rights of the Parties to obtain a fair trial and do not disappear simply because the trial has started.

68. Litigation of these types of matters thus may well continue throughout the pre-trial phase and well into trial—and sometimes into the post-judgement appeal phase. Some matters may be incapable of resolution before the transfer of the case file to the Trial Chamber, irrespective of the length of the pre-trial phase, and the fact that it is before a dedicated Pre-Trial Judge. The experience of the Special Tribunal in this regard mirrors precisely that of the other international criminal courts and tribunals in the sixteen years preceding the Special Tribunal’s commencement in 2009. The submissions of the Head of the Defence Office advocate a formalistic, unrealistic and impractical interpretation of the respective roles of the Trial Chamber and the Pre-Trial Judge. They also contradict Rule 89 (H) which specifically provides that the Pre-Trial Judge may ‘order that a pre-trial or preliminary motion be deferred for determination at trial’.

69. The conduct of fair and expeditious proceedings must always be the motivating factor in dividing responsibilities between the two chambers. Thus, Rule 70 (C) allows a division of responsibilities after joinder, to be decided by the Trial Chamber after consulting the Pre-Trial Judge.

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<sup>130</sup> The Legal Representatives of Victims, too, list 57 witnesses, and an exhibit list of 369 intended trial exhibits.

<sup>131</sup> Transcript of 29 October 2013, pp. 30-31, accompanied by an expedited deadline for Defence responses, *see* STL-11-01/PT/TC, Orders for Trial Preparation Following the Pre-Trial Conference of 29 October 2013, 31 October 2013, para. 3; STL-11-01/PT/TC, Prosecution Rule 155 Motion for Admission of Written Statements in lieu of Oral Testimony for the First Section of the Prosecution Case, 15 November 2013.

### The role of the Trial Chamber under Rule 70 (C)

70. In February 2013, the Plenary of the Judges of the Special Tribunal, anticipating future joinder applications and recognising a lacuna in the Rules in this regard, decided to add Rule 70 (C) to the Rules. It provides:

[i]n cases [of joinder] under paragraphs (A) and (B) the Trial Chamber, in consultation with the Pre-Trial Judge, may perform any of the Pre-Trial Judge's functions in Rules 89 (A)-(D), (F), 90 (A) (iv), 91 and 94. Rule 95 may be wholly or partly dispensed with.

71. Rule 70 (C) deals directly with the entirely predictable circumstances of this newly joined case. The Trial Chamber will therefore apply it accordingly. Counsel for Mr. Merhi do not explain why the Trial Chamber is not competent to protect the rights of an accused in the preparatory phase before the resumption of trial, since it is itself entrusted with ensuring a fair trial for *all* accused before it. As such, they show no reason for the Trial Chamber not to exercise the discretion specifically conferred upon it by the Rules. Under Rule 70 (C), in consultation with the Pre-Trial Judge, the Trial Chamber may perform pre-trial functions including:

- supervising the Parties as they prepare their cases, including by coordinating communication and recording points of agreement, in order to ensure a fair and expeditious trial (Rule 89);
- preparing and overseeing the implementation of a working plan for the pre-trial phase (Rule 91);
- ordering the submission of Pre-Trial Briefs, lists of witnesses, and lists of exhibits (Rule 91); and
- convening status conferences (Rule 94).

72. The Trial Chamber may also decide to dispense, in whole or in part, with the preparation of a case file and report under Rule 95. The Pre-Trial Judge retains certain unique roles, as set out in Rule 130 (B), relating to Rules 93 (questioning of anonymous witnesses), 117 (*in camera* hearings on security interests of States and other international entities) and 118 (submissions related to information never subject to disclosure without consent of the provider). The Trial Chamber has no competence to decide matters falling within Rules 93, 117 or 118 as they are within the sole domain of the Pre-Trial Judge.



73. The functions under Rule 89 (I) related to unique investigative opportunities could also remain with the Pre-Trial Judge;<sup>132</sup> this role is probably more appropriately performed by the Pre-Trial Judge, in the same manner as the ICC's Pre-Trial Chamber.<sup>133</sup> Rule 92 (the exceptional gathering of evidence) is analogous and falls into the same category. As is Rule 123 (the taking of depositions). Likewise, the function of the granting of the status of victims participating in the proceedings in Rule 86 in respect of any new applications could also be performed by the Pre-Trial Judge. However, contrary to the submission of counsel for Mr. Merhi, nothing in the Rules states that the Pre-Trial Judge has the *sole* competence on such matters.<sup>134</sup> Rule 130 (B) reserves to the exclusive competence of the Pre-Trial Judge only matters governed by Rules 93, 117 and 118.

74. In exercising its discretion under Rule 70 (C), the Trial Chamber recognises every procedural right guaranteed by the Special Tribunal's Statute and Rules.<sup>135</sup> As required by Rule 70 (C), the Trial Chamber has consulted with the Pre-Trial Judge in relation to their respective roles in assisting the Parties, and especially counsel for Mr. Merhi, to prepare for the resumption of the trial.

75. After this consultation, the Trial Chamber has decided to perform the pre-trial functions of the Pre-Trial Judge that are not exclusively given to him under the Rules—those specified in Rules 93, 117 and 118. However, the Trial Chamber will continue to consult with the Pre-Trial Judge in relation to his possibly performing any of the functions in Rules 86, 89 (I), 92, and 123.

76. The Trial Chamber has made this decision in the interests of the fair and efficient preparation for trial. The trial commenced on 16 January 2014 and awaits an order on a resumption date, including when counsel for Mr. Merhi may make any opening statement. Between now and that date, however, the Trial Chamber will have to make various decisions relating to the admission into evidence of proposed Prosecution exhibits under Rule 154 and any witness statements proposed under Rules 155 and 156.

77. It will also have to make decisions on other matters including *inter partes* disclosure and Lebanon's cooperation with the Special Tribunal. These particular issues, given the advanced stage of the proceedings, directly affect the rights of the five Accused to receive a fair trial. They have progressed well beyond the early pre-trial stage when they may have been more appropriately dealt with by a dedicated Pre-Trial Judge. It would be illogical and contrary to the interests of justice at this late stage to split these issues between two separate chambers. Doing so would cause

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<sup>132</sup> Transcript of 11 February 2014, p. 76.

<sup>133</sup> See ICC, Statute, Art. 56.

<sup>134</sup> See Position de la Défense sur l'extension de la participation des victimes à la procédure concernant M. Merhi, 21 February 2014, para. 9.

<sup>135</sup> See also transcript of 12 February 2014, p. 66.

unnecessary delay and risk having different chambers making inconsistent decisions on issues directly affecting the fairness of the proceedings. In these circumstances of a joinder in an ongoing trial, the balance of convenience and of fairness towards the Accused favours the Trial Chamber assuming the Pre-Trial Judge's role as specified in paragraph 75.

78. Issues on which submissions were heard after the joinder decision included the need, if any, for a working plan under Rule 91 and the manner in which the Trial Chamber should exercise its discretion under Rule 70 (C).<sup>136</sup> To advance the proceedings in the most effective manner possible, the Trial Chamber immediately issued some preliminary directions on relevant preparatory matters. These were:

i.) Order to file consolidated indictments, and witness and exhibit lists

79. The Prosecution, which already filed separate indictments in the two cases, requested that it be permitted to file simultaneously consolidated versions of the indictment and its witness and exhibit lists. The Trial Chamber granted this request, and set a deadline for the filing of these documents on 7 March 2014.<sup>137</sup>

ii.) Deadline for preliminary motions under Rule 90

80. The Trial Chamber noted the deadline set by the Pre-Trial Judge for the filing of any preliminary motions under Rule 90 based on the existing indictment, *i.e.*, 14 February 2014.<sup>138</sup> On 14 February 2014, counsel for Mr. Merhi filed their preliminary motion on defects in the form of the indictment.<sup>139</sup>

iii.) Pre-Trial Briefs

81. Counsel for Mr. Merhi requested that the Prosecution file a consolidated pre-trial brief to replace the pre-trial briefs filed separately in the *Ayyash* and *Merhi* cases, incorrectly arguing that there were some major inconsistencies between the two documents.<sup>140</sup> The Prosecution submitted that the existing pre-trial briefs provide sufficient notice to counsel for Mr. Merhi, and that it is not necessary to order the filing of a consolidated pre-trial brief.<sup>141</sup> Prosecution counsel stated that there

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<sup>136</sup> Transcript of 12 February 2014, pp. 18-19.

<sup>137</sup> Transcript of 12 February 2014, pp. 25-26, 121.

<sup>138</sup> Transcript of 12 February 2014, pp. 48-49.

<sup>139</sup> STL-11-01/PT/TC, Exception préjudicielle pour vices de forme de l'acte d'accusation, 14 February 2014.

<sup>140</sup> Transcript of 12 February 2014, pp. 53, 58-59, 62-63. During the hearing, it transpired that counsel for Mr. Merhi was referring to a superseded version of the Prosecution Pre-Trial Brief, namely its 2012 version (Prosecution Pre-Trial Brief Pursuant to Rule 91, 15 November 2012, Public Redacted), and not the current version (Redacted Version of the Prosecution's Updated Pre-Trial Brief, 23 August 2013): transcript of 12 February 2014, pp. 57-58.

<sup>141</sup> Transcript of 12 February 2014, p. 25. *See also* pp. 52-53.

is no inconsistency between the existing pre-trial briefs,<sup>142</sup> but conceded that there may be some minor discrepancies in footnotes requiring correction.<sup>143</sup>

82. The Trial Chamber has carefully reviewed the two pre-trial briefs. The primary purpose of a pre-trial brief is to provide notice of the case against an Accused person to allow them to properly prepare a defence at trial.<sup>144</sup> It is the combination of the material facts and charges pleaded in the indictment, the pre-trial brief and the disclosed evidence supporting the allegations that provides this notice. The Trial Chamber is satisfied that the pre-trial brief filed in the *Merhi* case performs its role and provides the necessary notice to counsel for Mr. Merhi of the Prosecution case at trial.

83. Moreover, counsel for Mr. Merhi has, albeit in the court-room, informed Prosecution counsel of some minor incorrect evidentiary references in several footnotes,<sup>145</sup> which the Prosecution immediately undertook to correct. The Trial Chamber reiterates that the Parties should normally resolve such matters between themselves, and only if then unsuccessful, raise them in court or with the Trial Chamber.

84. Several incorrect footnote references do not justify ordering a new pre-trial brief. The Trial Chamber therefore sees no need for filing an additional pre-trial brief after a single consolidated indictment is filed.

iv.) Working plan under Rule 91

85. The Trial Chamber sought the specific views of the Parties on the need for any formal working plan under Rule 91. Given the advanced state of preparation of the case against Mr. Merhi, the Prosecution submitted that there is limited value in imposing a work plan under Rule 91,<sup>146</sup> and considered that the few parts of a typical Rule 91 working plan which remain relevant can be regulated by the Trial Chamber as well as the Pre-Trial Judge.<sup>147</sup> The Prosecution further submitted that the filing of a Rule 95 report is not necessary, given the close similarity between the case against Mr. Merhi and the other four Accused.<sup>148</sup>

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<sup>142</sup> Transcript of 12 February 2014, p. 57. *See also* p. 58.

<sup>143</sup> Transcript of 12 February 2014, pp. 59-60.

<sup>144</sup> The 'most basic function' of a Pre-Trial Brief 'is to inform the opposing party of the case they face': *see* STL-11-01/PT/TC, Decision on Defence motion to strike out part of the Prosecution's pre-trial brief, 8 March 2013, paras 13-14 and the international case-law cited therein.

<sup>145</sup> *See* STL-13-04/PT/PTJ, transcript of 31 January 2014, p. 43.

<sup>146</sup> Transcript of 12 February 2014, pp. 22-23, 27-28.

<sup>147</sup> Transcript of 12 February 2014, p. 23.

<sup>148</sup> Transcript of 12 February 2014, p. 23.

86. Counsel for Mr. Merhi stated that they were not yet in a position to give a view on the need for any working plan, or what such a plan may need to contain. They compared their position with that of counsel for the other four Accused at a similar time after their assignment.<sup>149</sup> However, there is little factual similarity between their respective positions at the corresponding times of assignment.

87. On 25 October 2012—ten and half months after the assignment of counsel in the *Ayyash* case—the Pre-Trial Judge issued a working plan because, ‘taking into consideration the progress made’, he considered that it would ‘assist this case to proceed expeditiously to trial’.<sup>150</sup> The working plan addressed matters including (i) deadlines for filing of pre-trial briefs and lists of witnesses and exhibits;<sup>151</sup> (ii) instructions on identification of experts and inspection of expert reports;<sup>152</sup> (iii) a general approach to disclosure;<sup>153</sup> and, (iv) denying an order (requested by defence counsel) to prevent further investigations by the Prosecution.<sup>154</sup>

88. In the *Merhi* case by contrast, the Pre-Trial Judge has already issued orders to the Prosecution to file its pre-trial brief, witness and exhibit lists and to complete all disclosure under Rule 110 (A) and (B) by specified dates. This has been completed. On 10 February 2014, he also issued a decision on the working language of the case.<sup>155</sup> This decision complemented the Trial Chamber’s own decision of 30 January 2014,<sup>156</sup> but was immediately superseded by the joinder of the cases on 11 February 2014 which automatically applied the existing decision on the working languages of the *Ayyash* case of 16 September 2011 to the joined *Merhi* case.<sup>157</sup>

89. Considering the orders already issued by the Pre-Trial Judge, the existing deadlines, and the Trial Chamber’s role under Rule 70 (C), there appears to be no need for an additional working plan to assist the expeditious preparation of the case.

90. The Trial Chamber has already received a case file in the *Ayyash* case and is now seised with the joined case of the five Accused. No useful purpose would be served by the Pre-Trial Judge preparing a duplicate to which he would add only material specific to Mr. Merhi that the Trial

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<sup>149</sup> Transcript of 12 February 2014, pp. 64-65.

<sup>150</sup> STL-11-01/PT/PTJ, Order on a Working Plan and on Joint Defence Motion Regarding Trial Preparation, 25 October 2012 (‘Working plan’), para. 19.

<sup>151</sup> Working plan, paras 21, 48.

<sup>152</sup> Working plan, paras 21, 38-43.

<sup>153</sup> Working plan, paras 23-33.

<sup>154</sup> Working plan, paras 34-37.

<sup>155</sup> STL-13-04/PT/PTJ, Decision on the Defence Office Request to Determine the Working Languages in the Pre-Trial Phase of the *Merhi* Case, 10 February 2014.

<sup>156</sup> STL-13-04/PT/TC, Decision re Interim Order on Working Language(s) and Application for Leave to Appeal, 30 January 2014.

<sup>157</sup> Transcript of 11 February 2014, pp. 91-96 (ordering joinder).

Chamber already has. Nor is there any need for the ‘detailed report’ by the Pre-Trial Judge referred to in Rule 95 (A) (vii). The purpose of such a ‘detailed report’ must be to help the Trial Chamber in its preparations for hearing a case—and most especially a newly constituted Trial Chamber with no prior knowledge of a case. However, in circumstances where the Trial Chamber is already familiar with the case (having been constituted in September 2011), and having already heard some of the evidence at trial, a report would serve no useful purpose and would only delay the case. Therefore, the only matter remaining appears to be to set a date for counsel for Mr. Merhi to file their Defence pre-trial brief. However, it is premature to set this date and the Trial Chamber will do this only after hearing further submissions from counsel for Mr. Merhi on this issue.

91. The Trial Chamber further draws to the attention of counsel for Mr. Merhi the agreement between the Prosecution and counsel for the four original Accused in the *Ayyash* case that nine facts will not be contested at trial.<sup>158</sup> The Trial Chamber therefore invites counsel for Mr. Merhi to consider their position in this regard, and to inform the Parties and the Legal Representatives for Victims by **14 March 2014**.

*C. Additional measures requested by counsel for Mr. Merhi*

92. The Trial Chamber also invited counsel for Mr. Merhi to make submissions on additional measures which might be necessary to address any prejudice arising from the Trial Chamber’s joinder decision.<sup>159</sup> Responding to the requests made by counsel in a written document provided to the Trial Chamber and the Parties on 12 February 2014, the Trial Chamber:

- agreed that counsel for Mr. Merhi have the right to request reconsideration of decisions previously taken by the Trial Chamber;<sup>160</sup>
- agreed that counsel for Mr. Merhi may request the recall for cross-examination of the small number of witnesses who have previously testified, and may request the exclusion of evidence received thus far, and set a deadline for counsel to file any written applications of this nature of 14 March 2014;<sup>161</sup> and

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<sup>158</sup> See STL-11-01/PT/PTJ, Prosecution’s Notice on the Implementation of the Pre-Trial Judge’s ‘Order Regarding Narrowing Issues Contested at Trial’, 19 March 2013.

<sup>159</sup> See also Merhi Joinder response, para. 28.

<sup>160</sup> Transcript of 12 February 2014, pp. 66, 121.

<sup>161</sup> Transcript of 12 February 2014, pp. 66, 121.

- clarified that counsel for Mr. Merhi sought to vary the Trial Chamber's directions on the conduct of proceedings, made under Rule 130, and set a deadline for counsel to file any written submissions in that regard of 21 February 2014.<sup>162</sup>

93. The Trial Chamber reaffirms that, generally, all of the evidence must normally be produced in the presence of the Defence at a public hearing with a view to adversarial argument.<sup>163</sup> This principle may be dispensed with in very limited circumstances—where the Rules expressly provide for the admission of certain kinds of evidence in written form,<sup>164</sup> or where the Rules otherwise so provide<sup>165</sup>—although of course a conviction cannot be based solely or to a decisive extent on evidence by individuals whom the defence has had no opportunity to examine.<sup>166</sup>

94. To date, counsel for the original four Accused in the *Ayyash* case have cross-examined only nine of the fifteen prosecution witnesses called to testify (for a combined total of 7 hours and 24 minutes).<sup>167</sup> This may be relevant to the Trial Chamber's consideration of whether witnesses should be recalled for questioning by counsel for Mr. Merhi.

*D. Adequate time and resources to prepare for trial*

95. The Trial Chamber also heard submissions from the Parties on the time and resources which might be required for counsel for Mr. Merhi to prepare further for trial—and any resulting impact on the fair and expeditious conduct of the proceedings that might ensue from providing that time or those resources.

Resources required by counsel for Mr. Merhi to further prepare for trial

96. A right to a fair trial also includes effective representation at trial. The Trial Chamber must therefore ensure that Mr. Merhi's counsel can effectively represent him and that they have sufficient resources to ensure equality of arms in their investigations and in the court room. Effective representation goes to the heart of the defence of an accused person in proceedings held *in absentia*. This includes working in the languages used at the Special Tribunal.

<sup>162</sup> Transcript of 12 February 2014, pp. 71, 121. Counsel for Mr. Merhi informed the legal officer of the Trial Chamber, by e-mail of 20 February 2014, that they no longer proposed to file any submission in this regard.

<sup>163</sup> See ECtHR, *A.M. v. Italy*, 37019/97, Judgment, 14 December 1999, para. 25; *Luca v. Italy*, 33354/96, Judgment, 27 February 2001, para. 39; see also Lebanon, Code of Criminal Procedure, especially Article 250.

<sup>164</sup> See Rules 155 (Admission of Written Statements and Transcripts in Lieu of Oral Testimony), 156 (Written Statements and Transcripts in Lieu of Examination in Chief), 158 (Unavailable Persons).

<sup>165</sup> See Rules 92 (Exceptional Gathering of Evidence), 93 (Questioning of Anonymous Witnesses by the Pre-Trial Judge), 157 (Taking of Depositions upon Order of the Trial Chamber), 159 (Statements of Anonymous Witnesses).

<sup>166</sup> ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, Judgment, GC, 15 December 2011, para. 119. See also Rule 159 (B).

<sup>167</sup> This information was provided to the Trial Chamber by the Court Management Services Section of the Registry, via e-mail.

97. On Monday 23 December 2013, the Head of the Defence Office issued a media release stating that he had appointed as lead counsel for Mr. Merhi, Mr. Mohamed Aouni, who ‘speaks Arabic and French’ and

is already working on interviewing several lawyers and legal officers, notably Lebanese lawyers included on the list of counsel, in order to create his defence team. Once the team is set up, and after it has received the evidence disclosed by the Office of the Prosecutor, the team will be in a position to study and analyse the voluminous Prosecution file, and subsequently to conduct its investigations so as to prepare the defence for Mr. Merhi.<sup>168</sup>

98. As February 2014, the Registrar informed the Trial Chamber that the documents disclosed to counsel for Mr. Merhi by the Prosecution are, in their original form: approximately 69% English, 20% Arabic, 6% other languages, 4.5% multiple languages, and 0.5% French. Of the translations undertaken, approximately 66.6% have been translated into English, 30.6% into Arabic, 2.4% into French, and 0.4% into multiple languages, as necessary.<sup>169</sup> Furthermore, an ‘overwhelming proportion’ of the filings in this case—meaning written submissions from the Parties and participants, and decisions and orders issued by chambers of the Special Tribunal, etc., between November 2012 and late October 2013—were submitted in English.<sup>170</sup> Under the terms of the Pre-Trial Judge’s order on the working languages, for resource reasons, only the most important filings are translated into another of the Special Tribunal’s three official languages, while *all decisions* of the three Chambers are translated into the three languages. Mindful of this, and the possibility that—as of 11 February 2014—the Merhi defence team was still understaffed (and especially in relation to its language capacity), the Trial Chamber asked the Registrar and the Head of the Defence Office whether counsel for Mr. Merhi had the resources required to complete their further preparations for trial. Assurances were given that the necessary resources would be made available, within the Special Tribunal’s administrative framework.

99. The Trial Chamber notes in particular that the Registry has made facilities available to counsel for Mr. Merhi, as it did for counsel for the other four Accused, to ensure that they can cope with written filings or evidentiary material provided to them in any of the three official languages of

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<sup>168</sup> ‘Defence Office Press Release—Counsel assigned to represent the rights and interests of the Accused Hassan Habib Merhi,’ 23 December 2013, available at <http://www.stl-tsl.org/en/media/press-releases/defence-office-press-release-counsel-assigned-to-represent-the-rights-and-interests-of-the-accused-hassan-habib-merhi>.

<sup>169</sup> See Registrar submission, para. 19; transcript of 12 February 2014, pp. 16-17; transcript of 14 January 2014, pp. 32-37.

<sup>170</sup> See STL-13-04/I/TC, Registry Submissions on Working Language(s) for Filings, 13 December 2013, para.13. The Trial Chamber has also received updated information from the Registry to similar effect.

the Special Tribunal.<sup>171</sup> On 12 February 2014, lead counsel for Mr. Merhi stated that his team was presently staffed and equipped to work in Arabic, English and French, and that he did not propose to seek additional language assistance, despite an offer from the Registrar to provide suitable language assistance from the Special Tribunal's Languages Services Section.<sup>172</sup> However, the Trial Chamber was also informed on that day that Mr. Merhi's defence team had not yet completed its recruiting, having only nine team members, but with funding available for a further four (including a language assistant).<sup>173</sup> The Registry had also offered to dedicate language support staff for the Merhi defence team but it was reported that this offer had been declined.<sup>174</sup> This offer now appears to have been accepted, but only as of 21 February 2014.

100. Lead counsel for Mr. Merhi also stated at the hearing on 12 February 2014 that he would need another three to four weeks to be in a position to estimate the further staffing needs of his team.<sup>175</sup> That, however, would be almost three months after he was assigned to represent Mr. Merhi. Cognisant of this, the Trial Chamber explored the issue of adequate resources for the Defence of Mr. Merhi in the Trial Chamber's first and second weekly meetings with counsel for Mr. Merhi and the Prosecution (on 14 and 21 February 2014), and in separate meetings with the Defence Office and the Registrar on this issue on 18 February 2014. The Trial Chamber will continue to monitor—as part of its duty to guarantee Mr. Merhi a fair trial with effective legal representation—whether counsel for Mr. Merhi are adequately resourced to prepare their defence and to defend Mr. Merhi at trial. This includes ensuring that they have sufficient legal staff to meet the task. The Trial Chamber will make any necessary intervention in this regard to ensure that Mr. Merhi receives a fair trial.

101. The Trial Chamber was also concerned to ensure that counsel for Mr. Merhi had jointly met counsel for the Prosecution counsel and the other Accused to help the Merhi Defence identify both the most important and relevant documents in all the filings submitted since June 2011 (meaning motions, responses, decisions etc.) and the most critical pieces of evidence against Mr. Merhi. Of concern to the Trial Chamber is that this had not occurred as of Friday 21 February 2014, despite the Trial Chamber asking in its meeting of 14 February 2014 for this to have taken place by that date. This too will be monitored by the Trial Chamber.

#### Time required by counsel for Mr. Merhi to further prepare for trial

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<sup>171</sup> Transcript of 12 February 2014, p. 10. *See also* p.15; Registrar submission, para. 19.

<sup>172</sup> Transcript of 12 February 2014, p. 89.

<sup>173</sup> Transcript of 12 February 2014, pp. 9-10.

<sup>174</sup> Transcript of 12 February 2014, pp. 9, 14.

<sup>175</sup> Transcript of 12 February 2014, p 114.



102. Counsel for Mr. Merhi submitted that he requires time to prepare for trial and to dispose of pre-trial matters.<sup>176</sup> Counsel for Mr. Badreddine has also suggested that time would be needed for him to consider the impact of the joinder of Mr. Merhi to the *Ayyash* case,<sup>177</sup> although he has not further specified his requirements. Counsel for Mr. Ayyash, Mr. Oneissi and Mr. Sabra have also not taken a position in this respect.<sup>178</sup>

103. The Parties have addressed the Trial Chamber at length concerning the further preparation time which counsel for Mr. Merhi may require before the resumption of trial, and were invited to file further written submissions.<sup>179</sup>

- Counsel for Mr. Merhi stated on 12 February 2014 that they were not in a position to recommend a date for the resumption of trial. They suggested that they could only make such a recommendation after an adjournment of four to six months.<sup>180</sup> Counsel also stated their objection to proceeding with any part of the trial before they had completed their preparations as a whole.<sup>181</sup>
- The Prosecution took the view that approximately four months would be the minimum time counsel for Mr. Merhi would be likely to need to prepare for the resumption of trial.<sup>182</sup> Although the Prosecution agreed that counsel may need at least some time before he can provide his own recommendation as to a date for resumption, it did not accept that four to six months was necessary.<sup>183</sup> When considering the length of any adjournment, the Prosecution submitted that the Trial Chamber should consider objective factors including the reduced scope of the case (by comparison to its scope in the pre-trial proceedings against the other four Accused), the assistance which counsel for Mr. Merhi might derive from the opening statements in understanding the Prosecution case, and the effective completion of all disclosure.<sup>184</sup>
- The Prosecution also noted the possibility that that the trial could be resumed on a limited basis to hear certain evidence, and then adjourned to allow further preparations.<sup>185</sup> In concrete

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<sup>176</sup> Merhi Joinder response, paras 16-18.

<sup>177</sup> Transcript of 9 January 2014, p. 52.

<sup>178</sup> Transcript of 12 February 2014, p. 99.

<sup>179</sup> Transcript of 12 February 2014, pp. 91, 120-121.

<sup>180</sup> Transcript of 12 February 2014, pp. 73-74.

<sup>181</sup> Transcript of 12 February 2014, p. 83.

<sup>182</sup> Transcript of 12 February 2014, pp. 75-76.

<sup>183</sup> Transcript of 12 February 2014, p. 81.

<sup>184</sup> Transcript of 12 February 2014, pp. 77-78.

<sup>185</sup> Transcript of 12 February 2014, pp. 78-79, 81-82.

terms, the Prosecution suggested that the Trial Chamber could order an adjournment until the end of April 2014, when counsel for Mr. Merhi would be required to i.) be ready to proceed with respect to limited witnesses ('the first part of the forensics case'); and, ii.) be ready to give a recommendation to the Trial Chamber as to the date on which it would be fully ready for the remainder of the trial.<sup>186</sup>

- The Legal Representatives of Victims stated that they would support a scheme for the resumption of trial which was 'well-monitored' and included the possibility for a phased resumption of proceedings with further adjournments as required ('time-outs'). They opposed any 'scheme which places the whole trial into cryogenic storage, as it were'.<sup>187</sup>
- Counsel for Mr. Ayyash urged the Trial Chamber to provide counsel for Mr. Merhi with undisturbed time for trial preparation, and opposed any sort of phased or staggered schedule for the resumption of trial.<sup>188</sup> Counsel considered the request for a four to six month deferral of submissions on the resumption of trial to be legitimate.<sup>189</sup>
- Counsel for Mr. Badreddine agreed with the position taken by counsel for Mr. Ayyash,<sup>190</sup> and further argued that the Trial Chamber should not give weight to the reduction in the scope of the Prosecution case, given the broader focus of Defence preparations.<sup>191</sup>
- Counsel for Mr. Oneissi and Mr. Sabra requested that the Trial Chamber take into account the need for counsel for Mr. Merhi to make specific requests for disclosure under Rule 110 (B).<sup>192</sup>
- Counsel for Mr. Oneissi stated their view that the request of counsel for Mr. Merhi is reasonable, and that counsel should not be expected to appear in court during the preparation period.<sup>193</sup>
- Counsel for Mr. Sabra stated that counsel for Mr. Merhi may also need time to seek the assistance of the Lebanese authorities.<sup>194</sup>

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<sup>186</sup> Transcript of 12 February 2014, p. 82.

<sup>187</sup> Transcript of 12 February 2014, p. 88.

<sup>188</sup> Transcript of 12 February 2014, p. 92.

<sup>189</sup> Transcript of 12 February 2014, p. 93.

<sup>190</sup> Transcript of 12 February 2014, p. 93.

<sup>191</sup> Transcript of 12 February 2014, p. 93.

<sup>192</sup> Transcript of 12 February 2014, pp. 95, 97.

<sup>193</sup> Transcript of 12 February 2014, pp. 95-96.

<sup>194</sup> Transcript of 12 February 2014, p. 97.

- The Head of the Defence Office stressed his view that counsel for Mr. Merhi are best placed to advise the Trial Chamber on the time they require for preparation. He expressed concern as to how counsel could both conduct adequate preparation and handle ongoing business in court.<sup>195</sup>

104. Counsel for Mr. Merhi subsequently filed additional written observations on the length of time required to prepare for trial, suggesting that they will not be in a position for at least five to six months (meaning before July or August 2014) to recommend a date for the resumption of trial.<sup>196</sup> They reiterated their objection to any part of the trial recommencing before they have reviewed the case against Mr. Merhi in its entirety.

105. In support of his submissions, counsel for Mr. Merhi cited case-law of the European Court of Human Rights in relation to the length of time necessary to prepare for trial. They referred to the Court's findings that two weeks of trial preparation time for a case file of 17,000 pages (in *Öcalan*) and 100 work hours to study a file amounting to 6,200 pages of documents and video evidence recorded on twenty-two video cassettes (in *Huseyn*) contributed to making a trial unfair.<sup>197</sup> They suggest that, by this calculation, they would need 8 to 10 months' time for preparation.<sup>198</sup>

106. The two cases cited stand for the propositions that:

[t]he principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment on them [...]<sup>199</sup>

Moreover,

[t]he issue of the adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case [...]<sup>200</sup>

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<sup>195</sup> Transcript of 12 February 2014, p. 114.

<sup>196</sup> Observations additionnelles concernant le temps nécessaire, p.10 ('la Défense de M. Merhi disposera d'un délai minimum de cinq à six mois pour évaluer le temps de préparation nécessaire à la défense des intérêts de M. Merhi, la question de la reprise du procès ne devant pas être discutée avant ce temps d'évaluation indispensable').

<sup>197</sup> Observations additionnelles concernant le temps nécessaire, para. 17.

<sup>198</sup> Observations additionnelles concernant le temps nécessaire, para. 17.

<sup>199</sup> ECtHR, *Öcalan v. Turkey*, 46221/99, Judgment (GC), 12 May 2005, para. 146.

<sup>200</sup> ECtHR, *Huseyn and Others v. Azerbaijan*, 35485/05, 45553/05, 35680/05 and 36085/05, Judgment, 26 July 2011, para. 175.

107. The Trial Chamber agrees with these general principles, which should be applied with respect to the specific circumstances of each case. However, the reference to the particular time held to be insufficient for trial preparation in those two cases bears little relevance to the *Merhi* case. The issue before the Trial Chamber concerns: (i) a team of at least nine persons working full time on the case, soon to be complemented by at least two other lawyers, with extensive experience in domestic and international criminal proceedings; (ii) equipped with specific software to search through the evidence; (iii) with the support of a dedicated Defence Office, which has considerable resources at its own disposal; (iv) in the framework of extremely flexible budgetary arrangements ‘so that the [defence] teams can be set up to maximize efficiency’;<sup>201</sup> (v) with appropriate language assistance; and, (vi) which could appropriately avail themselves of and benefit from work done by other defence counsel in this case. There appears therefore to be little resemblance to the circumstances in the *Öcalan* and the *Huseyn* cases.

108. The Trial Chamber considers the following factors to be especially relevant to its assessment of the time required by counsel for Mr. Merhi to further prepare for trial:

- The Prosecution submits that it completed its initial disclosure obligations to counsel for Mr. Merhi as of 24 December 2013 (Rule 110 (A) (i)), as of 7 February 2014 (Rule 110 (A) (ii)), as of 7 February 2014 (Rule 113), and as of 31 January 2014 (Rule 91).<sup>202</sup>
- In the *Ayyash* case, the outstanding pre-trial issues of disclosure were ‘in principle’ resolved by August 2013,<sup>203</sup> with the trial starting scheduled to start about five months later. Counsel for Mr. Merhi was assigned on 20 December 2013, and a competent defence team was constituted—with two co-counsel assigned on 30 December 2013, pursuant to the Head of the Defence Office’s Directive on Appointment and Assignment of Counsel and the Legal Aid Policy—and with other staff in place by mid-January 2014.<sup>204</sup>
- Counsel for Mr. Merhi should also benefit from the work done thus far by the other defence counsel, who could share with them their leads and results of their own defence investigations. It is evident that defence counsel have thus far joined in the motions of their colleagues, as appropriate, and have at times coordinated in cross-examining Prosecution witnesses.<sup>205</sup> The Trial Chamber is confident—absent any legitimate and specific reasons for

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<sup>201</sup> Transcript of 12 February 2014, p. 11 (remarks by the Registrar).

<sup>202</sup> Transcript of 11 February 2014, pp. 40-42; transcript of 12 February 2014, p. 79.

<sup>203</sup> STL-11-01/PT/PTJ, Order Setting a New Tentative Date for the Start of Trial Proceedings, 2 August 2013, para. 46.

<sup>204</sup> Transcript of 14 January 2014, p. 9.

<sup>205</sup> See, e.g., STL-11-01/T/TC, transcript of 10 February 2014, p. 18 (consultations by defence counsel on cross-examination of a Prosecution witness); STL-11-01/T/TC, transcript of 4 February 2014, pp. 81-84, 85-90 (counsel for

not cooperating one with the other on specific issues—that counsel for Mr. Merhi will benefit from this practice in more efficiently preparing for trial.

109. In these circumstances, the Trial Chamber considers it necessary to put in place complementary measures ensuring the right to a fair trial for Mr. Merhi and the other four Accused after joinder. These should also safeguard the rights of the Accused, and the interests of the victims, the Special Tribunal, and of the international community as a whole, in having the trial proceed expeditiously and without ‘unreasonable delay’, as mandated by the Statute.<sup>206</sup>

110. First, a delay of at least four months from the date of assignment of counsel for Mr. Merhi is necessary. The joint trial cannot therefore resume at the earliest before early to mid-May 2014. However, this is subject to the possible exception of the Trial Chamber hearing the evidence of three Prosecution witnesses, PRH-125, PRH-128 and PRH-129, who were scheduled to testify in the week before the joinder decision was made but whose testimony had to be postponed for logistical reasons,<sup>207</sup> and possibly also receiving relevant documents into evidence.

111. The actual recommencement date, however, will be the subject of a specific scheduling order, and will be issued only after the Trial Chamber has heard further submissions from the Parties and Legal Representatives for Victims, and has had regard to the state of trial preparations of counsel for Mr. Merhi. The Trial Chamber will therefore **schedule a status conference for Tuesday 4 March 2014** to receive further submissions on these issues, including a possible date for a partial resumption of the trial.

112. On 8 January 2014, counsel for Mr. Merhi received the Prosecution’s pre-trial brief, with the lists of anticipated witnesses and exhibits, which are very similar to the pre-trial brief and witness and exhibit lists in the *Ayyash* case.<sup>208</sup>

113. So, second, and recognising that the adjournment might not be enough for counsel to fully prepare for the whole of the Prosecution case, the Trial Chamber will, in due course, order the Prosecution to continue the presentation of its case *in part*, exclusively concerning the explosion and the eye-witness testimony of the events of, and around, 14 February 2005.

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Mr. Ayyash and Mr. Badreddine supporting a request for certification of a Trial Chamber’s decision by Counsel for Mr. Oneissi); STL-11-01/PT/TC, Joint Defence Response to ‘Prosecution Notice Pursuant to the Working Plan as to Further Disclosure under Rule 113, and Motion to Vary the 25 October 2012 Working Plan’, 2 January 2014.

<sup>206</sup> Statute, Art. 21.

<sup>207</sup> See transcript of 10 February 2014, pp. 92-94.

<sup>208</sup> Although the lists have not been made public, a public redacted version of the Pre-Trial Brief (in English) has been available since 31 October 2013: STL-11-01/PT/TC, Redacted Version of the Prosecution’s Updated Pre-Trial Brief, dated 23 August 2013, 31 October 2013.

114. In this respect **the Prosecutor is ordered to file by 30 March 2014** a provisional notice of the order of witnesses relating to the rest of this part of its case. After this portion of the evidence presentation is concluded, the Trial Chamber will hear the Parties and assess whether another adjournment is required and, if so, its length, before the evidence on the remaining parts of the Prosecution case is presented.

115. Third, the Prosecutor is ordered to extend all necessary assistance to all Defence teams, and in particular to counsel for Mr. Merhi, on disclosure-related matters. The Trial Chamber expects to be kept informed of any issue that might cause delay or prejudice the defence. Likewise, during the adjournment, the Trial Chamber urges the Parties to maintain regular and effective communication to facilitate preparation for the resumption of the trial.<sup>209</sup> To this end, the Trial Chamber will hold regular status conferences, and convene other meetings with the Parties, as appropriate, in chambers.<sup>210</sup>

116. Finally, the Trial Chamber emphasises that it will continue monitoring the situation throughout the trial and will take any measure—up to and including severance of the case of an Accused person from the trial—necessary to ensure a fair trial for all Accused.

### **DISPOSITION**

#### **THE TRIAL CHAMBER:**

#### **PROVIDES ITS WRITTEN REASONS FOR HAVING:**

**GRANTED** the Prosecution's motion requesting joinder of the case of *Prosecutor v. Hassan Habib Merhi* with that of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*;

**ORDERED** the joinder of the two cases from 11 February 2014;

**ORDERED** the Prosecution to file a consolidated indictment and witness and exhibit lists by 7 March 2014;

**ORDERED** counsel for Mr. Merhi 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, by 14 March 2014;

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<sup>209</sup> Transcript of 12 February 2014, pp. 5, 122.

<sup>210</sup> Transcript of 12 February 2014, p. 122.

**ORDERED** counsel for Mr. Merhi to file any submissions requesting variation of the Trial Chamber's directions on the conduct of proceedings, made under Rule 130, by 21 February 2014;

**AND, FURTHER, HAVING JURISDICTION UNDER RULE 70 (C):**

**DISMISSES** the motion filed by the Head of the Defence Office, '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*', relating to the alleged violation of Mr. Merhi's rights;

**DISMISSES** the motion filed by counsel for Mr. Merhi, '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', requesting the Trial Chamber to grant the motion filed by the Head of the Defence Office;

**DECIDES**, under Rule 70 (C), to dispense with the requirements of Rule 95, and that a further report by the Pre-Trial Judge under Rule 95 (A) (vii) is not required;

**DECIDES**, under Rule 70 (C), having heard the Parties and consulted with the Pre-Trial Judge, to perform the Pre-Trial Judge's functions under Rules 89 (A)-(D), (F), 90 (A) (iv), 91 and 94 as may be necessary in this case;

**DECIDES**, under Rule 70 (C), that it will continue to consult with the Pre-Trial Judge in relation to his possibly performing functions specified in Rules 86, 89 (I), 92 and 123;

**DENIES** counsel for Mr. Merhi's request to order the Prosecution to file a consolidated Pre-Trial Brief;

**DECIDES** that an additional working plan for the preparation of trial is unnecessary;

**ORDERS** counsel for Mr. Merhi to inform the Parties by **14 March 2014** of their position concerning the nine facts that counsel for the other four Accused have chosen not to contest at trial;

**ORDERS** the adjournment of the resumption of the trial until at least **early to mid-May 2014** with the possible exception of hearing the evidence identified in paragraph 110;

**SCHEDULES** a status conference for **Tuesday 4 March 2014, at 10 am**;

**ORDERS** the Prosecution to file a provisional notice of the order of witnesses for the rest of its case relating to the circumstances of the explosion of 14 February 2005, and relevant testimony, by **30 March 2014**; and

**EMPHASISES** to the Parties that it will continue to monitor the fair and expeditious conduct of the proceedings during the adjournment and throughout the trial generally, and will take any measure necessary to ensure a fair trial for all accused persons.

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

Leidschendam,

The Netherlands

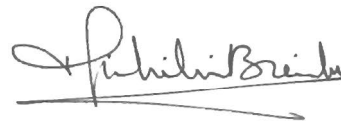
25 February 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

