



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE PRE-TRIAL JUDGE**

Case No.: **STL-13-04/I/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr Daryl Mundis**

Date: **2 January 2014**

Original: **French**

Classification: **Public**

**THE PROSECUTOR**  
v.  
**HASSAN HABIB MERHI**

**DECISION REFERRING THE MATTER OF  
JOINDER OF CASES TO THE TRIAL CHAMBER**

**Office of the Prosecutor:**  
Mr Norman Farrell

**Counsel for Mr Hassan Habib Merhi:**  
Mr Mohamed Aouini



## I. Introduction

1. By way of the present decision, the Pre-Trial Judge grants the Prosecution request of 18 December 2013 to refer to the Trial Chamber, on the basis of Rule 89 (E) of the Rules of Procedure and Evidence (the “Rules”), the matter of the joinder of the *Ayyash et al.* (STL-11-01) and *Merhi*<sup>1</sup> (STL-13-04) cases pursuant to Rule 70 (B) of the Rules (respectively the “Request” and the “Motion for Joinder”).

## II. Procedural background

2. On 18 December 2013, the Prosecution filed the Request.

3. On 20 December 2013, the Trial Chamber decided to initiate *in absentia* proceedings against Mr Merhi,<sup>2</sup> and the Head of Defence Office proceeded to assign a counsel (the “Counsel for the Defence”).<sup>3</sup>

4. On 23 December 2013, the Head of Defence Office submitted his observations regarding the Request at the invitation of the Pre-Trial Judge (the “Observations of the Defence Office”).<sup>4</sup>

5. On 24 December 2013, the Pre-Trial Judge ordered the Prosecution to disclose to the Counsel for the Defence the documents provided for in Rule 110 (A) of the Rules, as well as other materials.<sup>5</sup>

6. On 30 December 2013, the Counsel for the Defence responded to the Request (the “Response”).<sup>6</sup>

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<sup>1</sup> STL, *The Prosecutor v. Hassan Habib Merhi*, Case No. STL-13-04/I/PTJ, Prosecution Request for Rule 89 (E) Referral of the Matter Joinder, 18 December 2013.

<sup>2</sup> STL, *The Prosecutor v. Hassan Habib Merhi*, Case No. STL-13-04/I/TC, Decision to Hold Trial *In Absentia*, 20 December 2013.

<sup>3</sup> STL, *The Prosecutor v. Hassan Habib Merhi*, Case No. 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>4</sup> STL, *The Prosecutor v. Hassan Habib Merhi*, Case No. STL-13-04/I/PTJ, *Observations de 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>5</sup> STL, *The Prosecutor v. Hassan Habib Merhi*, Case No. STL-13-04/I/PTJ, Order Relating to Disclosure of the Material Referred to in Rule 110 (A) of the Rules and Other Material in the Proceedings, 24 December 2013.

<sup>6</sup> STL, *The Prosecutor v. Hassan Habib Merhi*, Case No. 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.

### III. The arguments of the Parties

7. The Prosecution requests the Pre-Trial Judge to refer the Motion for Joinder – annexed to the Request<sup>7</sup> – to the Trial Chamber so that it may rule on that matter. In support of the Request, the Prosecution invokes the following arguments:

- a) the Trial Chamber should, in theory, be competent to rule on the Motion for Joinder insofar as it relates to the *Ayyash et al.* case of which it alone is already seized.<sup>8</sup> However, the Chamber is not seized of the *Merhi* case until such time as the case file is transferred to it in accordance with Rule 95 of the Rules. As a consequence, the Chamber may only rule on a matter regarding the latter case if it has been specifically seized of that case in accordance with Rule 89 (E) of the Rules,<sup>9</sup> and
- b) in this respect, the criteria previously employed in order to justify the seizure of the Trial Chamber pursuant to Rule 89 (E) of the Rules have, according to the Prosecution, been met;<sup>10</sup> in point of fact:
  - as he no longer has jurisdiction over the case of *Ayyash et al.* and is thus no longer able to take decisions regarding that case, the Pre-Trial Judge cannot adjudicate on the matter of the joinder of that case to that of *Merhi*;<sup>11</sup> furthermore, the matter of joinder does not fall within the exclusive jurisdiction of the Pre-Trial Judge;<sup>12</sup> lastly, the Trial Chamber, by virtue of the Rules, does not have the possibility of referring an issue to the Pre-Trial Judge so that it might be determined by him;<sup>13</sup>
  - the referral of the matter of the seizure of the Trial Chamber is not likely to cause prejudice to Mr Mehri or to any potential victims that might participate in the proceedings;<sup>14</sup> indeed, at this stage, it is not a question of ruling on the joinder itself – which, according to the Prosecution, should be done at a later stage after

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<sup>7</sup> STL, *The Prosecutor v. Hassan Habib Merhi*, Case No. STL-13-04/I/TC, Prosecution Motion for Joinder, 18 December 2013.

<sup>8</sup> Request, para. 3.

<sup>9</sup> *Id.*, paras 3 and 4.

<sup>10</sup> *Id.*, para. 7.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Id.*, para. 8.

the Counsel for the Defence, once assigned, or the Head of Defence Office have been heard – but rather one of determining which chamber has jurisdiction to rule on the matter;<sup>15</sup> the Prosecution however calls on the Pre-Trial Judge to hear the Head of Defence Office in accordance with Rule 57 (F) of the Rules on the limited issue of referral to the Trial Chamber;<sup>16</sup> and

- joinder may only be ordered in the event that the Trial Chamber decides to initiate *in absentia* proceedings in the case of *Merhi*, an issue of which it is seized and on the subject of which it has already heard the Prosecution and the Head of Defence Office.<sup>17</sup> Should the Chamber decide to initiate proceedings *in absentia*, the Prosecution will, in that event, request the Chamber for joinder of the *Merhi* case to that of *Ayyash et al.*<sup>18</sup> However, as the trial in the case of *Ayyash et al.* must start on 16 January 2014, the immediate referral of the matter of joinder to the Trial Chamber should assist it in organising its work and taking appropriate steps so as to be able to rule on the matter expeditiously.<sup>19</sup>

8. In essence, the Head of Defence Office expresses reservations with regard to the Request,<sup>20</sup> notably in that it contains the Motion for Joinder whereas the decision relating to *in absentia* proceedings has not yet been issued.<sup>21</sup> He notes however that, in the meantime, proceedings *in absentia* have been initiated and that the Counsel for Defence has been assigned to represent Mr Merhi.<sup>22</sup> He concludes from this that it is for that counsel to decide on the merits of the Request after receiving all the materials filed in that case and, where appropriate, to decide if he “[TRANSLATION] agrees to deprive himself of the role of the Pre-Trial Judge in the *Merhi* case, whereas it must be recalled that the role of the Pre-Trial Judge is an innovative institution before the Special Tribunal for Lebanon.”<sup>23</sup>

9. With regard to the Counsel for the Defence, he concurs with the observations of the Defence Office and primarily submits the following points: the Prosecution request is moot

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<sup>15</sup> *Id.*, paras 8 and 9.

<sup>16</sup> *Id.*, para. 9.

<sup>17</sup> *Id.*, para. 10.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.*, para. 11.

<sup>20</sup> Observations of the Defence Office, para. 4.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.*, para. 5.

<sup>23</sup> *Id.*, paras 6 and 7.

insofar as it was filed before the opening of the proceedings in the *Merhi* case and is based on an erroneous legal foundation, since the motion for joinder of the cases cannot be considered an “issue” within the meaning of Rule 89 (E).<sup>24</sup> On that point, the Counsel for the Defence states that the joinder of cases is a fundamental issue which brings to an end the pre-trial phase. As such, it cannot be considered a matter that can be determined before the Chamber has been seized of the case.<sup>25</sup> He states that, according to Rule 70, the Chamber has the exclusive responsibility for determining the matter of joinder of cases and that, therefore, it cannot be a matter that the Pre-Trial Judge may refer to the Chamber.<sup>26</sup>

10. In the alternative, the Counsel for the Defence points out that the referral to the Trial Chamber of matter of the joinder, at this stage of the proceedings, would deprive it of a pre-trial phase under the Pre-Trial Judge which could cause prejudice to the Accused. Indeed, he states that there is a strong likelihood that the Trial Chamber will seize itself of the entire *Merhi* case and that it will raise the issue of the expedition of the proceedings in terms of its effect on the interests of the five accused and not those of Mr Mehri alone.<sup>27</sup> He thus concludes that the Request should not be determined by the Pre-Trial Judge until he has reached a minimum level of preparedness after having received the prosecution case file.<sup>28</sup>

#### IV. Statement of reasons

11. The Pre-Trial Judges notes, firstly, an ambiguity in the Request. In point of fact, it states that the Prosecution will file a Motion for Joinder once the *in absentia* proceedings have been initiated<sup>29</sup> while attaching to the Request the Motion for Joinder itself. In theory, as the Head of Defence Office<sup>30</sup> rightly points out, that Motion for Joinder should have been filed after the initiation of the *in absentia* proceedings and after the assignment of Counsel for the Defence. However, at the present time that ambiguity no longer has an effect on the Request insofar as *in absentia* proceedings have been initiated and Counsel for the Defence assigned. The Pre-Trial

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<sup>24</sup> Response, para. 7.

<sup>25</sup> *Id.*, paras 17 and 18.

<sup>26</sup> *Id.*, paras 20-22.

<sup>27</sup> *Id.*, paras 8, 25-30.

<sup>28</sup> *Id.*, paras 32 and 34.

<sup>29</sup> Request, para. 10.

<sup>30</sup> Observations of the Defence Office, para. 4.

Judge notes moreover that, since the Request was filed, the Prosecution has filed before the Trial Chamber a motion for the joinder of cases in the case of *Ayyash et al.*<sup>31</sup>

12. The Pre-Trial Judge further recalls that Rule 89 (E) of the Rules sets forth that he may refer to the Trial Chamber any matter which, in his opinion, can be adjudicated by the Chamber before it is seized of the case. In a previous decision, the Pre-Trial Judge set out the criteria for determining whether matters can be referred to the Trial Chamber under that provision.<sup>32</sup> It is appropriate to refer to those criteria in the case at hand, which are as follows:

- a) the matters referred do not fall or no longer fall within the jurisdiction of the Pre-Trial Judge, but within that of the Trial Chamber;
- b) the referral of those matters does not cause prejudice to the respective rights of the Parties and the victims participating in the proceedings; and
- c) the Trial Chamber is able to determine those matters at this stage of the proceedings and its decision is likely to expedite the preparation for trial; or, alternatively
- d) even if they are matters that the Trial Chamber is unable to determine at this stage of the proceedings, their referral to the Trial Chamber is likely to enable it to prepare the case effectively, for example by already requesting the submissions of the Parties and of the Legal Representative of Victims.

13. With regard to the first criterion, it should be noted that the matter of the joinder of cases concerns both the *Merhi* case and the case of *Ayyash et al.* In this respect, the term “issue” in Rule 89 (E) of the Rules must be understood in the broad sense and not in a limited one as suggested by the Counsel for the Defence. In this instance, the *Merhi* case currently falls within the jurisdiction of the Pre-Trial Judge, whereas since 25 October 2013, the Trial Chamber has been seized of the case of *Ayyash et al.*<sup>33</sup> Those two chambers therefore each have jurisdiction to rule on the matter with regard to the cases of which they have been respectively seized. For the

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<sup>31</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/TC, Prosecution Motion for Joinder, 30 December 2013.

<sup>32</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. 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>33</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Corrected Version: The Pre-Trial Judge’s Report Prepared Pursuant to Rule 95 (A) of the Rules of Procedure and Evidence, confidential, 25 October 2013. A redacted version was filed on 11 December 2013.

proper administration of justice, it is appropriate to resolve this dispute as to which chamber has jurisdiction and to give a single chamber the responsibility of determining the matter of the joinder of cases. Therefore, it should be determined which chamber is best suited to rule on that matter. In this respect, the Pre-Trial Judge considers that, in the case at hand, the Trial Chamber is best able to consider whether the criteria that are customarily applied when determining a joinder of cases – in particular those relating to the nature of the evidence at issue or the effect that the joinder will have on the conduct of the ongoing proceedings and the rights of the participants in the proceedings – have been met.

14. With regard to the second criterion, the Pre-Trial Judge considers that, contrary to the submission of the Counsel for the Defence, the referral of the Motion for Joinder to the Trial Chamber is not a decision that might prejudice the rights of Mr Mehri. In point of fact, the referral of that matter to the Trial Chamber does not deprive the Counsel for the Defence of the right to make his observations on the legality and appropriateness of the joinder, on the legal and practical consequences that it could have on the rights of Mr Mehri and on any other considerations linked to that. Furthermore, the Pre-Trial Judge points out that, contrary to the submission of the Head of Defence Office<sup>34</sup> and the Counsel for the Defence,<sup>35</sup> the joinder of cases does not necessarily and automatically deprive the Defence of the role of the Pre-Trial Judge during the pre-trial phase. Indeed, Rule 70 (C) of the Rules sets forth that the Trial Chamber may, after consultation with the Pre-Trial Judge, perform his functions as part of the pre-trial phase. Therefore, in principle, the pre-trial phase of a case, even in the event of the joinder of cases, falls within the jurisdiction of the Pre-Trial Judge.

15. Furthermore, it is the Trial Chamber alone that is able to assess the effect the joinder of cases will have on the rights of Mr Mehri, taking account in particular of the status of the proceedings taking place before it.

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<sup>34</sup> Observations of the Defence Office, para. 7.

<sup>35</sup> See para. 10 above.

16. Lastly, with regard to the third criterion, the Pre-Trial Judge considers well-founded the Prosecution's argument that, once *in absentia* proceedings are initiated in the *Merhi* case, it should be determined, at the earliest opportunity and in conformity with the rights of the Parties, whether it should be joined to the case of *Ayyash et al.*, all the more so as the start of the trial in that case is scheduled for 16 January 2014. Under these circumstances, it seems reasonable to refer the Motion for Joinder to the Trial Chamber forthwith so that it may anticipate future deadlines and organise its work accordingly, as well as that of the participants in the two trials. This should serve to expedite the course of the proceedings or, at the very least, allow the Trial Chamber to prepare the case efficiently, notably by requesting the observations of the participants in the proceedings with regard to the Motion for Joinder.

17. It follows from the above that the criteria required in order to refer the matter raised in the Request to the Trial Chamber, on the basis of Rule 89 (E) of the Rules, have effectively been met.

## V. Disposition

### FOR THESE REASONS,

Pursuant to Rule 89 (E) of the Rules,

### THE PRE-TRIAL JUDGE,

**REFERS** the matter of the joinder of the cases of *Ayyash et al.* (STL-11-01) and *Merhi* (STL-13-04) to the Trial Chamber, pursuant to Rule 70 (B) of the Rules.

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

Leidschendam, 2 January 2014

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[signature]

Daniel Fransen  
Pre-Trial Judge

