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:	**4 March 2014**
Original language:	**English**
Classification:	**Public**

DECISION SETTING A TIMEFRAME FOR THE MERHI DEFENCE TO REQUEST THE RECALL OF WITNESSES

(Extract from Official Public Transcript of Hearing on 4 March 2014, page 33, line 7 to page 41, line 16)

On […] 12th of February, 2014, the Trial Chamber ordered counsel for Hassan Habib Merhi to file by Friday, the 14th of March, any requests to re-call for cross-examination any of the 15 witnesses who have so far testified in the trial, and to file any challenge to the documents and other material so far admitted into evidence including witness statements admitted under Rule 155, which allows witness statements to be tendered into evidence in lieu of the witness testifying orally.

On the 19th of February, counsel for Mr. Merhi filed an application for leave to reconsider the decision and/or to certify it for appeal. On the 24th of February, the Prosecution informed the Trial Chamber that it would not be responding. No other counsel for the accused or the Legal Representative for the Victims filed a response.

In their submissions, counsel for Mr. Merhi argued in essence that it was premature to set a timetable for them to request the re-call of any witnesses or challenge any evidence and that it was unjust to impose such a timetable, especially considering that it only gave them

four weeks to review all of the evidence admitted in three weeks of hearing. They drew the Trial Chamber's attention to the volume of material, citing hundreds of thousands of pages of evidence and disclosed material and stated that their legal support staff were only in place on the 13th of January and their evidence support staff on the 2nd of February this year. Counsel, however, did not nominate a date nor state when they would be in a position to inform the Trial Chamber as to whether they wish to ask to re-call any of the 15 witnesses for cross-examination or to challenge any of the evidence thus admitted at trial.

The first question is reconsideration. Under Rule 140 of the Tribunal's Rules of Procedure and Evidence, the Trial Chamber may, proprio motu, which means of its own volition, or at the request of a party with the leave of the Presiding Judge, reconsider a decision, if necessary to avoid injustice. Reconsideration is an exceptional remedy and a party must show that the decision has resulted in an injustice. The Presiding Judge must grant leave before the Trial Chamber can reconsider a decision. That is my role here and I have carefully reviewed the arguments of counsel for Mr. Merhi, and in the circumstances I have just outlined, we will -- I will grant leave to reconsider the decision of the 12th of February, 2014.

The Trial Chamber is not necessarily convinced that the decision has resulted in an injustice or has caused any real prejudice to Mr. Merhi and his right to a fair trial. However, in the circumstances and most especially that we have adjourned to allow counsel for Mr. Merhi sufficient time to prepare their defence at trial and to mount their investigations, we will exceptionally reconsider the decision and vary the time for counsel to file their submissions by another three weeks, that is, to Friday, the 4th of April, 2014. So in this sense, this decision today is more a variation of a time-limit than a true reconsideration under Rule 140.

The new date, we observe, will be three months and two weeks since Mr. Aouini was assigned to represent Mr. Merhi. The Trial Chamber considers the dates of employing legal support staff and evidence review staff to be irrelevant to this reconsideration and variation of that time-limit.

In making this decision, the Trial Chamber stresses that this is not a decision on the merits of any application to re-call witnesses or to contest evidence, but is merely a variation of a time-period in which the applications should be made.

Further, it concerns submissions, that is, this decision concerns submissions, only on whether any of the 15 witnesses so far heard at trial should be re-called to allow counsel for

Mr. Merhi time to question them and whether they wish to challenge the admission into evidence of any material so far admitted into evidence.

The Trial Chamber notes that only six of the 15 witnesses were questioned by Defence counsel during the first few weeks of hearing. We note that our decision on the trial management and reasons for joinder at paragraph 94 wrongly due to a proofreading error said nine, it' s in fact six, and a correction will shortly be issued.

Of these 15 witnesses, seven were either the direct victims of the explosion or family members of some of those who were killed on 15 February 2005. The remaining witnesses were Lebanese officials who assisted in the collection of material at the crime scene, a fire-fighter, an English counter-terrorist police officer who assisted in collecting material from the seabed near the St. Georges Hotel in Beirut, and a Prosecution investigator who testified about examining closed-circuit video footage of the events before the explosion.

Of the witnesses cross-examined by the Defence counsel, five were involved in attending the scene of the explosion or the collection of physical evidence and one was that Prosecution investigator. The 181 Prosecution exhibits so far admitted are either connected with these witnesses or are documents admitted from the bar table such as videos, photographs and the statements of the witnesses that the Prosecution intends to use in lieu of oral testimony under Rule 155. These exhibits include also include artifacts like vehicle parts recovered near the scene of the explosion.

Seven exhibits have been tendered by the Defence and one by the Legal Representative for the Victims.

Further, the Trial Chamber has ruled that 163 documents, records, or collections are admissible "from the bar table.” Some of these, 36 of the 163, have so far been admitted into evidence. The remainder are yet to be formally tendered. Counsel for two of the accused, for Mr. Badreddine and Mr. Oneissi, contested the admission into evidence of only seven of these documents or records in total.

Of these 163 exhibits, 36 documents or records comprising 1542 images, 17 videos, two maps, two models, were ruled admissible under Rule 154 on the 13th of January and they have all been now received into evidence.

Another 127 documents or records which comprise 113 records of victim interviews, two compilations of death certificates, 12 medical or similar records were ruled admissible by

the Trial Chamber under Rule 155 on the 28th of January, unopposed by any of the counsel. These documents are yet to be formally received into evidence.

The Trial Chamber has ruled that 45 witness statements may be received into evidence under Rule 155 in the first part of the Prosecution's case but to date has received the evidence of only 11 of those witnesses. At least one Defence team challenged the admission into evidence of statements for 44 of the 71 proposed Rule 155 witnesses but mainly on the basis of their form and their compliance with the relevance Practice Direction but not the substance of the evidence contained in the statements. And of these statements, 24 concerned the victims of the explosion, including their identification and the surrender of bodies to families, nine provide evidence about CCTV and other imagery of the scene of the explosion, and 12 provide evidence about the search and investigation of the site of the explosion, including collecting human remains, artifacts and mechanical parts. For the most part, this evidence is not controversial and none of it goes directly to the acts and conduct of any of the five accused.

The Defence motion, however, referred to a Prosecution exhibit list of 695 pages and a witness list of some 115 pages and 365.000 pages of evidence. But these figures taken out of context are quite misleading.

Here, at most, the relevant figure is 60 witnesses of some 540 on the Prosecution's witness list, including those who testified in court and those ruled admissible under Rule 155. And there are approximately 300 Prosecution documents which are relevant here. These include the exhibits admitted and the documents ruled admissible under Rule 154. Furthermore, more than 6.000 of the 7.345 pages so far -- of exhibits so far in the Tribunal's document management system of Legal Workflow are photographs, 6. 000 of these are photographs. That is, 83 per cent of the admitted exhibits are photographs and photo compilations, for example, of the crime scene before and after the explosion and movements of Mr. Rafik Hariri in the months leading to his death.

So the real number of pages of exhibits requiring analysis which includes the witness statements is therefore somewhere between about 600 and 700 pages, of which many pages are simply extracts in Arabic translated into English of the Lebanese investigation case file. Many of the relevant extracts are no more than several paragraphs in length. Additional to this are the 34 witness statements that the Trial Chamber has held it will admit into evidence but has yet to formally give exhibit numbers. These witness statements fall into the same

category, namely, crime scene investigation, body identification, collection of artifacts, and closed circuit TV. They total maybe a thousand pages of reading material, some of which is repetitive because some witness statements refer to the same documents in the Lebanese investigation case file.

So when placed in this context, it is apparent that the task confronting Defence counsel in analysing this material is nowhere near as daunting as was presented in their motion for reconsideration or certification for appeal or -- nor in their oral submissions made by Mr. Aouini before I started reading this decision.

The Trial Chamber thus considers that having over three months from the date of assignment to analyse this particular material in this particular phase of the case is adequate time for counsel to inform the Court whether it is challenging any of this evidence, all of which was referred to in public motions filed by the Prosecution on the 20th of November, on the 13th of December, 2013, and the 10th of January, 2014. Counsel for Mr. Merhi have been on notice of the evidence initially presented by the Prosecution for some time, the substance of which was disclosed to them from early January through to the 7th of February, 2014.

The Trial Chamber must set dead-lines for the efficient case management of the trial. Decisions on the possible re-calling of witnesses for questioning must be made in a timely fashion, timely manner, to allow the Prosecution to make all travel and visa arrangements for witnesses to attend the court in The Hague. This can take up to a month, so it is essential that any decisions to re-call witnesses are made well before the trial recommences.

The Trial Chamber will issue a written decision giving fuller reasons as soon as possible.

We also make some observations on the request for certification for appeal. Counsel for -- these observations not a decision.

Counsel for Mr. Merhi have also sought to have the decision certified for appeal. As the Trial Chamber has decided to reconsider the original decision or vary it, thus superseding it, it cannot now be certified for appeal. However, we will make some general remarks on the application and we do so to assist counsel especially for Mr. Merhi in making future applications for certification for appeal.

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[…]

First, counsel for Mr. Merhi did not identify any distinct questions to certify for appeal as they are required to do, under the relevant jurisprudence of the Appeals Chamber, instead relying upon the general arguments raised in support of their request for reconsideration. Any future applications for certification to appeal must follow the guide-lines set down by the Appeals Chamber.

Second, the general issue raised, namely, having sufficient time to prepare for trial in the narrow sense here relating to this particular decision, possibly "could" but not "would" significantly affect the fair and expeditious conduct of the proceedings, which is the test under Rule 126, but not the outcome of the trial.

But thirdly, and most importantly, on the second limb of the test for certification, namely, "for which an immediate resolution by the Appeals Chamber may materially advance the proceedings," the request for certification could not have succeeded because the question of a dead-line for filing an application to re-call witnesses at this early stage of the trial could not benefit from an immediate resolution by the Appeals Chamber.

Why? Because any party at any point until the issuing of the judgment could make such an application, of course showing good reasons, to re-call a witness. The original dead-line of the 14th of March, which is now extended to the 4th of April, is not an absolute dead-line. It is merely an internal time-line or timetable for the case management of the trial.

And we will, of course, bear that in mind when we receive Mr. Aouini's submissions on the 4th of April. If you wish to make further submissions as to particular difficulties you are facing in respect to particular witnesses, we will, of course, bear that in mind in relation to any decision we make.