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

THE TRIAL CHAMBER

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

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

Registrar: Mr. Daryl Mundis

Date: 31 March 2014

Original language: English

Classification: Public

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

REASONS FOR DECISION ON RECONSIDERATION OR CERTIFICATION OF THE DEADLINE FOR CERTAIN EVIDENTIARY MOTIONS (MERHI)

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INTRODUCTION

1. This decision concerns the function of judicial case management and, in particular, varying administrative guidelines issued to the Parties.

2. The Statute of the Special Tribunal charges the Trial Chamber with ensuring a fair and expeditious trial to all accused persons. This involves a careful balancing of various rights and interests, especially those of the Accused and the Prosecution but also taking into account, where appropriate, the interests of the participating victims, Lebanon, the United Nations, and the international community in general.

3. Ensuring a fair and expeditious trial entails careful judicial case management by the Trial Chamber—which includes, in the case of the Accused, Mr. Hassan Habib Merhi, issuing relevant orders to facilitate his counsel's preparation for the resumption of trial. A fair and expeditious trial incorporates the right of an accused person to effective representation; this is actually recognised in Rule 57 (D) of the Special Tribunal's Rules of Procedure and Evidence. A Chamber must carefully monitor this, especially where the Accused are tried *in absentia* and are not giving instructions to counsel, and thus cannot assure themselves of the adequacy of their legal representation.

4. Effective judicial case management requires a proper working relationship between the Trial Chamber and the counsel for the Parties. Each counsel, and, where necessary, the Legal Representatives of Victims and the Defence Office, must cooperate. Defence counsel must proactively represent their Accused; this includes making formal submissions to the Trial Chamber and, additionally, liaising with their Defence and Prosecution colleagues out of court to exchange relevant information and to avoid raising unnecessary matters before the Trial Chamber. In this regard, cooperation in judicial case management is an essential part of the preparation for trial.

5. Counsel for Mr. Merhi filed a motion asking the Trial Chamber to reconsider or to certify for appeal an order it made on 12 February 2014 setting an administrative timetable for making submissions in relation to evidence already heard by 14 March 2014.[1] Defence counsel's motion to reconsider or to certify for appeal, is however, is based on the mistaken belief that, before filing a response they must review *all* the material disclosed by the Prosecution—that is, hundreds of

[1] *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, STL-11-01/T/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 (Urgent Request for Reconsideration and/or for Certification to Appeal the Order of 12 February 2014 relating to the Evidence admitted before the Joinder), 19 February 2014.

thousands of pages of documents. Rather than asking for a variation of the date, they sought a formal reconsideration or a certification for appeal of the decision

6. Because of this apparent misapprehension as to the level of evidence review necessary before making the relevant submissions, and the role of judicial case administration in a Tribunal using the principles of international criminal law, this decision, concerning a relatively minor administrative deadline, is reasoned in some detail. The decision explains the rationale of judicial case management and why Defence counsel do not need to read hundreds of thousands of pages of documents before filing their submissions. The Trial Chamber has already issued guidelines for the conduct of trial, giving practical directions concerning scheduling and similar matters,[2] but here provides some further guidance to assist Defence counsel in their trial preparation.

PROCEDURAL BACKGROUND

7. Between being seised of the case of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra* on 25 October 2013, and the temporary adjournment of the trial on 12 February 2014, the Trial Chamber issued a number of case management orders relating to both the pre-trial and trial phases. These included orders to receive written evidence including witness statements and oral evidence, and to regulate disclosure and Lebanon's cooperation with the Special Tribunal. On 11 February 2014, with written reasons following on 25 February 2014, the Trial Chamber ordered the joinder of the *Ayyash* case with that of *Prosecutor v. Hassan Habib Merhi*.[3]

8. By the date of joinder, the Trial Chamber had heard 12 days of evidence in the *Ayyash* case—15 Prosecution witnesses and had received 189 exhibits.[4] It had also granted two Prosecution motions under Rule 154 'Admission of Documents'[5] and allowed in part one Prosecution motion under Rule 155 'Admission of Written Statements and Transcripts in lieu of Oral Testimony',

[2] Directions on the Conduct of the Proceedings, 16 January 2014.
[3] Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014, para. 1. *See also* STL-11-01/T/TC and STL-13-04/PT/T, transcript of proceeding 11 February 2014, pp. 91-96.
[4] Decision on Trial Management, para. 56; Reasons for Decision Granting Leave to Reconsider Deadline for Motions Concerning Evidentiary Decisions Issued Before Joinder, 7 March 2014, para. 1, fn. 4.
[5] Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps and 3-D Models, 13 January 2014; Decision on Prosecution's Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014.

relating to 45 witnesses.[6] The Prosecution has not yet formally tendered into evidence the statements of 34 of these witnesses.[7]

9. On 12 February 2014, the Trial Chamber heard submissions from the Parties on preliminary matters concerning the judicial case management of the newly joined trial. The Trial Chamber discussed with counsel for Mr. Merhi their right to request the recall of any of the 15 Prosecution witnesses previously heard at trial and the exclusion of evidence previously received or ruled admissible. A deadline of 14 March 2014 was set for any such submissions.[8] Defence counsel did not object to the date during the hearing nor suggest an alternative or later date. Despite this silence on 12 February 2014, one week later, on 19 February 2014, they filed a motion seeking reconsideration and or certification for appeal of the Trial Chamber's decision.[9] Neither the Prosecution[10] nor any other Party responded.

10. During a status conference on 4 March 2014, the Presiding Judge formally granted leave to reconsider the deadline of 14 March 2014 for submissions on the recall of witnesses for cross-examination or the exclusion of evidence previously received or ruled admissible. The Trial Chamber then issued an oral decision, varying the deadline to 4 April 2014 and dismissing the request for certification to appeal the decision, with written reasons to follow.[11] On 7 March 2014, the Presiding Judge of the Trial Chamber issued his written reasons for granting leave for reconsideration.[12]

THE EVIDENCE – WITNESS TESTIMONY AND DOCUMENTS

11. Of the fifteen witnesses called to testify by the Prosecution in the first three weeks of trial, seven were victims of the explosion or their family members. The remaining eight were Lebanese officials who assisted in collecting material at the scene of the explosion, a fire-fighter, a British

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[6] First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013; Second Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 30 January 2014.
[7] STL-11-01/T/TC, transcript of 23 January 2014 (admitting the evidence of PRH-310 under Rule 155); transcript of 29 January 2014 (admitting the evidence of PRH-333, PRH-555, PRH-053, PRH-371, PRH-288, PRH-239, PRH-286, PRH-316, PRH-463, and PRH-587 under Rule 155). *See also* transcript of 10 February 2014, p. 92; Decision on Protective Measures for Six Witnesses Giving Evidence under Rule 155, 26 February 2014.
[8] Decision on Trial Management, para. 92, Disposition; STL-01/T/TC, transcript of 12 February 2014, pp. 66-67, 121.
[9] 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 (Urgent Request for Reconsideration and/or for Certification to Appeal the Order of 12 February 2014 relating to the Evidence admitted before the Joinder), 19 February 2014.
[10] E-mail of 24 February 2014 from the Prosecution to the Trial Chamber and the Parties.
[11] Transcript of 4 March 2014, pp. 33-41.
[12] Reasons for Decision Granting Leave to Reconsider Deadline for Motions Concerning Evidentiary Decisions Issued Before Joinder.

counter-terrorist police officer, and a Prosecution investigator. Defence counsel cross-examined six of these witnesses, but none of the seven victims.

12. The 189 exhibits admitted into evidence comprise approximately 7,345 pages. The majority—more than 6,000 of the 7,345 pages, *i.e.* greater than 80%—are photographs. Approximately 600 to 700 additional pages come from the Lebanese investigation case file, including witness statements—many of these are English translations of the original Arabic documents. The remainder are mainly videos and records relating to victims of the explosion or the recovery of evidence.

13. The Trial Chamber has ruled 163 documents, records, and collections admissible under Rule 154. These documents comprise background images and images of the scene of the explosion, video footage, maps, two 3-D models, records of victim interviews, compilations of death certificates and medical or similar records. Counsel for Mr. Badreddine and Mr. Oneissi contested the admissibility of seven of the 163 documents. Thirty-six of these documents, records and collections have been formally received into evidence and given exhibit numbers. The Trial Chamber has also held the evidence of 45 witnesses admissible under Rule 155, in the form of brief written statements in lieu of oral testimony. The Trial Chamber has issued four relevant decisions under Rules 154 and 155, introducing and outlining these documents and their relevance.[13]

14. Of the 45 witnesses whose statements were ruled admissible under Rule 155, 24 concern the victims of the explosion, nine concern CCTV and other imagery of the scene of the explosion, and the remaining twelve concern the search and investigation of the site of the explosion, including the collection of human and other remains. The admissibility of this evidence was contested by counsel for some of the Accused on formal grounds, but generally not on matters of substance. Eleven of these statements have been formally admitted into evidence, included in the 7,345 pages detailed above. The brief statements of the remaining 34 witnesses, and their associated exhibits, amount perhaps to an additional 1,000 pages.

[13] First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013; Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014; Decision on Prosecution's Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014; Second Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 30 January 2014.

RECONSIDERING A DECISION

15. A Chamber may reconsider its *own* decisions under Rule 140, 'Power to Reconsider Decisions'. It may '*proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice'. Rule 140 does not elaborate on what is meant by avoiding injustice. The Appeals Chamber has emphasised that reconsideration is exceptional and that the reference to an *actual* injustice ensures that the Rule will not be used as 'an ordinary remedy' to redress 'imperfections in a decision or to circumvent the unfavourable consequences of a ruling'.[14] The party seeking reconsideration must show an injustice that 'involves prejudice' and 'demonstrated on specific grounds.'[15] If prejudice or 'an injustice' is shown, reconsideration may be granted on grounds that include an error of law or abuse of discretion, or the existence of new facts or a material change in circumstances.[16]

16. The crux of the Defence arguments here is that they want more time. But how much is not specified. Defence counsel submitted, not during the status conference on 12 February 2014, but rather in a motion filed a week later, that they could not review the evidence referred to in paragraphs 11-14 by 14 March 2014. They argued that the Trial Chamber should reconsider its deadline to avoid an injustice.[17]

17. Specifically, they asserted that the Trial Chamber abused its trial management discretion by taking into account irrelevant considerations, failing to give sufficient weight to relevant considerations and erring in its appreciation of relevant matters of fact.[18] The evidence, however, is neither complex nor voluminous. It is but a small, discrete and manageable part of a larger case; the Trial Chamber itself reviewed all the evidence tendered under Rules 154 and 155 before deciding its admissibility.

18. The deadline of 14 March 2014 could not have caused injustice—as Rule 140 requires—or any prejudice to counsel for Mr. Merhi. Alone, this would be sufficient to deny the motion. No material change in circumstances has occurred, beyond the fact that counsel now want the deadline varied. And, in the circumstances, this was not an unreasonable request. However, counsel for Mr.

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[14] STL-11-01/PT/AC/R176*bis*, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, 18 July 2012 ('Applicable Law Reconsideration Decision'), paras 22-23. *See also* STL-11-01/PT/TC, Decision on Reconsideration of the Trial *In Absentia* Decision, 11 July 2012, para. 7.
[15] Applicable Law Reconsideration Decision, paras 24-25. *See also* STL-11-01/PT/AC, Decision on Request by Counsel for Messrs Badreddine and Oneissi for Reconsideration of the Appeals Chamber's Decision of 25 October 2013, 10 December 2013, para. 10.
[16] Applicable Law Reconsideration Decision, para. 25.
[17] Motion, para. 16.
[18] Motion, para. 17.

Merhi went further by arguing that the Trial Chamber was requiring them 'to renounce' their 'right to review the evidence already admitted'.[19] This, however, is incorrect and misunderstands both the nature of judicial case management and how a Trial Chamber applying the well-established principles of international criminal law receives evidence.

19. In the status conference on 4 March 2014, the Trial Chamber heard further submissions from Defence counsel concerning 'the nature of' their 'preparation level and how it is conflicting with the various trial proceeding stages.'[20] In answer to judicial questions exploring the discrete nature of the evidence in question and how the Trial Chamber could manage the resumption of the trial, including hearing evidence in stages,[21] Defence counsel stated that they understood the possibility of staggering the reception of evidence,[22] but could not evaluate the evidence previously received or ruled admissible without familiarity with the Prosecution evidence as a whole.[23]

20. Yet for two reasons the approach is flawed. First, counsel should, in all of the circumstances outlined, be competent to review the evidence. But second, and critically, any Party may move the Trial Chamber to recall a witness—upon good cause being shown—*at any time before judgement is issued*. A Party could also make further submissions on the admissibility of evidence already received. This lies at the heart of the apparent misunderstanding of the function of judicial case management and of how evidence is admitted. The Defence cannot have been prejudiced by the setting of this administrative deadline because such decisions are not 'set in concrete'[24] and may be varied if circumstances change. And it was varied.[25] Hence, filing a lengthy motion seeking reconsideration or certification to appeal the decision was unnecessary.

21. Counsel for Mr. Merhi have repeatedly stated, in absolute terms, that they cannot take a position on *any* piece of evidence before mastering the entirety of the material disclosed to them.[26]

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[19] Motion, para. 29.
[20] Transcript of 4 March 2014, p. 6, and generally pp.6-32.
[21] Transcript of 4 March 2014, pp. 13-17.
[22] Transcript of 4 March 2014, p. 17.
[23] Transcript of 4 March 2014, pp. 22, 24-26.
[24] Transcript of 4 March 2014, p. 41.
[25] Decision Denying Leave to Reconsider a Decision of the Pre-Trial Judge re Disclosure Regarding a Computer, 11 March 2014, para. 13 (describing variation as 'merely changing or varying the terms or conditions of an existing decision' which does 'not necessarily require a reassessment of the reasoning in the decision'—but noting that a 'variation could of course be tantamount to a reconsideration by producing what is effectively a substitution of the original decision').
[26] Transcript of 12 February 2014, pp. 83-84 ('to be business-like, honest, diligent as Defence counsel means that you need to have full mastery of the entirety of the case file before getting involved in any debate on the merits or any material debate […] [W]e think that we are not unable to question the witnesses [sic] even if there are noncontentious witnesses, even if they are eye-witnesses of the explosion. What we need is some time, a certain period of time, a reasonable period of time, to be able to examine the whole case file'); transcript of 4 March 2014, pp. 11-23 ('[h]ow can

They cannot 'voice an opinion on the merits of a single piece of evidence without having *an overview* of the case file, the evidence comprising it and the lines of defence' that they intend to follow.[27] The deadline of 14 March 2014, they say, 'circumvented' the 'exceptional volume' of the Prosecution evidence and pre-trial disclosure as they had to 'review the whole case file' before making submissions. This meant reviewing some 365,000 to 667,000 pages of documents disclosed, plus exhibits contained in a list of 695 pages, and witnesses in a 115 page witness list.[28] In other words, everything ever disclosed to them by the Prosecution. Leaving aside that the concept of a 'case file' of relevant evidence does not actually exist at trial at the Special Tribunal—the Parties perform their own investigations and produce their own evidence in court, and no 'case file' is produced—this argument overstates the scale and nature of the evidence that Defence counsel must review before deciding whether to file any requests within the (now varied) administrative deadline.[29]

22. And, moreover, what they say they must do is physically impossible. In a case of this size and complexity, no-one person could possibly ever read every page of the material electronically disclosed. No suggestion has been made that the other Defence or Prosecution counsel have done so. Counsel for Mr. Merhi certainly need an overview of the case and to understand the relevance of the evidence, but they could never be expected to have first read and mastered every document electronically disclosed to them.[30] The Trial Chamber reiterates—as a matter of providing guidance under the head of judicial case management—that trial preparation does not require counsel to have read every document *ever disclosed*. Defence counsel must know the case against an Accused and prepare a defence, but to gain this knowledge they can employ many different tools including using sophisticated search engines to conduct electronic searches across disclosure databases.

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we fully represent the interests of Mr. Merhi with regards to all the fine details and the evidence submitted by the Prosecutor while we have been unable, up until now, to determine the interests of Mr. Merhi with regards to the entirety of the file?'), 24 ('[w]e need to have a total or semi-total understanding of the components of the case file'); motion, para. 23 (referring to '[t]he need for the Defence, before any discussion on the merits, to review the whole case file'). Also, Additional Observations Regarding the Time Needed to Prepare the Defence of the Interests of Mr. Merhi, 17 February 2014 ('Merhi Additional Observations'), paras 31-35.

[27] Merhi Additional Observations, para. 33 ('aucun avocat honnête, sérieux et consciencieux n'oserait se prononcer sur le fond d'un pan de la preuve sans avoir *une vue globale* du dossier, des éléments de preuve le composant et de la ligne de défense qu'il entend poursuivre', emphasis added). On the issue of joinder, counsel for Mr. Merhi were similarly ambivalent as to whether they felt bound to consider all the evidence or only an overview of the evidence before they could form a view: *compare* transcript of 14 January 2014, p. 16 ('We cannot take a stance regarding joinder without having knowledge of the *entire* [case file]', emphasis added), *with* pp. 22-23 ('JUDGE AKOUM: I have a question. Do you think that you need to examine all the documents in the case file in order to have a say in the joinder motion? […] MR. AOUINI: […] In order to examine all these documents, we will need many months. We limited ourselves to a period of two months at least *in order to have a general overview* and in order to have a say in the motion matter and so that we can be satisfied […] That is what we are asking for, a period of two months', emphasis added).

[28] Motion, para. 23.

[29] Transcript of 4 March 2014, pp. 37-39; motion, paras 23, 27.

[30] Transcript of 4 March 2014, pp. 9-10.

23. As part of this absolute position, counsel for Mr. Merhi also stated[31] that they could not give a concrete time-frame for making their submissions,[32] because they 'might' first employ an explosive expert who 'might' advise them on whether to request the recall of witnesses,[33] as this would enable them to explore alternative theories as the cause of the explosion.[34] Defence counsel, however, have not demonstrated to the Trial Chamber the relevance of explosives expertise in assessing, in relation to the documents and witnesses referred to in paragraphs 11 to 14, whether witnesses should be recalled or the *admissibility* of the documents challenged.[35] Submissions in relation to explosives evidence and expertise thus appear to be premature.[36] As is Defence counsel's submission that they may be taken to 'tacitly accept' the truth of evidence if they fail to cross-examine a witness.[37] The hearing of evidence has barely begun and they may request the recall of a witness at any time before judgement.

24. The Trial Chamber consciously structured the first few weeks of the *Ayyash* trial—before the joinder hearing—to hear the least contentious evidence,[38] and the evidence heard or admitted does not go directly to the acts and conduct of any of the Accused. The aim was to allow a fair and expeditious trial to Mr. Merhi if his case were joined.

25. Defence counsel also describe the Trial Chamber's decision as 'unreasoned'.[39] However, at the status conference they presented the Trial Chamber with a list of proposed 'Counter-balancing Measures for Prejudice',[40] which included that the Trial Chamber assure them of their right to recall previously heard witnesses for cross-examination, and to request the exclusion of evidence previously received or ruled admissible.[41] The Trial Chamber immediately affirmed this,[42] and set a

[31] Transcript of 4 March 2014, p. 11.
[32] Transcript of 4 March 2014, pp. 23-24. *See also* pp. 19 ('within six or seven weeks' they could provide 'a clear image of our preparations'), 22-23.
[33] Transcript of 4 March 2014, p. 21. *See also* p. 26 ('we are considering recruiting an explosives expert because there are other versions, other theories').
[34] Ttranscript of 4 March 2014, pp. 18-21.
[35] Including the thousands of pages of photographs and the Rule 155 witness statements relating to the identification and collection of bodies.
[36] The explosives evidence has yet to be called; *see, e.g.*, transcript of 12 February 2014, pp. 33-34 (anticipating calling 'in the next stage of the case' an 'expert in relation to the nature and cause of the explosion').
[37] Motion, para. 29, fn. 45 (citing ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 310). *See also* Merhi Additional Observations, para. 35.
[38] Transcript of 12 February 2014, pp. 7-8.
[39] Motion, paras 3, 21, 27, 33.
[40] Transcript of 12 February 2014, pp. 3-4.
[41] Transcript of 12 February 2014, p. 66. *See further* Préjudices et Mesures compensatoires, document provided to the Trial Chamber and the Parties by e-mail of 12 February 2014.
[42] Transcript of 12 February 2014, p. 66 (affirming, 'of course' the Trial Chamber 'has no problem with receiving any request from the Merhi defence in respect of those two particular points').

deadline of four further weeks to file any connected motions.[43] This deadline was set in the considered context of the time elapsed since the assignment of Defence counsel,[44] the nature and extent of the evidence already heard or admitted, and the scope of the challenges to it by counsel acting for the other four Accused.[45] But Defence counsel did not then—*nor any time that day*—query this administrative deadline of 14 March 2014, nor express their concern, nor request an alternative date.

26. Rule 126 (B) actually *requires* counsel to apply for appropriate ruling or relief orally—unless otherwise decided by the Trial Chamber; status conferences and hearings should be used to address such matters without unnecessary formalities.[46] Defence counsel also asserted that the Trial Chamber set its deadline without hearing submissions on the time they needed to prepare and their 'ability to contest a whole portion of the evidence within a short time frame'.[47] However, the record reveals that they made submissions in court both before and after the Trial Chamber set its deadline.[48]

CONCLUSION

27. The Trial Chamber varied to 4 April 2014 the original deadline of 14 March 2014 as part of its on-going judicial case management, not because the first date caused any injustice to the Defence. Lead counsel, by 4 April 2014, will have been assigned for more than three months, assisted by an experienced and competent support team for much of that time, and will have had all the relevant evidence for at least two months.[49] Defence counsel overstate the extent of the task confronting them—the evidence they must review is nowhere near as extensive as they assert. The original deadline was an administrative time-limit for the purpose of judicial case management, and was not

[43] Transcript of 12 February 2014, p. 67.
[44] Transcript of 12 February 2014, p. 65.
[45] Motion, paras 26, 28.
[46] Rule 126 (B) reads: 'After a case is assigned to the Trial Chamber, either Party may apply by motion for appropriate ruling or relief. Such a motion shall be oral unless decided otherwise by the Trial Chamber.'
[47] Motion, para. 18. *See also* paras 20 (referring to the 'specific and realistic time the Defence might need to review the evidence admitted before the joinder'), 21 (arguing that the Trial Chamber 'omitt[ed] to *seek* the[ir] observations', emphasis added).
[48] Motion, para. 19, fns 21-23. For example, counsel's submissions that they could not take any substantive position without having reviewed the entire 'case file' and that it was 'highly premature' to address case management issues because 'we've just embarked on our pre-trial phase' were made on 14 January 2014, 11 February 2014, and 12 February 2014—the last of which just two transcript pages (approximately five minutes) before the Trial Chamber set its deadline. Counsel made further submissions on the need for 'full mastery of the case file before getting involved in any debate on the merits or any material debate' beginning just six transcript pages (approximately 19 minutes) after the Trial Chamber set its deadline. *See* STL-13-04/PT/TC, transcript of 14 January 2014, pp. 10-12, 21-22, 32; transcript of 11 February 2014, pp. 64-65; transcript of 12 February 2014, pp. 64-65, 73, 83. *See also* motion, fn. 22 (citing Merhi Additional Observations).
[49] The most recent testimony was given on 10 February 2014, almost two months before the new deadline of 4 April 2014.

definitive. Moreover, the Trial Chamber stresses, a Party seeking a variation of a judicial case management order should, generally, not file it as an application for reconsideration.[50]

OBSERVATIONS ON THE REQUEST FOR CERTIFICATION FOR APPEAL

28. Counsel for Mr. Merhi also sought to have the decision certified for interlocutory appeal.[51] They wanted the Trial Chamber to send to the Appeals Chamber an interlocutory appeal on the issue of changing a date for the filing of some submissions; a date that, according to the normal principles of judicial case management, could have been—and was—varied. As the original decision (which strictly relates to the date for filing submissions) is now superseded, it cannot be certified for appeal and the remainder of the motion would therefore normally simply be dismissed. However, here, some additional observations may assist counsel in future requests for certification.

29. First, the motion failed to identify with requisite precision the legal issues for which certification for appeal was sought. The motion argued that the deadline imposed by the Trial Chamber was 'likely to seriously affect the fairness of the proceedings and, as a result, the outcome of the trial', but failed to define with any precision the 'discernible error' that had to be appealed.[52] A mere cross-reference to its arguments for reconsideration is insufficient.[53] An issue for certification for appeal must be identified with precision.

30. Second, the issue here—the time counsel required before filing their submissions—while *possibly* falling within the first limb of the test in Rule 126, in that it *might* 'significantly affect the fair and expeditious conduct of the proceedings'—but obviously not their outcome—could not fall within the second limb. An immediate resolution by the Appeals Chamber could not materially advance the proceedings for the obvious reason that the issue in question had not necessarily been determined to finality. This deadline was administrative and the Trial Chamber, on the application of the Party affected could have varied it—as it has. Most significantly, it is stressed that this particular issue—the recall of witnesses or the potential exclusion of evidence—can be revisited, upon good cause being shown, at any time before judgement is issued. Such an issue is therefore not capable of *immediate* resolution by the Appeals Chamber—that is, now.

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[50] Reasons for Decision Granting Leave to Reconsider Deadline for Motions Concerning Evidentiary Decisions Issued before Joinder, para. 11.
[51] Motion, para. 31. *See also* paras 3, 15, Disposition (seeking reconsideration '*and*/or' certification, emphasis added).
[52] Motion, paras 32-33.
[53] Motion, para. 33, fn. 46.

31. Finally, the motion asserts—although without any citing any international case law in support—that minor scheduling matters such as the deadline here 'are regularly and validly certified and brought before the Appeals Chambers of the *ad hoc* tribunals.'[54] This assertion, however, is actually contrary to the established jurisprudence on the exceptional nature of interlocutory appeals.[55]

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

VARIED its order of 12 February 2014 setting a deadline of 14 March 2014 for counsel for Mr. Hassan Habib Merhi to file any requests to re-call previously heard witnesses for cross-examination and any requests for the exclusion of evidence previously received or ruled admissible; and

ORDERED counsel for Mr. Merhi to file any requests to re-call witnesses for cross-examination or to exclude evidence previously received or ruled admissible, by **4 April 2014;** and

DISMISSED the request to certify the decision for appeal.

[54] Motion, para. 33.
[55] STL-11-01/PT/AC/AR126.2, Decision on Appeal against Pre-Trial Judge's Decision on Motion by Counsel for Mr. Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 11; STL-11-01/PT/AC/AR126.1, Corrected Version of Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, paras 8-9 (citing ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 17 ('[i]nterlocutory appeals […] interrupt the continuity of trial proceedings and so should only be allowed when there is a significant advantage to doing so—that is, when, in the Trial Chamber's judgement, there is an important issue meriting immediate resolution by the Appeals Chamber'); ICC, Situation in Uganda, ICC-02/04-01/05, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, para. 19).

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

Dated 31 March 2014
Leidschendam
The Netherlands

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy