



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No: STL-11-01/T/AC/AR126.7

Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko, Judge Rapporteur
Judge Ivana Hrdličková

Registrar: Mr Daryl Mundis

Date: 21 May 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 APPEAL BY COUNSEL FOR MR MERHI AGAINST TRIAL CHAMBER'S
“DECISION ON TRIAL MANAGEMENT AND REASONS FOR DECISION ON JOINDER”**

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O’Sullivan, Mr Emile Aoun &
Mr Thomas Hannis

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz, Mr John Jones &
Mr Iain Edwards

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Larochelle

Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Guénaél Mettraux
Mr Geoffrey Roberts



INTRODUCTION

1. We are seized of an Appeal by counsel for Mr Merhi¹ against the Trial Chamber's joinder and trial management decision of 25 February 2014,² in which the Trial Chamber provided reasons for its oral decision to join the *Ayyash et al.* and *Merhi* cases and set out certain modalities with respect to the proceedings following joinder. Counsel request that we set the Impugned Decision aside, order that separate trials be held, or, alternatively, that the proceedings with respect to Mr Merhi be kept at the pre-trial stage coupled with a complete adjournment of the *Ayyash et al.* trial for at least six months.³ However, we conclude that counsel for Mr Merhi have not shown any error by the Trial Chamber in taking certain measures to ensure that Mr Merhi's right to a fair trial is respected. We therefore dismiss the appeal.

BACKGROUND

2. A full procedural history of the proceedings is provided in the Impugned Decision.⁴ In short, on 28 June 2011, the Pre-Trial Judge confirmed an indictment issued against Messrs Ayyash, Badreddine, Oneissi and Sabra for their alleged role in the explosion of 14 February 2005 in Beirut resulting in the death of twenty-two persons, including the former Lebanese Prime Minister Rafiq Hariri, and in injuries to over 200 others.⁵ On 31 July 2013, the Pre-Trial Judge confirmed a separate indictment issued against Mr Hassan Habib Merhi for his alleged role in the same attack.⁶ The Trial Chamber ordered a trial *in absentia* against Mr Merhi,⁷ as it had already done for the other four Accused.⁸ On 30 December 2013, the Prosecutor filed a

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.7, F0006, Interlocutory Appeal Brief from the Merhi Defence Against the Decision on Joinder, 15 April 2014 ("Appeal"). All further references to filings and decisions relate to this case number unless otherwise stated.

² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1424, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014 ("Impugned Decision").

³ Appeal, p. 15.

⁴ Impugned Decision, paras 2-18.

⁵ STL-11-01/I/PTJ, F0012, 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. This indictment was subsequently amended, the last time before joinder in July 2013 (*see* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1022, Redacted Version of the Decision Relating to the Prosecution Request of 21 June 2013 for Leave to Amend the Indictment of 6 February 2013, Dated 31 July 2013, 2 August 2013).

⁶ STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0008, Public Redacted Version of the "Decision Relating to the Examination of the Indictment of 5 June 2013 Issued Against Mr Hassan Habib Merhi" Dated 31 July 2013, 11 October 2013.

⁷ STL, *Prosecutor v. Merhi*, STL-13-04/I/TC, F0037, Decision to Hold Trial *In Absentia*, 20 December 2013.

⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/TC, F0112, Decision to Hold Trial *In Absentia*, 1 February 2012.

motion before the Trial Chamber, requesting the joinder of the two cases.⁹ After hearing the views of the Parties, the Legal Representative of Victims, the Head of Defence Office and the Registrar, the Trial Chamber issued, on 11 February 2014, an oral order joining the two cases, with written reasons to follow.¹⁰ It also requested the Parties to present further submissions the next day on the measures necessary to ensure a fair and expeditious trial for all five Accused.¹¹ Then, on 25 February 2014, the Trial Chamber issued the Impugned Decision.

3. Following counsel for Mr Merhi's request for certification of the Impugned Decision, the Trial Chamber certified the following issue for appeal, namely:

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

(i) inviting counsel for Mr. Merhi to participate, though not as a party, in the *Ayyash* proceedings and to raise any issue of substance and procedure before joinder;

(ii) allowing the Head of the Defence Office to raise issues related to the fairness of the proceedings for Mr. Merhi before the opening statements of the Defence in the *Ayyash* proceedings, but after the Prosecution and the Legal Representatives of Victims, and thereafter—both in writing and orally;

(iii) ordering an adjournment of the trial until at least early to mid-May 2014 with the possible exception of hearing the evidence identified in paragraph 110 of its Decision of 25 February 2014;

(iv) holding several meetings with counsel for Mr. Merhi to ensure trial preparation; and

(v) setting deadlines, which counsel for Mr. Merhi considers premature, to file any requests to re-call previously heard witnesses for cross-examination, and any requests for the exclusion of previously heard or admitted evidence and to file any submissions requesting variation of the Trial Chamber's directions on the conduct of proceedings, made under Rule 130.¹²

⁹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, F1289, Prosecution Motion for Joinder, 30 December 2013. The Prosecutor had asked the Pre-Trial Judge to refer the matter of joinder to the Trial Chamber (STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0033, Prosecution Request for Rule 89 (E) Referral of the Matter of Joinder, 18 December 2013). The Pre-Trial Judge referred the issue of joinder to the Trial Chamber on 2 January 2014 (STL, *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0050, Decision Referring the Matter of Joinder of Cases to the Trial Chamber, 2 January 2014).

¹⁰ STL, *Prosecutor v. Ayyash et al. & Prosecutor v. Merhi*, STL-11-01 & STL-13-04, Transcript of 11 February 2014 ("Transcript of 11 February 2014"), pp. 91-96.

¹¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 12 February 2014 ("Transcript of 12 February 2014").

¹² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1472, Decision on Certification of 'Decision on Trial Management and Reasons for Decision on Joinder', 31 March 2014 ("Certification Decision"), Disposition (emphasis in the original).

4. Counsel for Mr Merhi filed the Appeal after having been granted an extension of time,¹³ setting out three grounds of appeal.¹⁴ The Prosecutor responded by praying that the Appeal should be dismissed.¹⁵

DISCUSSION

I. Preliminary issues

A. Request for Suspensive Effect

5. Before filing the Appeal, counsel for Mr Merhi requested the Appeals Chamber to “grant suspensive effect to the appeal” against the Impugned Decision.¹⁶ We rejected that request because we had not yet been seized of the Appeal.¹⁷ Following the filing of the Appeal, counsel brought a fresh motion, seeking “a stay in the execution of the Impugned Decision until the issue of the legality of the joined proceedings is finally decided on appeal”.¹⁸ The stay as requested includes “an effective adjournment of the *Ayyash* trial” and the “suspension of all deadlines to decide on the admissibility of the evidence admitted prior to joinder and [...] all other evidence”.¹⁹

6. Counsel argue that to continue the joined proceedings would prejudice the outcome of the Appeal and render it “meaningless”.²⁰ They also claim that a suspension of the Impugned Decision is required to avoid the risk of “further and irreversible impact on the fairness of the trial and on the fundamental rights” of the Accused.²¹ The Prosecutor responds that the Suspension Request exceeds the scope of certification and falls outside the Appeals Chamber’s

¹³ F0005, Order by Judge Rapporteur on Request for Extension of Time and Word Limits, 4 April 2014.

¹⁴ See Appeal.

¹⁵ F0008, Prosecution Response to Merhi Defence “*Mémoire d’appel interlocutoire de la Défense de Merhi à l’encontre de la décision sur la jonction*”, 29 April 2014 (“Prosecutor’s Response”), para. 55. The Judge Rapporteur dismissed a request by counsel for Mr Merhi to file a reply (see F0012, Order by Judge Rapporteur on Request for Leave to File a Reply, 8 May 2014).

¹⁶ F0001, Merhi Defence Request Seeking Suspensive Effect of the Appeal Against the Decision on Joinder, 3 April 2014, para. 9.

¹⁷ F0004, Order on Request for Suspensive Effect of Appeal, 4 April 2014, para. 4.

¹⁸ F0007, Urgent Merhi Defence Request for Suspensive Effect of the Appeal Against the Decision on Joinder, 17 April 2014 (“Suspension Request”), para. 8.

¹⁹ *Ibid.*

²⁰ Suspension Request, para. 10.

²¹ *Id.* at para. 11.

jurisdiction.²² He argues that, even if it were within the certified issue, counsel have not demonstrated that suspension is necessary to preserve the appellant's position if the Appeal succeeds and that there is no prejudice to the Defence given that the *Ayyash et al.* proceedings have been adjourned.²³

7. In this decision, we deal simultaneously with counsel for Mr Merhi's request for the suspension of the Impugned Decision and the merits of their Appeal. For the reasons indicated below, we dismiss the Appeal. Consequently, we do not deem it necessary to make any determination regarding the Suspension Request.²⁴

B. Scope of the appeal

1. Proceedings before the Trial Chamber

8. Counsel for Mr Merhi sought certification of the Impugned Decision before the Trial Chamber with respect to three distinct issues.²⁵ As a first issue, they identified the question of whether the Trial Chamber erred by ruling on the joinder of the cases at too late a stage in the *Ayyash et al.* case.²⁶ As a second issue, they identified the question of whether the Trial Chamber erred by depriving Mr Merhi of the pre-trial phase because of the late joinder.²⁷ Finally, as the third issue, they identified the question of whether the compensatory measures ordered by the Trial Chamber were adequate to allow the continuation of the trial.²⁸

9. In the Certification Decision, the Trial Chamber rejected the Merhi request with respect to the first and second issues. On the first issue (joinder *per se*), the Trial Chamber held that the request had not identified a "discrete certifiable issue".²⁹ In particular, it stated that the "issue

²² F0009, Prosecution Response to "*Requête urgente de la Défense de Merhi aux fins de suspension de l'appel à l'encontre de la décision sur la jonction*", 29 April 2014 ("Prosecutor's Response to Suspension Request"), para. 3.

²³ *Id.* at paras 4-5.

²⁴ See ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07 OA 6, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008 ("As the Appeals Chamber examined the merits of the issue of suspension concurrently with the merits of the appeal and came to a conclusion as to its outcome, the Appeals Chamber decided that suspension would be a superfluous measure and on that account should not be made the subject of any order.").

²⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1439, Merhi Defence Request for Certification to Appeal the Decision on Joinder and Trial Management, 4 March 2014.

²⁶ *Id.* at paras 9-14.

²⁷ *Id.* at paras 15-18.

²⁸ *Id.* at paras 19-24.

²⁹ Certification Decision, para. 33.

was—and remains—the *modalities* of joinder”.³⁰ With respect to the second issue (alleged deprivation of pre-trial stage), the Trial Chamber similarly held that the Defence had failed to point to a certifiable issue in that it had not shown how the Trial Chamber’s assumption of the Pre-Trial Judge’s functions would significantly affect the fair and expeditious conduct of the proceedings.³¹ Ultimately, the Trial Chamber granted certification “on the basis of the arguments” presented in the last limb of the Defence request³² and formulated the issue as whether it had “erred in ordering joinder *and* in taking measures to ensure a fair trial” to Mr Merhi.³³ It also included a list of these measures.³⁴

2. Arguments of the Parties

10. In their Appeal, counsel for Mr Merhi first claim that the Certification Decision was incorrect and that the Trial Chamber failed to apply the proper legal criteria when assessing their certification request.³⁵ At the same time they also assert that the Trial Chamber “allowed the Defence to lodge an appeal of the Impugned Decision in its entirety, even though it redefined the context of the question it considered to be founded”.³⁶ In this regard counsel argue that the issue of the validity of the joinder cannot be separated from those of the modalities following joinder.³⁷ They also submit that it was unfair for the Trial Chamber to limit the appeal to the matters certified “and to thereby confine the Defence in an appeal devoid of purpose”.³⁸ They complain that the Trial Chamber reformulated the certifiable issue proposed by them, “thereby [restricting them] to an appeal with no relation to the one [they] initially intended to lodge”.³⁹

11. Accordingly, counsel seek to advance three grounds of appeal. Under Ground 1, they challenge the validity of the joinder decision *per se*.⁴⁰ Under Ground 2, they argue that the Trial Chamber erred by refusing to consider at the opening of the *Ayyash et al.* trial reasonable

³⁰ *Ibid.* (emphasis in the original).

³¹ Certification Decision, paras 37-38.

³² *Id.* at para. 47.

³³ *Ibid.* (emphasis in the original); *see also* Certification Decision, para. 44.

³⁴ *Id.* at para. 47.

³⁵ Appeal, para. 20.

³⁶ *Id.* at para. 21.

³⁷ *Ibid.*

³⁸ Appeal, para. 22.

³⁹ *Ibid.*

⁴⁰ Appeal, paras 24-33.

alternatives to protect Mr Merhi's rights.⁴¹ Under Ground 3, they claim the Trial Chamber erred by planning to continue admitting prosecution evidence, and thus propelled the *Merhi* case into the trial phase before considering whether the case was ready for trial.⁴²

12. The Prosecutor responds that counsel's challenges against the Certification Decision are not properly before the Appeals Chamber and that, even if they were, such challenges are without merit.⁴³ He further argues that all issues raised by the Defence that go beyond those covered by the certification should be dismissed without further consideration.⁴⁴ These include the arguments on joinder *per se* and the alleged deprivation of the pre-trial phase.⁴⁵

3. Discussion

13. In our previous decisions, we have clarified the requirements of certification under Rule 126 (C) of the Rules of Procedure and Evidence ("Rules")⁴⁶ and the scope of our appellate jurisdiction with respect to appeals following such certification. We have held that the first-instance chamber may not simply certify a whole decision for appeal, but must certify only specific appealable issues;⁴⁷ that a party requesting certification must identify such issues, and that the certifying chamber must—in the absence of an issue identified by the party—pinpoint those issues itself;⁴⁸ that the scope of the appeal is determined solely by the certification

⁴¹ *Id.* at paras 34-39.

⁴² *Id.* at paras 40-46.

⁴³ Prosecutor's Response, paras 4, 9-12.

⁴⁴ *Id.* at paras 5, 13-18.

⁴⁵ *Ibid.*

⁴⁶ The same standard applies to certification requested under Rule 90 (B) (ii).

⁴⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.1, F0012, *Corrected Version of Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial In Absentia Decision*, 1 November 2012 ("Trial In Absentia Appeal Decision"), para. 11.

⁴⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/90.2, F0007, *Decision on Defence Appeals Against Trial Chamber's "Decision on Alleged Defects in the Form of the Amended Indictment"*, 5 August 2013 ("Indictment Appeal Decision"), paras 10-11.

decision;⁴⁹ and that the chamber should not certify issues that do not arise from the impugned decision, and, in case it does, the Appeals Chamber will not deal with them.⁵⁰

14. As pointed out by the Prosecutor, counsel for Mr Merhi's attempt to raise on appeal alleged errors in the Certification Decision is procedurally improper. Indeed, we have previously explained that we "will usually not second-guess the decision granting certification".⁵¹ An appeal under Rule 126 (C), which is only permitted by virtue of certification by the Trial Chamber or the Pre-Trial Judge, is not an opportunity to challenge the correctness of their decision to provide the certificate in the first place. We may intervene in interlocutory decisions of the Trial Chamber or the Pre-Trial Judge only on appeal as of right or following certification.⁵² Here, no such certification was requested or granted with respect to the Certification Decision.

15. We may also provide guidance on the proper certification standard, and we have indeed done so in the past when required.⁵³ However, clarification is not necessary in this case. The Trial Chamber did as it was required by Rule 126 (C): it analysed the issues identified by the Defence, rejected those it held did not meet the standard of Rule 126 (C) and certified the Impugned Decision for appeal on the basis of the issue it held did meet the test. It was within the Trial Chamber's power to reformulate the appealable issue identified by counsel for Mr Merhi—after all it is the Trial Chamber's obligation to "pinpoint" such issues.⁵⁴

⁴⁹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.6, F0003, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on the Oneissi Defence's Request for Disclosure Regarding a Computer", 12 May 2014 ("Computer Disclosure Appeal Decision"), para. 11; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 ("LRV Appeal Decision"), para. 22.

⁵⁰ Computer Disclosure Appeal Decision, para. 11; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.5, F0003, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judge's "Decision on Sabra's Tenth and Eleventh Motions for Disclosure", 6 November 2013 ("Disclosure Appeal Decision"), paras 6-7.

⁵¹ Indictment Appeal Decision, para. 6.

⁵² See ICTY, *Prosecutor v. Delić*, IT-04-83-Misc.1, Decision on Prosecution's Appeal, 1 November 2006, p. 3; see ICC, *Situation in the Democratic Republic of the Congo*, ICC-01-04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006 (holding that there is no right of appeal against decisions denying leave to appeal under the provisions of the Statute of the International Criminal Court, which mirror the relevant provisions of our Rules).

⁵³ See Indictment Appeal Decision, para. 6; see STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.2, F0008, 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. 10.

⁵⁴ Indictment Appeal Decision, para. 10.

16. With regard to counsel's submission that the Trial Chamber certified the whole Impugned Decision for appeal,⁵⁵ we note that this assertion is not correct. The Trial Chamber certified only one issue for appeal, namely, the "modalities of the joinder ordered by the Trial Chamber as a whole",⁵⁶ and our jurisdiction to address the Appeal is circumscribed by this certificate.⁵⁷ The reliance of counsel⁵⁸ on a previous decision in which we held that it is not for the Parties or the first-instance chamber to determine whether a matter is properly before the Appeals Chamber is misplaced. That particular part of the decision concerned the admissibility of the appeal rather than the scope of certification.⁵⁹ Similarly, counsel misinterpret a decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.⁶⁰ In that decision, the Appeals Chamber explicitly stated that it would consider only arguments directly relating to the certified issue.⁶¹ Here, counsel conflate the question of what was certified by the Trial Chamber with the question of which arguments support their appeal with respect to that specific issue. Moreover, counsel's claim that the issue of joinder *per se* is so inextricably linked with the issue of the modalities of the joinder that they cannot properly appeal the latter is unpersuasive.⁶² We note that there is no further explanation why they cannot do so. On the contrary, this assertion merely reflects counsel's disagreement with the approach taken by the Trial Chamber and we therefore reject it.

17. Consequently, we dismiss all arguments relating to issues not covered by the Certification Decision. This includes Ground 1 (arguing that the joinder was in error) in its totality.⁶³ We will also not consider any arguments under Grounds 2 and 3 that go beyond the issue of the modalities or compensatory measures ordered by the Trial Chamber to ensure a fair trial to Mr Merhi.

⁵⁵ Appeal, para. 21.

⁵⁶ Certification Decision, para. 43; *see also* paras 47-48, Disposition.

⁵⁷ *See* Computer Disclosure Appeal Decision, para. 11; LRV Appeal Decision, para. 22.

⁵⁸ Appeal, para. 21 (referring to LRV Appeal Decision, para. 8).

⁵⁹ LRV Appeal Decision, paras 7-18.

⁶⁰ Appeal, para. 21.

⁶¹ ICTY, *Prosecutor v. Stanišić and Simatović*, IT-09-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings, 16 May 2008, paras 7-10.

⁶² Appeal, para. 21.

⁶³ Arguments raised under that ground which potentially relate to other grounds will be considered elsewhere if necessary.

II. Standard of review on appeal

18. The Trial Chamber enjoys considerable discretion in relation to the management of the proceedings before it.⁶⁴ In the parts relevant to this Appeal, the Impugned Decision sets out the modalities of the trial proceedings after joinder. It is therefore a discretionary decision to which we accord deference if it complies with settled principles.⁶⁵ Such deference is based on the recognition of the Trial Chamber's organic familiarity with the day-to-day conduct of the proceedings and the practical demands of the case.⁶⁶ As we have held before, on appellate review, the issue is not whether or not we agree with the Impugned Decision but whether the Trial Chamber is shown to have exercised its discretion incorrectly.⁶⁷ Accordingly, we will not interfere with the Impugned Decision unless the Trial Chamber has committed a discernible error. Such error exists where the Trial Chamber i) based its decision on an incorrect interpretation of the governing law; ii) made a patently incorrect finding of fact; or iii) reached a decision so unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁶⁸

III. Applicable Law

19. Under Rule 70 (B) of the Rules "[p]ersons accused of the same or different crimes falling within Article 1 of the Statute may be jointly charged and tried". Rule 130 (A) provides:

The Trial Chamber, after hearing the parties, may give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial. These may include *inter alia* orders relating to disclosure and directions to the Parties regarding communication between Parties and witnesses.

⁶⁴ See, e.g., ICTY, *Prosecutor v. Mladić*, IT-09-92-AR73.2, Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods, 28 November 2013, para. 21 ("It is well established that matters of practice, procedure, and the general conduct of the proceedings are within a trial chamber's discretion [...]"); ICTR, *Prosecutor v. Ngirabatware*, ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012, para. 12 ("Decisions relating to the general conduct of trial [...] are matters within the discretion of the Trial Chamber."); see also ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07 OA 10, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 12 July 2010, para. 33.

⁶⁵ Disclosure Appeal Decision, para. 9; Trial *In Absentia* Appeal Decision, para. 5.

⁶⁶ Disclosure Appeal Decision, para. 9.

⁶⁷ *Ibid.* (with reference to the relevant case-law of this and other courts and tribunals).

⁶⁸ *Ibid.* (with reference to the relevant case-law of this and other courts and tribunals).

IV. Whether the Trial Chamber erred in ordering certain measures in conjunction with the joinder

20. We recall that an appellant is required to “specify with clarity the alleged errors in the Impugned Decision”.⁶⁹ The brief submitted by counsel for Mr Merhi is lacking in this regard. While counsel raise a number of alleged errors, it is not always clear how the arguments submitted in support of a specific assertion of error actually relate to that assertion. Nevertheless, and taking into account that we are dismissing all arguments not covered by the certificate granted by the Trial Chamber,⁷⁰ we have identified in the Appeal a number of matters falling under the certified issue, *i.e.*, the different measures which the Trial Chamber ordered to ensure a fair trial to Mr Merhi. These matters include the Trial Chamber’s invitation to counsel for Mr Merhi to participate as a non-party in the *Ayyash et al.* proceedings prior to joinder; permitting the Head of Defence Office to raise issues related to the fairness of the proceedings for Mr Merhi in the *Ayyash et al.* case; ordering an adjournment of the trial after the joinder; and monitoring the state of trial preparation with respect to counsel for Mr Merhi.

A. Whether the Trial Chamber erred in inviting counsel for Mr Merhi to participate as a non-party in the Ayyash et al. proceedings

21. Among the efforts to mitigate any possible prejudice to Mr Merhi by the conduct of the *Ayyash et al.* proceedings prior to joinder, the Trial Chamber invited counsel for Mr Merhi to participate as an observer to these proceedings and to make submissions.⁷¹ Counsel declined the Chamber’s invitation to participate as a non-party.⁷²

22. On appeal, counsel for Mr Merhi allege that, pending a decision on joinder, the Trial Chamber erred in proposing to counsel the status of “interested observer” as the “only alternative” to adjournment of the *Ayyash et al.* trial.⁷³ They argue that the Trial Chamber should have suspended the *Ayyash et al.* proceedings to first rule on the joinder, which would have

⁶⁹ Indictment Appeal Decision, para. 13; *see also id.* at para. 12.

⁷⁰ *See above* para. 17.

⁷¹ Impugned Decision, para. 58

⁷² STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript, 20 January 2014, pp. 58-59; STL, *Prosecutor v. Merhi*, STL-13-04/PT/TC, F0066, Position of the Merhi Defence Regarding the Invitation to Participate in the *Ayyash et al.* Case Pursuant to Rules 130 and 131 of the Rules, 24 January 2014 (“Merhi Filing on Participation”).

⁷³ Appeal, paras 34, 37.

allowed Mr Merhi to be represented at the trial.⁷⁴ According to counsel, the Trial Chamber erred by unreasonably weighing financial considerations and the expeditiousness of the *Ayyash et al.* trial against the protection of Mr Merhi's fundamental rights.⁷⁵ The Prosecutor responds that counsel for Mr Merhi have not demonstrated any error on the part of the Trial Chamber for offering them the opportunity to participate in the *Ayyash et al.* proceedings as a non-party; furthermore, counsel did not seek an adjournment of the *Ayyash et al.* proceedings pending joinder.⁷⁶

23. We first observe that on several occasions the Trial Chamber invited counsel for Mr Merhi to participate in the *Ayyash et al.* proceedings.⁷⁷ Counsel never accepted that invitation.⁷⁸ On appeal, they fail to explain why the Trial Chamber's invitation to them "to intervene or to file observations in [the *Ayyash et al.* proceedings] in relation to any matter which they believe may affect the rights of their client"⁷⁹ was an error or how they were prejudiced by such invitation. We note the broad powers of the Trial Chamber under Rule 130 to manage the conduct of the proceedings. Indeed, Rule 131 specifically allows the Trial Chamber to "invite or grant leave to a State, organisation or person to make written submissions on any issue".

24. Counsel also seek to frame the alleged error in a different light by asserting that the Trial Chamber viewed the invitation to counsel as "the only alternative to adjournment of the *Ayyash* trial".⁸⁰ Counsel provide no support for this assertion and we could dismiss the argument on that basis alone.⁸¹ Moreover, we are not persuaded by counsel's assertion that the Trial Chamber erred in not suspending the trial proceedings until after a joinder of the two cases. For one, counsel declined the Trial Chamber's invitation to participate in the *Ayyash et al.* proceedings and did not request to suspend that case. We agree with the Prosecutor that counsel can hardly allege error by the Trial Chamber for not granting particular relief that they themselves never

⁷⁴ *Id.* at para 36.

⁷⁵ *Ibid.*

⁷⁶ Prosecutor's Response, paras 36-38.

⁷⁷ STL, *Prosecutor v. Merhi*, STL-13-04, Transcript of 14 January 2014 ("Transcript of 14 January 2014"), pp. 44-45; STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 16 January 2014 ("Transcript of 16 January 2014"), p. 37; STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 20 January 2014 ("Transcript of 20 January 2014"), p. 59.

⁷⁸ See Merhi Filing on Participation.

⁷⁹ Transcript of 20 January 2014, p. 59.

⁸⁰ Appeal, para. 34.

⁸¹ See ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement"), paras 16, 18, 26.

requested.⁸² Second, counsel have failed to substantiate their claim that the Trial Chamber “had a duty to ensure that all the alternatives to the violation of the right of the anticipated fifth accused to be represented at his trial were unreasonable”.⁸³ We stress again that the Trial Chamber has broad discretion in managing the trial proceedings. On appeal, we are not required to explore the various procedural options available to the Trial Chamber. Rather, the question before us is whether the Trial Chamber’s exercise of its discretion in a particular matter was so unreasonable as to constitute an abuse of that discretion.⁸⁴

25. Here, the decision not to adjourn the start of the *Ayyash et al.* proceedings pending the request for joinder was one of the options within the discretion of the Trial Chamber. Counsel have failed to demonstrate that exercising this option and inviting counsel for Mr Merhi to participate as a non-party in these proceedings constituted an abuse of the Trial Chamber’s discretion. We recall in this context that the Trial Chamber specifically allowed counsel for Mr Merhi to seek the recall of witnesses already heard, to apply for the exclusion of evidence and to request reconsideration of decisions rendered before joinder.⁸⁵

26. In conclusion, counsel for Mr Merhi have failed to demonstrate that the Trial Chamber erred by inviting them to participate in the *Ayyash et al.* case prior to ordering joinder.

B. Whether the Trial Chamber erred by not hearing the Head of Defence Office at the beginning of the Ayyash et al. trial

27. During a hearing held in the *Merhi* proceedings on 14 January 2014, the Head of Defence Office requested an opportunity to speak on behalf of Mr Merhi “*in limine litis* to express reservations at the beginning of the Ayyash case”.⁸⁶ He reiterated his request at the opening of the *Ayyash et al.* trial on 16 January 2014.⁸⁷ The Trial Chamber permitted him to speak, however, only after the opening statements of the Prosecutor and the Legal Representative of Victims and before the opening statements of the Defence.⁸⁸ The Head of Defence Office then

⁸² Prosecutor’s Response, para. 37.

⁸³ Appeal, para. 35.

⁸⁴ See above, para. 18.

⁸⁵ Impugned Decision, para. 92.

⁸⁶ Transcript of 14 January 2014, p. 40.

⁸⁷ Transcript of 16 January 2014, p. 8

⁸⁸ See Impugned Decision, para. 8; see also Transcript of 20 January 2014, pp. 4-12.

addressed the Chamber.⁸⁹ In the Impugned Decision, the Trial Chamber held that the Head of Defence Office had “no particular right to address the Trial Chamber *in limine litis* on the first day of trial—*before* the Prosecutor’s opening statement”.⁹⁰

28. On appeal, counsel for Mr Merhi allege that the Trial Chamber abused its discretion by refusing to hear the reservations that the Head of Defence Office intended to express at their request before the opening of the *Ayyash et al.* trial.⁹¹ The Prosecutor does not respond to this particular issue.

29. We recall that the question of whether the Trial Chamber erred by not permitting the Head of Defence Office to speak at the outset of the first day of the proceedings in the *Ayyash et al.* case was the subject of a certification request by the Head of Defence Office himself.⁹² This request was not granted⁹³ and the Head of Defence Office as the affected organ of the Tribunal is not party to these appeal proceedings. However, the Trial Chamber did include the matter in its certificate,⁹⁴ and counsel for Mr Merhi argue that the Head of Defence Office was acting upon their request.⁹⁵ We therefore proceed to address it.

30. We first consider that counsel have not substantiated their assertion that the Trial Chamber erred in “refusing to hear [the Head of Defence Office’s observations] at the appropriate time” with any arguments as to why this was an error and we could dismiss this particular argument for that reason.⁹⁶ In any event, we stress again the broad margin of discretion afforded to the Trial Chamber in conducting the proceedings before it. This includes decisions on who may appear before it and in what order, subject to the general guidelines provided by the Statute and Rules. With respect to the Head of Defence Office, Rule 57 (F) provides him with a right of audience on certain matters. However, the Rule does not require the Trial Chamber to hear the Head of Defence Office at any particular time during an oral hearing. Furthermore, if the Head of Defence Office had wanted to raise certain reservations before the commencement of

⁸⁹ Transcript of 20 January 2014, pp. 5-12.

⁹⁰ Impugned Decision, para. 12 (emphasis in the original).

⁹¹ Appeal, para. 37.

⁹² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1440, *Demande de certification d’appel de la décision sur la jonction*, 4 March 2014, paras 25-26.

⁹³ Certification Decision, para. 26.

⁹⁴ Certification Decision, para. 47, Disposition.

⁹⁵ Appeal, para. 37.

⁹⁶ See *Krajišnik* Appeal Judgement, paras 16, 26.

opening statements, he could have done so by way of written submission. Moreover, we recall that the Head of Defence Office did exercise the opportunity given to him by the Trial Chamber and addressed the court.⁹⁷

31. In sum, counsel for Mr Merhi have not shown that the Trial Chamber committed an error by allowing the Head of Defence Office to speak after and not before the opening statements of the Prosecutor and the Legal Representative of Victims.

C. Whether the Trial Chamber erred in adjourning the trial, with the possible exception of hearing the evidence of three Prosecution witnesses and receiving relevant documents into evidence

32. In the Impugned Decision, the Trial Chamber ordered the adjournment of the trial until at least early to mid-May 2014, with the possible exception of hearing three Prosecution witnesses who had been scheduled to testify in the week before the joinder and possibly also receiving relevant documents into evidence.⁹⁸ It also set a number of deadlines for the Parties related to the preparation for the trial.⁹⁹

33. Counsel for Mr Merhi assert that the Trial Chamber erred in deciding that a suspension of trial hearings was a measure that safeguarded the rights of Mr Merhi.¹⁰⁰ They argue that the trial was in fact only suspended in part, since they were required within short deadlines to present their position on the evidence already admitted, even though they had not yet conducted investigations or been able to benefit from the assistance of experts.¹⁰¹ In addition, they refer to the fact that the Trial Chamber left open the possibility of continuing to hear a number of witnesses and to admit new evidence at any time.¹⁰² They claim that all of this infringed their right to properly prepare for the trial.¹⁰³

⁹⁷ Transcript of 20 January 2014, pp. 5-12; *see also* Impugned Decision, para. 12.

⁹⁸ Impugned Decision, para. 110, Disposition.

⁹⁹ *Id.* at Disposition.

¹⁰⁰ Appeal, para. 40.

¹⁰¹ *Id.* at para. 42.

¹⁰² *Id.* at para. 40.

¹⁰³ *Id.* at para. 43.

34. The Prosecutor primarily responds that the Defence has not demonstrated that setting tentative timelines and deadlines was an error.¹⁰⁴ He submits that the Defence cannot be prejudiced by the preparation for trial since it has not been required to take final positions on evidence admitted or witnesses heard and no new trial date was set in the Impugned Decision.¹⁰⁵

35. In ordering compensatory measures following the joinder, the Trial Chamber correctly considered that it had to ensure the rights of Mr Merhi and the other four Accused after joinder and, in particular, that the measures should safeguard the rights of the Accused, and the interests of the victims, the Tribunal and of the international community as a whole to have the trial proceed expeditiously and without unreasonable delay.¹⁰⁶ The Trial Chamber specifically considered the need to “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”.¹⁰⁷

36. With respect to the Trial Chamber’s order to adjourn the trial to at least “early to mid-May 2014”,¹⁰⁸ counsel have failed to establish why such adjournment is unreasonable or how it prejudices them. Indeed, in the Impugned Decision, the Trial Chamber did not set a date for the resumption of trial proceedings. It merely stated that “[t]he actual recommencement date [...] will be the subject of a specific scheduling order” after having heard from the Parties.¹⁰⁹ Counsel’s arguments are therefore premature and speculative.¹¹⁰

37. As regards the Trial Chamber’s order on the filing of submissions in relation to witnesses already heard and evidence previously admitted, the Trial Chamber subsequently varied this time-limit.¹¹¹ Moreover, the Trial Chamber has made clear that this “is not an absolute deadline”

¹⁰⁴ Prosecutor’s Response, para. 49; *see also id.* at para. 43.

¹⁰⁵ *Id.* at paras 49, 51.

¹⁰⁶ Impugned Decision, para. 109.

¹⁰⁷ *Id.* at para. 96.

¹⁰⁸ *Id.* at para. 110, Disposition.

¹⁰⁹ *Id.* at para. 111.

¹¹⁰ We note in this regard that the Trial Chamber, after hearing from the Parties, has set a new date for the resumption of trial and that it certified that decision for appeal immediately. Counsel for Mr Merhi have already indicated that they will file an appeal against this decision (*see* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.8, Order by Judge Rapporteur on Request for Extension of Time for Filing of Interlocutory Appeal, 15 May 2014).

¹¹¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 4 March 2014, pp. 34-35.

and that it will consider further applications “until the issuing of judgment”.¹¹² In these circumstances, counsel have failed to demonstrate that the Impugned Decision was an abuse of discretion.

38. Finally, the Trial Chamber noted that, despite the adjournment of the trial, it might hear the evidence of three previously scheduled witnesses and receive relevant documents into evidence.¹¹³ Counsel have not shown how the Trial Chamber abused its discretion by merely mentioning this *possibility*. Nor have they shown how they are prejudiced by it.

39. In conclusion, counsel for Mr Merhi have not demonstrated an error in the Impugned Decision with respect to the Trial Chamber’s order to adjourn the proceedings while leaving open the possibility of hearing certain evidence and requesting counsel to make submissions with respect to witnesses heard previously and evidence already admitted.

D. Whether the Trial Chamber erred in monitoring the preparedness of the Defence

40. In the Impugned Decision, the Trial Chamber stated that it “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”.¹¹⁴ It also requested that counsel meet with counsel for the other Accused and the Prosecutor with a view to enlisting their assistance in identifying the most important and relevant documents in the filings submitted since 2011 and the most critical pieces of evidence against Mr Merhi.¹¹⁵

41. Counsel for Mr Merhi submit that the continuing supervision and monitoring of the work and composition of the Defence team and its strategic analysis of the evidence is not a compensatory measure.¹¹⁶ They refer in particular to the Trial Chamber’s “instruction to take assistance from the Prosecution in identifying the ‘most critical pieces of evidence’”.¹¹⁷ They argue that this is prejudicial to them and affects the integrity of the trial.¹¹⁸ The Prosecutor

¹¹² *Id.* at p. 41.

¹¹³ Impugned Decision, para. 110.

¹¹⁴ *Id.* at para. 100, *see also id.* at Disposition.

¹¹⁵ *See id.* at para. 101.

¹¹⁶ Appeal, para. 32.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

responds that the Defence has not demonstrated interference in the composition of the Defence team nor any other prejudice suffered from the instructions given by the Trial Chamber.¹¹⁹

42. We find that counsel's arguments misrepresent the Impugned Decision. In particular, they have not substantiated their allegation that the Trial Chamber has interfered with the management of the Defence team or has dictated to counsel how to conduct the case.¹²⁰ It is clear from the Impugned Decision that the Trial Chamber is concerned about the state of preparation by counsel for Mr Merhi and the commensurate effect this might have on the rights of the Accused.¹²¹ It merely suggests but does not dictate. We are thus at loss to see how the Trial Chamber's stated intention to make sure that the Defence team is adequately resourced, which includes having sufficient legal staff,¹²² is in any way prejudicial to them.

43. Similarly, it is unclear how the meetings held between the Prosecutor, counsel for Mr Merhi and counsel for the other Accused at the Trial Chamber's suggestion had prejudicial effect or affected the integrity of the trial. As pointed out by the Prosecutor,¹²³ counsel for Mr Merhi have not been ordered to agree with the Prosecutor on any evidence. On the contrary, they are free to accept or ignore any assistance offered by the other Parties in the case.

44. In sum, counsel have not shown that the Trial Chamber has erred in monitoring the work of the Defence team to ensure that it is adequately resourced for trial and to facilitate further meetings between the Parties.

E. Conclusion

45. Counsel have failed to show that the Trial Chamber committed an error in the Impugned Decision when it ordered several judicial case management measures in conjunction with the joinder of the *Ayyash et al.* and *Merhi* cases. Consequently, we dismiss the Appeal.

¹¹⁹ Prosecutor's Response, para. 50.

¹²⁰ Appeal, para. 32.

¹²¹ Impugned Decision, paras 95-101.

¹²² *Id.* at para. 100.

¹²³ Prosecutor's Response, para. 50.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

DECLARES the Suspension Request moot; and

DISMISSES the Appeal in its entirety.

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

Filed 21 May 2014

Leidschendam, the Netherlands



Judge David Baragwanath
Presiding

