

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No: STL-11-01/T/AC/AR126.8

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

Registrar: Mr Daryl Mundis

Date: 5 June 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 THE TRIAL CHAMBER'S DECISION ON THE RESUMPTION OF TRIAL PROCEEDINGS

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

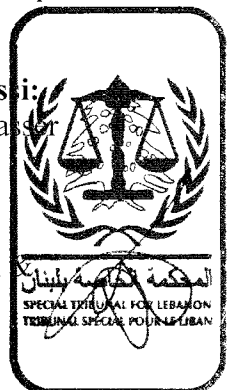
Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan, Mr Emile Aoun &
Mr Thomas Hannis

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. Counsel for Mr Merhi have filed an Appeal¹ against the Trial Chamber's decision to resume hearings in the *Ayyash et al.* case on 18 June 2014.² The Prosecutor, while making some observations, has not taken a position on whether setting this date was an error.³ We find that the Trial Chamber erred in part by not giving enough weight to the fact that the expert engaged by counsel for Mr Merhi had not yet commenced his work and was not expected to provide a final report until August 2014. We therefore set aside the Impugned Decision to the extent it relates to the scheduled testimony of witnesses listed by the Prosecutor in the second and third groups of witnesses to testify after the resumption of trial. We instruct the Trial Chamber to assess, on the basis of arguments by counsel for Mr Merhi, whether counsel can reasonably challenge these witnesses' evidence in court without the assistance of expert advice before scheduling further hearings which could be affected by such advice. If the Trial Chamber finds that counsel cannot do so, it must postpone the hearing of the potentially affected evidence until they can. We dismiss all other aspects of the Appeal, in particular those under which counsel for Mr Merhi sought a general postponement of the trial.

BACKGROUND

2. The trial against the four Accused in the *Ayyash et al.* case commenced on 16 January 2014. On 11 February 2014, the Trial Chamber decided to join the case of a fifth Accused, Mr Merhi, with the *Ayyash et al.* case. It stayed the proceedings until further notice but at least until mid-May.⁴ After hearing the Parties, the Trial Chamber on 12 May 2014 decided that trial proceedings would resume on 18 June 2014.⁵ It certified this decision for appeal on the same

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.8, F0005, Interlocutory Appeal Brief from the Merhi Defence Against the Decision Setting the Date of Trial, 22 May 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, Transcript of 12 May 2014 ("Transcript of 12 May 2014"), pp. 61-74 (EN) ("Impugned Decision").

³ F0007, Prosecution Response to Merhi Defence's "Mémoire d'appel interlocutoire de la Défense de Merhi à l'encontre de la décision fixant la date du procès", 29 May 2014 ("Response").

⁴ STL, *Prosecutor v. Ayyash et al. & Prosecutor v. Merhi*, STL-11-01 & STL-13-04, Transcript of 11 February 2014, pp. 91-96 (EN); see also 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.

⁵ Impugned Decision, p. 73 (EN).

day.⁶ Counsel for Mr Merhi, after obtaining an extension of the applicable time limit,⁷ filed their Appeal on 22 May 2014. They also submitted a request to suspend the Impugned Decision pending the finalization of the Appeal.⁸ The Prosecutor responds that he does not take a position on the issue under appeal. However, he makes observations on a number of factual and legal matters.⁹ He also informed us that he does not respond to the Suspension Request.¹⁰

DISCUSSION

I. Preliminary issue – Suspension Request

3. Counsel for Mr Merhi request that we suspend the Impugned Decision. They mainly argue that resuming the trial on 18 June 2014 before we rule on their Appeal would pre-empt the outcome of the Appeal.¹¹ However, given that this decision is issued before the scheduled resumption of trial, the Suspension Request is moot and we need not make any further determinations in this regard.¹²

II. Standard of review

4. We have previously held that the Trial Chamber enjoys considerable discretion in relation to the management of the proceedings before it.¹³ This includes the scheduling of trial hearings.¹⁴

⁶ Transcript of 12 May 2014, p. 79 (EN) (identifying as the certifiable issue the question: “Did the Trial Chamber err in fixing the 18th of June, 2014, as the date for resumption of trial?”).

⁷ F0004, Order by Judge Rapporteur on Request for Extension of Time for Filing of Interlocutory Appeal, 15 May 2014.

⁸ F0006, Urgent Merhi Defence Request to Give Suspensive Effect to the Appeal Against the Decision Setting the Trial Date, 23 May 2014 (“Suspension Request”).

⁹ Response, para. 2.

¹⁰ Email from Acting Chief of Prosecutions to Legal Officer of the Appeals Chamber, 26 May 2014.

¹¹ Suspension Request, para. 8.

¹² See *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC/AR126.7, F0013, Decision on Appeal by Counsel for Mr Merhi Against Trial Chamber’s “Decision on Trial Management and Reasons for Decision on Joinder”, 21 May 2014 (“Joinder Modalities Appeal Decision”), para. 7.

¹³ See, e.g., *id.* at para. 18.

¹⁴ See, e.g., ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.5, Decision on Radovan Karadžić’s Appeal of the Decision on Commencement of Trial, 13 October 2009 (“*Karadžić* Scheduling Decision”), para. 6 (“Trial Chamber decisions regarding the scheduling of trial are discretionary.”); ICTR, *Ngirabatware v. The Prosecutor*, ICTR-99-54-A, Decision on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009 (“*Ngirabatware* Decision”), para. 8 (“A Trial Chamber has discretion with respect to the scheduling of a trial.”); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.7, Decision on Appeal from Decision on Motion for Further Postponement of Trial, 31 March 2010 (“*Karadžić* Postponement Decision”), para. 13; ICTY, *Prosecutor v. Milošević*, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (“*Milošević* Decision”), para. 16.

The Impugned Decision, in which the Trial Chamber set the date on which trial proceedings will resume, is therefore a discretionary decision to which we accord deference if it complies with settled principles.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

III. Applicable law and principles

5. Rule 130 (A) of the Tribunal's Rules of Procedure and Evidence ("Rules") 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.

6. The Appeal is mainly concerned with the question of whether the scheduled resumption of trial hearings on 18 June 2014 allows counsel for Mr Merhi to adequately prepare for trial, one of the Accused's rights under Article 16 (4) of the Statute. In this respect, we agree with the Appeals Chamber of the International Criminal Tribunal for Rwanda that:

[I]t is not possible to set a standard of what constitutes adequate time to prepare a defence. The length of the preparation period depends on a number of factors specific to each case, such as, for example, the complexity of the case, the number of counts and charges, the gravity of the crimes charged, the individual circumstances of the accused,

¹⁵ Joinder Modalities Appeal Decision, para. 18; 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"), para. 9; 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, para. 5.

¹⁶ Joinder Modalities Appeal Decision, para. 18; Disclosure Appeal Decision, para. 9.

¹⁷ Joinder Modalities Appeal Decision, para. 18; Disclosure Appeal Decision, para. 9. (with reference to the relevant case-law of this and other courts and tribunals).

¹⁸ Joinder Modalities Appeal Decision, para. 18; Disclosure Appeal Decision, para. 9 (with reference to the relevant case-law of this and other courts and tribunals).

the status and scale of the Prosecution's disclosure, and the staffing of the Defence team.¹⁹

The Trial Chamber must therefore take into account the particularized situation of each individual accused. The nature of this fact-intensive exercise makes unhelpful comparisons with cases at other international criminal courts or in domestic jurisdictions.²⁰ Counsel for Mr Merhi's attempt to draw such comparisons²¹ is therefore of only limited assistance to our determination of their Appeal.²²

7. We stress again that the Trial Chamber is best-placed to decide how much time is sufficient for counsel for Mr Merhi to prepare for the hearings and we will intervene only if it is shown that the Trial Chamber's assessment amounted to an incorrect exercise of its discretion.²³

IV. Whether the Trial Chamber erred in ordering the resumption of trial proceedings on 18 June 2014

8. Counsel for Mr Merhi raise four grounds of appeal.²⁴ While the first three grounds relate to alleged errors by the Trial Chamber when making factual findings or in exercising its discretion, the fourth ground relates to an alleged error of law. We therefore find it appropriate to first analyse this ground of appeal, followed by the other three. We also note that some of counsel's arguments under grounds 1 to 3 overlap and we will address them where appropriate.

¹⁹ *Ngirabatware* Decision, para. 28.

²⁰ See *Karadžić* Scheduling Decision, para. 23; see also ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, 19 July 2010 ("*Haradinaj et al.* Appeal Judgment"), para. 39 ("Trial Chambers enjoy considerable discretion in managing the trials before them. However, the manner in which such discretion is exercised by a Trial Chamber should be determined in accordance with the case before it. Indeed, what is reasonable in one trial is not automatically reasonable in another. Thus, the question of whether a Trial Chamber abused its discretion should not be considered in isolation, but rather should be assessed taking into account all the relevant circumstances of the case at hand.")

²¹ Appeal, paras 33 (fn. 48), 35 (fn. 51).

²² See *Karadžić* Postponement Decision, para. 23.

²³ See above, para. 4; see also *Milošević* Decision, para. 18; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 24 April 2005, para. 65.

²⁴ Appeal, para. 18.

A. Whether the Trial Chamber erred in finding Rule 91 (C) inapplicable (ground 4)

9. Rule 91 (C) of the Rules provides:

The Pre-Trial Judge, in consultation with the Parties, the Registrar, the Presiding Judge of the Trial Chamber and, if necessary, the President, shall set a tentative date for the start of trial proceedings at least four months prior to that date.²⁵

In the Impugned Decision, the Trial Chamber stated that it considered Rule 91 (C) “inapplicable where the trial has already commenced and the Trial Chamber is setting a date for its resumption rather than its commencement”.²⁶ It held that resuming the trial after mid-June 2014, more than four months from the joinder decision, “in any event complies with the spirit of Rule 91 (C)”.²⁷

10. Counsel for Mr Merhi assert that the Trial Chamber erred “in that it denied the Defence the benefit of the provisions of Rule 91 (C)”.²⁸ They argue that the case of Mr Merhi was effectively still in the pre-trial phase as evidenced by the Trial Chamber’s orders regarding the filing of a pre-trial brief; the holding of a pre-trial conference and the making of an opening statement all prior to the resumption of hearing evidence.²⁹ They also claim that their lack of information regarding the precise date for the recommencement of trial proceedings impeded their ability to adequately prepare for trial.³⁰ They finally argue that the Trial Chamber erred by setting the trial date while a number of issues were still being litigated.³¹ The Prosecutor responds that Rule 91 (C) is not applicable when the trial proceedings are merely resumed and that the “real issue” is whether counsel for Mr Merhi have had enough time to prepare.³² He also argues that the pending motions before the Trial Chamber did not legally prevent the Trial Chamber from scheduling a trial date.³³

11. We note that the wording and context of Rule 91 (C) make clear that it is directly applicable only when the Pre-Trial Judge is seized of a case and before he transfers the case file to the Trial Chamber. Here, the Trial Chamber became seized of the *Merhi* case by virtue of its

²⁵ Rule 70 (C) permits the Trial Chamber to perform any of the functions of the Pre-Trial Judge after one or two cases have been joined.

²⁶ Impugned Decision, p. 68 (EN).

²⁷ *Id.* at p. 69 (EN).

²⁸ Appeal, para. 45.

²⁹ *Id.* at para. 44.

³⁰ *Id.* at para. 45.

³¹ *Id.* at para. 46.

³² Response, para. 18.

³³ *Id.* at paras 19-20.

joinder with the *Ayyash et al.* case, which had already commenced. The Trial Chamber therefore did not err when it held that in the circumstances Rule 91 (C) did not apply. Counsel for Mr Merhi's argument that Rule 91 (C) is applicable because Mr Merhi should not be disadvantaged vis-à-vis the other Accused is without basis. It is correct that in a joint trial all individual accused retain the same rights as if they were tried separately.³⁴ But this has no bearing on the determination of whether Rule 91 (C) applies in a case of joinder after a trial has already begun. Rather, the question is whether counsel for Mr Merhi are given sufficient time to prepare for trial. This question cannot be answered in the abstract by merely relying on the four-month time frame of Rule 91 (C).

12. In any event, we recall that the Trial Chamber, after joining the cases on 11 February 2014, indicated that it would not resume trial proceedings until three months later and that it would do so only after hearing the Parties.³⁵ It subsequently ordered the resumption of proceedings for 18 June 2014. In effect, counsel for Mr Merhi was given more than the four months provided under Rule 91 (C). In this regard, we find unconvincing counsel's allegation that not knowing the precise trial date had a "substantial deleterious effect on the quality of their preparation time".³⁶ Counsel have not substantiated this claim. We recall again that in the joinder decision the Trial Chamber explicitly decided that the trial would not resume for at least three months. It remains completely unclear why counsel's ability to prepare should have been affected or indeed hampered just because the Trial Chamber indicated at the same time that it reserved its decision on the precise date for the resumption of proceedings.

13. We also reject counsel's argument that the Trial Chamber could not schedule the resumption of proceedings while certain motions were pending before it. Counsel have not shown how the mere decision to set a future trial date would be impacted by other litigation. We also note that the two specific matters mentioned by counsel for Mr Merhi³⁷ have already been decided by the Trial Chamber.³⁸

³⁴ See Joinder Decision, para. 33; see also Rule 82 (A) ICTY RPE, Rule 82 (A) ICTR RPE, Rule 82 (A) SCSL RPE, Rule 97 (A) MICT RPE, Rule 136 (2) ICC RPE.

³⁵ Joinder Decision, paras 110-111.

³⁶ Appeal, para. 45.

³⁷ *Id.* at para. 46.

³⁸ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1537, Decision Dismissing Merhi Motion Alleging Defects in the Form of the Consolidated Indictment, 22 May 2014; STL, *Prosecutor v. Ayyash et al.*,

B. Whether the Trial Chamber failed to properly weigh the competing rights and interests (ground 1)

14. The Trial Chamber explained that in setting a date on which to resume the trial it had to “balance a number of competing interests”.³⁹ It referred to the “paramount right of Mr Merhi to receive a fair and expeditious trial [...] and of course the same right in respect of the other four accused and then the Prosecution’s right to present its case in a timely manner”.⁴⁰ It also made reference to the “interests of the participating victims”,⁴¹ the “Tribunal’s temporally limited mandate and the interests of the Lebanese people and the international community in resuming and completing this trial in a timely manner”.⁴²

15. Counsel for Mr Merhi allege that the Trial Chamber gave undue importance to a rapid resumption of trial,⁴³ that it disregarded the fact that neither the other Accused nor the Prosecutor opposed a further three-month postponement of the trial,⁴⁴ that it referred to rights which did not exist or weighed incorrectly other rights and interests⁴⁵ and that it did not at any point consider the real needs of counsel to prepare for the trial.⁴⁶ The Prosecutor does not respond to these specific allegations.

16. We first observe that there is no indication in the Impugned Decision that the Trial Chamber favoured a speedy resumption of trial proceedings over the rights and interests of Mr Merhi. On the contrary, the Trial Chamber explicitly referred to the “paramount” nature of Mr Merhi’s right to receive a fair and expeditious trial.⁴⁷ Counsel for Mr Merhi seem to misunderstand the nature of the Trial Chamber’s duty to ensure the fairness and expeditiousness of the proceedings, which requires an often delicate balancing of potentially competing rights and interests.⁴⁸ While the Trial Chamber did not grant counsel’s request for a further three-month

STL-01-11/T/TC, F1551, Decision Dismissing Merhi Defence Motion to Certify for Interlocutory Appeal ‘Decision on Merhi Defence Request for a “Table of Incriminating Evidence”’, 30 May 2014.

³⁹ Impugned Decision, p. 66 (EN).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Appeal, paras 19 (heading), 23.

⁴⁴ *Id.* at paras 19-20, 23.

⁴⁵ *Id.* at paras 21-22.

⁴⁶ *Id.* at paras 24-27.

⁴⁷ Impugned Decision, p. 66 (EN).

⁴⁸ See, e.g., ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, 6 February 2007 (“*Prlić Decision*”), para. 16.

postponement of trial proceedings, it does not mean that the Trial Chamber did not conduct this balancing exercise.

17. It is also irrelevant that neither counsel for the other four Accused nor the Prosecutor took a position on a further postponement of trial proceedings.⁴⁹ While the Trial Chamber must hear the Parties, it is not required to accept or defer to their views on any particular issue. This is all the more so when the Trial Chamber makes decisions relating to the management of proceedings before it. Indeed, Article 21 (1) of the Statute gives the Trial Chamber the ultimate responsibility to “confine the trial [...] proceedings strictly to an expeditious hearing of the issues raised by the charges” and “to prevent any action that may cause unreasonable delay”.

18. Counsel’s claim that the Trial Chamber “contrived”⁵⁰ a right of the Prosecutor to present his evidence in a timely manner is likewise without merit. While it might be more appropriate to speak of “interests” rather than “rights” of the Prosecutor to avoid confusion with an accused’s fair trial rights under Article 16 of the Statute, other international criminal tribunals have confirmed that the “requirement of the fairness of a trial is not uniquely predicated on the fairness accorded to any one party”.⁵¹ In particular, the Prosecutor as a party to the proceedings must not be put at a disadvantage when presenting his case.⁵² The Trial Chamber was therefore entitled to take into account the Prosecutor’s interest to present his evidence without further delay.

19. Counsel for Mr Merhi also argue that the Trial Chamber gave undue weight to the fact that the Tribunal’s mandate is limited and that the Lebanese people and the international community have an interest in resuming and completing the trial in a timely manner.⁵³ We first note that the Trial Chamber was entitled to assess these additional important considerations in setting a trial date. As the Appeals Chamber of the Special Court for Sierra Leone has held:

If there can be no peace without justice, there can be no peace until justice is done.
Victims and relatives of victims are entitled to have those accused of hideous offences

⁴⁹ *Contra Appeal*, paras 19-20, 23.

⁵⁰ *Appeal*, para. 21 (« invente de toutes pièces »).

⁵¹ *Prlić Decision*, para. 14.

⁵² *Ibid.*; see also ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 48; *Haradinaj et al.* Appeal Judgment, paras 17, 35, 49 (addressing the duty of the Trial Chamber to ensure the fairness of the proceedings when Prosecution witnesses are intimidated).

⁵³ *Appeal*, para. 22.

which have caused them so much grief to be [*sic*] tried expeditiously: they may not achieve personal closure until the process concludes. Similarly, the international community which establishes special courts expects them to work expeditiously as well as fairly. That justice delayed is justice denied is no less true for being a truism.⁵⁴

The same also applies to the interest of the people of Lebanon to see that justice is done fairly and expeditiously by the Tribunal on their behalf. However, nowhere in the Impugned Decision did the Trial Chamber suggest that it gave priority to those interests over those of Mr Merhi, including his right to adequately prepare a defence. It merely recognized that its decision was guided by a number of factors.⁵⁵

20. We also reject counsel's assertion that the Trial Chamber did "not, at any point, consider the real needs of the Defence to prepare itself for trial".⁵⁶ This allegation is wholly without merit. The Trial Chamber gave counsel for Mr Merhi ample opportunity to present their arguments on what time frame counsel deemed necessary to prepare for the trial.⁵⁷ It discussed this issue extensively with counsel⁵⁸ and devoted several pages of the Impugned Decision to the matter.⁵⁹ The Trial Chamber recalled that shortly following their appointment, on 24 December 2013, counsel received the material supporting the indictment. The Prosecutor filed his pre-trial brief and witness and exhibit lists in relation to Mr Merhi on 8 January 2014. By 7 February 2014, the Prosecutor had completed the bulk of his disclosure.⁶⁰ With the exception of their stated need for an expert, which we address further below,⁶¹ counsel have not pleaded or demonstrated what "real needs" the Trial Chamber did not meet. To do so would require establishing with specificity how Mr Merhi's right to a fair trial was infringed when the Trial Chamber ordered the trial to resume on 18 June 2014. However, apart from making generalized arguments that more time was required, and without a demonstration of counsel's particular needs, they fail to establish that the Trial Chamber abused its discretion.

⁵⁴ SCSL, *Prosecutor v. Norman et al.*, SCSL-2003-08-PT, SCSL-2003-07-PT, SCSL-2003-09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, para. 8.

⁵⁵ See above, para. 16.

⁵⁶ Appeal, para. 24.

⁵⁷ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1515, Scheduling Order for Status Conference on 12 May 2014, 2 May 2014 ("Scheduling Order"); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1520, Submissions from the Merhi Defence on Setting the Date for the Start of Trial, 9 May 2014 ("Merhi Submissions").

⁵⁸ Transcript of 12 May 2014, pp. 24-47 (EN).

⁵⁹ Impugned Decision, pp. 65-74 (EN); see also below, para. 32.

⁶⁰ See Impugned Decision, pp. 62-63 (EN).

⁶¹ See below, para. 32.

21. Finally, counsel have failed to substantiate their allegation that the decision to resume trial proceedings on 18 June 2014 was a foregone conclusion.⁶² While the Trial Chamber requested the Parties to make submissions on “a *possible* date for resumption of trial—some time shortly after the pre-trial conference scheduled for Monday 16 June 2014”,⁶³ the wording makes clear that this was merely a suggestion. The same applies to the question posed by Judge Lettieri cited by counsel as an indication that the Trial Chamber had set the resumption date before hearing the Parties.⁶⁴ Finally, the fact that the Trial Chamber issued the Impugned Decision shortly after hearing from the Parties is not an indication that it had made its decision as to when to resume the trial proceedings in advance.⁶⁵

22. In sum, counsel have not shown that the Trial Chamber erred in weighing competing rights and interests when determining the date of resumption of trial. Ultimately, in arguing there was a reasonable alternative of postponing trial proceedings for another three months,⁶⁶ counsel merely express their disagreement with the outcome of the Impugned Decision. We recall that such disagreement is not sufficient to demonstrate error. Indeed, “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”.⁶⁷ That has not been made out.

C. Whether the Trial Chamber violated the principle of equality between Mr Merhi and the other Accused (ground 2)

23. Among other factors, when setting a date for the resumption of trial, the Trial Chamber considered the time counsel for Mr Merhi needed to prepare vis-à-vis the time granted to the other Accused, taking into account the scope of the case against him,⁶⁸ and the state of disclosure.⁶⁹

⁶² Appeal, para. 23.

⁶³ Scheduling Order, p. 1 (emphasis added).

⁶⁴ Transcript of 12 May 2014, p. 38 (FR).

⁶⁵ See ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik* Appeal Judgement”), para. 134 (“[G]eneral comments on the length of the deliberations are insufficient to show improprieties in the deliberative process.”).

⁶⁶ Appeal, para. 24.

⁶⁷ Joinder Modalities Appeal Decision, para. 24; see also above, para. 4.

⁶⁸ Impugned Decision, pp. 65-66 (EN).

⁶⁹ *Id.* at pp. 67-68 (EN).

24. Counsel for Mr Merhi argue that the Trial Chamber violated the principle of equality by not properly taking into account the differences between the case against Mr Merhi and those of the other four Accused.⁷⁰ They also claim that the Trial Chamber failed to take into account the current volume of the case file,⁷¹ counsel's ability to analyse it,⁷² the circumstantial nature of the case⁷³ and the absence of the Accused.⁷⁴ The Prosecutor submits that a number of factual assertions by counsel for Mr Merhi with respect to the volume of disclosure and certain statements ascribed to the Prosecutor are incorrect.⁷⁵ He also argues that counsel have failed to demonstrate that they need to prepare for more allegations against Mr Merhi in comparison with the other Accused and that the absence of Mr Merhi or the circumstantial nature of the case require additional time for counsel to prepare.⁷⁶

25. In the Impugned Decision, the Trial Chamber recalled that the Prosecutor had "significantly reduced the number of exhibits on its list and the number of witnesses that he intends to call at trial".⁷⁷ It found that "[t]he case against Mr Merhi is thus less than the case that was intended to be presented against the other four accused when Mr Merhi's counsel were in an equivalent position of having been appointed".⁷⁸ While counsel for Mr Merhi argue that this constitutes an abuse of discretion,⁷⁹ the alleged error relates to a finding of fact, namely, that the case against Mr Merhi is "less" than the case against the other four Accused at the time of appointment of their counsel. Counsel for Mr Merhi must therefore show that no reasonable Trial Chamber could have made such a finding.⁸⁰ However, counsel do not dispute the information given by the Prosecutor to the Trial Chamber on 12 February 2014 that he had reduced his case by removing more than 9,000 exhibits from his original list of exhibits and more than 150

⁷⁰ Appeal, paras 28-29, 34.

⁷¹ *Id.* at paras 30-31.

⁷² *Id.* at para. 32.

⁷³ *Ibid.*

⁷⁴ Appeal, para. 33.

⁷⁵ Response, paras 9-14.

⁷⁶ *Id.* at paras 15-17.

⁷⁷ Impugned Decision, pp. 65-66 (EN).

⁷⁸ *Id.* at p. 66 (EN).

⁷⁹ Appeal, para. 28.

⁸⁰ 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. 5.

witnesses from his original list of witnesses.⁸¹ It was therefore not unreasonable for the Trial Chamber to conclude that the case presented by the Prosecutor was now less than it was at an earlier stage of the proceedings, before the joinder of Mr Merhi's case.

26. Counsel for Mr Merhi next argue that the Trial Chamber arbitrarily set a date for resumption of trial without due regard for the fact that the other four Accused had more time to prepare for the case.⁸² We recall again that the preparation time for each accused might differ depending on the circumstances of the specific accused and his counsel and that the Trial Chamber is not required to mechanically assign the same preparation time to counsel for one accused on the basis of the time that was available to counsel for the other accused.⁸³

27. The Trial Chamber found here that the circumstances of the case were different from the situation faced by counsel for the other four Accused and that the time period which allowed adequate preparation time could therefore be shorter.⁸⁴ Counsel have not shown that this was an error.

28. Counsel for Mr Merhi contend that since Mr Merhi is being prosecuted not only for his alleged participation from the outset in the conspiracy with Messrs Badreddine and Ayyash, but also for the false claim of responsibility, as are Messrs Oneissi and Sabra, his defence must be prepared to address all the prosecution allegations, unlike any of the other Accused.⁸⁵ But as all the Accused are charged as co-conspirators and the allegations against Messrs Oneissi and Sabra include being an accomplice to the terrorist act and intentional homicide at issue in the indictment,⁸⁶ their counsel, like those of Mr Merhi, must prepare to defend against alleged conduct in preparation for the killing as well as conduct thereafter. The distinction raised by counsel for Mr Merhi essentially goes to the date on which Mr Merhi allegedly joined the conspiracy. Counsel for Mr Merhi have not demonstrated how the stage at which their client allegedly became part of the conspiracy bears materially upon the assessment of their required preparation time.

⁸¹ Response, para. 11 (referring to STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 12 February 2014 ("Transcript of 12 February 2014"), pp. 77-78 (EN)).

⁸² Appeal, para. 29.

⁸³ See above, para. 6.

⁸⁴ Impugned Decision, pp. 65-66 (EN).

⁸⁵ Appeal, para. 29.

⁸⁶ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1444, Redacted Version of the Consolidated Indictment, 7 March 2014, paras 53-70.

29. Moreover, counsel for Mr Merhi's allegation that the Trial Chamber erred in stating that counsel had not been distracted by pre-trial litigation issues⁸⁷ misrepresents the Impugned Decision. Indeed, the Trial Chamber found that "most of the pre-trial litigation *involving disclosure issues* was completed before [counsel for Mr Merhi's] assignment and, consequently, they have avoided having to deal with such distractions from their trial preparations".⁸⁸ Counsel have not shown that this finding was in error. In any event, it is unclear why the issues which counsel argue they had to address in the past few months were so unusual that they would materially affect their preparation time. Indeed, such matters are part and parcel of that preparation. We note for example that "regular correspondence with the Prosecution regarding issues related to disclosure"⁸⁹ will probably feature in the work of counsel for Mr Merhi until the end of the proceedings, given the continued obligation of the Prosecutor to disclose any material that is exculpatory.

30. Counsel for Mr Merhi further claim that the Trial Chamber "nowhere" took into consideration the current volume of the case and actual time required for counsel to familiarize themselves with it.⁹⁰ On a preliminary note, it has not escaped our attention that counsel misrepresent a number of matters in this regard. For instance, they refer to an alleged suggestion by the Prosecutor "that [counsel for Mr Merhi] should have a seven-month preparatory period from the completion of Rule 113 disclosures".⁹¹ This is not correct. In the transcript of the hearing cited by counsel for Mr Merhi, the Prosecutor merely mentioned that seven months had elapsed between the time that counsel for the other four Accused had received disclosure of exculpatory material and the beginning of trial.⁹² He also suggested periodic adjournments during the trial to enable counsel for Mr Merhi to prepare, which "may add up in total to somewhere in the six or seven months [range]" given to counsel for the other Accused.⁹³ Counsel for Mr Merhi also assert that there are 36,247 exculpatory documents,⁹⁴ when in fact this number refers to all documents disclosed by the Prosecutor under various disclosure provisions.⁹⁵ In

⁸⁷ Appeal, para. 34.

⁸⁸ Impugned Decision, p. 65 (EN) (emphasis added).

⁸⁹ See Appeal, para. 34.

⁹⁰ Appeal, paras 30-32.

⁹¹ *Id.* at para. 29.

⁹² Transcript of 12 February 2014, p. 79.

⁹³ *Id.* at p. 80.

⁹⁴ Appeal, para. 31.

⁹⁵ See Response, para. 11; see also Transcript of 12 May 2014, pp. 15-16 (EN).

addition, they claim that the Prosecutor conceded that these documents “*sont pertinents et [...] doivent être lus pour que la Défense soit prête à reprendre le procès*”.⁹⁶ However, counsel actually quote from a question directed by Judge Nosworthy to counsel for the Prosecution.⁹⁷ Moreover, they rely on an incorrect French interpretation of what Judge Nosworthy actually said.⁹⁸ Indeed, Judge Nosworthy did not ask whether counsel for Mr Merhi would have to read all the documents in the case. On the contrary, she simply inquired with counsel for the Prosecution about “the precise number of documents that have been disclosed to the Merhi Defence that you consider relevant to the issue of preparedness”.⁹⁹ Counsel then gave her the total number of 32,247 documents.¹⁰⁰ We strongly disapprove of this kind of distortion of the record before us and recall our power to dismiss summarily any arguments based on such distortions.¹⁰¹

31. In any event, counsel for Mr Merhi have not demonstrated that the Trial Chamber failed to assess the volume of the case against Mr Merhi.¹⁰² On the contrary, after receiving written submissions from the Parties in this regard,¹⁰³ the Judges of the Trial Chamber extensively questioned both counsel for the Prosecution and Mr Merhi on this issue before taking the Impugned Decision.¹⁰⁴ In the Impugned Decision itself, the Trial Chamber explicitly referred to the dates on which the Prosecutor had disclosed relevant material to counsel for Mr Merhi.¹⁰⁵ It noted that the Prosecutor had fully complied with his disclosure obligations by 7 February 2014, less than a month after counsel for Mr Merhi were assigned to the case,¹⁰⁶ and found that the case against the five Accused had been significantly reduced.¹⁰⁷

⁹⁶ Appeal, para. 31 (in the French original of counsel’s brief) (emphasis in bold in the original).

⁹⁷ Transcript of 12 May 2014, p. 15 (EN).

⁹⁸ See Transcript of 12 May 2014, p. 15 (FR). We note that every transcript page bears the following indication: “Interpretation serves to facilitate communication. Only the original speech is authentic.” We therefore encourage counsel to verify the transcript of the relevant language used by the speaker when relying on direct quotations.

⁹⁹ Transcript of 12 May 2014, p. 15 (EN).

¹⁰⁰ *Ibid.*

¹⁰¹ See *Krajišnik* Appeal Judgement, paras 16, 18.

¹⁰² *Contra* Appeal, para. 30.

¹⁰³ Merhi Submissions; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1521, Prosecution Plan for Resumption of Trial, 9 May 2014 (“Prosecutor’s Plan”).

¹⁰⁴ See, e.g., Transcript of 12 May 2014, pp. 13, 15, 16, 21.

¹⁰⁵ Impugned Decision, pp. 62-63 (EN).

¹⁰⁶ *Id.* at p. 63 (EN).

¹⁰⁷ *Id.* at p. 65 (EN).

32. With respect to counsel's ability to familiarize themselves with the disclosed material, the Trial Chamber found that at the time of the Impugned Decision counsel had been in possession of those documents that the Prosecutor was required to disclose under the Rules for more than three months. While counsel for Mr Merhi requested additional disclosures, the Trial Chamber considered that such disclosures consisted in large part of documents that the Prosecutor had originally provided to counsel for the other Accused but later withdrew because he was no longer going to rely on them.¹⁰⁸ Counsel have failed to explain why this was an error. We repeat that counsel have not provided any specific arguments as to how, with respect to the issues at stake, their sequencing, the nature and scale of disclosure and the time and staff available for appraisal, the reasonable needs of counsel were not met.¹⁰⁹

33. Finally, counsel have not shown that either the circumstantial nature of the case or the absence of Mr Merhi required the Trial Chamber to give them more preparation time.¹¹⁰ We note that the Prosecutor is required to prove the guilt of Mr Merhi beyond reasonable doubt, regardless of his theory of the case or the type of evidence presented.¹¹¹ Mr Merhi's absence does not alter that position. Given that the trial proceedings are taking place in the absence of all Accused, counsel for Mr Merhi have failed to demonstrate how the Trial Chamber disregarded the fact that Mr Merhi was not present at trial and could therefore not assist them.

34. In sum, counsel for Mr Merhi have not shown that the Trial Chamber made incorrect findings of facts or abused its discretion when assessing the particular circumstances of counsel for Mr Merhi vis-à-vis those of counsel for the other Accused. We stress again that counsel's mere disagreement with the date on which the Trial Chamber decided to resume trial proceedings does not amount to a showing of error. We therefore dismiss the arguments presented under this ground of appeal.

¹⁰⁸ Impugned Decision, pp. 67-68 (EN).

¹⁰⁹ See above, para. 20.

¹¹⁰ Appeal, paras 25, 32-33.

¹¹¹ See, e.g., ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Judgement, 9 May 2007, para. 226.

D. Whether the Trial Chamber erred when determining that it was not necessary to delay the trial until after counsel for Mr Merhi received an expert report (ground 3)

35. In the Impugned Decision, the Trial Chamber emphasized that the trial would resume without any evidence going directly to the alleged acts and conduct of Mr Merhi.¹¹² It stressed that such evidence would not be called until later in the trial.¹¹³ Instead it decided that the trial would recommence with the presentation of certain evidence relating to the crime scene.¹¹⁴ In particular, it relied on a proposal by the Prosecutor, which grouped the witnesses scheduled to appear in “three groups of descending non-contentiousness insofar as the evidence concerns Mr Merhi”.¹¹⁵

36. Counsel for Mr Merhi argue that the Trial Chamber erred by finding that they were adequately prepared for the next proposed part of the Prosecutor’s case.¹¹⁶ They assert that the Trial Chamber erred in finding that it was still unclear whether counsel would challenge the Prosecutor’s case in relation to the cause of the explosion of 14 February 2005.¹¹⁷ They also claim that the Trial Chamber impermissibly relied on the lack of substantial challenges to the evidence by counsel for the other four Accused with respect to evidence presented before the joinder.¹¹⁸ Counsel finally argue that the Trial Chamber disregarded the state of their investigations, in particular with respect to the availability of the report prepared by an expert they had recently engaged.¹¹⁹ The Prosecutor limits his response to arguing that a recall of witnesses for cross-examination as a remedy for any lack of preparation by counsel for Mr Merhi is not desirable.¹²⁰

37. During the hearing of 12 May 2014, the Trial Chamber inquired of counsel for Mr Merhi as to the appointment of an expert required by counsel to assist them in their investigations. Counsel informed the Trial Chamber that the expert would commence his work on 19 May 2014 and that they expected to receive a report from him at the end of August 2014. The Trial

¹¹² Impugned Decision, p. 70 (EN).

¹¹³ *Ibid.*

¹¹⁴ Impugned Decision, pp. 70-71 (EN).

¹¹⁵ *Id.* at p. 69.

¹¹⁶ Appeal, para 39; *see also id.* at para 37.

¹¹⁷ *Id.* at para. 38.

¹¹⁸ *Id.* at para. 39.

¹¹⁹ *Id.* at paras 40-42, 25-27.

¹²⁰ Response, paras 7-8.

Chamber concluded from this that “it is thus unclear whether Defence counsel will be challenging the Prosecution’s case in relation to the cause of the explosion or putting forward an alternative case. At this point, three months after the adjournment of the trial, it is still speculative”.¹²¹ In the light of the circumstances of the case, this finding was not unreasonable. While it is true that counsel for Mr Merhi had repeatedly stressed the possibility of bringing challenges with regard to the Prosecutor’s theory on the nature of the explosion, they made such challenges dependent on the expert advice they were going to receive.¹²² While a challenge therefore remains possible or even likely, the Trial Chamber did not err in referring to it as being speculative at that time.

38. In the Impugned Decision, the Trial Chamber also stated that in order to determine the time required by counsel for Mr Merhi it also needed to analyse “the degree of challenge to the Prosecution’s witnesses and assessing what is actually in dispute”.¹²³ In this respect, it relied on the fact that the evidence presented by the Prosecutor before the joinder was not substantially contested by counsel for the other four Accused.¹²⁴ We find that this approach was problematic. The Trial Chamber is generally free to base certain future assumptions with regard to the course of the proceedings on relevant prior conduct by counsel, including the counsel of co-accused. However, here it disregarded the fact that counsel for Mr Merhi had consulted with the Prosecutor and identified among the groups of witnesses that the Prosecutor intends to call first two groups of witnesses which counsel referred to as “controversial” and “highly controversial”.¹²⁵ Regardless of the precise challenge that counsel for Mr Merhi might bring with respect to the evidence presented by any of these witnesses, it is clear that at present counsel do intend to contest such evidence. In the absence of any basis for contention that the submission is unfounded, the Trial Chamber could not therefore draw on its previous experience as regards the evidence heard before joinder, at least with respect to the two groups of witnesses whose

¹²¹ Impugned Decision, para. 67 (EN).

¹²² See, e.g., Transcript of 12 May 2014, p. 32 (FR); STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 4 March 2014, p. 26 (FR).

¹²³ Impugned Decision, pp. 70-71 (EN).

¹²⁴ *Id.* at p. 71.

¹²⁵ Transcript of 12 May 2014, p. 39 (EN); see also Prosecutor’s Plan, paras 4-5.

prospective evidence counsel for Mr Merhi had identified as contested.¹²⁶ That it did constitutes an abuse of discretion. We will discuss the impact of this error below.

39. A substantial part of the discussions between counsel for Mr Merhi and the Trial Chamber prior to the Impugned Decision concerned counsel's request to postpone the trial proceedings until an expert had reviewed the relevant material and prepared a report. As mentioned above, counsel informed the Trial Chamber that the expert could only be engaged by 19 May 2014 and was expected to present a final report by the end of August of 2014.¹²⁷ In the Impugned Decision, the Trial Chamber took note of this¹²⁸ but nevertheless found that counsel was sufficiently prepared for the resumption of trial.¹²⁹ The Chamber then proceeded to permit:

counsel for Mr Merhi, and of course for any other accused, to have present in court, where necessary, their expert witnesses to advise them when the Prosecution is presenting any relevant evidence especially in relation to the explosives evidence, which counsel for Mr. Merhi has now informed us they will not have the next few months.¹³⁰

The Trial Chamber also allowed "any party to request the re-call of any witness after their testimony is complete, upon their showing good cause to do so. In the case of Mr Merhi, this could include the discovery of a potentially relevant new line or form of questioning".¹³¹

40. We recall that under Article 16 (4) (b) of the Statute the Trial Chamber has an obligation to ensure that counsel for Mr Merhi are given adequate time and facilities for the preparation of Mr Merhi's defence. Counsel here asserted, without contradiction, that they needed the services of an expert to provide them with the necessary technical advice to be in a position to reasonably challenge the next part of the Prosecutor's case.¹³² There is also no indication that the expert's appointment was unduly delayed or indeed dilatory and the Trial Chamber made no such finding. Under these circumstances, the Trial Chamber should have considered specifically whether and for which witnesses or groups of witnesses such expert advice was necessary to proceed with the presentation of these witnesses' evidence. Such determination does not necessarily require waiting for a final report from the expert. Rather, the Trial Chamber, in the light of submissions

¹²⁶ Appeal, fn. 60.

¹²⁷ Transcript of 12 May 2014, pp. 26, 31, 33-35.

¹²⁸ Impugned Decision, p. 67 (EN).

¹²⁹ *Id.* at p. 71 (EN).

¹³⁰ *Id.* at p. 72 (EN).

¹³¹ *Id.* at p. 73 (EN).

¹³² Merhi Submissions, paras 33-36.

from counsel for Mr Merhi, may consider whether interim information gathered from the expert is sufficient for counsel to prepare with respect to the evidence of a particular witness. The failure of the Trial Chamber to make such inquiries at all was unreasonable and constitutes an abuse of its discretion.

41. This error is not offset by the Trial Chamber's permission to counsel to be assisted by their experts in the courtroom during the testimony of the Prosecutor's witnesses. For counsel to receive the advice of an expert only during a hearing is not sufficient to protect an accused's right to have "adequate time and facilities" for the preparation of his defence. Rather, the expert is expected to conduct certain research on the basis of which counsel can make decisions as to the conduct of the case, which may include submissions to the Court before evidence is led as well as preparing the cross-examination of witnesses. Similarly, we share the concern of both counsel for Mr Merhi¹³³ and the Prosecutor¹³⁴ with respect to the recall of witnesses once they have testified. The tenor of evidence may be quite different if challenged on an informed basis at an early stage. Moreover, given the potential disruptive effect that such recall might have on the trial proceedings, it should remain the exception and be granted only on the basis of good cause.¹³⁵ Here, the possibility that counsel for Mr Merhi may not be able to properly prepare for individual witnesses in the absence of advice from their expert increases the likelihood that witnesses will have to be recalled on a regular basis. This should be avoided.

42. In sum, we find that the Trial Chamber abused its discretion when it failed to consider whether counsel for Mr Merhi required the assistance of their expert—at least on the basis of interim reports—for particular witnesses or groups of witnesses that the Prosecutor intends to call in the next part of his case. We also recall that the Trial Chamber erred when it relied on the lack of substantive challenges to previous witnesses in determining the time counsel for Mr Merhi need to prepare for trial.¹³⁶ In the light of these errors, we must consider their impact on the Impugned Decision. We first note that the trial is scheduled to resume with the first group of witnesses, described by the Prosecutor and counsel for Mr Merhi as relatively uncontested.¹³⁷

¹³³ Appeal, paras 25-26.

¹³⁴ Response, para 7.

¹³⁵ See, e.g., ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Recall Johannes Rutten, 26 April 2012, paras 7-8 (with reference to the case-law of the ICTY and the ICTR).

¹³⁶ See *above*, para. 38.

¹³⁷ See Prosecutor's Plan, para. 4; Transcript of 12 May 2014, p. 38 (FR); Appeal, fn. 60.

We also consider that from the record, the precise scope of the advice that the expert engaged by counsel for Mr Merhi will provide is somewhat uncertain. While it appears that information from the expert is required with respect to the third group of witnesses, this is less clear with respect to the second group.¹³⁸ In any event, the Trial Chamber is best placed to determine the actual requirements of counsel for Mr Merhi in this respect.

43. We therefore set aside the Impugned Decision to the extent it relates to the scheduled testimony of witnesses listed by the Prosecutor in the second and third groups of witnesses.¹³⁹ We remand this part of the Impugned Decision to the Trial Chamber with the instruction to assess, on the basis of arguments by counsel for Mr Merhi, whether counsel can reasonably challenge these witnesses' evidence in court without the assistance of expert advice before scheduling further hearings which could be affected by such advice. If the Trial Chamber finds that counsel for Mr Merhi cannot do so, it must postpone the hearing of the potentially affected evidence until they can. Any expert report in this regard need not be final. In particular, the Trial Chamber may find that interim advice from the expert is sufficient to allow counsel for Mr Merhi to prepare adequately for the hearing. We leave the Impugned Decision intact in all other regards, including the scheduled resumption of the trial on 18 June 2014 and the hearing of evidence from the witnesses listed by the Prosecutor in the first group of witnesses.¹⁴⁰

¹³⁸ See Transcript of 12 May 2014, pp. 38-39.

¹³⁹ Prosecutor's Plan, Annex A.

¹⁴⁰ *Ibid.*

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

DECLARES the Suspension Request moot;

GRANTS the Appeal in part;

SETS ASIDE the Impugned Decision to the extent that it relates to the scheduled testimony of witnesses listed by the Prosecutor in the second and third groups of witnesses;

REMANDS this part of the Impugned Decision to the Trial Chamber with the instruction to assess, on the basis of arguments by counsel for Mr Merhi, whether counsel can reasonably challenge these witnesses' evidence in court without the assistance of expert advice before scheduling further hearings which could be affected by such advice, and, if the Trial Chamber finds that counsel cannot do so, it must postpone the hearing of the potentially affected evidence until they can; and

UPHOLDS the Impugned Decision in all other parts, including the scheduled resumption of the trial on 18 June 2014 and the hearing of evidence from the witnesses listed by the Prosecutor in the first group of witnesses.

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

Dated 5 June 2014

Leidschendam, The Netherlands



Judge David Baragwanath
Presiding

