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

THE TRIAL CHAMBER

Case No.:	**STL-11-01/T/TC**
Before:	**Judge David Re, Presiding**
Registrar:	**Mr. Daryl Mundis**
Date:	**24 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 REFUSING LEAVE TO RECONSIDER DECISION TO ADMIT MEDICAL PROOF OF DEATHS (MERHI DEFENCE)

Office of the Prosecutor:
Mr. Norman Farrell, Mr. Graeme Cameron & Mr. Alexander Milne

Victims' Legal Representatives:
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. Guénaël Mettraux & Mr. Geoffrey Roberts

BACKGROUND

1. The Trial Chamber, on 12 February 2014 and again on 25 February 2014, after joining the cases of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra* and *Prosecutor v. Hassan Habib Merhi*, specified that counsel for Mr. Merhi could request the Trial Chamber to reconsider any decision taken before it joined the two cases on 11 February 2014.[1]

2. Counsel for Mr. Merhi, on 12 June 2014, made their first request for such a reconsideration pursuant to that decision.[2] They sought my leave as the Presiding Judge to reconsider a decision made on 30 January 2014 to admit into evidence two forensic reports relating to the deaths of two victims killed in the explosion in Beirut on 14 February 2005. Annexed to their application for leave was the substantive application that they would file if granted leave. Prosecution counsel orally opposed the application at a pre-trial conference held on 16 June 2014.[3]

3. On 30 January 2014, the Trial Chamber, on the application of the Prosecution, decided to admit into evidence, under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence, and without cross-examination, the witness statements of two Lebanese police officers, witnesses 389 and 489, who participated in the investigation of the explosion in Beirut.[4] The Prosecution tendered the two statements to prove the deaths in the explosion of two victims, whose names are listed in annex A of the consolidated indictment. Annexed to the two police witness statements were relevant extracts from the Lebanese investigation case file. These included—in the case of witness 389—a forensic report from a medical doctor working in the morgue at Zahraa Hospital where one victim was taken after the explosion. That victim was pronounced dead on arrival. The doctor was proposed Prosecution expert witness 386. The other victim was taken to Jeitawi Hospital where he was admitted into its intensive care unit, and died shortly afterwards. A forensic report from a medical doctor at that hospital, attesting to the death of the second victim, was annexed to witness 489's witness statement.

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[1] STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, Transcript of 12 February 2014, pp. 66, 121. *See also*, Decision on trial management and reasons for decision on joinder, 25 February 2014, para. 92.
[2] STL-11-01/T/TC, Demande d'Autorisation de la Défense de Merhi aux fins de Déposer une Requête en Réexamen de la Décision du 30 Janvier 2014, 12 juin 2014. Merhi Defence Request for Leave to File a Request for Reconsideration of the Decision of 30 January 2014, 12 June 2014.
[3] STL-11-01/T/TC, Transcript of Pre-Trial Conference of 16 June 2014, pp. 25-28.
[4] STL-11-01/T/TC, Second Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 30 January 2014, para. 14.

4. No counsel for any of the four Accused then in the proceedings objected to the admission into evidence of the two witness statements under Rule 155. Counsel for Mr. Ayyash, Mr. Badreddine and Mr. Sabra did not object to the admission into evidence of the two statements under Rule 155,[5] although counsel for Mr. Sabra submitted that Rule 154 was more appropriate for the admission of any (unspecified) expert reports.[6] Counsel for Mr. Oneissi took 'no position' on a group of statements that included these two.[7] None sought to cross-examine the two police witnesses.

5. In finding the documents admissible, the Trial Chamber held that the two witness statements and their annexes were admissible under Rule 155 without cross-examination, and that the two brief annexed forensic medical reports were admissible under Rule 161.

6. In a status conference on 10 April 2014 counsel for Mr. Merhi informed the Trial Chamber that they were not contesting the deaths in the explosion of 22 people. That included these two victims.[8] The following day, the Trial Chamber recorded this agreement under Rule 122, and specified that this fact (and eight other facts) need not be proved at trial.[9]

7. In filing its application under Rule 155 to admit the two forensic reports into evidence as annexes to the two police witness statements, the Prosecution did not bring to the Trial Chamber's attention that the author of the forensic report from Zahraa Hospital was already on the Prosecution's witness list as the proposed expert witness 386.[10] No Defence counsel connected the name of witness 386 with the forensic report that was annexed to the police witness statement. Neither did the Trial Chamber.

8. Subsequently, the Defence filed notices under Rule 161 in respect of the Prosecution's proposed revised expert witness list. One of these was for witness 386, whose report the Trial Chamber had already found to be admissible under Rule 161. In their Rule 161 response, counsel for Mr. Ayyash opposed the admission into evidence under Rule 161 of the forensic report, but without saying

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[5] STL-11-01/PT/TC, Ayyash Defence Response to the "Third Addendum to Prosecution Rule 155 Motion", 13 January 2014, para. 5; Corrected version of "Badreddine Defence Response to 'Prosecution Rule 155 motion for admission of written statements in lieu of oral testimony for the first section of the Prosecution case"', 28 November 2013, para. 5; Sabra Defence response to Prosecution Rule 155 motion, 27 November 2013, paras 2, 13.

[6] STL-11-01/PT/TC, Sabra Defence response to Prosecution Rule 155 motion, 27 November 2013, para. 20, saying that the admission of expert reports 'must always follow the procedure established in Rule 161'. The submission did not specify what this procedure was.

[7] STL-11-01/PT/TC, Defence for Hussein Hassan Oneissi Response to Prosecution's Rule 155 Application of 15 November 2013, 27 November 2013, para. 26.

[8] STL-11-01/T/TC, Transcript of Pre-Trial Conference of 10 April 2014, pp. 18-20.

[9] STL-11-01/T/TC, Second Decision on Agreed Facts Under Rule 122, 11 April 2014.

[10] STL-11-01/PT/TC, Prosecution Rule 155 Motion for Admission of Written Statements in lieu of Oral Testimony for the First Section of the Prosecution Case, 15 November 2013.

why.[11] Counsel for Mr. Oneissi indicated, in a table annexed to their response, that they did not accept the report, but without specifying why; they did not wish to cross-examine him.[12] Counsel for both Mr. Badreddine and Mr. Sabra accepted the report and did not wish to cross-examine the witness.[13]

9. As a result of the decision on 10 April 2014 by counsel for Mr. Merhi to agree to the fact that the two deceased had died in the explosion, the Prosecution, on 9 May 2014, filed a notice stating that they no longer intended to call witness 386 (the medical doctor from Zahraa Hospital).[14] Three weeks later this motion was filed.

DISCUSSION

Applicable law

10. Rule 140 states that 'A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice'. On 11 March 2014, in a decision refusing leave to reconsider a decision of the Pre-Trial Judge, I identified the following principles as relevant to my task in considering whether to grant leave to have the Trial Chamber reconsider an earlier decision:[15]

> The role of the Presiding Judge is to perform a *prima facie* examination of the request to ensure that it may 'be admitted in terms of procedure' and that it is not manifestly ill-founded,[16] including 'a filtering function to prevent the filing of unwarranted requests'.[17] The request 'must be duly reasoned' and 'reconsideration may only be granted if the application is not manifestly unfounded, frivolous or aims at circumventing the Rules'.[18] The Presiding Judge acts 'as a filter to screen applications to

[11] STL-11-01/T/TC, Confidential Annex A to Notice by the Ayyash Defence Pursuant to Rule 161(B) in Response to the Prosecution Filing of 4 March 2014, 4 April 2014, p. 6.
[12] STL-11-01/T/TC, Annex A to the Defence for Hussein Hassan Oneissi Rule 161(B) Updated Notice of Expert Witness and their Statements, 4 April 2014, p. 7.
[13] STL-11-01/T/TC, Annex to Badreddine Defence Third Notice Pursuant to Rule 161(B), 4 April 2014, p. 9; STL-11-01/T/TC, Annex A to Updated Sabra Defence Notice Pursuant to Rule 161(B), 4 April 2014, p. 7.
[14] STL-11-01/T/TC, Prosecution Plan for the Resumption of Trial, 9 May 2014, para. 7.
[15] STL-11-01/T/TC, Decision Denying Leave to Reconsider a Decision of the Pre-Trial Judge re Disclosure Regarding a Computer, 11 March 2014, paras 16-18.
[16] *See* STL-11-01/PT/TC, Décision refusant à la défense de M. Badreddine l'autorisation de déposer une requête en réexamen, 2 July 2013, para. 11; Decision Authorising the Ayyash Defence and the Sabra Defence to File a Request for Reconsideration, 22 May 2012, para. 6; Decision Authorising the Badreddine Defence and the Oneissi Defence to File a Request for Reconsideration, 15 May 2012, para. 10.
[17] STL-11-01/PT/AC, Decision on Request by Defence for Messrs Badreddine and Oneissi for Authorization to Seek Reconsideration of the Appeals Chamber's Decision of 25 October 2013, 13 November 2013, para. 4.
[18] STL-11-01/PT/PTJ, Decision on the Prosecution's Request for Partial Reconsideration of the Pre-Trial Judge's Order of 8 February 2012, 29 March 2012, paras 30-31.

ensure that they contain the procedural and legal justifications necessary to allow the Trial Chamber to decide an application for reconsideration on its merits'.[19]

Arguments of counsel for Mr. Merhi

11. Counsel for Mr. Merhi argued that the decision of 30 January 2014 is fundamentally wrong in law for not qualifying the two doctors as experts before admitting their reports under Rule 161. As a precondition for their admission into evidence, the Trial Chamber should have recognised their qualifications as experts. Rule 161 governs the admission of expert reports into evidence and it contains strict conditions for admissibility as the *lex specialis* (the specific legal provision) for receiving expert reports. The Defence of the other four Accused were thus denied the opportunity to object to the admission of these two reports under Rule 161 as opposed to under Rule 155. Further, this creates a prejudice in allowing the Prosecution to request the Trial Chamber to admit documents into evidence under Rule 161 in circumstances in which they are inadmissible under that section. This has created an injustice to the Defence.

12. In their substantive application, annexed to the request for leave, however, Defence counsel stated that they would not oppose the admission into evidence of the two medical reports—without requiring their authors be called for cross-examination—but under the general provision for the admission of documents into evidence, namely, Rule 154.[20] They repeated these arguments in oral submissions on 16 June 2014.[21] They also added, in their intended substantive submission, that Rule 161, as the *lex specialis*, contains a strict procedure for admitting expert reports which guarantees the Defence the right to contest the expert's qualifications and to request his or her cross-examination in court.[22]

Prosecution's response

13. The Prosecution responded that the request was moot as witness 386 had been withdrawn as a proposed expert witness following the Merhi Defence's acceptance of the agreed fact relating to the death. Moreover, there is no injustice, either actual or theoretical, which could justify granting leave to reconsider this decision as the documents were merely admitted into evidence using an alternative method to that preferred by counsel for Mr. Merhi. The decision was also taken on its own facts and

[19] STL-11-01/T/TC, Reasons for Decision Granting Leave to Reconsider Deadline for Motions Concerning Evidentiary Decisions Issued Before Joinder, 7 March 2014, para. 7.
[20] STL-11-01/T/TC, Requête de la Défense de Merhi aux fins de Réexamen de la Décision du 30 Janvier 2014 Admettant en Preuve Deux Rapports Médicaux au Titre de l'Article 161 du Règlement, Annexe, 12 juin 2014, para. 3.
[21] STL-11-01/T/TC, Transcript of Pre-Trial Conference of 16 June 2014, p. 28.
[22] STL-11-01/T/TC, Requête de la Défense de Merhi aux fins de Réexamen de la Décision du 30 Janvier 2014 Admettant en Preuve Deux Rapports Médicaux au Titre de l'Article 161 du Règlement, Annexe, 12 June 2014, para. 11.

contained no erroneous precedent. The Trial Chamber, where it deems it necessary, has shown itself ready to seek further information in respect of expert witnesses.[23]

Decision

14. Counsel for Mr. Merhi are not challenging (a) the death of the two victims (b) that they died in the explosion on 14 February 2005 (c) that the victims were either dead on arrival at the hospital or died shortly thereafter (d) that doctors working at the two hospitals declared that the victims were deceased, or (e) that the two doctors were qualified to assess whether the victims had died and to describe in a report the injuries they observed. Yet, despite all of this, they argue that the Trial Chamber erred in admitting the forensic reports into evidence under Rule 161 instead of Rule 154, and leave should be granted for the Trial Chamber to reconsider its decision.

15. Under Rule 140, reconsideration is permitted to avoid an injustice. My role is to filter out unwarranted requests and those which are manifestly unfounded. The closest the Defence argument comes to avoiding an injustice—but then only briefly touching the point in passing—is that a precedent may have been created to allow the Prosecution to tender expert reports without utilising Rule 161. But this argument is misconceived. The Trial Chamber, of *its own volition* held that the two forensic reports were admissible under Rule 161; the Prosecution did not submit that they should have been admitted under that rule. And, besides, the rule applies to experts proposed by any Party to the proceedings.

16. Rule 161 has two functions; one is to fix timetables for parties to disclose expert reports, and for the opposing parties to respond as to whether they accept the statement, wish to cross-examine the expert or challenge his or her qualifications or the relevance of any of the report. The second permits the Chamber, if the opposing party accepts the statement, to receive it into evidence without cross-examination. Contrary to the Defence arguments, the Rule does not itself otherwise regulate the admission into evidence of expert reports or the statements of expert witnesses, nor the manner in which they testify. The Defence submissions on this are premature as the Trial Chamber is yet to rule on the application of the relevant general principles of international criminal law to Rule 161.

17. The Trial Chamber accepted the two forensic reports into evidence as annexes to witness statements—the annexes being extracts from the Lebanese investigation case file. Counsel for the four Accused then in the case did not object to their admission into evidence under Rule 155.

[23] STL-11-01/T/TC, Transcript of Pre-Trial Conference of 16 June 2014, pp. 25-27.

18. The Trial Chamber's decision of 30 January 2014 cannot create a precedent disadvantaging any of the Accused; the Defence could have objected to the substance of the forensic reports annexed to the witness statements under Rule 155. The same substantive objection permissible under Rule 161 (B) (iii) regarding the expert's qualifications could have been made under Rule 155. Rule 161 was merely the vehicle for admitting into evidence the annexure to a statement offered under Rule 155, and it was the obvious route, as forensic pathology reports, are, in essence, expert reports. And no other Defence counsel have subsequently challenged the Trial Chamber's decision to admit the two forensic reports into evidence under Rule 161, as opposed to another Rule of admission.

19. Substantively, it matters not in either practical or legal terms whether the forensic reports were admitted under Rule 154 or Rule 155 or, alternatively, under Rule 161. No injustice has been done. No dangerous precedent creating potential prejudice to the Defence has been created—and, as noted above, Rule 161 applies equally to the experts of any Party to the proceedings, not just the Prosecution.

20. There is therefore no reason to grant leave to have the Trial Chamber reconsider this decision to avoid an injustice. Moreover, even if the Trial Chamber had committed some minor technical breach under the general principles of international criminal law in not seeking submissions under Rule 161, here, of the qualifications of a medical doctor to pronounce as deceased a victim of an explosion and to describe the injuries sustained—where the deaths and their cause were unchallenged—no injustice could have occurred. The justification for filing this motion is non-existent. At the time of its filing, the 'issue' not only was not in contention, but as explained by the Prosecution, was moot. Legally, it is a non-issue. The request is unwarranted and manifestly unfounded.

21. Finally, and incongruously, while counsel for Mr. Merhi repeatedly complained of having insufficient to time to prepare for the resumption of trial,[24] they found time to file 10 pages of submissions of around 4,000 words.[25] As the Appeals Chamber has held, I too am 'puzzled that counsel would expend their resources on such a matter'.[26]

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[24] *See* STL-11-01/T/TC, Merhi Defence Request for Certification to Appeal the Decision on Joinder and Trial Management, 4 March 2014, para. 21; Merhi Defence Request Regarding the Disclosure of a Table of Incriminating Evidence, 17 April 2014, para. 2; Submission from the Merhi Defence on Setting the Date for the Start of the Trial, 9 May 2014. This was repeated in their Defence opening statement, Transcript of the Hearing of 19 June 2014, pp. 10-11.

[25] To the four page motion for reconsideration of 1,558 words was attached a 2,398 word six-page annex—with 39 footnotes, and quoting seven international decisions.

[26] STL-11-01/PT/AC/AR126.2, Decision on Appeal Against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 22.

CONCLUSION

22. In exercising my filtering function I have decided that the motion is unwarranted and is manifestly unfounded. It is without merit and is dismissed.

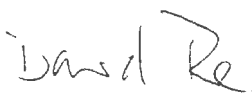
DISPOSITION

FOR THESE REASONS;

The Defence motion, 'Demande d'Autorisation de la Défense de Merhi aux fins de Déposer une Requête en Réexamen de la Décision du 30 Janvier 2014' (Merhi Defence Request for Leave to File a Request for Reconsideration of the Decision of 30 January 2014), is dismissed.

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

Leidschendam,
The Netherlands
24 June 2014



Judge David Re, Presiding