



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: 30 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 LEAVE TO RECONSIDER TWO DECISIONS ON CHALLENGES TO THE FORM OF THE INDICTMENT (MERHI DEFENCE)

Office of the Prosecutor:

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Mr. Peter Haynes, Mr. Mohammad F. Mattar
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& Mr. Thomas Hannis

Counsel for Mr. Mustafa Amine Badreddine:

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& Mr. Iain Edwards

Counsel for Mr. Hassan Habib Merhi:

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du Hellen & Mr. Jad Khalil

Counsel for Mr. Hussein Hassan Oneissi:

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Counsel for Mr. Assad Hassan Sabra:

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& Mr. Geoffrey Roberts



BACKGROUND

1. The Trial Chamber, on 28 March 2014, dismissed a motion filed by counsel for Hassan Habib Merhi alleging defects in the indictment filed against him on 5 June 2013.¹ Counsel for Mr. Merhi did not seek to have the decision certified for interlocutory appeal in the seven days allowed under Rule 126 (D) of the Special Tribunal's Rules of Procedure and Evidence.
2. On 4 April 2014, the Trial Chamber declared operative a consolidated indictment in the joined case of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra* and *Prosecutor v. Hassan Habib Merhi*.² That indictment had been filed by the Prosecution on 7 March 2014.³ The consolidated indictment was to all intents and purposes in substance the same—in relation to Mr. Merhi—as the original indictment, but with some minor adjustments to the pleadings. Some of these, explained the Prosecution,⁴ were made as a result of arguments put by counsel for Mr. Merhi in their challenge to the form of the original indictment (against Mr. Merhi) filed on 14 February 2014.⁵
3. Counsel for Mr. Merhi, however, then filed another challenge alleging defects in the form of the consolidated indictment, expressed to be under Rule 71 (F) and Rule 90 (A) (ii), but effectively repeating the arguments that the Trial Chamber had dismissed in its decision of 28 March 2014.⁶ The Trial Chamber, on 22 May 2014, similarly dismissed that challenge, holding that it was procedurally invalid as it lacked any legal basis.⁷ The Trial Chamber also held that it amounted to an implicit but unstated request to reconsider the decision of 28 March 2014 and in the absence of any compelling reason to do so it was not going to reconsider it.⁸ Counsel for Mr. Merhi, again, did not ask the Trial Chamber to certify that second decision for interlocutory appeal in the permitted seven days. On 3 June 2014, more than two months after the first decision, and two weeks after the second, counsel for

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, Decision on Alleged Defects in the Form of the Indictment Against Hassan Habib Merhi, 28 March 2014.

² STL-11-01/T/TC, Decision on Prosecution Motion on a Consolidated Indictment and Amending Witness and Exhibit Lists, 4 April 2014.

³ STL-11-01/T/TC, Prosecution Submission of Consolidated Indictment, Witness and Exhibit Lists, 7 March 2014.

⁴ At para. 2 of its submission, the Prosecution stated that 'During its preparation of the consolidated Indictment, the Prosecution considered the clarifications sought by Defence counsel for Mr. Merhi as outlined in the Preliminary Motion on Defects in the Form of the Indictment, which was filed before the Trial Chamber on 14 February 2014. The Prosecution also noted several areas in which amendments could enhance the clarity of the indictment through the removal of unnecessary evidential information, the addition of more precise information and by clarifying the roles of the Accused'.

⁵ STL-11-01/PT/TC, Preliminary Motion on Defects in the Form of the Indictment, 14 February 2014.

⁶ STL-11-01/T/TC, Preliminary Motion on Defects in the Form of the Consolidated and Amended Indictment of 7 March 2014, 25 April 2014.

⁷ STL-11-01/T/TC, Decision Dismissing Merhi Motion Alleging Defects in the Form of the Consolidated Indictment, 22 May 2014, paras 9-11.

⁸ Decision of 22 May 2014, para. 15.

Mr. Merhi sought my leave as the Presiding Judge of the Trial Chamber to have the Trial Chamber reconsider both decisions.⁹ Annexed to the motion was a copy of the intended motion to reconsider the decisions, if leave were granted to do so.¹⁰ The Prosecution opposed the application.¹¹

ANALYSIS

4. Under Rule 140, ‘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 accepted the following principles as relevant to my task in considering whether to grant leave to have the Trial Chamber reconsider an earlier decision:¹²

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,¹³ including ‘a filtering function to prevent the filing of unwarranted requests’.¹⁴ 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’.¹⁵ The Presiding Judge acts ‘as a filter to screen applications to ensure that they contain the procedural and legal justifications necessary to allow the Trial Chamber to decide an application for reconsideration on its merits’.¹⁶

5. The question therefore is whether the request seeking leave to reconsider the two decisions is not manifestly unfounded, frivolous or aimed at circumventing the Rules. My role is to act as a filter to prevent the Trial Chamber having to decide unwarranted applications for reconsideration.

⁹ STL-11-01/T/TC, Application by the Merhi Defence for Leave to File a Request for Reconsideration of the Decisions on Defects in the Form of the Indictment, 3 June 2014, (Demande d’autorisation de la Défense de Merhi aux fins de déposer une requête en réexamen des décisions sur les vices de forme de l’acte d’accusation).

¹⁰ Annex, ‘Motion from the Merhi Defence for Reconsideration of the Decisions on Defects in the Form of the Indictment’ (Annexe, Requête de la Défense de Merhi aux fins de réexamen des décisions sur les vices de forme de l’acte d’accusation).

¹¹ STL-11-01/T/TC, Prosecution Response to the Merhi Defence’s Application for Leave to File a Request for Reconsideration of the Decision on Defects in the Form of the Indictment, 18 June 2014.

¹² 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, para. 17.

¹³ See STL-11-01/PT/TC, Décision refusant à la défense de M. Badreddine l’autorisation de déposer une requête en réexamen, 2 juillet 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.

¹⁴ 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.

¹⁵ 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.

¹⁶ 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.

6. Five arguments support the application for leave to permit reconsideration. Under the heading (i) 'Errors in fact and law' are four grounds arguing that the Trial Chamber erred in (1) applying an erroneous legal standard in finding that 'the Defence would be informed of the nature of the charges through a combination of the indictment, the pre-trial brief, but also the evidence which the Prosecution intends to use at trial'; (2) concluding an absence of a link between stated material facts and the counts was not a defect in the form of the indictment; (3) concluding that the legal characterisation of Mr. Merhi's role and contacts in connection with the purchase of a van and the surveillance of Mr. Rafik Hariri was a matter of evidence; and (4) finding that the circumstances of Mr. Merhi allegedly joining the charged conspiracy were not material facts. These alleged errors, although generally asserted to relate to both decisions, are footnoted to the decision of 28 March 2014. No specific errors are alleged in relation to the second decision, which had been dismissed on procedural grounds.

7. As the Prosecution has submitted,¹⁷ the Defence arguments in relation to these four alleged errors¹⁸ do no more than recite a disagreement with a decision (or decisions). They do not substantiate how the Trial Chamber erred, and thus why leave should be granted to allow the Trial Chamber to reconsider its decisions.

8. The fifth argument, under the heading (ii) 'Abuse of discretion and effective remedy' argues that the Trial Chamber 'abused its discretion by rendering on 28 March 2014 a decision on an indictment that it was to declare null and void a few days later', thus rendering the Defence arguments in their motion challenging that indictment moot and 'blocking any possibility of appeal'.

(i) Decision of 28 March 2014

9. Acting on the Trial Chamber's order of 12 February 2014,¹⁹ the Prosecution, on 7 March 2014, filed a motion to submit a consolidated indictment under Rule 71 (A) (iii), and consolidated witness and exhibit lists. Counsel for Mr. Merhi did not respond to the motion in the fourteen days allowed under Rule 8 (A); they did not oppose the filing of a consolidated indictment. On 4 April 2014, the Trial Chamber declared 'the consolidated indictment dated 7 March 2014 to be the operative indictment in the proceedings'. No formal order was made in respect of the original indictment. Defence counsel, however, argue that the Trial Chamber, by declaring the consolidated indictment to be operative rendered the original indictment null and void and hence deprived the Defence of any

¹⁷ Prosecution response, paras 5-17.

¹⁸ Request for leave, paras 12-15.

¹⁹ Official transcript of 12 February 2014, page 121.

possibility of appealing against the decision of 28 March 2014. They also asserted, despite the Trial Chamber making no such finding, that it was about to declare the original indictment null and void.²⁰ This, however, does not accurately represent the Trial Chamber's decision.

10. The decision declaring a consolidated indictment operative naturally had the effect of replacing the original indictment. The proceedings had been joined and the Trial Chamber considered it desirable to proceed on one rather than two separate indictments.²¹ It did not, however, render the original indictment 'null and void' and no order or declaration was made to that effect. Irrespective of whether the decision simply replaced, or, alternatively, actually rendered the original indictment 'null and void', this representation—to the effect that the original indictment was no longer operative and an appeal would have been inadmissible—effectively frames the futility of this argument. Reconsidering a decision relating to a challenge to a non-operative indictment would be pointless.

11. The motion also misquotes the Trial Chamber's decision and misrepresents its effect. Here, Defence counsel argue, as the first alleged error, that the Trial Chamber 'applied an erroneous legal standard whereby the Defence would be informed of the nature of the charges through a combination of the indictment, the pre-trial brief, but also the evidence which the Prosecution intends to use at trial'.²² The Prosecution described this as a 'misrepresentation of the Trial Chamber's Decision of 28 March 2014'.²³ The Trial Chamber made no such finding; rather—in the paragraphs referenced in the motion—it referred to 'the totality of the case' and not the nature of the charges. In fact, the Trial Chamber, at paragraph 46 of the decision, under 'Conclusion', stated unequivocally that '*the indictment provides counsel for Mr Hassan Habib Merhi with enough detail to inform them clearly of the nature and cause of the charges to allow them to prepare a defence of the case at trial*' (italics added). Counsel are again reminded to take care to accurately represent the court record in their filings.²⁴

²⁰ Request for leave, para. 17.

²¹ STL-11-01/T/TC, Decision on Prosecution Motion on a Consolidated Indictment and Amending Witness and Exhibit Lists, 4 April 2014, para. 5.

²² Request for leave, para. 12 (referring to Decision of 28 March 2014, paras 18, 45).

²³ Prosecution response, para. 6.

²⁴ And legal authorities relied upon, *see e.g.*, STL-11-01/T/AC/AR126.8, Decision on Appeal by Counsel for Mr Merhi against the Trial Chamber's Decision on the Resumption of Trial Proceedings, 5 June 2014, paras 20, 29-31; STL-11-01/T/AC/AR126.7, 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, paras 16, 42; STL-11-01/T/TC, Decision on Certification of 'Decision on Trial Management and Reasons for Decision on Joinder', 31 March 2014, para. 34; STL-11-01/T/TC, Reasons for Decision Denying Merhi Defence an Extension of Time to File an Application for Certification to Appeal, 19 May 2014, paras 12-17, 27. *See*, STL-11-01/T/TC, Decision on Merhi Defence Request for a 'Table of Incriminating Evidence', 9 May 2014, para. 24; STL-11-01/T/TC, Decision on Alleged Defects in the Form of the Indictment against Hassan Habib Merhi, 28 March 2014, para. 22.

12. As the indictment to which the decision relates is no longer operative, this part of the motion is inadmissible. It is either therefore frivolous or an abuse of process. For the purpose of Rule 140, the motion in this aspect is unwarranted and manifestly unfounded.

(ii) Decision of 22 May 2014

13. In its decision of 22 May 2014, the Trial Chamber dismissed, as procedurally defective, the motion purporting to allege defects in the form of the consolidated indictment. It found that there was no legal basis under Rule 90 (A) (ii), nor, in the absence of fresh charges, under Rule 71 (F) to mount a second challenge alleging defects in the form of the same, but now consolidated, indictment. The Trial Chamber, however, then addressed the substantive challenges to the consolidated indictment and explained that it would have dismissed them anyway as they merely either repeated challenges dismissed in the decision of 28 March 2014, or challenges already dismissed in 2013 in relation to the amended *Ayyash* indictment.²⁵

14. The specific error alleged in relation to this decision is that the Trial Chamber ‘did not take into account the exceptional circumstances of the case when it decided not to render a reasoned decision on the merits and subject to appeal...’ These are expressed to be the joinder and the filing of a consolidated indictment ‘rather than simply an “amended” indictment within the meaning of Rule 71 (F) and the entry into force of an amended indictment during the debate on defects in the form’.²⁶

15. This, however, is legally wrong. Rule 71 (F) provides (*italics added*):

The accused shall have a further period of twenty-one days in which to file preliminary motions pursuant to Rules 89 and 90 *in respect of the new charges*. Where necessary, the Pre-Trial Judge or a Chamber may postpone the date for trial to ensure adequate time for the preparation of the defence.

There were no new charges. No challenge alleging defects in the form of the consolidated indictment was possible under Rule 71 (F). I could not grant leave to reconsider the decision on the basis of this argument.

16. The other argument is that the decision caused prejudice to the Merhi Defence by depriving it ‘of a reasonable opportunity to lodge an appeal on the issue of defects in the form of its indictment,

²⁵ Decision of 22 May 2014, paras 12-14 (referring to: Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013; Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013; and, Decision of 28 March 2014.).

²⁶ Request for leave, para. 18.

before the start of the trial, on an equal footing with the four co-accused'.²⁷ Counsel for Mr. Merhi, it appears, must be referring to the right to file an application under Rule 126 (C) to have certified for interlocutory appeal a decision on their challenge alleging defects in the form of an indictment against Mr. Merhi. And into this must also be read 'a reasoned decision' on the challenge itself, rather than one dismissing a second challenge as being procedurally invalid.

17. These arguments should be balanced against counsel for Mr. Merhi not seeking to have certified for interlocutory appeal the decision to dismiss their second challenge as procedurally invalid without delivering a reasoned decision on the substance of the motion. They could have sought the Appeals Chamber's intervention to direct the Trial Chamber to consider the substance of their second motion. From 12 February 2014—two days before they filed their challenge to the form of the original indictment—counsel for Mr. Merhi knew that the Trial Chamber wanted the joined case to proceed to trial on a consolidated indictment.²⁸ That is the practice of other international criminal courts and tribunals. Notwithstanding this, counsel for Mr. Merhi chose to file a challenge to the form of an indictment that they knew would soon be replaced by a consolidated indictment, knowing that the decision on the original *Merhi* indictment may have become moot and thus not subject to an interlocutory appeal.²⁹

18. However, despite this, the combination of two procedural events has produced a unique situation that could cause an injustice under Rule 140. The first is that the two cases were joined three days before the first challenge to the form of the indictment was due to be filed on 14 February 2014. The second is that the consolidated indictment was declared operative on 4 April 2014, a week after the first challenge to the original *Merhi* indictment was dismissed, on 28 March 2014. This confluence of procedural circumstances could function to deprive Mr. Merhi of a reasoned decision on this issue that his counsel could, if it went against them, seek to have certified for interlocutory appeal.

19. On balance, in these circumstances, and only on this basis, I am prepared to grant leave to reconsider the decision of 22 May 2014. The decision may thus be reopened to avoid an injustice, namely, of not being able to seek an interlocutory appeal against a substantive decision.

20. I have consulted the full Trial Chamber and it agrees, in the circumstances and for procedural expedition, that because counsel for Mr. Merhi have already filed their substantive motion for

²⁷ Request for leave, para. 19.

²⁸ Official transcript of 12 February 2014, pages 48-49.

²⁹ As per the Appeals Chamber's decision in STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals Against Trial Chamber's 'Decision on Alleged Defects in the Form of the Amended Indictment', 5 August 2013, para. 2.

reconsideration as an annex to the motion for leave for reconsideration, it need not be refiled. The Trial Chamber will treat it as filed and will only reconsider those paragraphs relating to the decision of 22 May 2014. The Trial Chamber is also prepared to reconsider the decision on the basis of the arguments already filed by the Parties.

(iii) The motion is partly frivolous or an abuse of process

21. I have found that the motion insofar as it relates to the Trial Chamber's decision of 28 March 2014 is inadmissible and should not have been filed. In this respect it is either frivolous or an abuse of process. The Special Tribunal's Appeals Chamber has issued warnings to counsel not to file motions that are frivolous or an abuse of process,³⁰ and against expending their resources on filings that 'lack any serious legal or factual basis'.³¹ These warnings are consistent with the case-law and Rules of Procedure and Evidence of other international criminal courts and tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY),³² where motions that are 'manifestly ill-founded, an abuse of the court process and frivolous' have been subject to such sanctions.³³ The International Criminal Court (ICC) has also imposed sanctions and recognised that 'frivolous and vexatious' filings 'can be considered an abuse of procedure', despite the lack of any particular statutory provision.³⁴ The Trial Chamber has now, several times, noted that counsel for Mr. Merhi should not have filed certain motions.³⁵ Rule 126 (G) provides,

³⁰ STL-11-01/PT/AC, Decision on Application by Counsel for Messrs Badreddine and Oneissi against President's Order on Composition of the Trial Chamber of 10 September 2013, 25 October 2013, para. 17; 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. 13.

³¹ 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.

³² Pursuant to Rule 46 (D) of its Rules of Procedure and Evidence, from which the Special Tribunal's Rule 126 (G) derives. *See e.g.*, ICTY, *Prosecutor v. Kupreškić*, IT-95-16-A, Decision on Motion by Zoran Kupreškić, Mirjan Kupreškić and Vladimir Šantić for Leave to Appeal the Decision of the Appeals Chamber dated 29 May 2001, 18 June 2001, p. 2; ICTY, *Prosecutor v. Kvočka*, IT-98-30/1-A, Decision on Motion by Zoran Žigić for Issuing of a Binding Order to Prosecution, 7 March 2002, p. 3; ICTY, *Prosecutor v. Seselj*, IT-03-67-PT, Decision on Motion for Disqualification, p. 2. *Cf.* ICTY, *Prosecutor v. Delić*, IT-04-83-Misc.1, Decision on Prosecution's Appeal, 1 November 2006, p. 3.

³³ *See e.g.*, ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Decision on Motion by Zoran Kupreškić, Mirjan Kupreškić and Vladimir Šantić for Leave to Appeal the Decision of the Appeals Chamber dated 29 May 2001, 18 June 2001, p. 2.

³⁴ ICC, *Situation in Darfur, Sudan*, Decision on the Request for Review of the Registry's Decision of 13 February 2007, 15 March 2007, p. 7.

³⁵ *See, e.g.*, STL-11-01/T/TC, Decision and Observations on Inspection of Prosecution's Expert Reports, 28 February 2014, paras 5, 7; STL-11-01/T/TC, Decision on 'Merhi Defence Request Relating to Holding Confidential Meetings and the Public Nature of the Proceedings', 1 April 2014, para. 16; STL-11-01/T/TC, Reasons for Decision on Reconsideration or Certification of the Deadline for Certain Evidentiary Motions (Merhi), 31 March 2014, para. 20; STL-11-01/T/TC, Decision Refusing Leave to Reconsider Decision to Admit Medical Proof of Deaths (Merhi Defence), 24 June 2014, para. 20.

When a Chamber finds that a motion or other filing is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion or other filing and the costs thereof.

22. The normal consequence of such a finding is the withholding of fees associated with the production of such a motion. However, as this is the first such ruling against counsel for Mr. Merhi some discretion is required and the Registrar, on this occasion, should not withhold the payment of those fees associated with producing the offending part of the motion.

CONCLUSION

23. In exercising my filtering function, I have decided that the motion is partly inadmissible and thus unwarranted and manifestly unfounded. Counsel for Mr. Merhi should not have filed a motion seeking leave to reconsider the decision of 28 March 2014. As it is also an abuse of process or frivolous, it follows that that part of it must be dismissed.

24. Leave will be granted to reconsider the decision of 22 May 2014. This is to allow counsel for Mr. Merhi the opportunity to have a reasoned decision, on their challenge alleging defects in the form of the indictment, that is capable of certification for interlocutory appeal.

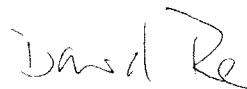
DISPOSITION**FOR THESE REASONS, I**

PARTLY DISMISS the motion ‘Demande d’autorisation de la Défense de Merhi aux fins de déposer une requête en réexamen des décisions sur les vices de forme de l’acte d’accusation’ (Application by the Merhi Defence for Leave to File a Request for Reconsideration of the Decisions on Defects in the Form of the Indictment) and refuse leave to reconsider ‘Decision on Alleged Defects in the Form of the Indictment Against Hassan Habib Merhi,’ of 28 March 2014; and

GRANT LEAVE to reconsider the ‘Decision Dismissing Merhi Motion Alleging Defects in the Form of the Consolidated Indictment,’ of 22 May 2014.

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

Leidschendam,
The Netherlands
30 June 2014



Judge David Re, Presiding

