



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

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

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

Registrar: Mr. Daryl Mundis

Date: 25 July 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 DISMISSING MERHI DEFENCE MOTION FOR
CERTIFICATION TO APPEAL THE DECISION OF 3 JULY 2014 ON
DEFECTS IN THE FORM OF THE CONSOLIDATED INDICTMENT**

Office of the Prosecutor:

Mr. Norman Farrell, Mr. Graeme Cameron
& Mr. Alexander Milne

Counsel for Mr. Salim Jamil Ayyash:

Mr. Eugene O'Sullivan, Mr. Emile Aoun
& Mr. Thomas Hannis

Victims' Legal Representatives:

Mr. Peter Haynes, Mr. Mohammad F. Mattar
& Ms. Nada Abdelsater-Abusamra

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. Dorothee 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 M.
& Mr. Geoffrey Roberts



INTRODUCTION AND BACKGROUND

1. The Trial Chamber, in a decision on 22 May 2014, dismissed on procedural grounds a motion filed by counsel for the Accused, Mr. Hassan Habib Merhi, alleging defects in the form of the consolidated indictment against Mr. Merhi and the other four Accused, Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra, filed on 7 March 2014.¹
2. On 30 June 2014, at counsel for Mr. Merhi's request, the Presiding Judge of the Trial Chamber granted leave to reconsider that decision.² The Trial Chamber then, on 3 July 2014, reconsidered and reversed its decision to dismiss the motion on procedural grounds. It then considered the arguments of counsel for Mr. Merhi alleging defects in the form of the consolidated indictment, and the Prosecution's response, and dismissed the motion.³ On 14 July 2014, counsel for Mr. Merhi requested, under Rule 90 (B) (ii) of the Special Tribunal's Rules of Procedure and Evidence, certification to appeal that decision.⁴ The Prosecution opposed the motion.⁵

ISSUE FOR CERTIFICATION

3. Counsel for Mr. Merhi have identified for certification for interlocutory appeal, the following issue, summarised in the question:⁶

Did the Chamber err in finding that Mr. Merhi has been clearly and sufficiently informed of the material facts supporting the charges laid against him under each count?

Defence counsel identified three sub-headings of legal error:

- (i) Lack of reasoning on the 'non-material' nature of the alleged facts: the Trial Chamber summarily and without reasoning concluded that the circumstances of Mr. Merhi's joining the alleged conspiracy and his alleged role in the preparatory acts constitute evidence and not material facts;

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, Decision Dismissing Merhi Motion Alleging Defects in the Form of the Consolidated Indictment, 22 May 2014.

² STL-11-01/T/TC, Decision on Leave to Reconsider Two Decisions on Challenges to the Form of the Indictment (Merhi Defence), 30 June 2014.

³ STL-11-01/T/TC, Decision on Merhi Defence Motion for reconsideration of Decision of 22 May 2014 on Alleged Defects in the Form of the Indictment, 3 July 2014.

⁴ STL-11-01/T/TC, Merhi Defence Request for Certification to Appeal the Decision of 3 July 2014 on Defects in the Form of the Indictment, 14 July 2014.

⁵ STL-11-01/T/TC, Prosecution response to "Requête de la Défense de Merhi en certification de l'appel de la décision du 3 juillet 2014 sur les vices de forme de l'acte d'accusation", 21 July 2014.

⁶ 'La Chambre a-t-elle erré en concluant que Merhi était clairement et suffisamment informé des faits matériels supportant les charges à son encontre sous chaque chef d'accusation?', Merhi Defence motion, para. 8.

- (ii) Legal characterisation of the alleged material facts: the Trial Chamber erred in concluding that the absence of legal characterisation of the material facts does not constitute a proper challenge alleging a defect in the form of the indictment; and
- (iii) Material facts linked to the characterisation of the crime of conspiracy: the Trial Chamber erred in holding that the date and circumstances of Mr. Merhi's joining and participating in the alleged conspiracy are sufficiently specific.

4. Counsel for Mr. Merhi argue that the identified issue would affect the fair and expeditious conduct of the proceedings because it infringes Mr. Merhi's fundamental rights, protected by Article 16 (4) (a) of the Statute of the Special Tribunal, and affects their capacity to prepare for trial.⁷ The immediate resolution of the issue by the Appeals Chamber could contribute to significantly expediting the proceedings.⁸

APPLICABLE LAW

5. Rule 90 (B) (ii) provides that a Chamber may certify a decision for appeal on a preliminary motion if two cumulative criteria are satisfied: first, the decision must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and second, that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The 'parties applying for certification to appeal a decision must take care to ensure that they specify the appealable issues in that decision.'⁹ A request for certification is not concerned with whether a decision was correctly reasoned or not. This is a 'high threshold', and a grant of certification will therefore be exceptional.¹⁰ The strict standard that the Trial Chamber must apply in considering motions for certification requires not only a clear and precise identification of the issues in the challenged decision but, above all, an accurate one.¹¹

⁷ 'Cette question est susceptible de compromettre l'équité de la procédure car elle touche au droit fondamental de l'accusé d'être informé des charges pesant contre lui, au sens de l'article 16(4)(a) du Statut, et affecte la capacité de la Défense de se préparer utilement au procès.', Merhi Defence motion, para. 9.

⁸ '[S]on règlement immédiat par la Chambre d'appel pourrait aussi faire progresser de manière significative la procédure', Merhi Defence motion, para. 10.

⁹ 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. 11.

¹⁰ 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 citing ICTY, *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, IT-04-84-T, Decision on Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65 *ter* Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92 *ter*, 15 March 2012, para. 8.

¹¹ STL-11-01/T/TC, Decision on Request for Certification to Appeal Orders Concerning Five Defence Motions on State Cooperation, 27 January 2014, para. 10.

DISCUSSION

6. The crux of the legal issue here is whether the consolidated indictment contains all necessary legal averments of the nature and cause of the charges thus providing Defence counsel with proper notice of the case against an Accused person to allow them to properly defend him at trial. The general principles of international criminal law are well-settled: notice to the Defence of a Prosecution case is ‘contained in the combination of the [...] indictment, the Prosecution’s pre-trial brief and the evidence intended to be used at trial’.¹² In this case, all have been long disclosed to Defence counsel.

7. The Trial Chamber has previously decided the substance of the arguments posed by counsel for Mr. Merhi in this application for certification for an interlocutory appeal. The arguments in this motion substantially mirror challenges to the amended indictments in the *Ayyash* case made by counsel for Mr. Badreddine, Mr. Oneissi and Mr. Sabra. The Trial Chamber twice dismissed these in 2013,¹³ including declining to certify for interlocutory appeal an essentially identical issue raised by those Defence counsel on the amended indictment, dated 21 June 2013.¹⁴ Also of relevance is the Trial Chamber’s decision that the consolidated indictment of 7 March 2014 against all five Accused—which contains no new charges in respect of Mr. Merhi—is in substance the same as the indictment of 5 June 2013 (against Mr. Merhi only) and, by extension, the amended indictment of 21 March 2013 (against the other four Accused).¹⁵

First sub-issue: lack of reasoning on the ‘non-material’ nature of the alleged facts

8. At paragraph 21 of its decision the Trial Chamber held that ‘the circumstances in which Mr. Merhi is alleged to have joined the alleged conspiracy is a matter for evidence at trial and need not be pleaded as material facts in an indictment’. And, at paragraph 24, ‘the issues raised in the motion

¹² STL-11-01/T/TC, Decision on Alleged Defects in the Form of the Indictment against Hassan Habib Merhi, 28 March 2014 (‘Decision of 28 March 2014’), where the Trial Chamber identified, summarised and applied these principles.

¹³ STL-11-01/PT/TC, Sabra’s Preliminary Motion Challenging the Form of the Indictment, confidential, 25 June 2012, with a public redacted version dated the same day; STL-11-01/PT/TC, Preliminary Motion Submitted by the Defence for Mr. Mustafa Amine Badreddine on the Basis of Rule 90 (A) (ii) of the Rules of Procedure and Evidence, 25 June 2012; STL-11-01/PT/TC, The Defence for Hussein Hassan Oneissi Preliminary Motion on Defects in the Form of the Indictment, 25 June 2012; STL-11-01/PT/TC, The Defence for Hussein Hassan Oneissi Preliminary Motion on the Defects in the Form of the Amended Indictment of 21 June 2013, Confidential, 19 August 2013, with a public redacted version filed on 20 August 2013; STL-11-01/PT/TC, Preliminary Motion on the Form of the Indictment, Confidential, 19 August 2013, with a public redacted version filed on 23 August 2013; STL-11-01/PT/TC, Nouvelle exception préjudicielle présentée par la Défense de M. Badreddine a l’encontre de l’Acte d’accusation modifié du 21 juin 2013, 19 August 2013. The Trial Chamber dealt with the challenges raised in these motions in the Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013 and the Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013.

¹⁴ STL-11-01/T/TC, Decision on Defence Motion for Certification for Appeal of the Trial Chamber’s 13 September 2013 ‘Decision on Alleged Defects in the Form of the Indictment’, 9 October 2013.

¹⁵ STL-11-01/T/TC, Decision on Merhi Defence Motion for Reconsideration of Decision of 22 May 2014 on Alleged Defects in the Form of the Indictment, 3 July 2014, para. 28.

relate to the evidence to be led at trial and to particulars between the Parties and not to the content and form of the consolidated indictment'. Counsel for Mr. Merhi claim that the decision, in those paragraphs, lacks legal reasoning in relation to the 'non-material' nature of the alleged facts.¹⁶ The lack of a definition of 'material facts' prevents them, it is argued, from challenging the Trial Chamber's conclusion that these alleged facts need not be pleaded as material facts in the indictment.¹⁷

9. The Prosecution responded by arguing—in relation to the circumstances of Mr. Merhi's joining the alleged conspiracy—that the consolidated indictment pleads the material facts, and the Prosecution was not required to define those material facts or distinguish them from the evidence. The Prosecution was not required to allege a specific event or date marking the beginning of the alleged conspiracy or when each co-conspirator agreed to join. Immediate resolution of a purported issue which does not actually arise from the decision would not materially advance the proceedings.¹⁸

10. In the decision, at paragraphs 21 and 24—and consistent with its finding on the same issue at paragraph 28 of the decision of 28 March 2014¹⁹—the Trial Chamber implicitly defined what constitutes material facts in the context of this case. It did so by holding that the circumstances in which Mr. Merhi is alleged to have joined the conspiracy alleged and his role in any preparatory acts in the conspiracy need not be pleaded as material facts in the consolidated indictment. They are matters for evidence at trial. In other words, in the Trial Chamber's view, those facts that it has specified do not have to be pleaded in the consolidated indictment are not material facts. Therefore, the facts not pleaded in the consolidated indictment—in the context of this case—do not constitute material facts. If they had to be pleaded as material facts the Trial Chamber would have ordered the Prosecution to amend the consolidated indictment to plead them.

11. This claim of a lack of legal reasoning thus amounts to no more than a disagreement with the Trial Chamber's decision. Further, counsel for Mr. Merhi have filed a challenge to the decision; hence their claim that the alleged lack of legal reasoning prevented them from properly challenging the decision is baseless.

¹⁶ '[L]a Chambre erre en concluant sommairement et sans motivation que les circonstances dans lesquelles Merhi se serait joint au complot, ainsi que son rôle allégué dans les actes préparatoires, seraient de simples «éléments de preuve» et non des faits matériels', Merhi Defence motion, para. 9 (i).

¹⁷ Merhi Defence motion, para. 9 (i).

¹⁸ Prosecution response, para. 9.

¹⁹ STL-11-01/T/TC, Decision on Alleged Defects in the Form of the Indictment against Hassan Habib Merhi, 28 March 2014.

12. Moreover, even if the Trial Chamber committed some technical legal error on the issue of whether the facts that can be derived from each individual piece of evidence supporting the averments in the consolidated indictment should be pleaded as ‘material facts’, its decision cannot ‘significantly affect the fair and expeditious conduct or the outcome of the proceedings’. Defence counsel have all of the evidence that they claim should be pleaded as material facts in the consolidated indictment. It logically follows that ordering the Prosecutor to plead—in the consolidated indictment—more facts derived from that evidence, will not provide Defence counsel with better information on how to prepare their defence at trial. It will not provide them with better information as to the nature and cause of the charges in the consolidated indictment. The Trial Chamber thus declines to certify this sub-issue for appeal.

Second sub-issue: legal characterisation of the alleged material facts

13. Counsel for Mr. Merhi submit, referring to paragraph 17 of the decision, that the Trial Chamber erred in applying ‘the same reasoning as that of the Decision of 28 March 2014 in order to conclude that the absence of a legal characterisation of the statement of the material facts did not constitute a valid motion regarding defects in the form’.²⁰ (The Trial Chamber there applied paragraph 22 of its decision of 28 March 2014). It is a little difficult, however, to decipher what this sentence actually means.

14. Defence counsel reiterate that the consolidated indictment is defective in form and jeopardises Mr. Merhi’s rights to a fair trial because it does not specify—under each count relating to Mr. Merhi—the paragraph number of any paragraph subsequently appearing in the consolidated indictment containing any material facts supporting that count.²¹ Counsel further submit that the Trial Chamber relied on an inaccurate description of the law and practice applied before the international tribunals.²²

15. The Prosecution responded by arguing that counsel for Mr. Merhi have not identified any legal authority supporting the proposition that an indictment must specify which paragraphs support each count. There is thus no discernible issue meeting the certification standard; the Trial Chamber did not err in concluding that no such legal requirement exists.²³

²⁰ ‘[L]a Chambre erre en appliquant, dans la Décision du 3 juillet 2014, le même raisonnement que dans sa Décision du 28 mars 2014 pour conclure que l’absence de qualification juridique des faits matériels énoncés ne constituait pas une exception pour vice de forme valable,’ Merhi Defence motion, para. 9 (ii).

²¹ Merhi Defence motion, para. 9 (ii).

²² Merhi Defence motion, para 9 (ii).

²³ Prosecution response, para. 10.

16. In relation to the practice before the international courts and tribunals, the Trial Chamber held that decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) cited by Defence counsel did not support their arguments. It emphasised that the *current* ICTY practice was actually the opposite; eight of the nine cases *on trial or on appeal* at the ICTY do not contain discrete lists of counts being linked to specific paragraphs in the indictment.²⁴ Unfortunately, the ICTY indictments cited by counsel for Mr. Merhi in this motion for certification similarly fail to support their argued legal assertions.²⁵ Some of the counts in some of indictments cited cross-reference random paragraphs in the indictments, but they do not *link* them to specific paragraphs in the indictment.²⁶ Counsel are again reminded to accurately cite any authorities used to support their legal arguments.²⁷

17. Furthermore, to succeed in their argument that the decision jeopardises Mr. Merhi's right to a fair trial, Defence counsel must connect the test in Rule 90 (B) (ii) with their assertion that the Trial Chamber erred in not ordering the Prosecution to amend the consolidated indictment to cross-reference the pleaded counts with any succeeding paragraph pleading material facts.

18. Counsel for Mr. Merhi, however, have not identified how the Trial Chamber's failing to order the Prosecution to insert this information into the consolidated indictment—and especially where the Prosecution has no statutory obligation to do so—'would significantly affect the fair and expeditious conduct of the trial'. It cannot. The issue submitted for certification for interlocutory appeal thus amounts to no more than a disagreement with how the Trial Chamber exercised its discretion. Moreover, the Trial Chamber has recently ruled that convenience to a Party does not translate into a

²⁴ At para. 17, by reference to and incorporating para. 22 of the Decision of 28 March 2014.

²⁵ Merhi Defence motion, footnote 16.

²⁶ For example, see *Prosecutor v. Karadžić*, IT-95-5/18-PT, Third Amended Indictment, 27 February 2009 and *Prosecutor v. Popović, Beara, Nikoli, Borovčanin, Milić, Gvero, and Pandurević*, IT-05-88-T, Indictment, 4 August 2006. The cross-references in these indictments do no more than state 'as alleged in paragraphs ...' or 'see Paras. ...'.

²⁷ As the Trial Chamber has previously reminded them in, STL-11-01/T/TC, Decision on Leave To Reconsider Two Decisions on Challenges to the Form of the Indictment (Merhi Defence), 30 June 2014, footnote 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."

fair trial issue under Article 16, and, then by extension to an issue certifiable for interlocutory appeal.²⁸ The Trial Chamber thus declines to certify this sub-issue for interlocutory appeal.

Third sub-issue: the dates and circumstances of Mr. Merhi's joining and participating in the conspiracy pleaded in the consolidated indictment are not sufficiently specific

19. Counsel for Mr. Merhi, without explaining how this issue falls within Rule 90 (B) (ii), seek to certify for interlocutory appeal that the consolidated indictment is imprecise and thus defective in form in pleading the date and circumstances of Mr. Merhi's joining and participating in the alleged conspiracy.²⁹

20. The Prosecution responded by reiterating that the consolidated indictment is sufficiently clear and it is not required to plead or prove the specific date upon which the conspiracy began, or when each member of the conspiracy joined. With respect to Mr. Merhi's role in the alleged conspiracy, the Prosecution submitted that the consolidated indictment clearly states that Mr. Merhi is alleged to have played a specific role in relation to the false claim of responsibility but is not alleged to have played a specific role in relation to the other preparatory acts, though Mr. Merhi was allegedly apprised of other aspects of the conspiracy through his communications with Mr. Ayyash and Mr. Badreddine.³⁰

21. The Trial Chamber dismissed, in its decision of 9 October 2013, an application for certification for interlocutory appeal based on whether the dates pleaded for the conspiracy charged in the amended indictment of 21 June 2013—in substance the same as in the consolidated indictment of 7 March 2014—are too vague.³¹ For the same reasons, the Trial Chamber now declines to certify for appeal the issue related to the dates of Mr. Merhi's joining the alleged conspiracy, and, further, the alleged circumstances of his joining the conspiracy pleaded.

22. The issue identified by counsel for Mr. Merhi is not one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Prosecution has charged the five Accused, including Mr. Merhi, with participating in a conspiracy between two dates; the consolidated indictment provides a legal categorisation of the offence charged and pleads the

²⁸ STL-11-01/T/TC, Decision Dismissing Merhi Defence Motion to Certify for Interlocutory Appeal 'Decision on Merhi Defence Request for a "Table of Incriminating Evidence"', 30 May 2014, para. 15.

²⁹ [L]a Chambre erre en rejetant l'exception pour vice de forme concernant le chef d'accusation de complot, notamment sur la question de l'imprécision de l'acte positif d'entente du complot et des circonstances de la participation de Merhi', Merhi Defence motion, para. 9 (ii).

³⁰ Prosecution response, paras 11-12.

³¹ Decision of 9 October 2013, paras 17-18.

relevant material facts; the Prosecution's pre-trial brief and the evidence disclosed to the Defence supplement these material facts.

23. Defence counsel have not demonstrated how failing to add more information *to the consolidated indictment* would significantly affect the fair and expeditious conduct or the outcome of the proceedings. They are on notice of the allegations of the existence of a conspiracy within specified dates and have received from the Prosecution the evidence and material relevant to this charge; this should have provided counsel with the information necessary to conduct their own pre-trial investigations. The consolidated indictment provides counsel for Mr. 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. This will not be improved by adding further specific information and supplementary material to that pleading document. This issue could thus not significantly affect the fair and expeditious conduct of the proceedings. The Trial Chamber therefore declines to certify this sub-issue for interlocutory appeal and dismisses the motion in its entirety.

DISPOSITION

FOR THESE REASONS, the Trial Chamber

DISMISSES the motion.

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

Leidschendam,
The Netherlands
25 July 2014

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

