



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

TRIAL CHAMBER II**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-18-10/I/TC

Before: Judge Nicola Lettieri, Presiding
Judge Walid Akoum
Judge Anna Bednarek

Registrar: Mr Daryl Mundis

Date: 5 February 2020

Original language: English

Classification: Public

THE PROSECUTOR
v.
SALIM JAMIL AYYASH

DECISION TO HOLD TRIAL *IN ABSENTIA*

Office of the Prosecutor:

Mr Norman Farrell

Accused:

Mr Salim Jamil Ayyash

Head of the Defence Office:

Ms Dorothée Le Fraper du Hellen



ABSTRACT

1. Trial Chamber II is seized with an order from the Pre-Trial Judge under Rule 105 *bis* (A) of the Rules of Procedure and Evidence,¹ to determine whether it can try the accused Mr Salim Jamil Ayyash *in absentia* in accordance with article 22 of the Tribunal's Statute and Rule 106.
2. For the reasons set out below, Trial Chamber II has concluded that Mr Ayyash has absconded, and all reasonable steps have been taken to secure his appearance before the Tribunal and to inform him of the charges against him.
3. Mr Ayyash can accordingly be tried *in absentia* under Rule 106.

PROCEDURAL BACKGROUND

a) *Case STL-11-01 and case STL-13-04*

4. On 14 February 2005, a large explosion occurred near the Saint-George Hotel in downtown Beirut, Lebanon. A number of people, including the former Lebanese Prime Minister Mr Rafik Hariri, were killed and many others injured. Mr Ayyash and three others—Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra—were indicted for nine counts in connection with this event, including conspiracy to commit a terrorist act, committing a terrorist act by using explosives, and the premeditated intentional homicide with explosives of Mr Hariri and 21 others (case STL-11-01).² The Pre-Trial Judge issued national and international arrest warrants against each of the four accused.³

¹ *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0061, Order to seize Trial Chamber II pursuant to Rule 105 *bis* (A) of the Rules in order to determine whether to initiate proceedings *in absentia*, 19 November 2019 (“Pre-Trial Judge’s order of 19 November 2019”).

² *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1026, Prosecution’s filing of the signed version of the amended indictment in compliance with the Pre-Trial Judge’s decision of 31 July 2013 & request for amended arrest warrants and orders/requests for transfer and detention, 2 August 2013; *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1026, Public redacted amended indictment, 21 June 2013.

³ *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0013, Warrant to arrest Mr Salim Jamil Ayyash including transfer and detention order, 28 June 2011; *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0014, Warrant to arrest Mr Mustafa Amine Badreddine including transfer and detention order, 28 June 2011; *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0015, Warrant to arrest Mr Hussein Hassan Oneissi including transfer and detention order, 28 June 2011; *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0016, Warrant to arrest Mr Assad Hassan Sabra including transfer and detention order, 28 June 2011; *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0019, International warrant to arrest Mr Salim Jamil Ayyash including transfer and detention request, 8 July 2011; *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0020, International warrant to arrest Mr Mustafa Amine Badreddine including transfer and detention request, 8 July 2011; *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0021, International warrant to arrest Mr Hussein Hassan Oneissi including transfer and detention request, 8 July 2011; *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0022, International warrant to arrest Mr Assad Hassan Sabra including transfer and detention request, 8 July 2011; *see also Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, F0014 & F0020, Rectificatif des mandats d’arrêt des 28 juin 2011 et 8 juillet 2011 à l’encontre

5. Trials *in absentia* were conducted against all four accused, after the Trial Chamber seized of the matter concluded that they cannot be found and that each had absconded and did not wish to participate in a trial.⁴

6. After the trial *in absentia* began in case STL-11-01, a fifth individual, Mr Hassan Habib Merhi, was indicted for his alleged role in the 14 February 2005 attack in a new case (STL-13-04).⁵ As with the other four accused, a national arrest warrant and an international arrest warrant were issued against the new accused, but could not be executed.⁶ The Trial Chamber similarly concluded that he had absconded or otherwise could not be found, and that all reasonable steps had been taken to secure his appearance and inform him of the charges.⁷ On 11 February 2014, case STL-13-04 was joined to case STL-11-01.⁸

7. One of the five accused died during the course of the trial, and proceedings against him were accordingly terminated.⁹ The trial against the remaining four accused in case STL-11-01 concluded on 21 September 2018 and the judgment is currently under deliberation.¹⁰

8. Further to an order from the Tribunal's then President, every month since September 2011, the Lebanese authorities report to the President on their continuing efforts to find and apprehend the accused, including Mr Ayyash.¹¹ To date, these efforts have been unfruitful.

b) Case STL-18-10

9. On 5 August 2011, at the Prosecutor's request, the Pre-Trial Judge ruled, in accordance with article 1 of the Tribunal's Statute and Rule 11 (A) and (B), that three other attacks against

de M. Mustafa Amine Badreddine, 20 September 2011. New arrest warrants were issued by the Pre-Trial Judge every time the Prosecution subsequently amended the indictment.

⁴ *Prosecutor v. Ayyash et al.*, STL-11-01/I/TC, F0112, Decision to hold trial *in absentia*, 1 February 2012 ("First Trial Chamber *in absentia* decision"), paras 107-111.

⁵ *Prosecutor v. Merhi*, STL-13-04/I/PTJ, F0008, Public redacted version of the "Decision relating to the examination of the indictment of 5 June 2013 against Mr Hassan Habib Merhi" dated 13 July 2013, 11 October 2013.

⁶ *Prosecutor v. Merhi*, STL-13-04/I/TC, F0037, Decision to hold trial *in absentia*, 20 December 2013 ("Second Trial Chamber *in absentia* decision"), para. 7. The national and international arrest warrants remain confidential.

⁷ Second Trial Chamber *in absentia* decision, paras 110-111.

⁸ *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1424, Decision on trial management and reasons for decision on joinder, 25 February 2014.

⁹ *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2633, Order terminating proceedings against Mustafa Amine Badreddine without prejudice and ordering the filing of an amended consolidated indictment, 11 July 2016.

¹⁰ *Prosecutor v. Ayyash et al.*, Transcript of 21 September 2018, p. 110.

¹¹ *Prosecutor v. Ayyash et al.*, STL-11-01/I/PRES, F0038, Order pursuant to Rule 76(E), 18 August 2011; *Prosecutor v. Merhi*, STL-13-04/I/PRES, F0013, Order pursuant to Rule 76 (E) with confidential and *ex parte* annexes, 10 October 2013.

prominent Lebanese political figures which took place in Lebanon during the course of 2004 and 2005 are *prima facie* connected to the 14 February 2005 attack which killed Mr Hariri.¹²

- a) The first of these attacks targeted Mr Marwan Hamade, a prominent Lebanese political figure who served as member of Parliament, held senior posts in several Lebanese governments, including serving several times as minister, and who shared a history of political cooperation and collaboration with Mr Hariri.¹³ On 1 October 2004, an explosive device concealed in a vehicle was detonated when Mr Hamade's vehicle drove past, injuring him and one other person, and killing his security guard, Mr Ghazi Bou Karroum;¹⁴
- b) The second attack targeted Mr George Hawi, the former long-serving secretary-general of the Lebanese Communist Party.¹⁵ He was killed and one other person was injured on 21 June 2005, when an explosive device placed on the undercarriage of their vehicle was detonated;¹⁶ and
- c) The third attack targeted Mr Elias El-Murr, a friend of Mr Hariri who had held several senior political positions, including serving as Minister of Interior in Mr Hariri's government from 2000 to 2004 and as Deputy Prime Minister.¹⁷ On 12 July 2005, an explosive device concealed in a vehicle was detonated when Mr El-Murr's vehicle drove past, injuring him and others, and killing Mr Khaled Moura, who was driving past in another vehicle.¹⁸

10. On 14 December 2018, the Prosecutor submitted an indictment to the Pre-Trial Judge alleging Mr Ayyash's involvement in these three attacks.¹⁹ After partially confirming it on 15 May 2019, and ordering the submission of a revised version of the indictment, the Pre-Trial

¹² *Prosecutor v. Ayyash*, STL-18-10/I/PTJ (cross-filed from STL-11-02/CCS/PTJ), F0031, Public redacted version of "Decision on the Prosecutor's connected case submission of 30 June 2011" of 5 August 2011, 16 September 2019 ("Pre-Trial Judge's decision on connected case").

¹³ Pre-Trial Judge's decision on connected case, paras 93-94.

¹⁴ Pre-Trial Judge's decision on connected case, paras 2 (a), 100-101.

¹⁵ Pre-Trial Judge's decision on connected case, paras 108-109.

¹⁶ Pre-Trial Judge's decision on connected case, paras 2 (b), 115-117.

¹⁷ Pre-Trial Judge's decision on connected case, paras 124-125.

¹⁸ Pre-Trial Judge's decision on connected case, paras 2 (c), 131-132.

¹⁹ *See Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0001, Public redacted version of Prosecution's submission of an indictment for confirmation and order to keep this filing and its annexes confidential and *ex parte*; and motion for an arrest warrant, order for transfer and detention; and order for non-disclosure dated 14 December 2018, 20 September 2019, and annex A thereto.

Judge, on 19 June 2019, declared the revised version of the indictment submitted by the Prosecution to be in conformity with his decision of 15 May 2019.²⁰ On that basis, the Pre-Trial Judge issued national and international arrest warrants against Mr Ayyash.²¹ In the international arrest warrant, the Pre-Trial Judge requested the General Secretariat of INTERPOL to issue and circulate INTERPOL notices of all types, including red notices, against the accused.²²

11. On 4 July 2019, at the Pre-Trial Judge's instruction, the Registrar transmitted the indictment, the national arrest warrant and related documents to the Government of Lebanon for service and execution.²³

12. Approximately one month later, the Lebanese authorities reported to the Tribunal on their unsuccessful attempts to execute the arrest warrant and serve the indictment and other documents on the accused.²⁴

13. On 16 September 2019, following consultations with the President and based on observations from the Prosecutor, the Pre-Trial Judge lifted the confidentiality of the indictment, of his decision of 15 May 2019, and of the national and international arrest warrants.²⁵ The following day, the President issued a statement urging the accused to cooperate with the Tribunal and informing him of his rights.²⁶

14. On 24 September 2019, the President issued an order in which she concluded that, although efforts made until then by the Lebanese authorities to serve Mr Ayyash with the

²⁰ *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0015, Public redacted version of the "Decision on the 14 June 2019 version of the indictment and the documents filed pursuant to the decision of 15 May 2019", dated 19 June 2019, 16 September 2019; *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0003, Public redacted version of the "Decision on the review of the indictment of 14 December 2018 issues against Mr Salim Jamil Ayyash" dated 15 May 2019, 16 September 2019.

²¹ *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0017, Warrant to arrest Mr Salim Jamil Ayyash including transfer and detention order, 20 June 2019; *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0018, International warrant to arrest Mr Salim Jamil Ayyash including transfer and detention request, 20 June 2019 ("International arrest warrant").

²² International arrest warrant.

²³ *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0022, Corrected version of the "Registrar's submission pursuant to Rule 48(C) reporting to the Pre-Trial Judge on the service of the redacted indictment of 14 June 2019 and the warrant to arrest of 20 June 2019" of 24 July 2019, 8 August 2019, para. 3.

²⁴ *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0026, Corrected version of the "Annex to the "Registrar's submission pursuant to Rule 48(C) reporting to the President on the response received from the Government of the Lebanese Republic to the Pre-Trial Judge's warrant to arrest Mr Salim Jamil Ayyash including transfer and detention request"", dated 9 August 2019, 12 December 2019 ("Corrected Annex to Registrar's submissions, filed on 12 December 2019").

²⁵ *Prosecutor v. Ayyash*, STL-18-10/I/PTJ, F0030, Order relating to the lifting of the confidentiality of the indictment of 14 June 2019 and of other related documents, 16 September 2019.

²⁶ "Statement of Judge Ivana Hrdličková, President of the Special Tribunal for Lebanon", 17 September 2019 (available at <https://www.stl-tsl.org/en/media/press-releases/statement-of-judge-ivana-hrdlickova-president-of-the-special-tribunal-for-lebanon>).

indictment, arrest warrant and related documents had been reasonable, these efforts had failed within the meaning of Rule 76 (E).²⁷ As a result, she ordered the Registrar to identify and carry out alternative means of service, including transmitting a form of public advertisement to the Lebanese authorities for publication.²⁸ She further ordered the Lebanese authorities to take all reasonable steps to notify the public of the existence of the indictment and call upon Mr Ayyash to surrender to the Tribunal or otherwise submit to its jurisdiction.²⁹ In addition, she requested that the Lebanese authorities submit detailed monthly reports, distinct from the monthly reports in case STL-11-01, outlining their efforts to find, serve and apprehend Mr Ayyash.³⁰

15. On 7 October 2019, following the President's order, the Lebanese authorities published in five Lebanese newspapers a public advertisement in the form of a poster prepared and provided to them by the Registrar.³¹

16. On 16 October 2019, the Lebanese authorities affixed the same poster on the judicial notice board of the Criminal Court of Cassation; six days later, they affixed the indictment on the judicial notice board of the Public Prosecution at the Court of Cassation, in accordance with part of the service procedures at article 148 of the Lebanese Code of Criminal Procedure (LCCP),³² which provides that a copy of a legal document shall be posted at the entrance to the judicial authority that ordered the notification, if the person to be served has no known place or residence or domicile.³³ As a result of the situation in the country, however, which began experiencing mass protests starting from 17 October 2019, it was only on 2 December 2019 that they were able to carry out the remaining procedures dictated by that provision, namely serving the indictment on the accused by posting it on the doors of his last known residences and delivering a copy of it to the *mukhtars* (the local mayors) of the relevant areas.³⁴

²⁷ *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0039, Order pursuant to Rule 76 (E), 24 September 2019 (“President’s order of 24 September 2019”), para. 30.

²⁸ President’s order of 24 September 2019, paras 32-33 and disposition.

²⁹ President’s order of 24 September 2019, disposition.

³⁰ President’s order of 24 September 2019, disposition.

³¹ *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0046, Registrar’s further submission pursuant to Rule 48(C) in response to the President’s “Order pursuant to Rule 76(E)” of 24 September 2019, 18 October 2019, paras 6-9 and annex B.

³² Draft official English translation of the New Lebanese Code of Criminal Procedure, Law no. 328 of 7 August 2001, as amended by Law no. 259 of 16 August 2001 (available at: https://www.stl-tsl.org/sites/default/files/documents/legal-documents/relevant-lebanese-law/Lebanese_Code_of_Criminal_Procedure_2.5_PA.pdf).

³³ *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0054, Registrar’s second submission pursuant to Rule 48(C) in response to the President’s “Order pursuant to Rule 76(E)” of 24 September 2019, 6 November 2019 (“Registrar’s submission of 6 November 2019”), annex E.

³⁴ Registrar’s submission of 6 November 2019, annex E; *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0075, Registrar’s submission pursuant to Rule 48(C) providing further information in response to the President’s “Order

17. On 6 November 2019, the Registrar reported to the President on his efforts—as from the lifting of the indictment’s confidentiality on 16 September 2019—to disseminate the indictment and to call upon the accused to submit himself to the Tribunal’s jurisdiction, particularly through the media and social media.³⁵

18. The same day, the President convened a new trial chamber (Trial Chamber II), to hear case STL-18-10.³⁶

19. As all the efforts up to that point had proven unsuccessful in locating and apprehending the accused, on 19 November 2019, the Pre-Trial Judge seized Trial Chamber II for the purpose of determining whether proceedings *in absentia* could be initiated against Mr Ayyash.³⁷

20. Trial Chamber II scheduled a hearing for 13 December 2019 and invited submissions from the Registry, Prosecution, Defence Office and the accused on the determination it must make under Rule 106.³⁸ Two days before the hearing, the Lebanese authorities informed the Tribunal that they had been unable to serve the scheduling order for that hearing on the accused.³⁹ They explained that officers had gone to his last two known places of residence but found no one there. Their service reports did not specify whether they posted the scheduling order on the doors of the two residences, nor whether they met or provided the *mukhtars* with a copy.⁴⁰

21. Following the hearing and at Trial Chamber II’s request, the Registry, Prosecution and Defence Office supplemented their oral submissions with written ones, which are summarised below.

pursuant to Rule 76(E)” of 24 September 2019, 11 December 2019 (“Registrar’s submission of 11 December 2019”), annex C (corrected version, filed 17 December 2019), and annex D.

³⁵ Registrar’s submission of 6 November 2019, para. 12 and annex A.

³⁶ *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0056, Order convening Trial Chamber II, 6 November 2019. The first Trial Chamber, who had heard cases STL-11-01 and STL-13-04, is referred to simply as “the Trial Chamber” in this decision, as it never received a number.

³⁷ Pre-Trial Judge’s order of 19 November 2019.

³⁸ *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0068, Scheduling order in respect of Rule 106 of the Rules of Procedure and Evidence, 2 December 2019.

³⁹ *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0076, Registrar’s submission pursuant to Rule 48(C) reporting on the response received from the Government of the Lebanese Republic to the Trial Chamber II’s “Scheduling order in respect of Rule 106 of the Rules of Procedure and Evidence” of 2 December 2019, 17 December 2019 (“Registrar’s submission of 17 December 2019”), para. 12 and annex B.

⁴⁰ Registrar’s submission of 17 December 2019, para. 12 and annex B.

22. In accordance with the President's order under Rule 76 (E), the Lebanese authorities have, to date, submitted four monthly reports on their efforts to find, serve and apprehend the accused.⁴¹

SUBMISSIONS

a) Registry

23. In its oral submissions, the Registry provided an account of its efforts to publicise the indictment against the accused.⁴² These included the issuance of press releases to announce important procedural events in the case, interviews given by the Tribunal spokesperson to different media outlets, the issuance of a bulletin on the Tribunal's judicial activities, and the posting of news and announcements on the Tribunal's social media platforms.⁴³ The Registry also provided updates to one of two in-depth reports it had filed on 6 November 2019, and in which it had described its dissemination efforts.⁴⁴

24. The Registry further described its efforts to support the Lebanese authorities in carrying out the service and notification procedures, notably by providing them with certified copies of the indictment and arrest warrant, and a public advertisement in the form of a poster.⁴⁵

b) Prosecution

25. In its oral submissions, the Prosecution argued that there is more than sufficient evidence to allow the conclusion that the legal requirements for ordering trial *in absentia* are met.⁴⁶

26. It submitted that there is no information that the accused has waived in writing his right to be present at the proceedings (as envisaged at Rule 106 (A) (i)), nor that the Lebanese authorities or any other relevant State authority failed to hand him over to the Tribunal (as envisaged at Rule 106 (A) (ii)). The only question to address, therefore, is the one set out at

⁴¹ Registrar's submission of 6 November 2019, annex E; Registrar's submission of 11 December 2019, annexes A (corrected version filed on 17 December 2019) and B; *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0080, Internal memorandum from the Appeals Chamber's Senior Legal Adviser to the Presiding Judge of Trial Chamber II re: Report from the Lebanese Prosecutor General dated 17 December 2019, 19 December 2019; *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0089, Internal memorandum from the Appeals Chamber's Senior Legal Adviser to the Presiding Judge of Trial Chamber II re: Report from the Lebanese Prosecutor General dated 20 January 2020, 29 January 2019.

⁴² *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 6-17.

⁴³ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 6-17.

⁴⁴ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 13-15

⁴⁵ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 16-17.

⁴⁶ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 22.

Rule 106 (A) (iii), namely whether the accused has absconded or otherwise cannot be found, and all reasonable steps have been taken to secure his appearance before the Tribunal and inform him of the charges.⁴⁷

27. The Prosecution recalled the three previous Tribunal decisions in which the elements underpinning a determination to begin proceedings *in absentia* were considered, positing that the Tribunal’s case law has “crystallized” when it comes to the test that needs to be applied.⁴⁸

28. After reviewing the efforts undertaken by the Registry to publicly advertise the indictment, and by the Lebanese authorities to notify the accused, it argued that the Lebanese authorities have taken all the steps required under the law of the Tribunal, and further, that they have met all requirements under domestic law—irrespective of whether full compliance with that domestic law is necessary under the Tribunal’s law.⁴⁹

29. It considered, moreover, that there had been sufficient media coverage to conclude that the accused must have been made aware of the proceedings.⁵⁰ It pointed out that there had been more than thirty days of almost daily reporting about the indictment, and argued that any reduction in coverage after 17 October 2019 (the date on which protests began in Lebanon), should not be a reason to conclude that the accused was not aware of the proceedings against him. Instead, it can be attributed to the progressively diminishing novelty of the story as a news item.⁵¹

30. The Prosecution emphasised, lastly, that it is “undisputable” that the accused Salim Jamil Ayyash in this case, and the accused Salim Jamil Ayyash in case STL-11-01, are the same person.⁵² It highlighted that Mr Ayyash has been in hiding since 2011 and that the Trial Chamber had already concluded in 2012 that he could be tried *in absentia* in relation to the attack of 14 February 2005. Since then, the Lebanese authorities have continued their efforts to find and arrest him and, as of the day of the hearing, provided 96 monthly reports to the Tribunal to the effect that they have been unsuccessful.⁵³

⁴⁷ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 18-19.

⁴⁸ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 19-22.

⁴⁹ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 22-36.

⁵⁰ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 48.

⁵¹ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 37-48.

⁵² *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 36.

⁵³ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 36, 38.

c) Defence Office

31. The oral submissions by the Defence Office focused on three interrelated points.
32. Firstly, in the context of the procedural safeguards that should be afforded to the accused, the Defence Office invited Trial Chamber II to “look more closely” at the issue of the service of the scheduling order for the Rule 106 hearing on the accused.⁵⁴ It pointed out that the Lebanese authorities had gone to Mr Ayyash’s last known places of residence, but, not finding anyone there, left the premises without posting the scheduling order on the doors of those residences nor handing a copy of it over to the local *mukhtars*. This, the Defence Office argued, was in contrast to case STL-11-01, where copies of the Rule 106 scheduling order had been posted at the last known residences of the accused and handed to the *mukhtars*.⁵⁵
33. Secondly, the Defence Office asked Trial Chamber II to apply the principles set out by the Appeals Chamber and emphasized the need to ensure not only that the accused is informed of the charges against him, but also of the procedural consequences for failing to appear before the Tribunal.⁵⁶
34. Thirdly, the Defence Office queried whether measures to notify the accused could be considered as being effective considering they were confined to Lebanon—specifically to locations at which Mr Ayyash evidently has not resided during the past eight years—and when there is no trace of his presence in the country.⁵⁷ Further, despite the fact that all five accused in case STL-11-01 were assumed to be in Lebanon, with searches for them confined to that country, one of them, Mr Badreddine actually died in Syria in May 2016.⁵⁸ Therefore, in its view, it can no longer be presumed that Mr Ayyash is in Lebanon, and it would be reasonable to expand measures to neighbouring countries to ensure that he is informed of the indictment and the possibility of appearing before the Tribunal.⁵⁹
35. To support its arguments, the Defence Office relied on case law from the European Court of Human Rights (ECtHR) interpreting fair trial rights as set out at article 6 of the European Convention on Human Rights (European Convention). With regard to the notification of the scheduling order, it cited *Korchagin v. Russia*, to the effect that a litigant should be notified of

⁵⁴ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 57-58.

⁵⁵ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 50-53, 56-57.

⁵⁶ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 59-62.

⁵⁷ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 62-67.

⁵⁸ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, pp. 64-65.

⁵⁹ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 67.

a court hearing in such a way as to not only have knowledge of the date, time and place of the hearing, but also to have enough time to prepare his case and to attend the court hearing.⁶⁰ More broadly, it highlighted the judgments in *Sejdovic v. Italy* and *T. v. Italy* that the Appeals Chamber had relied upon in its decision, and which held that notification must be carried out with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights.⁶¹

d) Supplemental written submissions

36. To clarify a number of issues that arose during the hearing, Trial Chamber II requested supplemental submissions in writing. In particular, it invited the Prosecution to provide the documents on the basis of which it was able to identify Mr Ayyash's last known residences. It also requested the Registry to clarify whether the Lebanese authorities had posted the scheduling order for the Rule 106 hearing on the doors of Mr Ayyash's last known residences or delivered it to the *mukhtars*. Trial Chamber II also sought submissions from the Prosecution and Defence Office on whether, and if so how, the failed service of the scheduling order for the Rule 106 hearing would affect the determination to initiate proceedings *in absentia*.⁶²

37. The Prosecution provided a number of documents which, it argued, proved the location of Mr Ayyash's last two known residences. It specified that these documents had already been admitted as Prosecution exhibits in the STL-11-01 case, and had also formed part of the supporting materials reviewed by the Pre-Trial Judge in the present case when he confirmed the indictment against Mr Ayyash.⁶³

38. The Prosecution argued that posting the scheduling order for the Rule 106 hearing on the doors of Mr Ayyash's residences was not required under the Tribunal's law, and is neither determinative of, nor relevant to, Trial Chamber II's decision that a trial *in absentia* can take place.⁶⁴ What is required and determinative, is that Trial Chamber II is satisfied that the accused knows of the proceedings against him.⁶⁵ According to the Prosecution, the ECtHR case law

⁶⁰ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 57; ECtHR, *Korchagin v. Russia*, No. 12307/16, Judgment, 28 November 2018 (“*Korchagin* judgment”).

⁶¹ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 60; ECtHR, *Sejdovic v. Italy*, No. 56581/00, Judgment (GC), 1 March 2006 (“*Sejdovic* judgment”); ECtHR, *T. v. Italy*, App. No. 14104/88, Judgment, 12 October 1992.

⁶² Email from Trial Chamber II's Legal Officer to the participants, 13 December 2019.

⁶³ *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0077, Prosecution's supplementary submissions and provision of evidence, 17 December 2019 (“Prosecution submissions of 17 December 2019”), paras 5-9.

⁶⁴ *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0083, Prosecution's supplementary submissions in relation to the trial *in absentia* determination, 20 December 2019 (“Prosecution's submissions of 20 December 2019”), paras 3-4, 7.

⁶⁵ Prosecution's submissions of 20 December 2019, paras 4, 7.

relied upon by the Defence Office reaffirms the Tribunal's case law that it is sufficient for the accused to be aware of the proceedings against him, and that all the relevant circumstances of the case are taken into account.⁶⁶

39. For its part, the Defence Office insisted that the accused's right to appear before the Tribunal required that he be notified of a hearing which concerns him, through the service of the scheduling order for the Rule 106 hearing. The fact that he was not notified of the Rule 106 hearing, breached his right to be present at his own trial.⁶⁷

40. The Defence Office compared the present situation with those in cases STL-11-01 and STL-13-04 by arguing that the formalities of Lebanese criminal procedure for service of judicial documents should have been followed in this case, but were not. Moreover, the Lebanese authorities posted the indictment for case STL-18-10 at Mr Ayyash's last known residences and delivered a copy to the *mukhtars* in accordance with article 148 LCCP, and should have done the same when it came to the scheduling order.⁶⁸ The publication of a press release on the Tribunal's website publicising the scheduling of a hearing cannot substitute for incomplete service.⁶⁹

41. As a consequence, submits the Defence Office, Trial Chamber II should schedule a new hearing and ensure that the scheduling order for that hearing is served on the accused by any appropriate means, including outside of Lebanon, and at the very least by posting it on the doors of his last known residences. Despite stressing what it considers to be the fundamental nature of service formalities under article 148 LCCP with regard to the scheduling order, the Defence Office nevertheless invited Trial Chamber II to examine the effectiveness of the measures undertaken so far to ensure the accused's presence and inform him of the charges, given that he has not been seen at his last known residences, nor recorded as moving within or out of Lebanon, in over eight years.⁷⁰

⁶⁶ Prosecution's submissions of 20 December 2019, paras 8-10.

⁶⁷ *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0078, Additional submissions from the Defence Office following the hearing of 13 December 2019, 17 December 2019 ("Defence Office observations of 17 December 2019"), paras 6-10.

⁶⁸ Defence Office observation of 17 December 2019, paras 11-15.

⁶⁹ Defence Office observation of 17 December 2019, para. 17.

⁷⁰ Defence Office observation of 17 December 2019, paras 18-19; *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0082, Réponse du Bureau de la Défense aux « Prosecution's supplementary submissions and provision of evidence » datées du 17 décembre 2019, 20 December 2019, paras 2-3.

42. On 23 December 2019, the Registrar filed correspondence received from the Lebanese authorities confirming that the scheduling order was not posted on the doors of the last known residences of the accused, nor provided to the *mukhtars* of those areas.⁷¹ The Lebanese authorities explained that these measures, envisaged in article 148 LCCP, would have required a prior determination by the Tribunal, under article 149 LCCP, to the effect that the person to be served with the document has no known place of residence and must therefore be notified in accordance with article 148 LCCP.⁷²

APPLICABLE LAW

43. In the present case, Trial Chamber II has received no evidence or submissions suggesting that Mr Ayyash expressly and in writing waived his right to be present before the Tribunal, nor that he has not been handed over to the Tribunal by any State authorities. Consequently, article 22 (1) (a) and (b) of the Tribunal's Statute and Rule 106 (A) (i) and (ii), which govern those two scenarios, do not apply in this instance.⁷³ Trial Chamber II will therefore confine its analysis to article 22 (1) (c) and Rule 106 (A) (iii).

a) The Tribunal's Statute and Rules of Procedure and Evidence

44. Article 22 (1) (c) of the Statute and Rule 106 (A) (iii) allow a trial be conducted in the absence of the accused where he "has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his appearance before the Tribunal and to inform him of the charges".

45. According to these provisions, in order to conduct a trial *in absentia*, two combined conditions must be fulfilled. First, Trial Chamber II must be satisfied that either an accused has absconded, *or* that he otherwise cannot be found. These two concepts do not constitute a hendiadys. In other words, they refer to distinct and mutually exclusive situations due to the fact that the former requires knowledge of the charges by the accused, and therefore a conscious decision on his part to evade service, arrest and prosecution, whereas the latter does not.

46. The second condition contained in the two provisions is that all reasonable steps have been taken to secure both the appearance of the accused before the Tribunal and inform him of

⁷¹ *Prosecutor v. Ayyash*, STL-18-10/I/TC, F0084, Registrar's submission pursuant to Rule 48(C) reporting on the further response received from the Government of the Lebanese Republic to Trial Chamber II's "Scheduling order in respect of Rule 106 of the Rules of Procedure and Evidence" of 2 December 2019, 23 December 2019 ("Registrar's submission of 23 December 2019"), para. 10 and annex B.

⁷² Registrar's submission of 23 December 2019, annex B.

⁷³ As Rule 106 (A) (ii) does not apply, it follows that Rule 106 (B) is also inapplicable.

the charges. These “reasonable steps” are founded on a number of procedural guarantees enshrined in the Tribunal’s texts. Article 22 (2) (a) of the Statute sets out the general principle in this regard, by providing that an accused tried *in absentia* must have been notified of or served with the indictment, or notice must have otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality.

47. Service of an indictment, together with the summons or arrest warrant, must first be attempted in person, in accordance with Rule 76 (A) and (B), through the authorities of the State in whose territory, relevantly, the accused resides or was last known to be residing.

48. If reasonable service attempts have failed, the Tribunal’s President can order alternative service under Rules 76 (E) and 76 *bis*, including through public advertisement in newspapers or via radio, television or other media such as the internet. The public advertisement would, amongst other things, notify the public of the indictment and call on the accused to surrender to the Tribunal or otherwise submit to its jurisdiction.

b) The Tribunal’s case law

49. Three previous Tribunal decisions have dealt with the determination of whether a trial can proceed *in absentia*. The Trial Chamber issued the first decision under Rule 106 in case STL-11-01. The second decision was by the Appeals Chamber, dismissing an appeal from defence counsel in which they challenged the Trial Chamber’s refusal to reconsider the first decision. Finally, the Trial Chamber issued a decision on *in absentia* proceedings in case STL-13-04, before that case’s joinder to STL-11-01.

50. The Appeals Chamber set out a three-pronged test for notification, based on article 22 of the Statute, Rule 106 and international human rights law:

- a) Reasonable efforts must have been made to notify the accused personally;
- b) The evidence as to notification must satisfy the Trial Chamber that the accused actually knew of the proceedings against him; and

- c) It does so with such a degree of specificity that the accused's absence means that he must have elected not to attend the hearing and therefore waived his right to be present.⁷⁴

51. As Trial Chamber II noted above, of the two alternative conditions at article 22 (1) (c) of the Statute and Rule 106 (A) (iii), namely whether the accused absconded *or* otherwise could not be found, only the first is predicated on the accused knowingly electing not to participate in the proceedings. Consequently, it is only necessary to meet the Appeals Chamber's test in order to reach a finding that the accused has absconded. For a finding that the accused "otherwise cannot be found", the accused's knowledge of the proceedings and a waiver of his right to appear are irrelevant.

52. When implementing the Appeals Chamber test, the steps taken to notify the accused personally must be considered in light of what was possible in the circumstances, combined with whether the accused had knowledge of the charges.⁷⁵ Therefore, the inability to complete some of the formalities required under Lebanese law would not preclude a finding that "reasonable efforts" for personal notification were nevertheless made.⁷⁶ At the same time, the Trial Chamber considered that the words "all reasonable steps" at Rule 106 (A) necessarily import a higher standard of attempting to secure the appearance of an accused or notify him of an indictment than the notification steps in Lebanese law.⁷⁷

53. Positive evidence of the accused's knowledge of the charges is not required; nor is it necessary for notification (as opposed to service) to be carried out officially and in person.⁷⁸ Moreover, the accused's waiver of his right to be present need not be express.⁷⁹ Rather, a Trial

⁷⁴ *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F0012, Corrected version of decision on Defence appeals against Trial Chamber's decision on reconsideration of the trial *in absentia* decision, 1 November 2012 ("Appeals Chamber *in absentia* decision"), paras 25, 31, *see also* paras 26-30; *see also* Second Trial Chamber *in absentia* decision, paras 66.

⁷⁵ Second Trial Chamber *in absentia* decision, para. 93.

⁷⁶ Second Trial Chamber *in absentia* decision, paras 93-95; *see also* First Trial Chamber *in absentia* decision, para. 28.

⁷⁷ First Trial Chamber *in absentia* decision, para. 34; *see also* paras 50-51, where the Trial Chamber considered that the failure to comply with part of the notification requirements under Lebanese law, namely posting the documents at the entrance of the Tribunal's Beirut Office, was not fatal to a finding under Rule 106 (A) (iii).

⁷⁸ Appeals Chamber *in absentia* decision, para. 32 and fn. 71; *see also* Second Trial Chamber *in absentia* decision, paras 67, 89.

⁷⁹ Second Trial Chamber *in absentia* decision, para. 102.

Chamber must be satisfied to a high evidential standard of the three components of the test based on the available evidence, which it may infer from the circumstances.⁸⁰

54. In addition, determining in which State formal notification is necessary is a factual finding based on the available evidence; there is no legal requirement for formal notification to the accused outside of Lebanon.⁸¹

55. Regarding all reasonable steps to secure the accused's appearance by apprehending him, Trial Chamber II must be satisfied that the accused will probably not be arrested in the near future, or in other words shortly after the commencement of proceedings *in absentia*.⁸²

56. Finally, the notification of a scheduling order seeking written or oral submissions from the accused is not part of the legal test applied by the Appeals or Trial Chambers under article 22 and Rule 106 (A) (iii).⁸³

c) *International human rights standards*

57. Rule 3 lists, in order of precedence, the sources of interpretation for the Rules of Procedure and Evidence. These consist of: the principles of interpretation laid down in customary international law; international standards on human rights; the general principles of international criminal law and procedure; and, as appropriate, the Lebanese Code of Criminal Procedure.

58. While the European Convention does not bind Lebanon nor the Tribunal, Trial Chamber II considers the case law from the ECtHR to be helpful in identifying the highest standards of international human rights when it comes to trials *in absentia*.⁸⁴

59. The ECtHR has held that, although proceedings that take place in the accused's absence are not, of themselves, incompatible with the fair trial rights enshrined at article 6 of the

⁸⁰ Appeals Chamber *in absentia* decision, paras 32-33; *see also* Second Trial Chamber *in absentia* decision, paras 67, 102.

⁸¹ Appeals Chamber *in absentia* decision, para. 48; *see also* First Trial Chamber *in absentia* decision, para. 25; Second Trial Chamber *in absentia* decision, para. 84.

⁸² First Trial Chamber *in absentia* decision, para. 41; *see also* paras 3, 29, 40; Second Trial Chamber *in absentia* decision, para. 86.

⁸³ Notably, the Trial Chamber's most recent decision on trial *in absentia*, in case STL-13-04, merely mentioned the Lebanese authorities' inability to serve such a scheduling order on the accused in the "Submissions" section of the decision, to point out that no submissions had been received from the accused; *see* Second Trial Chamber *in absentia* decision, paras 76-79.

⁸⁴ The Appeals Chamber adopted a similar approach in its decision. *See* Appeals Chamber *in absentia* decision, paras 27-30.

European Convention, a flagrant denial of justice and manifest breach of article 6 nevertheless occurs whenever a person convicted *in absentia* is unable to subsequently obtain a fresh determination of the charges, if it was not established that he had waived his right to appear and to defend himself.⁸⁵

60. In contrast, the Tribunal's legal texts guarantee the accused the following rights, even where he had waived his right to appear: the right to a retrial *ex novo* under Rule 108 if he appears in the course of proceedings *in absentia*; the right to a retrial or an appeal under Rule 109 (C) if he has been convicted *in absentia* at trial; the right to a retrial under Rule 109 (D) if he appears during the course of an appeal by the Prosecution against a judgment or sentence rendered *in absentia*; and, finally, the right to a retrial or a rehearing of the appeal under Rule 109 (E), if he has been convicted *in absentia* on appeal.

d) Lebanese Code of Criminal Procedure

61. Although the LCCP is not binding on the Tribunal, it is nevertheless one of the sources of interpretation of the Rules—the last one in order of precedence, according to Rule 3.⁸⁶ Consequently, it is helpful to cite three relevant provisions here, as they form an important part of the reasoning and the facts underpinning this decision :

- (a) Article 147 (6) LCCP – “The person serving the document shall execute his instructions without delay and do his utmost to notify the addressee in person.”
- (b) Article 148 (1) LCCP – “If the person to be served with a document has no known place of residence or domicile, or if the process server does not find anyone who can be served with the document at his place of residence or domicile, he shall be notified through the posting of a copy of the notification document at the entrance to his last known place of residence; a second copy thereof shall be communicated to the local mukhtar; and a third copy shall be posted at the entrance to the judicial authority that ordered the notification. [...]”
- (c) Article 149 (3) LCCP – “If it proves impossible to serve the document, the court may take it that the person to be served with the document has no known place

⁸⁵ *Sejdovic* judgment, paras 82 *et seq.*, ECtHR, *Colozza v. Italy*, No. 9024/80, Judgment, 12 February 1985, para. 29; ECtHR, *Einhorn v. France*, No. 71555/01, Decision, 16 October 2001, para. 33; ECtHR, *Krombach v. France*, No. 29731/96, Judgment, 13 February 2001, para. 85; ECtHR, *Somogyi v. Italy*, No. 67972/01, Judgment, 18 May 2004, para. 66; ECtHR, *Stoichkov v. Bulgaria*, No. 9808/02, Judgment, 24 March 2005, para. 56 *et seq.*

⁸⁶ See Statute, arts 2, 28.

of residence and it shall be served in accordance with the provisions of Article 148 of this Code.”

RELEVANT FACTS

62. As is made clear from the summary of the applicable law above, the determination of whether to proceed *in absentia* in accordance with Rule 106(A) (iii) rests on a number of factual considerations. These are summarised in the paragraphs that follow.

a) Biographical information of the accused

63. At her request, the Lebanese authorities supplied the President with information showing that the accused is officially registered as being alive, namely:

- a) A copy of a family personal status extract and an individual personal status extract for “Salim Jamil Ayyash”, from the Civil Register of Harouf no. 197, dated 21 August 2019; and
- b) A copy of the list of voters for Harouf since 2016, in which the name “Salim Jamil Ayyash” appears.⁸⁷

64. In addition, they provided an undated copy of an application form by Mr Ayyash for a government-issued identity card.⁸⁸

b) Last known place of residence

65. The Prosecution provided Trial Chamber II with the following documents, which establish the addresses of Mr Ayyash’s last two known places of residence in the Hadath area south of Beirut and in the village of Harouf: an electricity subscription, banking documents, Lebanese passport applications, a landline subscription record, an employment record, a deed of sale for a motor vehicle, and a real estate register.⁸⁹

⁸⁷ President’s order of 24 September 2019, para. 27; *Prosecutor v. Ayyash*, STL-18-10/I/PRES, F0028, Registrar’s submission pursuant to Rule 48(C) reporting to the President on the transmission of correspondence between the President and the Government of the Lebanese Republic, 12 September 2019 (“Registrar’s submission of 12 September 2019”), annex D.

⁸⁸ Registrar’s submission of 12 September 2019, annex D.

⁸⁹ Prosecution submissions of 17 December 2019, paras 3-9 and annexes B-K.

66. In addition, the Lebanese authorities have stated that they have not detected any travel movement by the accused into or out of Lebanon, between 1 January 2011 and 26 August 2019.⁹⁰

c) Efforts by the Lebanese authorities to secure the accused's appearance and inform him of the charges

67. The Lebanese authorities attempted to execute the arrest warrant and serve the indictment on Mr Ayyash according to the LCCP, and in line with the personal service procedure outlined at Rule 76 (B). These efforts began with attempts at service according to article 147 LCCP, which governs ordinary service in person. Prior to the lifting of confidentiality of the indictment by the Pre-Trial Judge, the Lebanese authorities:

- a) Issued a search and investigation notice against Mr Ayyash;
- b) Carried out surveillance of Mr Ayyash's known residences in Hadath and the village of Harouf, as well as other locations associated to him, on twelve separate occasions between 9 July and 1 August 2019;
- c) Knocked on the door of Mr Ayyash's residence in Hadath and inquired as to his whereabouts;
- d) Conducted searches and investigations in the vicinity of his past place of employment;
- e) Canvassed relevant neighbourhoods for information about the accused; and
- f) Met with and took statements from the *mukhtars* of the relevant areas in relation to Mr Ayyash's whereabouts.⁹¹

68. Following the lifting of confidentiality of the indictment and the receipt of a public redacted version of the indictment and arrest warrant, the Lebanese authorities posted the indictment on the judicial notice board of the Public Prosecution at the Court of Cassation, on the doors of Mr Ayyash's last known residences in Hadath and Harouf, and provided a copy to the *mukhtars* of those areas.⁹²

⁹⁰ President's order of 24 September 2019, para. 28; Registrar's submission of 12 September 2019, annex E.

⁹¹ Corrected Annex to Registrar's submissions, filed on 12 December 2019.

⁹² Registrar's submission of 6 November 2019, annex E; Registrar's submission of 11 December 2019, annex C (corrected version, filed 17 December 2019).

69. Additionally, as a form of alternative service ordered by the President, the Lebanese authorities published a poster publicising the warrant of arrest against Mr Ayyash. The poster included the photograph of the accused, his biographical information, the charges against him, and three telephone numbers reachable 24 hours a day, at which information about the accused could be provided.⁹³ The poster was published on 7 October 2019 in five Lebanese newspapers An-Nahar, Al Joumhouria, Al-Liwaa, The Daily Star, and L'Orient-Le Jour. In addition, it was affixed on 16 October 2019 to the judicial notice board of the Criminal Court of Cassation.⁹⁴

70. The Lebanese authorities continue to carry out efforts to find the accused and have provided four monthly reports since 19 October 2019 to detail these efforts.⁹⁵

d) Efforts by the Tribunal to disseminate the indictment and arrest warrant

71. In conjunction with these efforts, the Tribunal, through the Registry's Public Information and Communications Section (PICS), engaged in its own efforts to disseminate the indictment and arrest warrant as part of the public advertisement ordered by the President under Rule 76 (E). These efforts are described in extensive detail in a report filed by the Registrar on 6 November 2019, along with an explanation of the methodology employed and the statistical results in terms of audience reach.⁹⁶

72. The efforts began on 16 September 2019, with the issuance of a press release announcing the Pre-Trial Judge's decision to lift the confidentiality of the indictment. The press release provided an overview of the charges and informed the public of the issuance of local and international arrest warrants against Mr Ayyash:⁹⁷

- a) The press release was reported by 23 Lebanese, 15 regional and 13 international media outlets;
- b) It was published on the Tribunal's Facebook and Twitter accounts, where it was viewed by 87,870 members of the public;
- c) It was published on the Tribunal's website, where it was viewed 3,951 times;

⁹³ Registrar's submission of 6 November 2019, paras 7-9 and annex E.

⁹⁴ Registrar's submission of 6 November 2019, paras 7, 20, and annex E.

⁹⁵ See fn. 41 above.

⁹⁶ Registrar's submission of 6 November 2019, annex A.

⁹⁷ Registrar's submission of 6 November 2019, annex A, paras 4-7.

- d) In total, as of 6 November 2019, and taking into account dissemination methods in addition to the ones above, the press release was viewed 92,453 times.⁹⁸ By 11 December 2019, the number of total views had increased to 93,557.⁹⁹

73. On 17 September 2019, the Tribunal issued a statement from the President to the accused in which she notably urged him to cooperate with the Tribunal and informed him of his rights¹⁰⁰

- a) The statement was reported by 14 Lebanese and 5 regional media outlets;
- b) It was published on the Tribunal's Facebook and Twitter accounts, where it was viewed by 29,893 members of the public; and
- c) It was published on the Tribunal's website, where it was viewed 541 times.

74. On 24 September 2019, the Tribunal issued a press release informing the public of the President's order for alternative service of the indictment pursuant to Rule 76 (E). The press release stated that an indictment in case STL-18-10 had been issued against Mr Ayyash and that he is called upon to surrender to the Tribunal or submit to its jurisdiction :¹⁰¹

- a) The press release was reported by 18 Lebanese and 8 regional media outlets;
- b) It was published on the Tribunal's Facebook and Twitter accounts, where it was viewed by 34,031 members of the public; and
- c) It was published on the Tribunal's website, where it was viewed 535 times.

75. On 8 October 2019, following the publication of the poster by the Lebanese authorities in five Lebanese newspapers, the Tribunal issued a press release titled "Public service announcement by the Special Tribunal for Lebanon". The press release included the poster, as well as a link to the audio and an audio-visual versions of a public service announcement which reprised the information contained in the poster :¹⁰²

⁹⁸ Registrar's submission of 6 November 2019, annex A, p. 8.

⁹⁹ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 15.

¹⁰⁰ Registrar's submission of 6 November 2019, annex A, paras 8-9; "Statement of Judge Ivana Hrdličková, President of the Special Tribunal for Lebanon", 17 September 2019 (available at <https://www.stl-tsl.org/en/media/press-releases/statement-of-judge-ivana-hrdlickova-president-of-the-special-tribunal-for-lebanon>).

¹⁰¹ Registrar's submission of 6 November 2019, annex A, paras 10-11.

¹⁰² Registrar's submission of 6 November 2019, annex A, paras 12-14; STL Press Release, "Public service announcement by the Special Tribunal for Lebanon", 8 October 2019 (available at <https://www.stl-tsl.org/en/media/press-releases/public-service-announcement-by-the-special-tribunal-for-lebanon>, and linking to

- a) The press release was reported by 15 Lebanese and 6 regional media outlets;
- b) It was published on the Tribunal's Facebook and Twitter accounts, where it was viewed by 5,658 members of the public;
- c) It was published on the Tribunal's website, where it was viewed 351 times; and
- d) The poster and the audio-visual public service announcement were also separately advertised on the Tribunal's Facebook, Twitter, Flickr and YouTube accounts, resulting in 159,651 and 9,494 views respectively.¹⁰³ By 11 December 2019, the number of views for the poster had increased to 162,063.¹⁰⁴

76. Between 16 September and 6 November 2019, the Tribunal spokesperson gave 17 interviews to Lebanese, regional and international media outlets, which were covered and re-circulated in other media outlets.¹⁰⁵

77. On 31 October 2019, the Tribunal issued its monthly bulletin for the month of September. The bulletin, which is issued on a regular basis and provides an overview of the Tribunal's judicial proceedings and other work, included information on the STL-18-10 case, as well as information about the accused, the charges against him and the call to surrender to the Tribunal's jurisdiction.¹⁰⁶

- a) The September bulletin was disseminated through PICS's mailing list;
- b) It was published on the Tribunal's Facebook and Twitter accounts, where it was viewed by 850 members of the public; and
- c) It was published on the Tribunal's website, where it was viewed 109 times.

the audio-visual public service announcement at <https://www.youtube.com/watch?v=Nk9iUYb6to0&feature=youtu.be>).

¹⁰³ Paragraph 14 of annex A appears to have inadvertently inverted these numbers by stating that the number of views for the poster was 9,494, and those of the public service announcement was 159,651, whereas it is the other way around. This is made clear from the summary tables at pages 13 and 14 of the same annex, and the updated numbers for the number of views for the poster that the Registry provided at the hearing of 13 December 2019. See *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 15.

¹⁰⁴ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 15.

¹⁰⁵ Registrar's submission of 6 November 2019, annex A, paras 36-39 and p. 16.

¹⁰⁶ Registrar's submission of 6 November 2019, annex A, paras 16-17.

78. On 2 December 2019, the Tribunal issued a press release to publicise the scheduling of a hearing by Trial Chamber II on its Rule 106 determination. Again, the press release included information on the indictment and biographical information of the accused.¹⁰⁷

79. In addition to the press releases and the President's statement, information regarding the STL-18-10 case—including the indictment and the accused—was published on various pages of the Tribunal's website, notably its homepage.¹⁰⁸ At the hearing on 13 December 2019, the Registry provided Trial Chamber II with updated statistics on the number of website views and stated that the homepage had now been viewed 19,691 times, and the page relevant to case STL-18-10 had been viewed 7,248 times.¹⁰⁹

80. Finally, in addition to these efforts, PICS issued other posts on its social media accounts informing the public of the indictment which generated a further 109,845 views.¹¹⁰

e) Incidental media coverage

81. The service and public advertisement efforts by the Lebanese authorities and the Tribunal generated considerable "incidental" media coverage.

82. In its report of 6 November 2019, the Registry explains that 216 articles published in the Lebanese, regional and international media covered the indictment and the call for Mr Ayyash to surrender to the Tribunal.¹¹¹ A second report filed on the same day compiles screenshots and reproductions of these articles (grouping similar ones together) and summaries of television reports.¹¹²

83. Media coverage was strong in the week following the lifting of the confidentiality of the indictment up to and including 24 September 2019, with over 148 individual news items covering the indictment.¹¹³

¹⁰⁷ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 12.

¹⁰⁸ Registrar's submission of 6 November 2019, annex A, para. 19.

¹⁰⁹ *Prosecutor v. Ayyash*, Transcript of 13 December 2019, p. 13.

¹¹⁰ Registrar's submission of 6 November 2019, annex A, para. 20.

¹¹¹ Registrar's submission of 6 November 2019, annex A, para. 27.

¹¹² Registrar's submission of 6 November 2019, annex B.

¹¹³ Registrar's submission of 6 November 2019, annex B, pp. 6-88.

84. Coverage continued at a diminished but steady rate after 25 September 2019, though the Registry points out that, after the beginning of mass protests in Beirut on 17 October 2019, the indictment in case STL-18-10 received little, if any, media attention.¹¹⁴

85. A review of the press articles compiled by the Registry reveals the diversity in the media landscape coverage.¹¹⁵ In addition to international and regional media outlets, both political party-affiliated¹¹⁶ and non-party affiliated Lebanese outlets covered the indictment. All the major Lebanese newspapers (notably, An-Nahar, Al Akhbar, Al-Liwaa, L'Orient-Le Jour and the Daily Start), television stations (including MTV, LBC, Al Jadeed and OTV), and the two Lebanese news agencies (NNA and Al Markaziyah) also reported on the indictment.

86. Moreover, a number of media outlets published the photograph of the accused or the poster, and several recirculated the press releases of the Tribunal in full.¹¹⁷

87. In short, despite the gradual decrease in coverage, the indictment generated over thirty days of almost daily reporting and, for the first two weeks within that period, intense media coverage.

ANALYSIS

88. On the basis of the facts and legal principles detailed above, Trial Chamber II must now examine whether a trial *in absentia* can proceed in accordance with the Statute and the Rules. For reasons already explained, this analysis can be confined to article 22 (1) (c) and Rule 106 (A) (iii). The application of these two provisions to the facts at hand requires Trial Chamber II to consider: (i) whether all reasonable steps have been taken to secure the accused's appearance before the Tribunal and to inform him of the charges; and (ii) whether he has absconded or otherwise cannot be found.

a) Preliminary issues

89. Prior to engaging in this analysis, Trial Chamber II must first address three preliminary issues.

¹¹⁴ Registrar's submission of 6 November 2019, annex B, pp. 88-111; Registrar's submission of 6 November 2019, annex A, para. 3.

¹¹⁵ Registrar's submission of 6 November 2019, annex B.

¹¹⁶ Such as www.Kataeb.org (for the Kataeb Party), and www.Lebanese-forces.com (for the Lebanese Forces Party).

¹¹⁷ See e.g. Registrar's submission of 6 November 2019, annex B, pp. 6, 13, 19, 24, 21, 32, 36-38, 41, 43, 44, 46, 62, 80-83.

(i) There is no indication that Mr Ayyash is deceased

90. First, Trial Chamber II is not required to make a positive finding that the accused is alive. Rather, it only needs to consider whether the evidence establishes that he could not have been notified because he is deceased.¹¹⁸ Consequently, based on the documentary evidence obtained from the Lebanese authorities showing that Mr Ayyash continues to be registered in both family and individual personal status records of the civil register of Harouf, that he is still listed as a voter in Harouf, and there being no other evidence before it suggesting that he is deceased, Trial Chamber II is satisfied that Mr Ayyash is not deceased.

(ii) Mr Ayyash's last known places of residence

91. Second, the Lebanese authorities were asked to serve the indictment and other documents on the accused, which they attempted to carry out in accordance with the relevant domestic procedures, as well as to execute the arrest warrant. Because, as envisaged at article 149 LCCP, it proved impossible to serve the accused in person, the Lebanese authorities had to follow the procedure at article 148 LCCP, which requires that the accused be notified, notably, by posting a copy of the indictment at his last known residence, with a second copy communicated to the *mukhtar*, and a third copy posted at the entrance of the judicial authority that ordered the notification.

92. Based on the documentary evidence summarised at paragraph 65 above, Trial Chamber II is satisfied that the accused resided at the Hadath and Harouf addresses until at least 2009 and 2010, respectively.

93. Trial Chamber II nevertheless notes that the Lebanese authorities have unsuccessfully attempted to find the accused at these two locations since 2011 in connection with the STL-11-01 case, and consequently have been unable to arrest him. They were similarly unsuccessful in finding him there when they attempted to execute the arrest warrant and serve the indictment on him in the present case. In particular, they were informed that he does not visit either of those residences.¹¹⁹

94. On the other hand, there is no evidence before Trial Chamber II suggesting that the accused has changed residences or currently resides at any other address. Although the Defence Office questioned the effectiveness of attempting to serve the documents at these addresses

¹¹⁸ Appeals Chamber *in absentia* decision, para. 50.

¹¹⁹ Corrected Annex to Registrar's submissions, filed on 12 December 2019.

given that Mr Ayyash has apparently not resided there for a number of years, it has not presented any evidence showing that he has or had any other known residence.

95. Therefore, based on the totality of the available evidence, Trial Chamber II is satisfied that the Hadath and Harouf addresses are Mr Ayyash's *last known* residences. It was therefore reasonable to attempt to serve the indictment on him at those locations.

(iii) The geographic scope of notification

96. Third, having determined that Mr Ayyash's last known places of residence are in Lebanon, and given that he is a Lebanese national and there is no record of him leaving Lebanon, Trial Chamber II is satisfied that it is sufficient for it to consider the Rule 106 (A) (iii) measures taken within Lebanon.¹²⁰ This is in line with the Tribunal's case law.¹²¹

97. According to the Defence Office, notification procedures should extend to neighbouring States. It cites the example of an accused in case STL-11-01 dying in Syria, when he had never been recorded as leaving Lebanon by the Lebanese authorities. In the absence of any evidence that Mr Ayyash has left Lebanon, however, the Defence's Office's argument on this issue remains speculative. The mere fact that an accused in another case before the Tribunal may have died outside of Lebanon is insufficient to trigger a search for the accused outside of Lebanon in the present case. Trial Chamber II can only base its decision on the evidence before it, and this points to Mr Ayyash not having left Lebanon.

98. Moreover, requiring notification outside of Lebanon—based merely on the speculation that he may have left that country—would essentially require that notification take place all over the world, as there is no information before Trial Chamber II regarding where Mr Ayyash may be located other than in Lebanon. This would render trials *in absentia de facto* impossible due to the impracticably high threshold for notification.

¹²⁰ See paras 63-66 above, regarding Mr Ayyash's nationality, residences and the lack of evidence of him having left Lebanese territory.

¹²¹ The Trial Chamber has in past decisions found it sufficient to confine its analysis to measures taken by the authorities in Lebanon, given that the evidence suggested that the accused had not left the country; see Second Trial Chamber *in absentia* decision, para. 84; First Trial Chamber *in absentia* decision, para. 25.

b) Whether all reasonable steps have been taken to secure the accused's appearance and to inform him of the charges

99. Trial Chamber II must next determine whether all reasonable steps have been taken to secure the appearance of the accused before the Tribunal and to inform him of the charges against him.

100. The concept of “reasonableness” and what constitutes “reasonable efforts” were considered by the Trial Chamber in its two previous decisions. It concluded that they cannot be defined, as reasonable efforts must be determined according to the totality of the circumstances particular to each individual situation.¹²²

101. The reasonable steps, of course, are means to reach a given objective. The first objective that is relevant to mention here is that of “informing the accused of the charges”. Article 22 (2) (a) of the Statute suggests that the accused can be informed in three possible ways, namely by being “notified”, or “served with the indictment”, or by being given notice of the indictment through public advertisement. The Statute juxtaposes the concepts of “service”, “notification” and “notice through public advertisement” in a way that implies they should be considered three distinct procedures. Indeed, whereas “service”, when it comes to judicial documents, is a term of art and typically entails certain formalities to confirm and subsequently prove that the delivery of the documents actually took place,¹²³ “notification” could be interpreted in accordance with its ordinary meaning of “making known”.¹²⁴ As for public advertisement, according to Rule 76 (E), it is a measure that is subsidiary to service, and can be carried out if reasonable attempts to serve the indictment in person or execute the arrest warrant have failed. In practice, however, it is obvious that notification, as it is understood at article 22 (2) (a), is an umbrella category under which fall service, public advertisement, as well as other means of making the indictment known to the accused.

102. The objective of informing the accused is also necessarily linked to a second objective, namely that of securing his appearance before the Tribunal voluntarily, since being informed of the charges enables the accused to elect whether to appear before the Tribunal.

¹²² First Trial Chamber *in absentia* decision, para. 28; Second Trial Chamber *in absentia* decision, paras 89, 93.

¹²³ See Bryan A. Garner (ed.), *Black's Law Dictionary*, 11th ed. (Thomson Reuters 2019), which defines “service” as: “The formal delivery of a writ, summons, or other legal process, pleading, or notice to a litigant or other party interested in litigation”.

¹²⁴ Oxford English Dictionary, “notify” (available at <https://www.oed.com/view/Entry/128604?redirectedFrom=notify#eid>). In French, “notifier” is defined similarly as “Faire connaître quelque chose à quelqu'un dans les formes légales ou usitées”; see Larousse, “notifier” (available at <https://www.larousse.fr/dictionnaires/francais/notifier/55060?q=notifier#54679>).

103. In the case at hand, the Lebanese authorities undertook a number of steps during the course of July 2019 to serve Mr Ayyash personally in accordance with article 147 LCCP and Rule 76 (A) and (B), as described at paragraph 67 above. These steps were carried out covertly, since the indictment and arrest warrant were still confidential.

104. During the months of October and December 2019, after the confidentiality of the indictment was lifted, the Lebanese authorities carried out additional steps, in a manner that was no longer constrained by the need to preserve confidentiality.¹²⁵ These additional steps are those foreseen at article 148 LCCP for situations where, according to article 149 LCCP, it “proves impossible” to serve the documents in question.

105. In conjunction to the efforts carried out under article 148 LCCP by the Lebanese authorities, the Tribunal initiated a number of measures to disseminate the indictment in a public and wide-reaching way, notably by advertising the indictment, issuing press releases and statements, and engaging with the media. These are detailed at paragraphs 71 to 80 above. Significantly, the President issued a statement addressed to the accused in which she notified him of the confirmation of the indictment, urged him to cooperate with the Tribunal and informed him of his rights. The statement, as published on the Tribunal’s website, contains a hyperlink to the redacted version of the indictment. In setting out the accused’s rights, the President also stated that “article 22 of the Statute and Rule 106 specify the circumstances in which proceedings can be conducted *in absentia*, if those efforts are unsuccessful”.¹²⁶

106. In light of the information available on Mr Ayyash’s last known places of residence, and the fact that there is no record of him moving within or out of Lebanon, Trial Chamber II considers the totality of the service and notification efforts undertaken by the Lebanese authorities and the Tribunal to be reasonable in the present circumstances. Given that domestic service procedures did not succeed, the public advertisement measures that were carried out in accordance with Rules 76 (E) and 76 *bis*, consisting of publishing a poster in Lebanese newspapers, and the dissemination of the indictment through a variety of media, take on an even greater importance. These efforts not only sought to inform the accused of the charges, but also of his rights, and the consequences of failing to appear.

107. The Defence Office argued that when assessing whether all reasonable steps have been taken to inform the accused of the charges, Trial Chamber II should also take into account the

¹²⁵ These are described at paragraphs 68 and 69 above.

¹²⁶ See para. 73 above.

fact that the accused was not notified of the scheduling order for the Rule 106 hearing in the same manner that he had been notified of the indictment. Its argument centres on the fact that the scheduling order was not served on the accused according to the procedures set out at article 148 LCCP, notably by being posted on the door of his last known residences and delivered to the *mukhtars*.

108. Trial Chamber II does not accept this argument. The Tribunal's case law unequivocally and consistently has held that the formalities of Lebanese procedure are not required for the service of the indictment.¹²⁷ It follows then, *a fortiori*, that those same formalities are not required for the service of subsequent, more procedural judicial documents either. More fundamentally, the service of a scheduling order for a Rule 106 hearing does not even form part of the requirements of Rule 106.

109. The Defence Office relied on ECtHR case law to insist on the existence of an obligation to notify the accused of a Rule 106 hearing. This focus on the Rule 106 hearing is misplaced. It is evident from both article 6 of the European Convention and ECtHR case law itself, that the word "hearing" as used in the ECtHR context encompasses trial proceedings in general, rather than any one specific hearing.¹²⁸ It is noteworthy, in this regard, that the Appeals Chamber and the Trial Chamber in its Rule 106 decision in STL-13-04 similarly used the terms "hearing" and "trial" interchangeably.¹²⁹

110. This context is important to highlight as there appears to be some confusion on the part of the Defence Office in terms of the accused's right to be informed of the charges against him and be present at his trial in general, versus his alleged right to be present at the hearing held by Trial Chamber on 13 December 2019 to determine whether he could be tried *in absentia*.

¹²⁷ In the Trial Chamber's two previous Rule 106 decisions, the service formalities under Lebanese law were not considered to be *sine qua non* conditions for the service of the indictment. In case STL-13-04, heightened political and security tensions in Lebanon prevented the Lebanese authorities from completing some of the formalities of article 148 LCCP when it came to serving the indictment. Yet, the Trial Chamber did not consider this to be fatal. See Second Trial Chamber *in absentia* decision, para. 93.

The Trial Chamber reached an analogous conclusion in case STL-11-01 in regard to the posting of the indictment at the entrance of the Tribunal's Beirut Office. The Lebanese authorities at the time had interpreted the Tribunal as being the judicial authority that ordered the notification, and at the entrance of which the indictment, according to article 148 LCCP, should therefore be posted. The Trial Chamber did not consider this to be an effective means of informing an accused of the existence of an indictment. It accordingly did not take this requirement under Lebanese law into account in determining whether "all reasonable steps" had been taken. See First Trial Chamber *in absentia* decision, para. 50.

¹²⁸ See e.g. *Korchagin* judgment, paras 58, 65, 76.

¹²⁹ See e.g. Appeals Chamber *in absentia* decision, paras 2, 26-28, 31; Second Trial Chamber *in absentia* decision, paras 3, 88, 102, 107, 109.

111. Article 6 (3) (a) of the European Convention states that everyone charged with a criminal offence has the right to be informed promptly “of the nature and cause of the accusation against him”. This provision establishes the connection between the “accusation” (*i.e.* the charges) and the right to be notified of that accusation, as opposed to being notified of subsequent and ancillary procedural documents. The scope of this provision must be assessed in light of the broader right to a fair hearing guaranteed by article 6 (1) of the European Convention. This means that informing the accused of the charges is essential to ensuring that the proceedings are fair.¹³⁰ This is precisely why the guarantees enshrined in the Tribunal’s Statute and Rules require service or notification to the accused of the charges. There is no separate and additional requirement to serve, notify and publicly advertise a scheduling order for a Rule 106 hearing in the same manner that the indictment must be served, notified or publicly advertised under Rule 76 *bis*.

112. On the basis of these considerations, Trial Chamber II therefore finds that all reasonable efforts were made to inform the accused of the charges against him, within the meaning of article 22 (1) (c) of the Statute and Rule 106 (A) (iii). As a consequence of this conclusion, but also in addition to it, Trial Chamber II is further satisfied that all reasonable steps were taken to secure the *voluntary* appearance of the accused before the Tribunal, since he was informed of the existence of proceedings against him, of his ability to participate in them, and the consequences of failing to do so.

113. Finally, with regard to all reasonable steps taken to secure the *non-voluntary* appearance of the accused, Trial Chamber II considers it relevant that the Pre-Trial Judge has issued an international arrest warrant, as well as a national arrest warrant which the Lebanese authorities have repeatedly, but unsuccessfully, tried to execute. Trial Chamber II is therefore satisfied, in light of the totality of the circumstances, that all reasonable steps were also taken to secure the accused’s attendance via *non-voluntary* means, that is, by trying to arrest him, and that he is not likely to be arrested in the near future.¹³¹

c) Whether the accused has absconded or otherwise could not be found

114. Having found that all reasonable steps have been taken to inform the accused of the charges and to secure his appearance before the Tribunal, Trial Chamber II will now turn to

¹³⁰ *Sejdovic* judgment, paras 89-90.

¹³¹ *See* para. 55 above, setting out the Trial Chamber’s case law in this regard.

whether the evidence allows it to find that the accused had knowledge of the proceedings. This knowledge can be inferred from the totality of the circumstances, notably the reasonable steps taken to inform him of the charges.¹³²

115. As explained above, a finding that the accused had knowledge of the charges but nevertheless chose to be absent from the proceedings leads to the conclusion that he has absconded.¹³³ The analysis that must be carried out to this end is in line with the second and third elements of the Appeals Chamber's test. In addition, Trial Chamber II recalls that the requirement of knowledge in ECtHR case law concerns situations where a retrial or appeal is not available to the accused who had knowledge of the proceedings against him; whereas the Tribunal's Statute and Rules allow the accused tried *in absentia* to seek a retrial regardless of such knowledge, if he later appears before the Tribunal, whether he does so voluntarily or not.¹³⁴

116. To do so, Trial Chamber II has looked to the Tribunal's notification efforts, and the incidental media coverage these generated. In addition, Trial Chamber II took into account the online reach of those efforts as shown by the number of views generated. The two reports of 6 November 2019 by the Registrar, which are summarised at paragraphs 71 to 87 above, are particularly helpful in this regard.

117. Trial Chamber II considers the number of views garnered by relevant pages of the Tribunal's website, and by Tribunal announcements on Facebook and Twitter, to be especially pertinent. The most significant material in relation to the case, namely, the various press releases, the President's statement and the poster, were viewed, as of 11 December 2019, in excess of 300,000 times.¹³⁵ This is in addition to other posts on the Tribunal's social media account informing the public of the indictment, and which received, as of 6 November 2019, an additional 109,845 views.¹³⁶

118. As for traditional media, Trial Chamber II is satisfied that news of the indictment, after the lifting of its confidentiality, was sufficiently widely covered by Lebanese media outlets as to have been unavoidable to any person in Lebanon who was reasonably aware of current events in the country, and all the more so to the person named and directly concerned by that news.

¹³² Appeals Chamber *in absentia* decision, para. 32.

¹³³ See paras 45, 51 above.

¹³⁴ See para. 60 above.

¹³⁵ Trial Chamber II reaches this number by adding the number of views for the relevant items as detailed at paras 72-80 above.

¹³⁶ See para. 80 above.

Trial Chamber II takes particular note of the variety of media outlets which reported on the indictment.

119. Trial Chamber II also notes that the mass protests, which began in Lebanon on 17 October 2019 and thereafter overshadowed other news, post-dated by one month the news of the lifting of confidentiality of the indictment. By then, the indictment and the developments in case STL-18-10 had already been widely reported in the media. It is by no means a requirement—and in fact it would be illogical to expect—that the indictment remain “front page news” indefinitely without ever being supplanted by other news, in order for the requirements of notification to be fulfilled.

120. On this basis, Trial Chamber II is satisfied that the notification efforts were so far-reaching and so widely reported by the media, that Mr Ayyash must have known of the proceedings against him.

121. While this case, as the President has stated, is distinct from the judicial proceedings against Mr Ayyash in case STL-11-01,¹³⁷ Trial Chamber II considers that it is also relevant that Mr Ayyash was deemed to have absconded in that case since 2012 and as a result tried *in absentia*. This reinforces Trial Chamber II’s ability to infer that he must by now be fully aware of the consequences of not appearing before the Tribunal and of therefore waiving his right to be present at the proceedings against him.

122. Consequently, Trial Chamber II concludes that Mr Ayyash has knowingly waived his right to be present during the proceedings against him, and therefore that he has absconded within the meaning of Rule 106 (A) (iii). This is the inevitable conclusion reached from the combination of facts analysed above, in particular the totality of the reasonable steps taken to inform the accused of the charges and to secure his appearance before the Tribunal (whether voluntarily or through arrest), the inference drawn about the accused’s knowledge of the proceedings, his continued absence from his places of residence since 2011, and the fact that during this entire time, national and international arrest warrants issued in two separate trial proceedings could not be executed.

¹³⁷ President’s order of 24 September 2019, paras 19-20.

123. Even if, however, Mr Ayyash's knowledge of the proceedings could not be inferred from the circumstances, Trial Chamber II considers that he "otherwise cannot be found" within the meaning of Rule 106 (A) (iii).

CONCLUSION

124. Trial Chamber II concludes accordingly that each component of Rule 106 (A) (iii) is met. It will therefore order that Mr Ayyash be tried *in absentia*.

125. Trial Chamber II recalls its finding that the procedural guarantees offered by the Tribunal's legal instruments, notably Rules 108 and 109, more than amply satisfy the requirements of international human rights law. These provisions enable the accused to seek a retrial regardless of the reason for which he has been absent from the proceedings against him.

DISPOSITION

FOR THESE REASONS, Trial Chamber II:

DECIDES, pursuant to article 22 of the Statute of the Tribunal and Rule 106 of its Rules of Procedure and Evidence, to try Salim Jamil Ayyash *in absentia*.

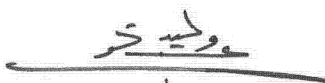
Done in English, Arabic and French, the English version being authoritative.

5 February 2020,

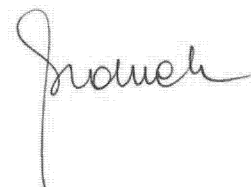
Leidschendam, Netherlands



Judge Nicola Lettieri, Presiding



Judge Walid Akoum



Judge Anna Bednarek

