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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: 19 May 2014

Original language: English

Classification: Public

THE PROSECUTOR
v.
SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

REASONS FOR DECISION DENYING MERHI DEFENCE AN EXTENSION OF TIME TO FILE AN APPLICATION FOR CERTIFICATION TO APPEAL

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INTRODUCTION

1. On 30 April 2014, the Trial Chamber received a belated request from counsel for Hassan Habib Merhi, styled as 'urgent', seeking to extend the time-limit for filing a motion to certify for appeal the Trial Chamber's decision on the filing date of their pre-trial brief. They asked for an extension of one week from the date of the filing of a dissenting opinion by Judge Nosworthy.[1] The Trial Chamber informally denied the request, with reasons to follow in any substantive decision on a request for certification. As no request for certification was filed, this decision sets out the basis for denying the request to extend the time-limit for certification to appeal. It also determines when the time for filing an application for certification to appeal runs when there is a dissenting or separate opinion. It runs from when the decision, and not the dissent or separate opinion, is filed.

BACKGROUND

2. In a status conference on Thursday 10 April 2014, the Trial Chamber orally ordered counsel for Mr Merhi—with written reasons to follow—to file their pre-trial brief by Monday 26 May 2014.[2] One week later, on Thursday 17 April 2014, the Trial Chamber, by majority, issued written reasons.[3] The decision stated that Judge Nosworthy was dissenting. On Wednesday 23 April 2014, and in a response to a query from counsel for Mr Merhi, the Trial Chamber's legal officers informed the Parties that Judge Nosworthy was hoping to have her dissenting opinion filed by the close of business on Friday 25 April 2014. Judge Nosworthy subsequently issued a dissenting opinion after business hours on 25 April 2014, and it was distributed to the Parties on the next working day—on the morning of Tuesday 29 April 2014.[4]

3. At 18:41 that same day, Tuesday 29 April 2014, and after the close of business, counsel for Mr Merhi filed an 'urgent' request asking for an extension of time to Tuesday 6 May 2014 to file a request for certification of the Trial Chamber's decision. The Trial Chamber and the Parties received this motion on the morning of Wednesday 30 April 2014. Effectively, this would have meant allowing them to file their application for certification some 19 days after the decision was distributed. In their motion, Defence counsel argued that under Rule 126 (D) of the Special

[1] STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, Merhi Defence Urgent Request to Extend the Time-Limit for Certification to Appeal the Decision Setting the Date for the Filing of the Defence's Pre-Trial Brief, 29 April 2014.
[2] STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, Status Conference, 10 April 2014, p. 45, lines 12-21.
[3] STL-11-01/T/TC, Reasons for Order on Date for Filing Merhi Pre-Trial Brief, 17 April 2014. Friday 18 and Monday 19 April 2014 were public holidays in the Netherlands (for Easter).
[4] STL-11-01/T/TC, Separate and Dissenting Opinion of Judge Nosworthy in Relation to 'Reason for Order on Date for Filing Merhi Pre-Trial Brief', 25 April 2014. Monday 28 April 2014 was a public holiday.

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Tribunal's Rules of Procedure and Evidence the time for filing their motion should commence from the filing of Judge Nosworthy's dissenting opinion, as it formed an integral part of the Trial Chamber's decision. Rule 126 (D) provides that requests for certification 'shall be filed within seven days of the filing of the impugned decision'. The decision, they argued, was only 'complete' when a dissent was filed. In the alternative, they argued that the Trial Chamber should grant the extension pursuant to Rule 9 (A) (i),[5] arguing that the publication of a dissenting opinion after the decision constituted 'good cause' for extending the time for filing the application. The Prosecution informed the Trial Chamber that it did not intend to respond to the motion.[6]

4. Later that day, 30 April 2014, the Trial Chamber informally denied the request for an extension of time to 6 May 2014, stating that a formal decision would be included in any substantive decision on a request for certification. The Trial Chamber informed the Parties that the Prosecution had until Monday 5 May 2014 to file any response to a request for certification.[7] Counsel for Mr Merhi, however, did not file any motion seeking to certify the decision for appeal.

DISCUSSION

5. One issue for determination is whether the time for filing a request for certification runs from the date of the filing of the decision or, alternatively, from the date of any dissenting or separate opinion. The other is whether counsel for Mr Merhi, in the circumstances, showed good cause to extend the deadline.

The time for filing a request for certification to appeal a decision

6. According to Rule 7 (A) 'time periods under these Rules are calculated by calendar days'. Rule 7 (B) specifies that 'time runs from the first working day after the filing of a document, decision, order or Judgement in English or French'. Rule 7 (C) states that 'time runs from the first working day after an oral decision, order or Judgement. If the Judge or Chamber states that a written decision will follow, time runs from the first working day after it is delivered'. The decision was

[5] STL-11-01/T/TC, Merhi Defence Urgent Request to Extend the Time-Limit for Certification to Appeal the Decision Setting the Date for the Filing of the Defence's Pre-Trial Brief, 29 April 2014, para. 11. Rule 9 (A) permits a Chamber or Judge to vary time limits 'on good cause being shown by motion'.

[6] Telephone call from the Prosecution to the Legal Officer to the Trial Chamber, 30 April 2014.

[7] Email from the Legal Officer to the Trial Chamber to Counsel for Mr Merhi, 30 April 2014. The email said;

> 'Dear Counsel for Mr. Merhi, Following your 'Requête urgente de la Défense de Merhi aux fins de prorogation du délai de certification de la décision fixant la date de dépôt du mémoire d'avant procès de la Défense', notified this morning and having received an oral communication from the Prosecution that it does not intend to file a response thereto, the Trial Chamber has considered the matter and denies the request for an extension of time. The formal decision on this matter will be contained in any substantive decision on a request for certification. In the event that a request for certification is filed, the Trial Chamber requests the Prosecution to respond within a shortened deadline, by Monday 5 May 2014 at 16:00.'

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issued on Thursday 17 April 2014 and the first working day thereafter was Tuesday 22 April 2014. According to Rule 126 (D), motions seeking certification for an interlocutory appeal against a decision 'shall be filed within seven days of the filing of the impugned decision'. Any request for certification should therefore have been filed, according to the Rules, by 29 April 2014.

7. The motion seeking an extension of time was submitted for filing after hours on 29 April 2014—some twelve days after the Trial Chamber's decision was distributed—on the day of the expiration of the time for filing a request for certification, and a working day after Judge Nosworthy's dissenting opinion was distributed. Defence counsel acknowledged that the date for filing a request for certification for appeal was 29 April 2014.[8] Despite this, the motion was filed after hours that same day and the Trial Chamber did not receive it until the next day, 30 April, the day after the expiration of the time normally allowed for filing a request for certification.

8. In the circumstances, and particularly in those described as 'urgent', counsel for Mr Merhi should have filed this request for an extension of time in a timely manner—they had received the decision on 17 April 2014. Instead, they filed it twelve days later. As the very issue was whether the time for filing the motion ran from when the decision (as it had been made by majority) was filed, or alternatively, from when the dissent was filed,[9] this motion should have been filed, at the very least, when counsel for Mr Merhi were informed that a written dissent was going to be issued. And that was on 23 April.[10]

9. The reason for the expedition was all the more compelling as the deadline for filing the pre-trial brief is 26 May 2014 and, if the decision had been certified for appeal, the interests of justice would have required any appeal to have been decided before then. And the Trial Chamber, in denying counsel for Mr Merhi's request for a one week extension of the time-limit, based on the publication of a dissent, and by significantly abridging the Prosecution's time-limit for any response, indicated that it would still accept an application for certification.

10. The reasons for refusing to allow an extension of six days from the filing of the dissent were twofold. First, the written reasons for the order for filing of the pre-trial brief had been filed and distributed thirteen days earlier on 17 April 2014. Second, the Trial Chamber needed to expeditiously decide whether to grant certification for appeal to allow the Appeals Chamber the time necessary to decide the matter before the expiration of the deadline for filing the pre-trial brief, if certification

[8] Defence motion, para. 12.
[9] Defence motion, paras 9-13.
[10] Email from a Legal Officer to the Trial Chamber to Counsel for Mr Merhi, 23 April 2014.

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were granted. The issue had to be determined with some urgency. Moreover—and this is discussed below in more detail—no good cause under Rule 9 (A) was shown to vary the time-limits.

Does time run from the filing of the decision, or from the filing of a separate or dissenting opinion?

11. Rule 7 (B) specifies that time runs from the 'filing of a document, order, decision or Judgement in English or French'. It does not refer to dissenting or separate opinions. Rule 168 (B) states that a Judgement shall be rendered by a majority of the Judges and 'shall be accompanied or followed as soon as possible by a reasoned opinion, in writing, to which separate or dissenting opinions may be appended'.[11] Rule 188 (B) refers in identical terms to appellate judgements. These Rules contemplate Judgements being published contemporaneously with separate or dissenting opinions. But there is nothing specific in the Rules connecting time-limits under Rule 7 with dissenting or separate opinions to decisions or orders. Defence counsel argue that provisions relating to judgements must apply *mutatis mutandis* to decisions and orders and that this is consistent with the practice of international courts and tribunals. In support of this they cited a provision of the Rome Statute of the International Criminal Court (ICC), a dissenting opinion to an ICC Trial Chamber judgement in the *Katanga* case,[12] and two Trial Chamber decisions of the Special Court for Sierra Leone (SCSL), in *Norman* and *Brima.*[13]

12. Their assertion that this accords with the case law of the SCSL is, however, incorrect. Counsel for Mr Merhi have failed to consider two pertinent international decisions contradicting these two decisions—including a directly applicable SCSL appellate decision contrary to the two Trial Chamber decisions—and an International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber decision. Moreover, the ICC case and statutory provision to which they refer are irrelevant. Additionally, the Trial Chamber's own research has revealed that Chambers at, for example the ICTY, normally, but do not always simultaneously publish decisions and any dissenting or separate opinions.[14]

[11] Article 23 (B) of the Statute of the Special Tribunal, states, in relation to a Judgement, that it 'shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended'.

[12] *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-Anx1, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014.

[13] *Prosecutor v. Norman, Fofana et Kondewa*, SCSL-04-14-T, Decision on Prosecution Application for Leave to Appeal 'Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', 15 December 2004; *Prosecutor v. Brima, Kamara et Kanu*, SCSL-04-16-PT, Decision on Brima – Kamara Application for Leave to Appeal from Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel, 5 August 2005.

[14] See *e.g., Prosecutor v. Milošević*, IT-05-54-AR73.4, Dissenting Opinion of Judge David Hunt on admissibility of evidence-in-chief in the form of a written statement, (Majority decision given 30 September 2003), 21 October 2003, published after *Prosecutor v. Milošević*, IT-05-54-AR73.4, Decision on interlocutory appeal on the admissibility of evidence- in-chief in the form of written statements', 30 September 2003; the disposition to the interlocutory appeal

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13. The dissenting opinion to the ICC's *Katanga* judgement concerns a judgement on conviction or acquittal, rather than interlocutory decision or order. The provision of the Rome Statute of the ICC to which they refer, Article 74 (5), specifically relates to decisions on judgement specifying that the decision on judgement includes the majority and minority views. Thus the footnote in Judge Van Den Wyngeart's dissenting opinion saying that her opinion is appended according to Article 74 (5) does no more than restate what Article 74 (5) requires. The Defence contention that 'where there is no unanimity, it is in fact essential that the views of both the majority and the minority be included ("appended") in a decision signed by all the judges'[15] relates to ICC judgements.

14. The decision of the Trial Chamber in the *Norman* case at the SCSL—that its Appeals Chamber later overruled—is also distinguishable given the clearly different circumstances facing the Trial Chamber here. The SCSL Trial Chamber was determining whether to grant leave to appeal

decision added, 'Judge Hunt will append a dissenting opinion to the present decision. Other judges reserve the right to append opinions to the present decision'; *Prosecutor v. Milošević*, IT-05-54-T, Dissenting opinion of Judge Robinson to Decision dated 31 October 2003 on Prosecution motion for the admission of witness statements relevant to events in Gaćko, Višegrad, Zvornik and Sanski Most municipalities in lieu of *viva voce* testimony pursuant to Rules 54 and 92 *bis*, 4 November 2003, published after *Prosecutor v. Milošević*, IT-05-54-T, Decision on Prosecution motion for the admission of witness statements relevant to events in Gaćko, Višegrad, Zvornik and Sanski Most municipalities in lieu of *viva voce* testimony pursuant to Rules 54 and 92 *bis*, 31 October 2003; *Prosecutor v. Milošević*, IT-02-54-T, Dissenting opinion of Judge Iain Bonomy in relation to the order of the Trial Chamber for expert medical reports, 16 November 2005, published after *Prosecutor v. Milošević*, IT-02-54-T Order for expert medical reports, 15 November 2005; see also *Prosecutor v Delalić* IT-96-21-A, Dissenting opinion of Judge Bennouna on the jurisdiction of the Appeals Chamber to hear provisional release matters, 22 February 1999, published after *Prosecutor v. Delalić,* IT-96-21-A, Order of the Appeals Chamber on the motion of the appellant for a provisional and temporary release, 19 February 1999; *Prosecutor v. Prlić*, IT-04-74-T, Dissenting opinion of Jean-Claude Antonetti, presiding Judge of the Trial Chamber, regarding the refusal to admit evidence presented by the Stojić defence during the testimony of Jovan Rajkov, 15 February 2007, published after *Prosecutor v. Prlić*, IT-04-74-T, Dissenting opinion of Jean-Claude Antonetti, presiding Judge of the Trial Chamber, regarding the refusal to admit evidence presented by the Stojić defence during the testimony of Jovan Rajkov, 15 February 2007, following an order of the Trial Chamber on 14 February 2007; *Prosecutor v. Gotovina*, IT-IT-06-90, Judge Orie's dissenting opinion on Decision on conflict of interest of attorneys Cedo Prodanović and Jadranka Sloković of 5 April 2007, 18 April 2007, published after *Prosecutor v. Gotovina*, IT- IT-06-90, Decision on conflict of interest of attorneys Cedo Prodanović and Jadranka Sloković, 5 April 2007 ('*Gotovina* decision'); *Prosecutor v. Prlić*, IT-04-74-AR65.11, Partially dissenting opinion of Judge Güney to Decision on Praljak's appeal of the Trial Chamber's 2 December 2008 decision on provisional release, 4 February 2009, published after *Prosecutor v. Prlić*, IT-04-74-AR65.11, Decision on Praljak's appeal of the Trial Chamber's 2 December 2008 Decision on provisional release, 16 December 2008; *Prosecutor v. Šešelj*, IT-03-67, Partially dissenting opinion of Judge Lattanzi on the Decision on Vojislav Šešelj's motion for contempt against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon, 28 December 2011, published after *Prosecutor v. Šešelj*, IT-03-67, Decision on Vojislav Šešelj's motion for contempt against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon, 22 December 2011; *Prosecutor v. Pećanac*, IT-05-88/2-R77.2, Dissenting Opinion of Judge Prisca Matimba Nyambe to the Order in Lieu of Indictment, 4 October 2011, published after *Prosecutor v. Pećanac*, IT-05-88/2-R77.2, *Prosecutor v. Pećanac*, IT-05-88/2-R77.2, Order in Lieu of Indictment, 21 September 2011; *Prosecutor v. Haradinaj*, IT-04-84bis, Judge Delvoie's partially dissenting opinion on the 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* dated 26 January 2012, 3 February 2012, published after *Prosecutor v. Haradinaj*, IT-04-84bis, 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*, 26 January 2012; *Prosecutor v. Tolimir*, IT-05-88/2, Dissenting Opinion of Judge Prisca Matimba Nyambe to Decision on Defence Request for Certification to Appeal, 18 January 2012, published after *Prosecutor v. Tolimir*, IT-05-88/2, Decision on Defence Request for Certification to Appeal, 13 January 2012.

[15] Defence motion, para.10.

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under the SCSL's Rule 75 (B), which is expressed quite differently to the Special Tribunal's Rule 126 (C). It provides,

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

15. The *Norman* Trial Chamber decided that 'the difference of legal opinion expressed by the Judges on the Decision on Norman's Indictment on issues of such fundamental importance constitute exceptional circumstances'. So not only was the SCSL Trial Chamber using a different legal test to the Special Tribunal's Rule 126 (C) to determine whether to allow an appeal, but, additionally, it decided that the existence of dissenting and separate opinions—in the circumstances of that decision—constituted the exceptional circumstance allowing the appeal, and hence the extension of time to file it. As the dissenting opinion was issued after the expiration of the three days normally allowed to appeal time for filing, the appeal started from the filing of the dissent.

16. The other SCSL decision, in *Brima*, is also distinguishable as it demonstrates precisely why its precedent—later overturned by its Appeals Chamber—should not be followed. There, one judge filed a dissenting opinion four weeks after the Trial Chamber had issued an oral decision. That illustrates why the Special Tribunal's Trial Chamber should not and could not have followed the example of these two SCSL Trial Chamber decisions, even if they were considered to be a part of international practice. A late dissent, by mere elapse of time, could frustrate a decision or order. It would be inconceivable that the implementation of a decision, for example, to allow an accused person provisional release could be delayed pending the publication of a dissenting or separate opinion.

17. However, more importantly, counsel for Mr Merhi neglected to refer the Trial Chamber to a decision of the SCSL Appeals Chamber in the *Brima* case, where (in a later interlocutory appeal) it held that the date for filing an appeal ran from the filing of the decision, rather than from when the dissenting opinion was filed. The Appeals Chamber held,[16]

> Rule 73(B) of the SCSL Rules of Procedure and evidence provides that application for leave to appeal interlocutory decision shall be filed within 3 days of the impugned decision. This Rule does not make

[16] *Prosecutor v. Brima, Kamara and Kanu,* SCSL-2004-16-AR73, Decision on Brima-Kamara defence appeal motion against Trial Chamber II majority decision on extremely urgent confidential joint motion for the re-appointment of Kevin Metzger and Wilbert Harris as lead counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, paras 19-20.

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> any exception as regards the later filing of concurring/dissenting opinions appended to the impugned decision.
>
> The Appeals Chamber takes this opportunity to emphasise that Article 18 of the Statute provides that judgements – or decisions – shall be accompanied by a reasoned opinion, which in practice embodies the reasoning of the decision, to which separate or dissenting opinions may be appended. Article 18 does not provide a time difference between the filing of the Decision and the filing of any concurring/dissenting opinion and the word "appended" clearly means that, in the spirit of the Statute, those opinions shall be filed at the very same time as the majority decision.

And further,[17]

> ... the 3-day time limit for filing an application for leave to appeal under Rule 73(B) obviously runs from the date when the decision the applicant wishes to appeal is filed, without any exception on the ground of the later filing of a dissenting/concurring opinion being admissible.

18. At the ICTY, a Pre-Trial Chamber in *Gotovina* held that the time for an application to appeal runs from the date of the ICTY's rule on certification—which is identical to the Special Tribunal's Rule 126 (C)—and not from the date of the filing of a dissenting opinion. It held that 'the Decision as filed is complete and should be the basis for the Defence ... to identity the issue and decide on whether to file a request for certification to appeal'. That Chamber then *exercised its discretion*, under the ICTY's equivalent to the Special Tribunal's Rule 9 (A), to vary the time for filing an application for certification to appeal to date from the filing of a dissenting opinion.[18]

19. The ICTY Appeals Chamber has also relevantly considered what constitutes a decision—and whether a dissenting opinion is an essential part of a decision, holding,[19]

> decisions and judgements are issued by the Trial Chamber as the body authorized to do so. In accordance with Article 23(2) of the Statute and Rule 87(A), judgements, and by logical implication other decisions, are rendered by a majority of the Judges assigned to a case. This has been the consistent practice of the Tribunal. The binding effect of judgements or decisions does not depend upon whether they were rendered unanimously or by a majority. When a Chamber renders a decision

[17] At paras 23-24.
[18] Holding that in the circumstances 'it was practical, serves procedural efficiency', p.2, *Gotovina* decision.
[19] *Prosecutor v. Prlić*, IT-04-74-AR73.13, Decision on Jadranko Prlic's consolidated interlocutory appeal against the Trial Chamber's orders of 6 and 9 October 2008 on admission of evidence, 12 January 2009, para. 27.

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in accordance with the Statute, the decision is that of the Chamber and not merely a bundle of opinions of individual judges.[20]

20. Apart from these, the Trial Chamber has not found any other decisions of the international criminal courts and tribunals on point. However, the ICTY's and SCSL's appellate decisions—and that of the *Gotovina* Pre-Trial Chamber—clearly contradict the position argued by counsel for Mr Merhi. In the Trial Chamber's view these decisions are correct and should be followed.[21]

21. The time for filing an application for a request for certification to appeal runs from the date when a decision or order is issued, either orally or in writing, as per Rule 7 (B). The decision is that of the Trial Chamber and not that of a dissenting member of the bench or even one writing a separate but concurring opinion.

22. It is the decision or order, and not the separate or dissenting opinion, that carries legal consequences. As the ICTY Appeals Chamber held, the 'binding effect of judgements or decisions does not depend upon whether they were rendered unanimously or by a majority'. The decision or order must be implemented or obeyed, whereas a dissenting or separate opinion has no legal consequences, irrespective of its date of issue. It is emphasised that a dissenting or separate or concurring opinion is merely an opinion. A Party or person, the subject of an order or decision, cannot refuse to implement or obey it on the basis that they are awaiting the publication of a separate or dissenting opinion. Awaiting the publication of a tardy dissenting or separate opinion could also, by the mere passage of time, render a decision moot or meaningless. The same reasoning applies to filing applications for appeal or filing appeals where a statutory time limit applies to subsequent applications or filings; unless otherwise ordered, time must run from the filing of the decision or order.

Extension of a time limit under Rule 9 upon good cause being shown

23. The Trial Chamber can, however, exercise its discretion under Rule 9 (A), provided that good cause is shown by motion, to allow an extension of time to do or not do something, until a dissenting or separate opinion is published. Here, counsel for Mr Merhi did not attempt to show good cause beyond arguing that the existence of a dissenting opinion was the good cause. The Trial Chamber does not agree, for the reasons above, that the mere existence of a dissenting or separate opinion of

[20] The words, 'bundle of opinions' as expressed by International Court of Justice *South West Africa*, Second Phase, Judgement 18 July 1966, Dissenting Opinion of Judge Jessup, *I. C. J.* Reports 1966, p. 325, fn . 1
[21] See also, STL, *Prosecutor v. Ayyash*, STL-11-01/T/TC, Status Conference, 12 May 2014, p. 76, lines 17-20.

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itself constitutes good cause under Rule 9. A dissenting or separate opinion may, but depending upon the circumstances including the importance of the issue, provide good cause to extend a prescribed time-limit.

24. Furthermore, the true value of a dissenting opinion may lie more in the submissions argued on appeal than in the application to certify a decision for appeal itself. An appellant may use the arguments contained in a dissent or separate opinion to develop submissions about the decision's legal error—but in the appellate arguments. Defence counsel, had they sought and gained certification to appeal, could have used the reasoning in Judge Nosworthy's dissent to argue that her legal interpretation was correct and the decision's was not.

25. Substantively, supporting their application, Defence counsel argued that it was 'materially impossible' for them to have evaluated Judge Nosworthy's dissenting opinion in less than a day. The Trial Chamber disagrees. The two points of contention between the decision and the dissent—namely, the function of a defence pre-trial brief and the date for filing it—were clearly and concisely framed, and Defence counsel had, both in court and in filings, canvassed the issues on the subject of both the decision and the dissent. Defence counsel were capable of referring to the substance of the dissent in any application for certification. But, moreover, the test for certification is not whether the Trial Chamber erred, or whether the dissenting judge was correct, but rather whether, according to Rule 126 (C)

> if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Any application for certification for appeal would have been from the decision and not from the dissent. The Defence, had they so wished, could have identified a certifiable *issue* falling within the two conditions in the test set out in the Rule.

26. In the prevailing circumstances—namely, that twelve days had passed since the distribution of the Trial Chamber's decision and that the points of contention between the decision and the dissent were clear, obvious and discrete—the distribution of the dissenting opinion on 29 April did not constitute good cause to extend the date for filing an application for certification to 19 days after the decision was distributed. No good cause was shown and the application was dismissed. For these reasons, the Trial Chamber denied the Defence request for an extension of time to 6 May 2014 to file a request for a certification to appeal a decision, based on the publication of a dissenting opinion.

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27. As a final matter, the Trial Chamber reminds counsel that better care should be taken to ensure that legal submissions refer to the true state of international criminal law. Counsel should refer the Trial Chamber to all relevant sources of law, but should then carefully distinguish, by argument, those cases that they do not believe the Trial Chamber should follow or apply.

DISPOSITION

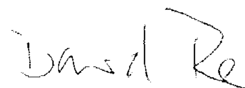
FOR THESE REASONS, the Trial Chamber:

DISMISSES the request to set the time-limit for the certification of the decision to run from the day on which the dissenting opinion was filed; and

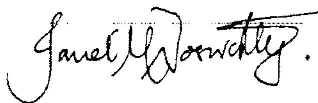
DENIES the request to extend the time-limit for the certification of the Decision.

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

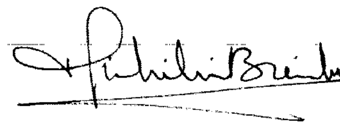
Leidschendam,
The Netherlands
19 May 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

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