



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: 21 August 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

Corrected Version of

**“DECISION ON MERHI DEFENCE MOTION FOR RECONSIDERATION
OF DECISION OF 22 MAY 2014 ON ALLEGED DEFECTS IN THE FORM
OF THE INDICTMENT” of 3 July 2014**

Office of the Prosecutor:

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INTRODUCTION

1. The Trial Chamber, in a decision on 22 May 2014, dismissed a motion filed by counsel for the Accused, Mr. Hassan Habib Merhi, alleging defects in the form of the consolidated indictment filed against him and the other four Accused, Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra, on 7 March 2014. That challenge to the form of the indictment was dismissed on procedural grounds.
2. On 30 June 2014, at counsel for Mr. Merhi's request, the Presiding Judge of the Trial Chamber granted leave to reconsider that decision.¹ The Trial Chamber has now reconsidered and reversed its decision to dismiss the motion on procedural grounds. The Trial Chamber has carefully considered the arguments of counsel for Mr. Merhi alleging defects in the form of the consolidated indictment and the Prosecution's response and has dismissed the motion.

PROCEDURAL BACKGROUND

3. The Trial Chamber, on 28 March 2014, dismissed a motion filed by counsel for Mr. Merhi alleging defects in the indictment filed against him on 5 June 2013.² Counsel for Mr. Merhi did not seek to have the decision certified for interlocutory appeal in the seven days allowed under Rule 126 (D) of the Special Tribunal's Rules of Procedure and Evidence.
4. On 4 April 2014, the Trial Chamber declared operative a consolidated indictment filed in the joined case of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra* and *Prosecutor v. Hassan Habib Merhi*.³ That indictment, filed by the Prosecution on 7 March 2014,⁴ was to all intents and purposes in substance the same—in relation to Mr. Merhi—as the original indictment. Minor adjustments had been made; some of which, as explained the Prosecution,⁵ resulted from the arguments of counsel for Mr. Merhi in their challenge to the form of the original indictment, against Mr. Merhi, filed on 14 February 2014.⁶

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, Decision on Leave to Reconsider Two Decisions on Challenges to the Form of the Indictment (Merhi Defence), 30 June 2014.

² STL-11-01/T/TC, Decision on Alleged Defects in the Form of the Indictment Against Hassan Habib Merhi, 28 March 2014.

³ STL-11-01/T/TC, Decision on Prosecution Motion on a Consolidated Indictment and Amending Witness and Exhibit Lists, 4 April 2014.

⁴ STL-11-01/T/TC, Prosecution Submission of Consolidated Indictment, Witness and Exhibit Lists, 7 March 2014.

⁵ At para. 2 of its submission on 7 March 2014, the Prosecution stated that '[d]uring its preparation of the consolidated Indictment, the Prosecution considered the clarifications sought by Defence counsel for Mr. Merhi as outlined in the Preliminary Motion on Defects in the Form of the Indictment, which was filed before the Trial Chamber on 14 February 2014. The Prosecution also noted several areas in which amendments could enhance the clarity of the indictment through

5. Counsel for Mr. Merhi subsequently, on 25 April 2014, filed a motion alleging defects in the form of the consolidated indictment. They expressed their challenge to be under Rule 71 (F) and Rule 90 (A) (ii).⁷ However, they essentially repeated the same arguments that the Trial Chamber had dismissed in its decision of 28 March 2014. The Trial Chamber, on 22 May 2014, dismissed this second challenge to the indictment against Mr. Merhi, holding that it was procedurally invalid and lacked any legal basis.⁸ In the Trial Chamber's view it also amounted to an implicit request to reconsider the decision of 28 March 2014, which, in the absence of any compelling reason it was not prepared to do.⁹ No request was made to the Trial Chamber to certify that second decision for interlocutory appeal.

6. On 3 June 2014, counsel for Mr. Merhi sought the Presiding Judge's leave to have the Trial Chamber reconsider both decisions.¹⁰ Annexed to the motion was a copy of the intended motion to reconsider the decisions if leave were granted. The motion sought as its substantive relief that the Trial Chamber '[o]rder the Prosecutor to amend the Consolidated Indictment in order to provide the specific information requested in the Second Preliminary Motion'.¹¹ The Prosecution opposed the application.¹² On 30 June 2014, the Presiding Judge of the Trial Chamber refused leave to reconsider the decision of 28 March 2014 but granted leave to reconsider the decision of 22 May 2014.¹³

7. The Presiding Judge's decision specified that the Trial Chamber would treat as filed the substantive motion annexed to the motion seeking leave to reconsider, and would decide the issue on the filings already before the Trial Chamber—namely, those supporting and opposing the motion filed on 25 April 2014. The Trial Chamber would also only reconsider those parts of the motion relating to the decision of 22 May 2014.

the removal of unnecessary evidential information, the addition of more precise information and by clarifying the roles of the Accused'.

⁶ STL-11-01/PT/TC, Preliminary Motion on Defects in the Form of the Indictment, 14 February 2014.

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

⁸ STL-11-01/T/TC, Decision Dismissing Merhi Motion Alleging Defects in the Form of the Consolidated Indictment, 22 May 2014, paras 9-11.

⁹ Decision of 22 May 2014, para. 15.

¹⁰ STL-11-01/T/TC, Application by the Merhi Defence for Leave to File a Request for Reconsideration of the Decisions on Defects in the Form of the Indictment, 3 June 2014, (Demande d'autorisation de la Défense de Merhi aux fins de déposer une requête en réexamen des décisions sur les vices de forme de l'acte d'accusation).

¹¹ Annex, 'Motion from the Merhi Defence for Reconsideration of the Decisions on Defects in the Form of the Indictment' (Annexe, Requête de la Défense de Merhi aux fins de réexamen des décisions sur les vices de forme de l'acte d'accusation).

¹² STL-11-01/T/TC, Prosecution Response to the Merhi Defence's Application for Leave to File a Request for Reconsideration of the Decision on Defects in the Form of the Indictment, 18 June 2014.

¹³ Decision of 30 June 2014.

DISCUSSION

8. A Chamber may reconsider its own decisions under Rule 140, ‘Power to Reconsider Decisions’. It may ‘*proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice’. The Appeals Chamber has emphasised that reconsideration is exceptional and that the reference to an *actual* injustice ensures that the Rule will not be used as ‘an ordinary remedy’ to redress ‘imperfections in a decision or to circumvent the unfavourable consequences of a ruling’.¹⁴ The party seeking reconsideration must show an injustice that ‘involves prejudice’ and is ‘demonstrated on specific grounds.’¹⁵ If prejudice or ‘an injustice’ is shown, reconsideration may be granted on grounds that include an error of law or abuse of discretion, or the existence of new facts or a material change in circumstances.¹⁶

Reconsideration of the decision to dismiss the motion on procedural grounds

9. In his decision of 30 June 2014, the Presiding Judge held that the combination of two procedural events—the joinder of the two cases three days before the first challenge to the form of the indictment was filed and the declaration of the consolidated indictment as operative a week after the first challenge to the original *Merhi* indictment was dismissed—produced a situation that could cause an injustice under Rule 140.¹⁷ The Presiding Judge concluded that the decision of 22 May 2014 could be reopened to avoid an injustice, namely, that of not being able to seek an interlocutory appeal against a decision on the merits of the motion.¹⁸ Defence counsel could have sought certification for appeal but it would have been against a decision on an inoperative indictment.

10. The Trial Chamber, in its decision on 22 May 2014, dismissed the motion for procedural reasons, but then explained why it would have dismissed it substantively. The basis of the Presiding Judge’s decision granting leave to reconsider the decision was to allow the Trial Chamber to consider whether it should reconsider its decision to dismiss the motion on procedural grounds and, if so, to then issue a reasoned decision on the merits of the second motion. Doing this would allow Defence counsel to seek to have an unfavourable decision certified for interlocutory appeal under Rule 126 (C). For this reason the Trial Chamber will reconsider the decision to dismiss the motion on

¹⁴ STL-11-01/PT/AC/R176*bis*, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012 (‘Applicable Law Reconsideration Decision’), paras 22-23. *See also* STL-11-01/PT/TC, Decision on Reconsideration of the Trial *In Absentia* Decision, 11 July 2012, para. 7.

¹⁵ Applicable Law Reconsideration Decision, paras 24-25. *See also*, STL-11-01/PT/AC, Decision on Request by Counsel for Messrs Badreddine and Oneissi for Reconsideration of the Appeals Chamber’s Decision of 25 October 2013, 10 December 2013, para. 10.

¹⁶ Applicable Law Reconsideration Decision, para. 25.

¹⁷ Decision of 30 June, para. 18.

¹⁸ Decision of 30 June, paras 19 and 24.

procedural grounds, although it notes that the motion was filed well outside of the fourteen days allowed under Rule 8 (A) to respond to motions; it should have been filed as a response to the Prosecution's motion filing the consolidated indictment, witness and exhibit lists filed on 7 March 2014.

11. The Trial Chamber is thus satisfied that to avoid an injustice—namely, that without a decision on the merits of the motion counsel for Mr. Merhi would be denied the right to seek certification for an interlocutory appeal of a *decision on the merits*—that it should reconsider the decision. This is because the Trial Chamber's decision of 4 April 2014 declaring the consolidated indictment operative in the joined case effectively replaced the indictment against Mr. Merhi filed on 5 June 2013. The Appeals Chamber would have ruled inadmissible an interlocutory appeal against an inoperative indictment.¹⁹

12. For these reasons the Trial Chamber has reconsidered the decision and will reverse its decision to dismiss the motion on procedural grounds. The Defence motion alleging defects in the consolidated indictment against Mr. Merhi will thus be considered on its merits.

Decision on the merits of the motion by counsel for Mr. Merhi alleging defects in the form of the consolidated indictment

13. In proceeding to consider the Defence motion on its merits, the Trial Chamber emphasises that it has previously decided the substance of the arguments posed by counsel for Mr. Merhi. The arguments in this second motion substantially mirror the challenges to the amended indictments in the *Ayyash* case made by counsel for Mr. Badreddine, Mr. Oneissi and Mr. Sabra; the Trial Chamber dismissed these in 2013.²⁰

14. The motion is also expressed to be filed pursuant to Rule 90 (A) (ii) and Rule 71 (F). Rule 71 (F) states that '[t]he accused shall have a further period of twenty-one days in which to file

¹⁹ As it did in STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals Against Trial Chamber's "Decision on Alleged Defects in the Form of the Amended Indictment", 5 August 2013, paras 16-23.

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

preliminary motions pursuant to Rules 89 and 90 in respect of the new charges'. The consolidated indictment, however, contains no new charges; no challenge alleging defects in its form could have been made pursuant to that Rule. Notwithstanding that multiple challenges alleging defects in an amended (or consolidated) indictment are not permitted, the Trial Chamber—in the unique procedural circumstances noted above—will exercise its discretion to consider this second challenge under Rule 90 (A) (ii), to what is essentially the same indictment against Mr. Merhi.

A. The list of material facts underpinning each count

15. Counsel for Mr. Merhi allege defects in relation to the material facts supporting the counts in the consolidated indictment. They argue that the consolidated indictment is defective in form because it does not 'list under each count concerning Merhi, the number of the paragraphs in which the material facts that specifically support each count are set out'.²¹ This 'specificity is necessary for their understanding of the charges and so that a proper and relevant defence may be prepared'.²² They requested the Trial Chamber to order the Prosecution to clarify the consolidated indictment by incorporating into it, for each count, a specific and exhaustive list of the paragraphs setting out the supporting material facts.²³

16. The Prosecution responded that the consolidated indictment provides a concise statement of facts and thoroughly lists the material facts related to the counts; the counts themselves reinforce this by referencing the specific alleged acts of the Accused that correspond to each count.²⁴ Further, providing a list of paragraph references is not a requirement and has not been a universal practice. The mere fact that the Prosecution did not choose to organise its indictment in the fashion preferred by Defence counsel cannot constitute a defect in the form of the indictment.²⁵

17. This part of the motion effectively repeats what was, in essence, a request by counsel for Mr. Merhi for a judicial decision ordering the Prosecution to provide better particulars to the Defence. The Trial Chamber rejected this argument in its decision of 28 March 2014, holding that it went beyond the scope of Rule 90 (A) (ii).²⁶ The same reasoning applies here. Moreover, there is no legal requirement that an indictment contain a list of paragraph references corresponding to each count in

²¹ Merhi Defence motion of 25 April 2014, para. 14.

²² Merhi Defence motion of 25 April 2014, para. 15.

²³ Merhi Defence motion of 25 April 2014, para. 18.

²⁴ Prosecution Response to the Merhi Defence's "Exception préjudicielle pour vices de forme de l'acte d'accusation joint et amendé du 7 mars 2014", 13 May 2014, paras 23-24.

²⁵ Prosecution response of 13 May 2014, paras 23-24.

²⁶ Decision of 28 March 2014, para. 22.

an indictment. The absence of such a list, consequently, cannot constitute a defect in the form of the indictment. This part of the motion is therefore dismissed.

B. Date and circumstances of the participation in the alleged conspiracy

18. Counsel for Mr. Merhi requested the Trial Chamber to order the Prosecution to clarify the consolidated indictment to the extent that it has more specific information of the date and the circumstances under which the agreement and alleged entry of Mr. Merhi into the conspiracy alleged in the consolidated indictment occurred.²⁷ They argued that because specificity in an indictment is necessary to mount a proper defence, ‘the Prosecution should not be exempted from providing more specific information whenever it is in a position to do so’.²⁸

19. Counsel submit that they should not have to go looking ‘outside’ the indictment ‘into other trials and other public statements, for evidence or for more precise information in the possession of the Prosecution concerning the date when and circumstances under which Merhi allegedly joined the conspiracy’.²⁹ The Prosecution responded by arguing that the dates pleaded in the consolidated indictment provide the Merhi Defence with sufficient notice of the relevance of the time frame of the conspiracy pleaded.³⁰ Moreover, if an Accused person can be convicted of participating in a conspiracy by inference, the Prosecution cannot be required to plead the specific circumstances and date on which this Accused joined a conspiracy.³¹

20. The Trial Chamber has now decided this issue three times. On 28 March 2014, the Trial Chamber ruled, consistent with its two earlier decisions on the form of the *Ayyash* amended indictment, that if a precise date of an act is unknown, it is permissible, and indeed normal, to plead in an indictment the occurrence of such an act within a range of dates.³² This form of pleading is permissible and the Special Tribunal’s Appeals Chamber has held—in relation to the duration of a conspiracy—that ‘no explicit time-line is required for the validity. The agreement stands, even though it is a long-term one or has no predefined or foreseen term’.³³

21. The Trial Chamber affirms—for the fourth time—and in line with the general principles of international criminal law, that an indictment must be viewed in its totality, and it is not

²⁷ Merhi Defence motion of 25 April 2014, para. 23.

²⁸ Merhi Defence motion of 25 April 2014, paras 19-23.

²⁹ Merhi Defence motion of 25 April 2014, para. 22.

³⁰ Prosecution response of 13 May 2014, paras 25-30.

³¹ Prosecution response of 13 May 2014, para. 30.

³² Decision of 28 March, para. 28; Decision of 12 June 2013, para. 36; Decision of 13 September 2013, para. 38.

³³ STL-11-01/I, Interlocutory Decision on the Applicable Law; Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 196.

disproportionate or overly broad to plead that an act relating to a conspiracy occurred within a three-month period.³⁴ The circumstances in which Mr. Merhi is alleged to have joined the alleged conspiracy is a matter for evidence at trial and need not be pleaded as material facts in an indictment. This part of the motion is similarly dismissed.

C. Hassan Habib Merhi's alleged role in the preparations other than the false claim of responsibility

22. Counsel for Mr. Merhi alleged vagueness in the form of the consolidated indictment. They submitted that despite the Prosecution clarifying some allegations in the consolidated indictment, it remains vague as to the alleged role of Mr. Merhi in the preparatory acts in the conspiracy charged. This includes notably the alleged surveillance of Mr. Rafik Hariri, and the purchase of a Mitsubishi van allegedly used in the attack on 14 February 2005.³⁵ The consolidated indictment still fails to link the material facts implicating Mr. Merhi in these preparations with specific counts in the consolidated indictment—other than the false claim of responsibility.³⁶ The Trial Chamber is therefore asked to order the Prosecution to specify in the consolidated indictment whether it intends to draw criminal inferences from the material facts alleging Mr. Merhi's role in the surveillance of Mr. Hariri and the purchase of the van. And, if Mr. Merhi is indicted for participating in such preparations, other than the false claim of responsibility, the Trial Chamber should order the Prosecution to provide further relevant details.³⁷

23. The Prosecution responded by explaining that the consolidated indictment does not plead a specific role for Mr. Merhi with respect to other preparatory acts such as the surveillance of Mr. Hariri and the van purchase.³⁸ The telephone contacts are referred to in the pre-trial brief, not as a way of attributing a specific role to Mr. Merhi with respect to other preparatory acts or introducing any additional charges, but rather to provide further information about the evidence supporting the existing charges.³⁹ Moreover, the consolidated indictment contains further details in relation to the alleged role of Mr. Merhi in the preparations, other than the false claim of responsibility.⁴⁰ It includes explicit information that Mr. Merhi was in contact with Mr. Ayyash and Mr. Badreddine regarding preparations for the attack. This adds to the information contained in the superceded

³⁴ Decision of 12 June 2013, para. 38; Decision of 13 September 2013, para. 40; Decision of 28 March 2014, para. 28.

³⁵ Merhi Defence motion of 25 April 2014, para. 24.

³⁶ Merhi Defence motion of 25 April 2014, para. 26.

³⁷ Merhi Defence motion of 25 April 2014, para. 27.

³⁸ Prosecution response of 13 May 2014, para. 31.

³⁹ Prosecution response of 13 May 2014, para. 31.

⁴⁰ Prosecution response of 13 May 2014, para. 32.

indictment, and thus provides sufficient information of Mr. Merhi's alleged contact with Mr. Ayyash in relation to the preparations for the attack.⁴¹

24. As the Trial Chamber already held in its decision of 28 March 2014—consistent with its two previous decisions on the *Ayyash* amended indictments⁴²—the pleading in the consolidated indictment against Mr. Merhi provides sufficient information to his assigned counsel to inform them clearly of the nature and cause of the charges such as to allow them to mount a defence at trial. The issues raised in the motion relate to the evidence to be led at trial, and to particulars between the Parties and not to the content and form of the consolidated indictment. This part of the motion is therefore dismissed.

D. The time frame of the charges relating to the alleged preparatory acts

25. Counsel for Mr. Merhi argue that the consolidated indictment is still vague as to the legal characterisation of telephone calls allegedly made by Mr. Merhi before 22 December 2004. This is particularly so in light of the Prosecution's pre-trial brief and the clarification made by the Prosecution that 'the history of contact between the co-conspirators before 22 December 2004 is relevant to the charges as it constitutes supporting evidence of the material facts underpinning those charges'.⁴³ Specifically, contacts alleged between 6 November and 21 December 2004 constitute material facts, and not evidence. These should be clearly connected with a count if the Prosecution intends to rely on them to prove the elements of a crime.⁴⁴ The Trial Chamber should therefore order the Prosecution to clarify whether it intends to draw inferences from the telephone calls made before 22 December 2004 and if so, under what count and legal classification.⁴⁵

26. The Prosecution responded that the relevant time frames are clearly specified in the counts of the consolidated indictment.⁴⁶ Further, this argument is irrelevant because, under Rule 90 (A) (ii), the indictment and not the Prosecution's pre-trial brief is the only accusatory instrument against an accused person.⁴⁷

27. The Trial Chamber, and now for the fifth time, confirms the basic legal principle that the indictment, as the primary accusatory instrument, provides notice of the nature and cause of the

⁴¹ Prosecution motion of 13 May 2014, para. 32.

⁴² Decision of 28 March 2014, para. 33; Decision of 12 June 2013, para. 46; Decision of 13 September 2013, para. 48.

⁴³ Merhi Defence motion of 25 April 2014, para. 28.

⁴⁴ Merhi Defence motion of 25 April 2014, para. 29.

⁴⁵ Merhi Defence motion of 25 April 2014, para. 30.

⁴⁶ Prosecution response of 13 May 2014, para. 34.

⁴⁷ Prosecution response of 13 May 2014, para. 35.

charges against an Accused person.⁴⁸ The references in the pre-trial brief to telephone contacts before 22 December 2004 relate to evidence supporting the material facts pleaded in the consolidated indictment. There is no legal requirement that this evidence must be linked to specific counts in an indictment. This part of the motion is also dismissed.

CONCLUSION

28. The consolidated indictment, which contains no new charges in respect of Hassan Habib Merhi and is in substance the same as the indictment of 5 June 2013 against Mr. Merhi, provides counsel for Mr. Merhi with enough detail to inform them clearly of the nature and cause of the charges to allow them to prepare a defence of the case at trial. The consolidated indictment is thus not defective in its form and the motion is thus dismissed.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

RECONSIDERS its decision ‘Decision Dismissing Merhi Motion Alleging Defects in the Form of the Consolidated Indictment’ of 22 May 2014;

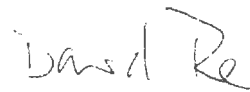
REVERSES its finding to dismiss as procedurally invalid the motion ‘Preliminary Motion on Defects in the Form of the Consolidated and Amended Indictment of 7 March 2014’, filed 25 April 2014; and

DISMISSES counsel for Hassan Habib Merhi’s motion ‘Preliminary Motion on Defects in the Form of the Consolidated and Amended Indictment of 7 March 2014’.

⁴⁸ Decision of 8 March 2013, para. 13; Decision of 12 June 2013, para. 64; Decision of 13 September 2013, para. 27; Decision of 28 March 2014, para. 40.

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

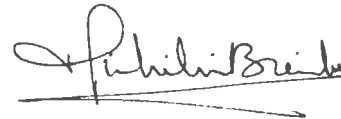
Leidschendam,
The Netherlands
21 August 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

