

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE TRIAL CHAMBER****SPECIAL TRIBUNAL FOR LEBANON**

**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:** 12 July 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH  
HASSAN HABIB MERHI  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

**DECISION DENYING CERTIFICATION TO APPEAL ‘DECISION ON MERHI  
DEFENCE REQUEST FOR DISCLOSURE OF DOCUMENTS CONCERNING  
WITNESS PRH230’ (ANDREW DONALDSON)**

**Office of the Prosecutor:**

Mr Norman Farrell & Mr Alexander Hugh  
Milne

**Legal Representatives of  
Participating Victims:**

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

**Counsel for Mr Salim Jamil Ayyash:**

Mr Emile Aoun, Mr Thomas Hannis &  
Mr Chad Mair

**Counsel for Mr Hassan Habib Merhi:**

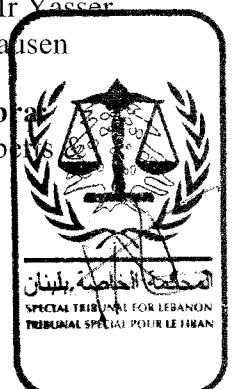
Mr Mohamed Aouini, Ms Dorothee Le Fraper  
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**Counsel for Mr Assad Hassan Sabra:**

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Ms Sarah Bafadhel



## INTRODUCTION

1. Prosecution analyst Mr Andrew Donaldson (Witness PRH230), in five reports, analyses evidence that attributes to the four Accused and the former Accused, Mr Mustafa Amine Badreddine, the use of various mobile telephones allegedly used in the attack against the former Lebanese Prime Minister, Mr Rafik Hariri, on 14 February 2005 in Beirut.

2. Mr Donaldson is presently testifying. Counsel for the Accused, Mr Hassan Habib Merhi, asked the Trial Chamber to order the Prosecution to disclose, as witness statements under Rule 110 (A) (ii) of the Special Tribunal's Rules of Procedure and Evidence, eight categories of documents relating to Mr Donaldson. The Trial Chamber, in a decision on 2 June 2017, ordered the Prosecution to disclose documents in two categories—Mr Donaldson's draft reports and statements—and dismissed the remaining requests.<sup>1</sup>

3. The Trial Chamber denied the Merhi Defence request that questions put to or answers provided by Mr Donaldson, and emails and meeting notes relating to Mr Donaldson be disclosed.<sup>2</sup> The Trial Chamber held that Mr Donaldson's practice of producing his own statements and reports meant that his situation was not analogous to that of a typical witness, namely, where the Prosecution interviews a person and then an investigator or lawyer creates a record of the interview. As a result, international criminal law case law holding that records of question asked to a witness and answers provided, investigators' notes and emails, could constitute witness statements was distinguishable from Mr Donaldson's situation.<sup>3</sup>

4. The Trial Chamber held that the Merhi Defence's request for these categories was formulated far too broadly, and could encompass hundreds or thousands of documents. As such, the request lacked sufficient detail to meet the requirement of specificity, and could be described as a fishing expedition.<sup>4</sup>

5. The Trial Chamber concluded:

Given these categories of documents sought probably bear little to no relation as to how Mr Donaldson's reports and statements were likely prepared, and the requests are

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3171, Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230, 2 June 2017 ('Decision').

<sup>2</sup> The Trial Chamber also dismissed the Defence's requests for disclosure of documents annotated by Mr Donaldson, presentation support that Mr Donaldson intended to use in court and documents containing an opinion or comments from Mr Donaldson. Decision, paras 3-4, 84-88.

<sup>3</sup> Decision, paras 65-68.

<sup>4</sup> Decision, paras 72-73.

formulated far too broadly, the Trial Chamber finds that they do not constitute proper requests for a ‘witness statement’ under Rule 110 (A) (ii) [...].<sup>5</sup>

6. Counsel for Mr Merhi seek, under Rule 126 (C), certification to appeal the decision.<sup>6</sup> The Prosecution opposes the motion.<sup>7</sup>

7. The Merhi Defence proposes two issues to be certified:<sup>8</sup>

1. Did the Chamber err in failing to specifically and definitively state under what conditions the e-mails and investigator’s notes exchanged between a witness and the staff of the Office of the Prosecutor, and concerning one or more subjects referred to during his testimony, could be regarded as a statement of a witness within the meaning of Rule 110 (A) of the Rules, and as a result, be subject to the disclosure obligation of the Prosecution?
2. Did the Chamber err in ruling that Mr Donaldson’s working methodology, used to prepare his reports and statements, resulted in his work product not corresponding to the broad definition of witness statement as accepted by international case law?

### **APPLICABLE LAW**

#### *Certification*

8. The Trial Chamber, under Rule 126 (C), may certify a decision for interlocutory appeal 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.

9. The Trial Chamber must be satisfied that an issue for certification meets the Rule’s strict requirements. This is a high threshold, and granting leave to appeal is exceptional. The test is not whether the challenged decision was correctly reasoned, but rather whether the decision involves an issue that satisfies both the Rule’s requirements. The issue must be

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<sup>5</sup> Decision, para. 74.

<sup>6</sup> F3179, Merhi Defence Request for Certification of the “Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230”, 12 June 2017 (‘Merhi Defence motion’).

<sup>7</sup> F3190, Prosecution Response to Merhi Defence Request for Certification of the “Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230”, 20 June 2017 (‘Prosecution response’). The Trial Chamber, in a 15 June 2017 email, ordered that any response be filed on an expedited basis, by 20 June 2017.

<sup>8</sup> Merhi Defence motion, para. 2.

identified precisely, it must have an adequate legal or factual basis and it must arise from the decision in question.<sup>9</sup> In particular, the issue must be:

An identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.<sup>10</sup>

10. Certification is not a method by which a party may obtain an advisory opinion or judicial guidance from the Appeals Chamber.<sup>11</sup> Moreover, the Trial Chamber will not certify an issue that does not accurately reflect a decision<sup>12</sup> or that is based on a misreading of the decision.<sup>13</sup> Certain factors—such as the voluminous, recurring nature of disclosure motions and the impact on a Party’s ability to cross-examine a witness—are inherent to every decision on disclosure, and thus may not be sufficient for purposes of certification.<sup>14</sup>

#### *Witness statements*

11. Rule 110 (A) (ii) provides that the Prosecution must disclose witness statements.<sup>15</sup> The Rule does not define ‘witness statement’, and the international case law holds that the usual meaning of a ‘witness statement’ is an account of a person’s knowledge of a crime that is recorded in the course of an investigation into the crime.<sup>16</sup> The Appeals Chamber has taken an expansive view of what constitutes a ‘witness statement’, and the various forms it might take. It is not just the final signed witness statement which is subject to disclosure; questions and

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<sup>9</sup> F3175, Decision Denying Certification to Appeal ‘Decision Admitting 10 Call Sequence Tables Related to Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi Under Rule 154 and Two Related Witness Statements under Rule 155’, 8 June 2017 (‘Call Sequence Decision’), para. 14; F2913, Decision Denying Certification to Appeal the ‘Written Reasons for Admitting Witness PRH707’s Statements and Annexes into Evidence’ and ‘Reasons for Decision Admitting Prosecution’s Cell Site Evidence’, 16 December 2016 (‘Witness PRH707 Decision’), paras 22, 28.

<sup>10</sup> Witness PRH707 Decision, para. 27, quoting ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9.

<sup>11</sup> F1643, Decision Dismissing Request for Certification to Appeal ‘Decision on Supplementary Submissions’ of 23 July 2014, 19 August 2014, paras 5, 7.

<sup>12</sup> Call Sequence Decision, para. 17; Witness PRH707 Decision, para. 28.

<sup>13</sup> F1347, Decision on Request for Certification to Appeal Orders Concerning Five Defence Motions on State Cooperation, 27 January 2014 (‘State Cooperation Decision’), para. 24. *See also* paras 13-20.

<sup>14</sup> STL-11-01/PT/AC/AR126.5, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0003-AR126.5, Decision on Appeal by Counsel for Mr Sabra against Pre-Trial Judge’s “Decision on Sabra’s Tenth and Eleventh Motions for Disclosure”, 6 November 2013 (‘Appeals Chamber Decision’), para. 7.

<sup>15</sup> Rule 110 (A) (ii) provides that the Prosecutor must disclose to the Defence, within a prescribed time-limit: (a) statements of all witnesses to be called at trial (b) all statements, depositions and transcripts under other specified Rules; and (c) copies of additional Prosecution witnesses’ statements.

<sup>16</sup> Decision, paras 45-47 and case law cited therein.

answers, investigators' notes and emails can also constitute 'witness statements' under Rule 110 (A) (ii). All stages of the preparation of a 'witness statement' can be important, as they enable the Chamber and the opposing Party to know how a witness' version has evolved.<sup>17</sup>

## SUBMISSIONS

### *Merhi Defence submissions*

12. Defence counsel submit that the request for certification satisfies the two requirements of Rule 126 (C).<sup>18</sup>

13. The two issues to be certified stem from the decision. Both issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial due to the fundamental nature of the Prosecution's disclosure obligation. The issues are linked to the scope of the Prosecution's disclosure obligation under Rule 110 (A), so the Appeals Chamber must resolve them to ensure the trial is fair and expeditious. The Pre-Trial Judge and various international tribunals' Trial Chambers have granted motions for certifications relating to the Prosecution's disclosure obligation.<sup>19</sup> Here, the large quantity of materials potentially subject to disclosure impacts the fairness of the proceedings. The impact will be even greater if this disclosure occurred at the appeals stage. The issues to be certified are crucial for determining the scope of the Prosecution's disclosure obligation. The result of the decision is that documents potentially subject to disclosure will not be disclosed to the Defence. These include emails, investigators' notes and documents relating to attribution, any of which can significantly

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<sup>17</sup> Decision, paras 12, 45 and case law cited therein.

<sup>18</sup> Merhi Defence motion, para. 22.

<sup>19</sup> See Merhi Defence motion, paras 26-30, citing STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1104, Decision on Sabra Defence Request for Certification to Appeal the Decision on Sabra's Tenth and Eleventh Disclosure Motions, 13 September 2013 ('Pre-Trial Judge Decision'); ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on the Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 13 August 2012; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 27<sup>th</sup> Rule 66 Violation, 9 February 2010; *Prosecutor v. Kanyarukiga*, ICTR-2002-78-T, Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Decision of 30 October 2009, 20 November 2009; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecutor's Application for Certification to Appeal the Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira and Decision on Prosecution on Cross-Motion for Enforcement of Reciprocal Disclosure, 2 October 2007; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 May 2006.

impact the trial's outcome. The Defence's strategy and its ability to cross-examine Mr Donaldson are therefore impaired.<sup>20</sup>

14. Immediate resolution by the Appeals Chamber of the two issues to be certified may materially advance the proceedings. The Merhi Defence requested that the Trial Chamber clarify the legal standard for disclosure of emails and investigators' notes, but the Trial Chamber failed to issue such a ruling. Clear rules on the disclosure obligations under Rule 110 (A) (ii) should be put in place to avoid future litigation on this recurring issue, in particular with respect to emails. Similarly, the issue of how the working methodology of a witness impacts on witness statements or other documents is likely to be disputed again. For example, the Trial Chamber's taking into account the witness' working methodology is tantamount to taking into account the witness' status, and therefore contrary to Appeals Chamber case law. Resolving the two issues to be certified without delay will allow the trial to continue on a more solid footing. Pursuant to Rule 120,<sup>21</sup> the Prosecution's disclosure obligation will continue after the end of its presentation of evidence, so the scope of its obligation should be clarified by the Appeals Chamber at this time.<sup>22</sup>

15. Given the urgency of these matters, the time period for filing a response should be shortened.<sup>23</sup>

#### *Prosecution submissions*

16. The Prosecution submits that the Defence motion for certification fails to meet the strict and cumulative requirements of Rule 126 (C) and should be dismissed.<sup>24</sup>

17. First, the motion should be summarily dismissed, because it is 4,755 words in length, well above the applicable word limit of 3,000 words. The Merhi Defence failed to seek leave in advance or demonstrate exceptional circumstances justifying the oversized filing.<sup>25</sup>

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<sup>20</sup> Merhi Defence motion, paras 24-38.

<sup>21</sup> Rule 120 provides: 'If either Party discovers additional evidence or information which should have been disclosed earlier pursuant to the Rules, that Party shall immediately disclose that evidence or information to the other Party and the Pre-Trial Judge or the Chamber. The Prosecutor shall disclose to the other Party any information referred to in Rule 113 notwithstanding the completion of the trial and any subsequent appeal.'

<sup>22</sup> Merhi Defence motion, paras 39-47.

<sup>23</sup> Merhi Defence motion, para. 49.

<sup>24</sup> Prosecution response, para. 2.

<sup>25</sup> Prosecution response, para. 3, citing Practice Direction on Filing of Documents Before the Special Tribunal for Lebanon, STL/PD/2010/01/Rev.2, 14 June 2013, article 5 (1) (i).

18. As to the merits, the Merhi Defence has misconstrued the test for certification. It has incorrectly focused on the significance of disclosure in general, rather than demonstrating the significance of the two issues to be certified. The Defence cites a decision on certification by the Pre-Trial Judge but ignores that the Appeals Chamber, in its subsequent decision, determined that the Pre-Trial Judge's reasoning on the significance of disclosure issues could apply to every decision on disclosure. Similarly, the Defence's submissions on the scope of Rule 110 (A) or the impact of any non-disclosed email or investigator's note could apply to every decision on disclosure, and are too general to meet the test for certification. The case law from other international criminal tribunals cited by the Merhi Defence either granted certification for general reasons—contrary to the Appeals Chamber's decision—or addressed issues unrelated to the two issues to be certified.<sup>26</sup>

19. The first issue to be certified does not arise from the decision, which concerned whether documents relating to Mr Donaldson should be disclosed. The Merhi Defence instead seeks a general, abstract ruling regarding Rule 110 (A) (ii) on an issue that is irrelevant to the decision. Moreover, the Merhi Defence did not adequately request in its original motion a general ruling on the Prosecution's disclosure obligation regarding emails and investigators' notes.<sup>27</sup>

20. Even if the first issue arose from the decision, neither it nor the second issue would significantly affect the fair and expeditious conduct of the proceedings. In regard to the first issue, the Merhi Defence has not established that there are any ambiguous or conflicting decisions regarding the disclosure obligations for emails and investigators' notes that require clarification by the Appeals Chamber. As for the second issue, the Merhi Defence merely disagrees with the decision on the scope of the Prosecution's disclosure obligation. Defence counsel have not substantiated their claim that their ability to cross-examine Mr Donaldson would be severely diminished.<sup>28</sup>

21. Immediate resolution of both issues by the Appeals Chamber would not materially advance the proceedings. The Merhi Defence speculates about future disclosure disputes while ignoring that Mr Donaldson is one of the last live Prosecution witnesses. It is similarly speculative that there will be future disputes over a witness' working methodology and a document's status. In any event, the Defence counsel are wrong to say the Trial Chamber

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<sup>26</sup> Prosecution response, paras 2, 5-9, citing Appeals Chamber Decision.

<sup>27</sup> Prosecution response, paras 9, 11.

<sup>28</sup> Prosecution response, paras 12-14.

misapplied the case law on the status of a document versus the status of the document's author. The continuing disclosure obligation under Rule 120 does not apply to the two issues sought to be certified.<sup>29</sup>

*Merhi Defence reply*

22. The Merhi Defence requests that the Trial Chamber not summarily dismiss the motion for exceeding the applicable word limit. The matter is too important to not receive a decision on the merits. Defence counsel state that they involuntarily and inadvertently exceeded the word limit and apologise to the Trial Chamber and the Parties. The Defence seeks permission to file a corrected version of the motion that complies with the word limit. Because the Prosecution already responded to the merits of the original request for certification, there would be no prejudice if the corrected version were filed.<sup>30</sup>

23. The Appeals Chamber decision criticizing the Pre-Trial Judge's certification decision does not apply here. Unlike those decisions, the issues to be certified are specific and do not go beyond the scope of the decision.<sup>31</sup>

## **DISCUSSION**

*Preliminary matter – exceeding the word limit*

24. The Trial Chamber denies Defence counsel's request to file a 'corrected' version of the motion that complies with the word limit. The Parties are aware of the Trial Chamber's practice that requests to extend the word limit should be made by email—in advance of the filing—and that the opposing Party should inform the Trial Chamber, again by email, within 24 hours, if there is any opposition.<sup>32</sup> The Trial Chamber does not accept the Defence counsels' claim that they exceeded the word limit 'inadvertently' and 'involuntarily'.<sup>33</sup> This was deliberate. The oversized nature of the motion for certification—1,755 additional words (which is 58 percent above the word limit)—is obvious; the number of words is listed on the

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<sup>29</sup> Prosecution response, paras 15-17.

<sup>30</sup> F3194, Reply to the "Prosecution Response to Merhi Defence Request for Certification of the 'Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230'", 22 June 2017 ('Merhi Defence reply'), paras 3-7.

<sup>31</sup> Merhi Defence reply, paras 8-9.

<sup>32</sup> See also STL-11-01/PT/TC, F0271, Direction Shortening the Time to Respond to Requests to Vary or Extend Word or Time Limits, 25 May 2012.

<sup>33</sup> Merhi Defence reply, para. 3.



filing's last page, next to Defence counsel's signatures.<sup>34</sup> It could not have been 'inadvertent'. Defence counsel must have known, well in advance of filing the motion, that it was oversized.

25. Exceeding the word limit without justification can be grounds for denying a motion for certification.<sup>35</sup> Nevertheless, the Trial Chamber will address the merits of the Defence arguments. The Trial Chamber is unlikely to do so the next time a Party exceeds the word limit so wilfully and blatantly without permission, especially when the Trial Chamber has taken a liberal approach when Parties do seek permission to extend the word limit.<sup>36</sup>

*Certification for interlocutory appeal*

26. The Trial Chamber denied the Defence's motion for records of questions and answers, emails and meeting notes concerning Mr Donaldson for two reasons: (1) unlike a typical witness who was interviewed by the Prosecution, these categories of documents probably had little to no relation to how Mr Donaldson, a Prosecution staff member, likely prepared his reports and statements; and (2) the Defence's request for these documents was formulated far too broadly.<sup>37</sup> Neither issue posed for certification addresses both parts of the Trial Chamber's reasoning.

27. Indeed, both issues ignore the Trial Chamber's second reason, which is fatal to the Defence's request for certification. Before the Defence could seek certification regarding the Trial Chamber's legal analysis of emails and investigators' notes under Rule 110 (A) (ii) and Mr Donaldson's working methodology, it first needed to address the Trial Chamber's determination that the Defence's request for these documents failed to meet the requirement of specificity.<sup>38</sup> Yet the Defence has not sought certification to appeal this latter issue. As a result, the motion for certification should be dismissed for failing to identify the actual basis of the Trial Chamber's decision.<sup>39</sup>

28. In any event, the Defence has, in its two issues posed for certification, misconstrued the Trial Chamber's legal analysis.

29. The first issue is,

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<sup>34</sup> Merhi Defence motion, p. 13.

<sup>35</sup> Pre-Trial Judge Decision, para. 15.

<sup>36</sup> See F2630, Public Redacted Version of 'Decision Under Rule 13 in Respect of a Witness' of 30 June 2016, 30 June 2016, para. 7.

<sup>37</sup> Above paras 3-5.

<sup>38</sup> Decision, paras 72-73.

<sup>39</sup> See Witness PRH707 Decision, paras 24, 27; State Cooperation Decision, paras 22, 24.

Did the Chamber err in failing to specifically and definitively state under what conditions the e-mails and investigator's notes exchanged between a witness and the staff of the Office of the Prosecutor, and concerning one or more subjects referred to during his testimony, could be regarded as a statement of a witness within the meaning of Rule 110 (A) of the Rules, and as a result, be subject to the disclosure obligation of the Prosecution?

30. Contrary to the question posed and the Defence submissions,<sup>40</sup> the Trial Chamber acknowledged the Defence request to clarify the legal standard for documents such as emails and investigators' notes under Rule 110 (A) (ii),<sup>41</sup> and subsequently analysed the law governing these categories of materials.<sup>42</sup> In this respect, the Defence has confused its request for clarification with a different one, namely, its request for a general order reminding the Prosecution of its disclosure obligations.<sup>43</sup> The Trial Chamber found this latter request to be unnecessary,<sup>44</sup> and the Defence has not sought certification to appeal this issue.

31. Moreover, the Prosecution is correct in arguing that the Defence 'impermissibly seeks a ruling in the abstract [...]'.<sup>45</sup> The Trial Chamber, in the decision, did not need to state 'specifically and definitively' the conditions under which emails and investigators' notes may amount to a witness statement under Rule 110 (A) (ii).<sup>46</sup> Rather, the issue for determination was whether the Merhi Defence's request for emails and investigators' notes in relation to Mr Donaldson was a proper request for a 'witness statement'.<sup>47</sup>

32. The Appeals Chamber has imposed strict criteria for certifying issues for interlocutory appeal and these do not include seeking advisory opinions on hypothetical situations. The Trial Chamber will not grant certification to appeal to allow the Merhi Defence to obtain an advisory opinion from the Appeals Chamber on the first issue.<sup>48</sup> In these circumstances, the first issue cannot meet the requirement that it 'would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial'.

33. The second issue posed for certification is,

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<sup>40</sup> Merhi Defence motion, para. 40, fn. 30.

<sup>41</sup> Decision, para. 22.

<sup>42</sup> Decision, paras 65-66. *See also* paras 45-48.

<sup>43</sup> *See* Merhi Defence motion, para. 40, fn. 30; F3045, Merhi Defence Motion for Disclosure of Documents Relating to the Witness Andrew Donaldson (PRH230), 21 March 2017, paras 1, 31.

<sup>44</sup> Decision, para. 92. *See also* Prosecution response, para. 11.

<sup>45</sup> Prosecution response, para. 11.

<sup>46</sup> Merhi Defence motion, para. 2 (i).

<sup>47</sup> Decision, paras 63-74.

<sup>48</sup> *Above* para. 10.

Did the Chamber err in ruling that Mr Donaldson’s working methodology, used to prepare his reports and statements, resulted in his work product not corresponding to the broad definition of witness statement as accepted by international case law?

34. This slightly misstates the Trial Chamber’s ruling at paragraph 68 of the decision. The Trial Chamber did not find that Mr Donaldson’s ‘working methodology, used to prepare his reports and statements, resulted in his work product not corresponding to the broad definition of witness statement as accepted by international case law’.<sup>49</sup> Rather, it found that ‘Mr Donaldson’s working methodology in preparing his reports and statements does not fit within the broad international definition of what a “witness statement” is.’<sup>50</sup> In other words, Mr Donaldson, as a Prosecution staff member who prepared his own statements and reports, differed from a typical witness whom the Prosecution interviewed and who then signed a statement prepared by an investigator.<sup>51</sup>

35. But the essence of the decision is at paragraph 74, where the Trial Chamber held (emphasis added),

Given these categories of documents sought probably bear little to no relation as to how Mr Donaldson’s reports and statements were likely prepared, *and the requests are formulated far too broadly*, the Trial Chamber finds that they do not constitute proper requests for a ‘witness statement’ under Rule 110 (A) (ii), and dismisses the requests.

36. The Defence is incorrect in claiming that the Trial Chamber ‘subtract[ed] the documents produced by Mr Donaldson from the Prosecution’s disclosure obligation’ on the basis of his working methodology.<sup>52</sup> Rather, the Trial Chamber found, on the basis of Mr Donaldson’s methodology, that he did produce documents subject to disclosure as witness statements—namely, his draft reports and statements.<sup>53</sup>

37. The Merhi Defence have thus misconstrued the first part of the Trial Chamber’s reasoning, which relates to Mr Donaldson’s methodology. Moreover, as previously discussed, Defence counsel have ignored the second part of the Trial Chamber’s reasoning, namely, that the Defence request for disclosure was too general and vague.<sup>54</sup>

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<sup>49</sup> See Merhi Defence motion, para. 2 (ii). See also para. 21.

<sup>50</sup> Decision, para. 68.

<sup>51</sup> Decision, paras 65-68.

<sup>52</sup> Merhi Defence motion, para. 33.

<sup>53</sup> Decision, paras 67, 77, 83.

<sup>54</sup> Above paras 26-27.

38. Furthermore, the Merhi Defence improperly seeks certification based on general arguments regarding the Prosecution's disclosure obligation, rather than with specific arguments regarding the significance of each issue to be certified.<sup>55</sup>

39. Several factors relied upon by the Merhi Defence<sup>56</sup>—the voluminous and recurring nature of disclosure disputes, as well as the impact of disclosure on a party's ability to cross-examine a witness—are integral to almost every decision on disclosure, and are thus insufficient, alone, for purposes of certification for interlocutory appeal.<sup>57</sup>

40. Contrary to the Defence's argument, the Appeals Chamber's reasoning in this regard did not rest solely on the overly broad nature of the issues certified by the Pre-Trial Judge.<sup>58</sup> The Appeals Chamber found that the Pre-Trial Judge had erred in finding, generally, that 'unresolved concerns relating to disclosure would have a significant impact on the conduct of proceedings given that motions for disclosure are recurrent and often voluminous'.<sup>59</sup> According to the Appeals Chamber, 'such reasoning could be applied to each and every decision on disclosure'.<sup>60</sup> That decision is directly applicable to the Defence motion for certification and is another basis for dismissing it for not meeting the requirement that it would *significantly* affect the fair and expeditious conduct of the proceedings.

41. The Merhi Defence also claims that its ability to cross-examine Mr Donaldson is impaired, because of the possible impact of non-disclosure of 'the slightest email or slightest investigator's note', or 'any document relating to the attribution' of telephone numbers.<sup>61</sup> Such claims, which are speculative in nature, cannot show that the decision would *significantly* affect the fair *and* expeditious conduct of the proceedings.<sup>62</sup>

42. The Defence further relies on alleged errors in the decision relating to what documents are subject to disclosure and to case law on a document's status vis-à-vis the status of the

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<sup>55</sup> Merhi Defence motion, paras 24-31, 35-37. *See also* Response, paras 2, 5.

<sup>56</sup> Merhi Defence motion, paras 29, 31, 34, 41, 43-44.

<sup>57</sup> Appeals Chamber Decision, para. 7. The two issues to be certified are also unlikely to reoccur, given Mr Donaldson is one of the last Prosecution live witnesses. *See* Response, para. 15.

<sup>58</sup> Appeals Chamber Decision, paras 6-7. *See* Reply, para. 8.

<sup>59</sup> Appeals Chamber Decision, para. 7, quoting Pre-Trial Judge Decision, para. 17.

<sup>60</sup> Appeals Chamber Decision, para. 7.

<sup>61</sup> Merhi Defence motion, paras 35, 37.

<sup>62</sup> F1472, Decision on Certification of 'Decision on Trial Management and Reasons for Decision on Joinder', 31 March 2014, para. 38. *See also* ICTR, *Prosecutor v Ngirabatware*, ICTR-99-54-T, Decision on Defence Motion for Certification of the Chamber's Oral Rulings of 29 and 30 September 2009, 2 December 2009, para 23; *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana's Motion for Stay of Proceedings; Reconsideration and/or Certification of Decision Rendered on 29 October 2009; and Reconsideration and/or Certification of the Decision Rendered on 30 October 2009, 13 November 2009, para. 55.

document's author.<sup>63</sup> But this is no more than a disagreement with the decision and the Trial Chamber will not certify an issue on the basis of a mere disagreement.<sup>64</sup> Further, Rule 120, which governs the parties' continuing disclosure obligations, bears no relation to the two issues to be certified and thus does not support the request for certification.<sup>65</sup>

43. Finally, the Defence application for access to hundreds if not thousands of internal Prosecution emails between Mr Donaldson and other Prosecution and UNIIC<sup>66</sup> staff was made at the 'eleventh hour' in the trial, on 21 March 2017, some weeks before Mr Donaldson was scheduled to testify. The timing of this litigation goes to the heart of the requirement in Rule 126 (C) that the issue is one that would significantly affect the fair and *expeditious* conduct of the proceedings. There was nothing expeditious about the timing of this late request for disclosure,<sup>67</sup> and granting the request for certification could potentially delay the completion of the trial.

44. Moreover, the nature of Mr Donaldson's evidence—namely, providing analytical opinion evidence and not testifying as a fact witness or expert—is such that even if Defence counsel were granted access to internal Prosecution emails relating to his evidence, at best they could question him about how his analytical opinion may have evolved over the years. This could not *significantly* affect the fair and expeditious nature of the trial, and therefore meet the first condition for certifying an issue for interlocutory appeal. For these reasons, the second issue should not be certified for interlocutory appeal.

### **DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

**DENIES** counsel for Mr Merhi's request to file a 'corrected' version of the motion; and

**DISMISSES** the motion.

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<sup>63</sup> Merhi Defence motion, paras 34, 44.

<sup>64</sup> *Above* para. 9.

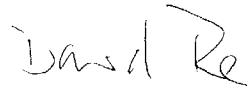
<sup>65</sup> Merhi Defence motion, para. 46. *See* Prosecution response, para. 17.

<sup>66</sup> United Nations International Independent Investigation Commission.

<sup>67</sup> *See* Decision, paras 100-101.

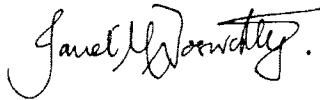
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,  
The Netherlands  
12 July 2017



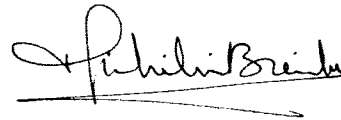
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Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

