



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 February 2016

Original language: English

Type of document: Public

THE PROSECUTOR

v.

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

**DECISION CERTIFYING FOR APPEAL
THE TRIAL CHAMBER'S DECISION OF 23 OCTOBER 2015 REGARDING
THE CONDITIONS OF ASSIGNMENT OF OMAR NASHABE**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Victims' Legal Representatives:

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

Counsel for Mr Salim Jamil Ayyash:

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

Counsel for Mr Mustafa Amine Badreddine:

Mr Antoine Korkmaz, Mr Iain Edwards &
Ms Mylène Dimitri

Counsel for Mr Hassan Habib Merhi:

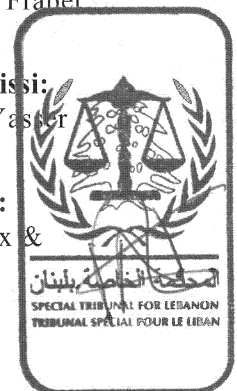
Mr Mohamed Aouini, Ms Dorothée Le Franer
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. The Defence for Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi seek certification, under Rule 126 (C) of the Special Tribunal's Rules of Procedure and Evidence, to appeal the Trial Chamber's 'Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013'.¹

2. In its decision, issued on 23 October 2015, the Trial Chamber had dismissed a joint motion by the Defence in which counsel requested a change in the conditions of assignment of Defence 'expert consultant' Mr Omar Nashabe.² After reviewing all the material and submissions put before it by the Defence, the Prosecution, the Legal Representatives for Victims and the Registrar, the Trial Chamber was not convinced that the issues raised by the Defence affected the fairness of the proceedings. It held nevertheless that it would review on a case-by-case basis any Defence requests to allow Mr Nashabe access to otherwise confidential information, subject to a positive security risk assessment, and, in respect of participating victims, input from their Legal Representative.³

3. The Prosecution and the Legal Representative for Victims responded,⁴ and the Defence replied to the Legal Representative's response.⁵ The Head of the Defence Office filed observations.⁶ The Registrar declined to provide submissions on the merits of the Defence request.⁷

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2298, Request from the Defence for Messrs Badreddine, Merhi and Oneissi for Certification to Appeal the 'Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013', 2 November 2015.

² F2286, Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013, 23 October 2015.

³ Decision of 23 October 2015, para. 69.

⁴ F2323, Prosecution Response to «Requête de la Défense de MM. Badreddine, Merhi et Oneissi aux fins de certification de l'appel de la «Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013»», 17 November 2015; F2308, Response of the Legal Representative of Victims to the «Requête de la Défense de M.M. Badreddine, Merhi et Oneissi aux fins de certification de l'appel de la «Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decision of 21 December 2012 and 27 March 2013»», 6 November 2015.

⁵ F2321, Reply from the Defence for Messrs Badreddine, Merhi and Oneissi to the response from the Legal Representative of Victims to their Request for Certification to Appeal of 2 November 2015, 13 November 2015.

SUBMISSIONS

4. Defence counsel submit that, in its decision of 23 October 2015, the Trial Chamber created an arbitrary system of guardianship over the conduct of Defence analyses and investigations which compromises the independence of counsel and the confidentiality of their strategy. This is because the Trial Chamber required to examine, on a case-by-case basis, any Defence request for disclosure of confidential documents to Mr Nashabe as its expert consultant. It also made such requests dependent on the views of the Registry's Victims and Witnesses Unit, the Victims' Participation Unit and the Legal Representative of Victims, without setting any criteria for that examination.⁸

5. The Defence therefore intends to raise on appeal the question of whether the conditions imposed by the Trial Chamber on Defence counsel in the exercise of their functions in conjunction with their expert consultant constitute an illegal and inappropriate interference in the strategy of the Defence and undermine its independence.⁹

6. The Legal Representative for Victims responded that the requirement set by the Trial Chamber—insofar as it concerns participating victims and consultation with the Legal Representative—is not an issue which affects the fair and expeditious conduct of the proceedings. Since the Legal Representative's duty is to safeguard the interests of participating victims and information related to their identity and personal circumstances, it is reasonable and fair to invite his views in relation to any specific request for disclosure that regards participating victims.¹⁰ He accordingly submits that the grounds for certification are not met.¹¹

⁶ F2320, Observations from the Head of the Defence Office with respect to the Request from the Defence of Messrs Badreddine, Merhi and Oneissi for certification to appeal the "Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013", 13 November 2015.

⁷ F2324, Registry Submission Pursuant to Rule 48 (C) Regarding "Requête de la Défense de MM. Badreddine, Merhi et Oneissi aux Fins de Certification de l'appel de la «Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013»", 17 November 2015.

⁸ Defence request, para. 3.

⁹ Defence request, para. 3.

¹⁰ Legal Representative's response, paras 6-7.

¹¹ Legal Representative's response, para. 9.

7. The Head of the Defence Office's observations echo and support the arguments made by the Defence. He points out notably that consultation with the various Registry units or the Legal Representative for Victims is not required in relation to the recruitment of persons who assist Defence counsel or on the matter of access of those persons to confidential documents. Such consultations would therefore run counter to the right of the Accused to have adequate time and resources to prepare their defence and to the principle of equality of arms.¹²

8. The Prosecution argues that the Defence has not demonstrated that the issue it raises meets the standard set out at Rule 126 (C). The framework established by the Trial Chamber is not a final decision with respect to Mr Nashabe's access to any specific confidential material. The Defence request fails to demonstrate that the mere establishment of a procedural framework would affect the fair and expeditious conduct of the proceedings or their outcome, and would prejudice the Defence. Additionally, the fact that there has been no final determination by the Trial Chamber demonstrates that immediate resolution of the matter by the Appeals Chamber is not required.¹³

DISCUSSION

9. Rule 126 (C) requires the Trial Chamber to certify a decision for interlocutory appeal:

[i]f 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.

10. The Trial Chamber must be satisfied that an issue for certification meets the Rule's strict requirements.¹⁴ This high threshold means that certification for appeal is exceptional.¹⁵ A request for certification is concerned not with whether a decision was correctly reasoned or not but solely whether the challenged decision involves a precise issue, with an adequate legal or factual basis in

¹² Head of Defence Office observations, paras 15-16.

¹³ Prosecution response, paras 2 and 7.

¹⁴ STL-11-01/PT/AC/AR90.2, F0007, Decision on Defence Appeals against Trial Chamber's "Decision on Alleged Defects in the Form of the Amended Indictment", 5 August 2013, para. 7.

¹⁵ STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 11.

the decision, which meets the requirements of Rule 126 (C).¹⁶ Judicial economy dictates that appeals on issues not meeting this threshold are heard, if necessary, once the Trial Chamber has rendered its judgment on the merits.¹⁷

11. Here, the Trial Chamber by majority, with Judge Re dissenting, finds that the Defence have identified an issue that would ‘significantly affect the fair and expeditious conduct of the proceedings’, namely, the ability to provide confidential information to their expert consultant without having to first undergo certain procedural conditions and obtain leave from the Trial Chamber. The immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.¹⁸ This would be the case, for instance, if the Appeals Chamber decides to remove the framework put in place for Mr Nashabe to receive confidential documents, or fundamentally change its parameters, on the basis that it was unduly burdensome. It is appropriate for the Defence to obtain finality on this matter now, rather than wait for an unfavourable decision from the Trial Chamber on a specific Defence request for Mr Nashabe to have access to confidential documents.

12. The Trial Chamber by majority, with Judge Re dissenting, accordingly deems both prongs of Rule 126 (C) to be met. It therefore certifies for appeal the issue framed by the Defence for Mr Badreddine, Mr Merhi and Mr Oneissi, namely, whether the conditions that the Trial Chamber imposed on Defence counsel in the exercise of their functions in conjunction with their expert consultant constitute an illegal and inappropriate interference in the strategy of the Defence and undermine its independence.

13. Judge Re appends a separate dissenting opinion.

DISPOSITION

FOR THESE REASONS, the Trial Chamber by majority, Judge Re dissenting:

¹⁶ Decision on Appeal on Absence of Authority of the Prosecutor, paras 13-15 and references therein.

¹⁷ STL-11-01/PT/AC/AR126.1, F0012, *Corrected Version of* Decision on Defence Appeals against Trial Chamber’s Decision on Reconsideration of the Trial in *Absentia* Decision, 1 November 2012, para. 11.

¹⁸ ICTY, IT-09-92-T, *Prosecutor v. Ratko Mladic*, Decision on Defence Motion for Certification to Appeal the Decision on Defence Request to Adopt Modality for Prosecution Re-Opening, 17 April 2015, para. 7.

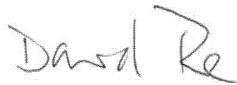
GRANTS the request from the Defence for Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi to certify for appeal the Trial Chamber's decision of 23 October 2015; and

CERTIFIES for appeal the issue of whether the conditions that the Trial Chamber imposed on Defence counsel in the exercise of their functions in conjunction with their expert consultant constitute an illegal and inappropriate interference in the strategy of the Defence and undermine its independence.

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

Leidschendam, the Netherlands

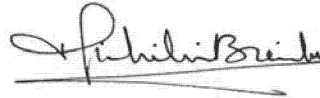
19 February 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy



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

**DISSENTING OPINION OF JUDGE DAVID RE
ON DECISION CERTIFYING FOR APPEAL THE TRIAL CHAMBER'S
DECISION OF 23 OCTOBER 2015 REGARDING THE CONDITIONS OF
ASSIGNMENT OF OMAR NASHABE**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Counsel for Mr Salim Jamil Ayyash:

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Victims' Legal Representatives:

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& Ms Nada Abdelsater-Abusamra

Counsel for Mr Mustafa Amine Badreddine:

Mr Antoine Korkmaz, Mr Iain Edwards & Ms
Mylène Dimitri

Head of Defence Office

Mr François Roux

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Larochelle

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts

INTRODUCTION

1. This concerns an interlocutory appeal against the Trial Chamber's 'Decision on Defence Request to Modify Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013'. There, the Trial Chamber refused an application by counsel for three of the Accused, Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi, to modify the parameters of conditions under which Mr Omar Nashabe, who is classified as an 'expert consultant', can contract with assigned Defence counsel. The Trial Chamber also refused an application to alter Mr Nashabe's status in relation to the Special Tribunal to allow him a form of diplomatic immunity.

2. Defence counsel seek to appeal the decision in relation to the conditions of Mr Nashabe's access to confidential material.¹ As the second aspect of the Trial Chamber's decision, refusing to alter Mr Nashabe's status *vis-à-vis* the Special Tribunal, appears not to be the subject of the application for certification for interlocutory appeal, I will not address it.

3. Although the Trial Chamber dismissed the application, it held that 'it will review on a case by case basis any Defence requests to allow Mr Nashabe access to otherwise confidential information. This would be subject to the Trial Chamber receiving a positive security risk assessment, and, in respect of participating victims, to receiving input from their Legal Representative'.² Because no application for review has been received by the Trial Chamber in relation to the matters the subject of the application, I do not agree with the decision to certify this decision for interlocutory appeal. The issue raised, and the question posed for certification, in my view, do not meet the standard required to certify an issue for interlocutory appeal. As no issue that is yet capable of certification has arisen, the application is premature.

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2298, Request from the Defence for Messrs Badreddine, Merhi and Oneissi for Certification to Appeal the "Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013", 2 November 2015.

² F2286, Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013, 23 October 2015, para. 69.

DISCUSSION

4. Rule 126 of the Special Tribunal's Rules of Procedure and Evidence has a two-limb test, namely that 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 immediate resolution by the Appeals Chamber may materially advance the proceedings' (italics added). The issue for certification must meet both parts of the Rule's strict conjunctive requirements,³ meaning that certification for appeal is exceptional.⁴

5. In their original application before the Trial Chamber, Defence counsel had sought to modify the terms of the orders of the former President, Judge David Baragwanath⁵—but through the Head of Defence Office—in respect of the parameters of Mr Nashabe's tasks in his contract with Defence counsel, and to alter his status *vis-à-vis* the Special Tribunal to give Mr Nashabe the 'immunities granted to persons assisting counsel'.⁶ Defence counsel, however, in their supporting submissions, did not specify with precision how the current terms of Mr Nashabe's engagement, dating from July 2012, were adversely affecting their preparation for trial, and hence the fairness of the trial. That is one of the reasons why the Trial Chamber rejected their application.⁷

Arguments disregarded as factually inaccurate

6. Two arguments supporting the application are factually wrong, and hence irrelevant, and are to be disregarded. The first is of finding it 'unacceptable' that 'the restrictions thus imposed contravene the provisions of paragraph 5 of the Code of Professional Conduct for Counsel Appearing before the Tribunal'.⁸

³ STL-11-01/P/AC/AR90.2, F007_AR90.2, Decision on Defence Appeals against Trial Chamber's "Decision on Alleged Defects in the Form of the Amended Indictment", 5 August 2013, para. 7 and cited references.

⁴ STL-11-01/PT/AC/AR126.2, F008_AR126.2, Decision on Appeal against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 11 and cited references.

⁵ STL-11-01/PRES, F1618, Decision on Head of Defence Office "Request to Change the Conditions Imposed by the Decisions of 21 December 2012 and 27 March 2013 Relating to the Assignment of Mr Nashabe", 14 July 2014, at para. 25.

⁶ F2201, Request from the Defence from Msrs Badreddine, Merhi and Oneissi for modification of the conditions imposed on the assignment of Mr Omar Nashabe by the Decisions of the President of the Tribunal of 21 December 2012 et 27 Mars 2013, 17 September 2015, para. 21.

⁷ Decision of 23 October 2015, paras 50, 66.

⁸ Defence application, para. 3.

7. Paragraph 5, to the contrary, specifies that the disclosure by counsel to third parties of confidential evidence is not unlimited and may be subject to a Chamber's supervision. It states, relevantly, 'Unless otherwise provided by the relevant Chamber, Counsel may only disclose confidential evidence to others who are ethically or contractually bound to protect its confidentiality and only when necessary for investigations or case preparation'. This argument must therefore be ignored for the purposes of the decision on certification. Moreover, the Trial Chamber decided that the modality of Mr Nashabe's access to confidential material—if granted—should be worked out between Defence counsel, the Defence Office and the Registrar.⁹ But not by the Trial Chamber. Nor by the Legal Representative of Victims.

8. The second argument is that 'the working conditions of the Defence investigators, and in particular their access to confidential information, are essential to the right to have adequate time and resources to prepare the defence of the Accused, to the principle of equality of arms and to the right to have the full opportunity to examine or have examined prosecution witnesses'.¹⁰ Mr Nashabe, however, is not a Defence investigator, as provided for in the Directive on the Appointment and Assignment of Defence Counsel.¹¹ Rather, he has a contract of services with Defence counsel as an 'expert consultant'. Defence investigators have a role different to that of 'expert consultants'. Investigators must be appointed by the Head of Defence Office, and, as 'persons assisting counsel' investigators must meet the criteria (*mutatis mutandis*) in Rule 58 (A) (ii) to (vi) of the Rules of Procedure and Evidence, including being qualified for the position. Further, the Directive specifies that the investigator must pass a security screening conducted by the Registry.¹²

9. The Defence application seeking a change of the conditions of Mr Nashabe's status did not seek his appointment as a Defence investigator, but rather specified that it wanted him to remain as 'an expert consultant'.¹³ That means that he would not be subject to the Directive and Rule 58 (A) and, thus, he would not be qualified by the Directive as an investigator.

10. Further, the two cases cited in support of this submission are off-point as they refer to instances where international courts and tribunals have allowed Defence investigators to sit in

⁹ Decision, para. 59.

¹⁰ Defence application, para. 4.

¹¹ STL/BD/2009/03/REV.4, Directive on the Appointment and Assignment of Defence Counsel, Article 22 *bis*.

¹² Directive, Article 22 *bis* (C).

¹³ Defence request of 17 September 2015, para. 21.

the court-room in closed session hearings.¹⁴ This is a discretionary matter that any Chamber in any court may regulate, upon application by a Party, to allow anyone access to a court-room. This could include experts, support people and the assistants of the Parties and Participants, including interns. It is irrelevant to the application, and, in any event, no application has ever been made to allow Mr Nashabe access to the court-room.

Rule 126 (C): ‘fair and expeditious conduct of the proceedings’

11. For a decision to be certified for interlocutory appeal a Party must identify the issue that significantly affects the fair and expeditious conduct of the proceedings. The application for certification to appeal the decision, however, does not do this. As with the application to modify Judge Baragwanath’s orders, noted above, Defence counsel have not, in the application for certification, identified how the current terms of Mr Nashabe’s contractual relationship—as maintained by the Trial Chamber’s decision—adversely affects their preparation for trial, and hence how it falls within the first limb of Rule 126 (C) in significantly affecting the ‘fair and expeditious conduct of the proceedings’.

12. The application submits, broadly, that the conditions in the Trial Chamber’s decision constitute ‘an illegal and inappropriate interference in the strategy of the Defence and undermine its independence’, and that ‘without setting any criteria for that examination, the Chamber has created an arbitrary system of guardianship over the conduct of the Defence analyses and investigations, compromising the independence of counsel and the confidentiality of their strategy with respect to the Chamber hearing the case and the Legal Representative of Victims participating in the proceedings.’¹⁵ This argument, however, merely speculates about possible outcomes in undefined situations that may or may not occur. And, by stating that the Trial Chamber has not set any criteria for any examination, the argument is self-defeating, illustrating why the issue should not be certified for interlocutory appeal.

13. The Trial Chamber has not set criteria because the issue is yet to arise. If it does, the Trial Chamber may then hear submissions from the Defence as to what criteria should be set.

¹⁴ Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman*, SCSL-04-14-T, Decision on Joint Motion by Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa Seeking Permission for Defence Investigators to Sit in Court During Closed Sessions, 28 February 2005; ICTR, *Prosecutor v. Pauline Nyiramasuhuko*, ICTR-98-42-T, Oral Decision in respect of the presence of Defence team investigators during closed sessions, Minutes of Proceedings of 30 November 2005 pp. 11-12.

¹⁵ Defence application, para. 3.

But, in the absence of any specific complaint about non-existent criteria, or receiving a request for access, this submission is hypothetical. A hypothetical scenario, of itself in most circumstances, cannot fall within the first limb of Rule 126 (C). Moreover, contrary to the argument posed, the Trial Chamber has made no decision tantamount to its ‘adjudicating on whether the Defence investigations or analyses are necessary or reasonable’.¹⁶ The Trial Chamber has neither been asked to adjudicate nor has it adjudicated this particular matter.

14. Defence counsel failed to specify in concrete terms—in either their original application before the Trial Chamber, or in their application for interlocutory appeal—how the current terms of Mr Nashabe’s contractual engagement with Defence counsel have ‘in any particular situation, hampered or prejudiced their preparations for trial’.¹⁷ In these circumstances, this is fatal to an application for certification.

Rule 126 (C) : ‘outcome of the trial’

15. In relation to the test for ‘or the outcome of the trial’, the application reasons that ‘the outcome of the trial is likely to be significantly affected if the Defence’s capacity to contribute effectively to the manifestation of the truth is diminished in any way’.¹⁸ The outcome of the trial, however, is either a conviction or an acquittal of the Accused on the various counts of the consolidated indictment.

16. Article 21 of the Statute of the Special Tribunal ‘Powers of the Chambers’ specifies (relevantly) that the Tribunal (here the Trial Chamber) ‘shall confine the trial... strictly to an expeditious hearing of the issues raised by the charges...’. The Trial Chamber’s task is to hear the evidence presented and to adjudicate on whether the Prosecution has proved its case beyond reasonable doubt.¹⁹ It is not required to seek the assistance of Defence counsel in finding a ‘manifestation of the truth’. And neither the Special Tribunal’s Statute nor its Rules of Procedure and Evidence specify that Defence counsel have a duty to ‘contribute to the manifestation of the truth’.²⁰

¹⁶ Defence application, para. 3.

¹⁷ Decision, para. 66.

¹⁸ Defence application, para. 4.

¹⁹ Article 16 (3) (c) Statute of the Special Tribunal for Lebanon, ‘In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt’.

²⁰ This contrasts with the duty of the Prosecutor of the International Criminal Court, as specified in Article 54 (1) (a) Rome Statute, which specifies that ‘1. The Prosecutor shall: (a) In order to establish the truth, extend the

17. Accused persons are presumed innocent and Defence counsel are not obliged to ‘contribute effectively to the manifestation of the truth’. Their role is to be ‘responsible for all aspects of the defence of the suspect or accused during all phases of the proceedings and any other matters relating to the defence of the suspect or accused’.²¹ They are engaged to defend the Accused person they represent against the charges on an indictment; they must seek to achieve an acquittal through their best investigative and tactical efforts, or alternatively to defend the Accused on a plea of guilty.

18. Finally, the assertion that the Defence has a requirement to contribute to the manifestation of the truth is unsupported by citation to the principles of interpretation as laid down in customary law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), international standards on human rights, the general principles of international criminal law and procedure, or, as appropriate, the Lebanese Code of Criminal Procedure.²²

Rule 126 (C) ‘immediate resolution by the Appeals Chamber’

19. In relation to the second limb of the test in Rule 126 (C), the application must also fail. The decision is not a final decision in respect of Mr Nashabe’s access to otherwise confidential information.

20. The unfairness—speculated upon in the application for certification—has not, and cannot, crystallise until the Trial Chamber actually rejects a request to allow Mr Nashabe’s access to such information. For this reason, the application cannot fall within the second limb of Rule 126 (C). It is premature. There has been no final determination in relation to access to specific material requiring resolution by the Appeals Chamber to prevent damage to Defence preparations for trial.

CONCLUSION

21. A request for certification requires a precise issue, with an adequate legal or factual basis in the decision, meeting the requirements of Rule 126 (C), and is not concerned with

investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally’.

²¹ STL/BD/2009/03/REV.4, Directive on the Appointment and Assignment of Defence Counsel, Article 18 (B).

²² As specified in Rule 3—that the Trial Chamber must apply in interpreting the Rules.

whether a decision was correctly reasoned.²³ Judicial economy dictates that appeals on issues not meeting this threshold are heard, if necessary, only after the Trial Chamber has rendered its judgment on the merits.²⁴

22. I agree that the issue would be appropriate for certification for interlocutory appeal if the Defence application had demonstrated actual prejudice in relation to *this particular Defence contractor*, and if he were the only person who could perform the specialised role, and thus his absence would unfairly prejudice the Defence preparations for trial. It would also be appropriate for certification if the Trial Chamber had rendered a final decision on the issue *and* the Defence could demonstrate prejudice by its application. But this is not the case. In my view, the issue therefore should not be certified for interlocutory appeal and I respectfully dissent from the Trial Chamber's decision.

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

Leidschendam,
The Netherlands

19 February 2016

David Re

Judge David Re



²³ Decision on Appeal on Absence of Authority of the Prosecutor, paras 13-15 and references therein.

²⁴ STL-11-01/PT/AC/AR126.1, F0012-AR126.1, *Corrected Version of Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial in Absentia Decision*, 1 November 2012, para. 11.