



THE PRESIDENT

Case No.: STL-11-01/PT/PRES
Before: Judge David Baragwanath, President
Registrar: Mr Herman von Hebel
Date: 25 September 2012
Original language: English
Classification: Confidential

THE PROSECUTOR

v.

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

DECISION OF PRESIDENT ON FORUM AND REDACTIONS

Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan
Mr Emile Aoun

Head of Defence Office:
Mr François Roux

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
Mr John Jones

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse
Mr Yasser Hassan

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaél Mettraux





I. Introduction

1. The Registrar and the Head of Defence sought further time to seek agreement whether, and if so on what terms, the Defence may be permitted to secure the assistance of Dr Omar Nashabe to assist their preparation for the trial which has a tentative fixture for 23 March 2013.¹ They have been unable to do so. While I encourage any further attempts to resolve the matter by agreement which would reconcile the competing interests of justice, I must determine (i) by what forum the issue is to be determined; (ii) the public or confidential status of the filings in this matter thus far and (iii) whether Dr Nashabe should be informed of the concerns expressed by the Registrar and the decisions issued in the instant matter. I have decided that the relevant forum is not the President in his administrative role but the judicial branch of the Tribunal. I deal also with the other issues.

II. The Choice of Forum

2. Were the issue truly one simply between the Registrar and the Head of Defence Office it could well be my responsibility to determine it, as an aspect of the STL's "effective functioning and the good administration of justice".² The more so when the Registrar's being "responsible for the administration and servicing of the Tribunal" is "[u]nder the authority of the President".³ Both Head of Defence Office and the Prosecutor submit, contrary to the Registrar's argument, that the President should determine the merits of this litigation.⁴

3. But the real issue—as shown by the submissions filed before me over the past two weeks—concerns two quite different parties: defence counsel, who claim to need Dr Nashabe's assistance to secure a fair trial for *in absentia* accused, and the persons who seek the protection of the claim for confidentiality, who may conceivably include victims. This is, as the Registrar contends, a fair trial issue. That makes it in my opinion a matter for the judicial branch of the STL which, at the present

¹ For a full recounting of the procedural history of this litigation prior to this decision, see STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PRES, Second Interim Decision, 10 September 2012 ("Second Interim Decision").

² Article 10(1) STLSt.

³ Article 12(1) STLSt.

⁴ See STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/PRES: *Observations additionnelles du Bureau de la Défense suite à la deuxième décision avant dire droit du Président*, 21 September 2012, para. 7; Prosecution's Further Submission Pursuant to President's Second Interim Decision, 21 September 2012, paras 2, 4. Registry Further Submission in Relation to the President's Second Interim Decision of 10 September 2012, paras 36, 45.



stage of the criminal trial prior to submission of the file to the Trial Chamber, is, in my opinion, the Pre-Trial Judge, to whom however I do not purport to give any direction.⁵

III. The *audi alteram partem* principle

4. Were it not for concessions by other parties I would leave the present topic for consideration by the Pre-Trial Judge. But the Registrar, the Head of Defence Office and the Prosecutor offer no objection to Dr Nashabe's receiving, duly redacted, not only the decisions issued in the instant matter but also particulars of the concerns expressed by the Registrar. They therefore helpfully allow me to deal with the topic, as a matter of judicial economy. It is a basic principle of fairness and of law that a party to litigation is entitled to know the case against him before any decision affecting him is made. Both civil law and common law apply the "*audi alteram partem*" principle – hear both sides before deciding. The principle is the subject of Megarry J's famous plea for what the common law calls one of the rules of natural justice.⁶ But Dr Nashabe is not a party to this specific litigation. So why should he be informed of the concerns expressed by the Registrar as well as the decisions issued in the instant matter? For the following reasons I am satisfied that he should.

5. The first is that Dr Nashabe is central to, and may be able to cast light on, the ultimate issue. It is whether the Head of Defence Office is entitled to retain Dr Nashabe at the expense of the STL to assist preparation of the Defence; or whether past conduct as a journalist requires that he be treated as disqualified from such a role. The decision-maker on that issue, whether it be the Pre-Trial Judge, the Trial Chamber, or the Appeals Chamber, will wish to make an informed decision. We know the position of the Registrar and the Prosecution, who support such disqualification, and that of the Head of Defence Office who opposes it. But we do not know what Dr Nashabe has to say about the reasons for the conduct. His account may shed important light on the issue requiring decision.

6. The second is that the issue is of high importance. While the present decision is not the occasion to pronounce on the point, two major public interests are here advanced by three of the four heads of organs of the STL: the Head of Defence Office, who has heavy responsibility to ensure that Defence counsel have the resources needed to secure a fair trial; the Registrar who is responsible for protecting legitimate interests which require to be kept confidential as a facet of the proper administration of the Tribunal; and the Prosecutor, whose responsibilities include ensuring that

⁵ Rule 95(B) of the Rules of Procedure and Evidence.

⁶ *John v Rees* [1970] Ch 345 at 402.



justice is done and who on this occasion largely supports the Registrar. So it is imperative that an informed decision be made by whichever member of the fourth – judicial – organ comes to deal with it.

7. The third is that, while not a party to the litigation between the Prosecutor and the accused, as a practical matter Dr Nashabe is potentially affected in more than an insignificant manner by the answer to the difference which divides the three Heads of organs. A decision that past conduct by Dr Nashabe disqualified him from being retained by the Head of Defence could have serious consequences for him. Nowadays judges adopt a practical approach to such a decision and consider whether possible injustice of making a decision that could adversely affect a person's reputation outweighs the ordinary practice to avoid unnecessary cost and delay, by confining to true parties the protection of the *audi alteram partem* principle. A recent illustration is the decision of the Privy Council in *R (ex parte Hoffmann) v The Commissioner of Inquiry and the Governor of Turks and Caicos* (2012)⁷ where a Commission of Inquiry had been appointed to consider whether corruption or other serious dishonesty in relation to past or present *elected* members of the House of Assembly of might have taken place in recent years. Its terms of reference did not extend to conduct of *appointed* members. The appellant, who was an appointed member, challenged by judicial review suggestions that he might have participated in corrupt practices involving elected members. Of present relevance is the Privy Council's finding that the *audi alteram partem* principle had required such unelected members to have fair notice of any such allegations against them which would be contained in the report.

8. The fourth, as regards the decisions but not other materials, is his right as a citizen of Lebanon under the open justice principle next discussed – to be apprised of what the STL has decided, to the extent that this does not infringe other rights or legitimate interests. Dr Nashabe should therefore be given copies of my decisions of 10 and 14 September 2012⁸ and this decision, but subject to such redactions as are necessary to protect the interests the Registrar and the Prosecutor seek to safeguard. For the purposes of the forthcoming hearing before the Pre-trial Judge he should also be given copies of documents other than the two above-mentioned decisions filed in the proceeding before me which the Registrar and the Prosecutor rely on to support the allegations against Dr Nashabe, similarly redacted.

⁷ [2012] UKPC 17.

⁸ Second Interim Decision; STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PRES, Further Scheduling Order, 14 September 2012.



IV. The open justice principle

9. Justice must be done openly unless to do so would put it at risk. So my decisions of 10 and 14 September 2012 and this decision should be published, but subject to such redactions as are necessary to protect the interests the Registrar and the Prosecutor seek to safeguard. At this stage I see no reason to make any other amendment to the order of 14 September 2012 which withholds other information from the public.

V. Principles of judicial review

10. The Registrar and the Prosecutor suggest that the decision-maker should treat the determination under review as that of the Registrar, and that this determination should stand unless shown to be irrational. The Defence Office suggests a more general form of judicial review of an administrative decision by the Registrar. There could be other options, such as to assess against one another the values advanced by both sides and then to evaluate what the interests of justice require. But, because of my decision as to forum this issue will be the task of a judicial organ of the STL and I have therefore not heard argument on the topic. I refrain from offering any view upon it.



SPECIAL TRIBUNAL FOR LEBANON

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VI. Disposition

11. For the foregoing reasons, I therefore`:

DECLINE to determine the dispute between the Registrar and the Head of Defence Office, and respectfully

INVITE the Pre-Trial Judge to consider dealing with it;

DIRECT:

- (1) That the Registrar by 4 pm on Wednesday 26 September 2012 file *confidentially*:
 - (i) copies of my decisions of 10 and 14 September 2012 and this decision containing such redactions as he proposes to protect the interests he seeks to safeguard;
 - (ii) copies of documents other than the two above-mentioned decisions filed in the proceeding before me which he relies on to support his allegations against Dr Nashabe, similarly redacted;
- (2) That the Prosecutor by 4 pm on Thursday 27 September 2012 file *confidentially* any submissions on the topic of redactions of items (i) and (ii) above;
- (3) That the Head of Defence Office by noon on Friday 28 September 2012 file *confidentially* any submissions on the topic of redactions of items (i) and (ii) above.

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

Dated this 25th day of 2012,

Leidschendam, the Netherlands

Judge David Baragwanath
President

