



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/PT/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransen**

The Registrar: **Mr. Herman von Hebel**

Date: **9 November 2012**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

DECISION ON FORUM FOR REVIEW OF THE REGISTRAR'S DECISION IN RELATION TO THE ASSIGNMENT OF A LOCAL RESOURCE PERSON

Office of the Prosecutor:
Mr. Norman Farrell

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I. Introduction

1. By way of this decision, the Pre-Trial Judge pronounces on his jurisdiction with respect to the Head of Defence Office's request for review of the Registrar's decision refusing the assignment of Mr. Omar Nashabe as a local resource person, filed before the President of the Tribunal on 31 August 2012 (the "Request for Review").¹

II. Procedural Background and Submissions

2. On 17 April 2012, the Defence Office received an initial request from Defence Counsel to assign Mr. Nashabe to assist the four defence teams.²

3. On 23 April 2012, the Defence Office requested the Registry to give Mr. Nashabe a services contract, which was issued on 29 April 2012 and signed on 1 May 2012.³

4. On 10 May 2012, the Registry terminated said contract following an internal risk assessment related to his employment at the Tribunal.⁴

5. On 13 July 2012, the Acting Head of Legal Aid Unit sent a confidential memorandum to the Registry informing it of the Defence Office's intention to assign Mr. Nashabe as a Local Resource Person⁵ and requesting its agreement to a proposed administrative framework for said assignment.⁶

6. On 27 July 2012, the Registry informed the Defence Office's Acting Head of Legal Aid Unit of its decision to reject the administrative framework proposed for the employment of Mr. Nashabe as a local resource person to assist Defence Counsel (the "Registry Decision").⁷ The Registry based its refusal on safety and security concerns.⁸

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Request for Review of Registrar's Decision of 27 July 2012 in Relation to the Assignment of a Local Resource Person, 31 August 2012 ("Request for Review"). A Public Redacted version was filed on 8 October 2012 pursuant to STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, President's Order on Publicity and Redactions, 3 October 2012 ("Order on Publicity"), which was made public on 8 October 2012.

² Request for Review, para. 4.

³ Request for Review, paras 5-6; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Registry Further Submission in Relation to the President's Second Interim Decision of 10 September 2012, 21 September 2012 ("Registry Further Submission"), paras 3-4, with a Public Redacted version filed on 8 October 2012 pursuant to the Order on Publicity.

⁴ Registry Further Submission, paras 10-11; Request for Review, para. 7.

⁵ Registry Further Submission, para. 16.

⁶ Request for Review, para. 9.

⁷ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Annex F to Supplement to "Request for Review of Registrar's Decision of 27 July 2012 in Relation to the Assignment of a Local Resource Person"

7. On 31 August 2012, the Head of Defence Office submitted the Request for Review before the President, seeking judicial review of the Registry Decision. Accordingly, the President was asked to order the Registry to agree to the administrative framework proposed by the Defence Office, and to administratively process the request without delay in order to allow for the employment of Mr. Nashabe.⁹

8. On 3 September 2012, the President issued an Interim Scheduling Direction,¹⁰ inviting the Head of Defence Office and the Registrar to respond to four procedural issues arising from the Request for Review, including whether the President should deal with the matter “administratively or whether it should be deal[t] with judicially by a Judge or Chamber”.¹¹

9. On 5 September 2012, the Registry responded to the President’s Interim Scheduling Direction (“First Registry Submission”).¹² With respect to the applicable forum, the Registry submitted that the matter in question is “a judicial one, and not a purely administrative one.”¹³ It argued that, pursuant to Rule 89(B) of the Rules of Procedure and Evidence (the “Rules”), the Pre-Trial Judge is “the appropriate authority to adjudicate in a matter in which fairness of trial issues are raised”.¹⁴

10. On 5 September 2012, the Defence Office also responded to the procedural issues raised by the President,¹⁵ reiterating that judicial review was sought before the President. Emphasising the administrative nature of the Registry Decision, the Head of Defence Office argued that it raises “fundamental institutional questions”¹⁶ with respect to the separation of powers between the Defence Office and the Registry, the responsibilities of the Registry in

Filed on 31 August 2012, 1 November 2012 (Confidential), (“Annex F to Supplement for Request for Review”); Request for Review, para. 11; Registry Further Submission, para. 20.

⁸ Annex F to Supplement for Request for Review, para. 6.

⁹ Request for Review, para. 74.

¹⁰ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Interim Scheduling Direction, 3 September 2012, with a Public Redacted version filed on 8 October 2012 pursuant to the Order on Publicity.

¹¹ *Id.*, paras 3-11.

¹² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Registry Submission in Relation to the President’s Interim Schedule Direction of 3 September 2012, 5 September 2012, with a Public Redacted version filed on 8 October 2012 pursuant to the Order on Publicity.

¹³ *Id.*, para. 7.

¹⁴ *Ibid.*

¹⁵ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Observations of the Defence Office, 5 September 2012 (Confidential and *ex parte*).

¹⁶ *Id.*, para. 4.

the context of assigning a person assisting counsel (“PAC”), and the discharge of the Defence Office’s mandate.¹⁷

11. On 10 September 2012, the President rendered his Second Interim Decision,¹⁸ whereby he concluded *inter alia* that “[e]ach of the Pre-Trial Judge, the Trial Chamber and the President may have jurisdiction in respect of a difference of this kind”.¹⁹ The President submitted that assessing the appropriate forum “may depend on the nature of the contested issue”.²⁰ He invited the Head of Defence Office and the Registrar, as well as the Prosecutor and Defence Counsel, to file further submissions on the matter.²¹

12. On 21 September 2012, the Registry responded to the President’s Second Interim Decision,²² providing additional factual background to emphasise that “the matter, although of an administrative nature, brings into play fundamental issues of a judicial nature.”²³ It referred to the First Registry Submission for more details.²⁴

13. On 21 September 2012, the Defence Office also responded to the President’s Second Interim Decision,²⁵ arguing that if the Registrar’s administrative decision “refusing to implement the decision of the Head of Defence Office affects the rights of the accused, that effect is only ‘indirect’ and does not alter at all the administrative character of the decision.”²⁶ Therefore, according to the Defence Office, this dispute clearly falls within the jurisdiction of the President.

14. The Prosecution also responded to the President’s Second Interim Decision on 21 September 2012.²⁷ The Prosecution considered the determination of the proper forum to be the “primary issue” at hand.²⁸ It submitted that the President is best placed to exercise

¹⁷ *Ibid.*

¹⁸ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Second Interim Decision, 10 September 2012, with a Public Redacted version filed on 8 October 2012 pursuant to the Order on Publicity.

¹⁹ *Id.*, para. 2(a).

²⁰ *Id.*, para. 26.

²¹ *Id.*, para. 48.

²² Registry Further Submission.

²³ *Id.*, para. 36.

²⁴ *Ibid.*

²⁵ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Further Submissions of the Defence Office Following the President’s Second Interim Decision, 21 September 2012, with a Public Redacted version filed on 8 October 2012 pursuant to the Order on Publicity.

²⁶ *Id.*, para. 7.

²⁷ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PRES, Prosecution’s Further Submission Pursuant to President’s Second Interim Decision, 21 September 2012, with a Public Redacted version filed on 8 October 2012 pursuant to the Order on Publicity.

²⁸ *Id.*, para. 1.

judicial review of an administrative decision by the Registrar that directly impacts upon the mandate of the Head of Defence Office.²⁹ The Prosecution submitted that because “the dispute involves first and foremost the administrative decision of hiring a Local Resource Person”,³⁰ the President has jurisdiction pursuant to Articles 10(a) and I (1) of the Statute and Rules 32(B)-(C) and 48(A). Furthermore, international criminal tribunals have affirmed the President’s inherent power to review administrative decisions of the Registrar.³¹

15. On 25 September 2012, the President rendered his Decision on Forum and Redactions,³² declining in his capacity as President to determine the dispute between the Registrar and the Head of Defence Office, and inviting the Pre-Trial Judge to consider dealing with the matter.³³

III. The Nature of the Dispute

16. In deciding on the appropriate forum for review of the Registry Decision, the Pre-Trial Judge considers it necessary to first determine the essence of the matter being disputed between the Parties.

17. In this regard, it is clear from the Request for Review and its confidential and *ex parte* Annexes³⁴ that the Head of Defence Office is challenging the Registry’s refusal to consent to the administrative framework outlined by the Defence Office in a memorandum dated 13 July 2012, which states the intention to appoint Mr. Nashabe as a PAC, pursuant to Article 22(B) of the STL Directive on the Assignment of Defence Counsel (the “STL Directive”). The administrative framework proposed establishes a contractual relationship directly between Mr. Nashabe and Counsel for the four defence teams, adding that “[t]he contract will however be directly tied to the Head of the Defence Office’s assignment decision pursuant to Article 22(B) of the Directive”.³⁵ The proposed framework also requires that the Tribunal, through the Registry Finance section, make payments directly to Mr. Nashabe on the basis of

²⁹ *Id.*, para. 2.

³⁰ *Id.*, para. 4.

³¹ *Id.*, para. 5.

³² STL, *Prosecutor v. Ayyash et al*, Case No. STL-11-01/PT/PRES, Decision of President on Forum and Redactions, 25 September 2012 (“Decision on Forum”), which was made public on 8 October 2012 pursuant to the Order on Publicity.

³³ *Id.*, Dispositon.

³⁴ Annexes A, B, C, D and E to Request for Review (Confidential and *ex parte*); Annex F to Supplement for Request for Review (Confidential and *ex parte*).

³⁵ Annex B to Request for Review (Confidential and *ex parte*), p. 2.

the principles governing Legal Aid for the Defence.³⁶ Indeed, these principles apply because Defence Counsel have been assigned with a view of ensuring full representation of the interests and rights of the accused for *in absentia* proceedings.³⁷

18. In summary, by contesting the Registry Decision, the Head of Defence Office is challenging the Registry's power to refuse to remunerate a PAC appointed by the Defence Office. In contrast, the Registry considers that it has discretion with respect to such payments and, in this case, bases exercising such discretion on safety and security concerns.

19. Addressing the present dispute therefore requires determining which body between the Defence Office and the Registry has the final say in assigning a PAC to assist Defence Counsel. This determination is of an administrative nature. The authority reviewing this matter will pronounce on the institutional framework of the Tribunal — including the distribution of powers and the division of responsibilities between the Defence Office and the Registry — as well as on the discharge of the mandate of the Defence Office.

20. In this respect, the Pre-Trial Judge considers that the overarching issue in this dispute may influence the current case as well as future cases, as noted by the Head of Defence Office in the Request for Review.³⁸

21. Having determined that the present dispute concerns the review of an administrative decision by the Registry on the assignment of a PAC, the Pre-Trial Judge will now examine whether he has jurisdiction to adjudicate on the matter.

IV. Discussion

22. Although the Rules and the STL Directive do not explicitly specify who has authority to review a Registry decision in relation to the assignment of a PAC, other relevant provisions provide guidance.

23. Article 10(A) of the Statute and Rule 32(B) provide that the good administration of justice and the effective functioning of the Tribunal fall under the President's authority. In addition, both the Statute³⁹ and the Rules⁴⁰ establish that the Registry is under the authority of

³⁶ *Id.*, p.3.

³⁷ Article 25 of the STL Directive.

³⁸ Request for Review, para. 3.

³⁹ Article 12(1) STLSt.

⁴⁰ Rule 48(A) STL RPE.

the President, who is also specifically tasked with supervising the Registry's activities pursuant to Rule 32(C).

24. In the Rules, one of the few provisions specific to PACs specifies that the Head of Defence Office shall consult with the President and the Registrar in establishing criteria for the payment of fees to assigned counsel and "their support staff".⁴¹

25. Indeed, the Pre-Trial Judge considers that Mr. Nashabe's designation as a PAC — be it a local resource person, an investigator, or a similar position — is particularly relevant in determining the appropriate forum for this dispute. At the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), when the Registrar denied the appointment of two investigators to the defence team, the President had jurisdiction to review the decision denying their assignment as "ancillary employees".⁴² Pursuant to Article 22(B) of the STL Directive, investigators fall within the category of PACs.⁴³

26. Additionally, the Pre-Trial Judge refers to Article 26 of the STL Directive for guidance on the appropriate forum in cases concerning PACs. Although this article concerns the review of assignment decisions made by the Head of Defence Office, it is notable that the Pre-Trial Judge is granted jurisdiction only with respect to the assignment of counsel and co-counsel, excluding PACs.⁴⁴

27. Finally, the Pre-Trial Judge refers to Article 15 of the STL Directive for guidance as it concerns the "Remedy against the Registrar's determination", and compares it to Article 13 of the ICTY Directive on the Assignment of Defence Counsel (the "ICTY Directive") on the same type of remedy. Article 13 of the ICTY Directive distinguishes between suspects and accused, stating that the former file motions for review of a Registrar's decision before the President, while the latter file them before the Chamber. While this distinction could be interpreted as making the ICTY Chamber a preferred forum for decisions closely affecting the trial,⁴⁵ the STL Directive does not provide for it. Article 15 of the STL Directive grants

⁴¹ Rule 57(D)(ix) STL RPE.

⁴² ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Request for Review of Registrar Decision and for Summary Reversal, 7 May 2012 ("*Karadžić* 7 May 2012 Decision"), para. 12.

⁴³ Article 22(B) STL Directive lists *inter alia* legal assistants, consultants and investigators as PACs.

⁴⁴ Article 26 of the STL Directive states: "The suspect or accused who disagrees with a decision pursuant to Articles 18(D), 18(E), 20(A), 21 or 22(A) may, within 15 days from the date upon which he was notified of the decision, file a motion before the Pre-Trial Judge for a review of that decision.[...]" The enumerated articles concern the assignment of counsel (Articles 18(D)-(E), 20(A) and 21) and the assignment of co-counsel (Article 22(A)). Notably, Article 22(B) regarding the assignment of PACs is not listed.

⁴⁵ Second Interim Decision, para. 25.

the President the authority to review determinations by the Registrar for both suspects and accused.⁴⁶ Moreover, the Pre-Trial Judge observes that the present Request for Review is especially administrative in nature since it was filed by the Head of the Defence Office in his own name, and not by a suspect or an accused.

28. In the present case, neither the Rules nor the STL Directive expressly empower the Pre-Trial Judge to review the Registry Decision. Therefore, if he were to appropriate such review power, the Pre-Trial Judge would be wrongfully interfering with the President's general authority and supervision over the Registrar's activities. As noted below, this approach conforms to decisions by other international tribunals which have "made explicit the power to review the Registrar's decisions vested in the President."⁴⁷

29. The Pre-Trial Judge has reviewed the case law of other tribunals⁴⁸ and finds that it supports the notion that in a case of review of an administrative decision, a Judge or Chamber "may only step in under its inherent power to ensure that proceedings are fair once all available remedies have been exhausted."⁴⁹ These "available remedies" include review of the decision by the President.⁵⁰

⁴⁶ Article 15 STL Directive.

⁴⁷ International Criminal Tribunal for Rwanda ("ICTR"), *Prosecutor v. Nzirorera*, Case No. ICTR-98-44-T, The President's Decision on Review of the Decision of the Registrar withdrawing Mr. Andrew McCartan as Lead Counsel of the Accused Joseph Nzirorera, 13 May 2002 ("*Nzirorera* Decision"), p. 3, para. (x), citing *Prosecutor v. Hadzihasanovic et al.*, IT-01-47-PT, 26 March 2002, Decision on the Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, esp paras 12, 13; *Prosecutor v. Delalic et al.*, Decision of the President on the Prosecutor's motion for the production of Notes Exchanged between Zejnil Delalic and Zdravko Mucic, IT-96-21-PT, 11 November 1996, President Cassese.

⁴⁸ Second Interim Decision, fn. 13, citing the following five decisions: ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on "Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel", 29 January 2007 ("*Krajišnik* Decision"); ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on the Registry Submission pursuant to Rule 33(B) following the President's Decision of 17 December 2008, 9 April 2009 ("*Šešelj* Decision"); ICTR, *Nahimana et al. v. the Prosecutor*, Case No. ICTR-99-52-A, Decision on Hassan Ngeze's Motion to Set Aside President Mose's Decision and Request to Consummate His Marriage, 6 December 2005 ("*Nahimana* Decision"); ICTR, *Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Decision on Request for Judicial Review of the Registrar's and President's Decisions Concerning Payment of Fees and Expenses, 13 April 2010 ("*Nshogoza* Decision"); and ICTR, *The Prosecutor v. Rutaganira*, Case No. ICTR-95-IC-AR, Decision on Appeal of a Decision of the President on Early Release, 24 August 2006 ("*Rutaganira* Decision"), where the Appeals Chamber dismissed the defendant's request for appeal and held that decisions of the President on early release are final.

⁴⁹ *Šešelj* Decision, para. 20.

⁵⁰ *Krajišnik* Decision, p. 3, stating that when the power to review a decision by the Registrar is vested in the President of the Tribunal, a Chamber is not competent to review such a decision but may "only step in thereafter under its inherent power to ensure that its proceedings are fair". See also *Nahimana* Decision, where the Appeals Chamber intervenes—to find that it has no jurisdiction in this matter—only after "the Appellant has exhausted all available remedies", including a review of the Registrar's decision by the President, p. 3-4.

30. The Pre-Trial Judge notes that the ICTY Appeals Chamber in *Blagojević* determined that the Trial Chamber had erred in finding that, under its inherent power, it had jurisdiction over a matter which the ICTY Directive assigned to the President's review authority. The Appeals Chamber held that the Trial Chamber "cannot appropriate for itself a power which is conferred elsewhere" and that in such cases its only option "is to stay the trial until the President has reviewed the decision of the Registrar."⁵¹ The Pre-Trial Judge therefore concludes that, when the power to review a decision by the Registrar is bestowed upon the President, a Chamber or Judge may not intervene.⁵²

31. As to the Registry's submissions that the Pre-Trial Judge has jurisdiction because the matter is not a purely administrative one, but rather a judicial matter which raises fair trial concerns,⁵³ the Pre-trial Judge considers that this distinction does not determine the appropriate forum for review of a Registrar's decision. It does, however, determine whether a decision may be impugned by supervisory review.⁵⁴ Consequently, in the *Delić* case, Judge Meron found both that the Registrar's decision was subject to review because the rights of the accused were at stake, and that he had the authority to review it as ICTY President.⁵⁵

32. Accordingly, the Pre-Trial Judge considers that any potential indirect consequences that may arise from an administrative decision by the Registry do not modify the nature of the decision and therefore should not be considered as determining factors in attributing jurisdiction to a reviewing authority. Rather, they are elements to be considered, if necessary, by the competent authority when deciding the case on its merits.⁵⁶

⁵¹ ICTY, *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7.

⁵² See ICTY, *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Motion Seeking Review of the Decision of the Registry and Assignment of Mr. Asim Črnalić as Lead Counsel, 22 April 2005, where the Trial Chamber dismissed the motion seeking review of a decision by the Registry because: "where, as in this case, the power of review of the Registrar's decision is specifically conferred upon the President by the Rules, the Trial Chamber may not intervene."

⁵³ First Registry Submission, para. 7.

⁵⁴ *Nzirorera* Decision, p. 3 para. (xi): "[N]ot every decision made by the Registrar can be made subject of review by the President. [...] The threshold condition is variously formulated in national jurisdictions, but a common theme is that the decision sought to be challenged must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy."

⁵⁵ ICTY, *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Request for Review, 8 June 2005, para. 6. Cited in Second Interim Decision, para. 15.

⁵⁶ See *Karadžić* 7 May 2012 Decision, para. 13, where the President finds that the Impugned Decision violated Karadžić's right to procedural fairness; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of Decision on Defence Team Funding, 31 January 2012, para. 21: "Karadžić asserts that the shortfall funding for his defence constitutes an injustice and that addressing this is necessary to assure a fair trial" and para. 37 where the President recalls "the International Tribunal's responsibility to provide for the rights of the accused and ensure fair trials" in rendering his decision. See also ICTY, *Prosecutor v. Karadžić*,

V. Conclusion

33. The Pre-Trial Judge considers that the present matter concerns the review of an administrative decision by the Registry on the assignment of a PAC by the Defence Office. The dispute is between two organs of the Tribunal and is essentially administrative in nature. The Pre-Trial Judge therefore finds that, absent any legal provision expressly granting him jurisdiction over this matter, he is not competent at this stage in proceedings to review the Registry Decision and to decide on the merits of the Request for Review.

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 77, 88 *et seq.* of the Rules,

DECLARES that he is not competent to review the Registry Decision and to decide on the merits of the Request for Review.

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

Leidschendam, 9 November 2012



Daniel Fransen
Pre-Trial Judge



Case No. IT-95-5/18-T, Decision on the Request for Review of Decision on Office Space, 10 February 2012. See also Article 15 of the STL Directive which gives the President authority to review the Registrar's determinations in relation to whether an accused is able to remunerate counsel.