

**THE PRESIDENT**

Case No.: STL-11-01/PT/PRES
Before: Judge David Baragwanath, President
Registrar: Mr Herman von Hebel
Date: 21 December 2012
Original language: English
Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON THE HEAD OF DEFENCE OFFICE REQUEST FOR REVIEW OF
THE REGISTRAR'S DECISION RELATING TO THE ASSIGNMENT OF A LOCAL
RESOURCE PERSON**

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





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INTRODUCTION

1. The Head of Defence Office of the Special Tribunal for Lebanon has sought to appoint Dr Omar Nashabe to assist Defence counsel for the four accused in the *Ayyash et al.* case. But the Registrar has advised he does not wish to permit the Tribunal's funds to be applied for that purpose on the grounds that Dr Nashabe has knowingly published material which was the subject of an order for confidentiality made by the Pre-Trial Judge and that he therefore poses security risks for the Tribunal. The Registrar further considers that to permit such expenditure would bring the Tribunal into disrepute. The Head of Defence Office challenges the Registrar's decision before me.¹

PROCEDURAL BACKGROUND

2. On 13 July 2012, the Head of Defence Office informed the Registrar that he intended to assign Dr Nashabe as a Local Resource Person in Lebanon for the purpose of assisting the Defence of the accused on their forthcoming trial *in absentia*.²

3. On 27 July 2012, the Registrar informed the Defence Office that he could not "consent to the framework [it has] proposed for the employment of Mr. Nashabe,"³ He did so on the basis that "the proposed framework does not relieve the Registrar's responsibility for the security of Tribunal staff, its victims and witnesses and his obligations as the custodian of the court record" and that Dr Nashabe's knowing disclosure of confidential information "adversely affects the

¹ STL, *Prosecutor v Ayyash et al.*, 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, Confidential, 31 August 2012 ("Request for Review"), paras 2, 74. (All further references to filings and decisions relate to this case number unless otherwise stated). A public redacted version was filed on 8 October 2012; *see also* Defence Office Request for Review of the Registrar's Decision in Relation to the Assignment of a Local Resource Person Following the Decision of the Pre-Trial Judge Dated 9 November 2012, 15 November 2012.

² Request for Review, Annex B, Confidential (Memorandum from Acting Head of Legal Aid Unit to Registrar), The role was particularized in the following way: "The local resource person shall only act under the explicit instruction and at the request of counsel."; *see also* Request for Review, Annex D, Confidential (Terms of Reference for Local Resource Person).

³ *See* Request for Review, para. 11.



interests of the Tribunal”.⁴ The Registrar maintained this position despite a meeting of 22 August 2012 to “explore[] avenues to resolve the impasse”,⁵ with the result that Dr Nashabe cannot be assigned by the Head of Defence Office.⁶

4. On 31 August 2012, the Head of Defence Office, joined by defence counsel, challenged before me, in my *administrative* capacity as President, the refusal of the Registrar to permit him to appoint Dr Nashabe.⁷ For reasons contained in my written decision of 25 September 2012, essentially because I saw the issue as concerning fairness of trial, I declined in that capacity to determine the dispute. Since the Trial Chamber is not yet seized of the case pursuant to Rule 95 of the Rules of Procedure and Evidence, I invited the Pre-Trial Judge as the alternative *judicial* forum to consider dealing with the matter.⁸

5. On 9 November 2012, the Pre-Trial Judge declared that he is not competent to review the Registrar’s Decision and to decide on the merits of the Request for Review.⁹ The Pre-Trial Judge held that the issue is to be characterized as one relating to the interrelation among Tribunal organs and is properly determinable by the President, rather than one relating to fair trial and thus a matter for the Pre-Trial Judge at this stage.¹⁰ The parties did not appeal against the Pre-Trial Judge’s decision. As a judicial determination, it is binding on the parties and on me as President.

6. On 15 November 2012, the Defence Office filed a new request asking me as President to rule on the merits of the Request for Review.¹¹ The Registry elected not to respond, while the

⁴ *Id.* at para. 12.

⁵ *Id.* at para. 13.

⁶ *Id.* at para. 14.

⁷ *Id.* at paras 2, 74.

⁸ Decision of President on Forum and Redactions, 25 September 2012.

⁹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Forum for Review of the Registrar’s Decision in Relation to the Assignment of a Local Resource Person, 9 November 2012.

¹⁰ *Id.* at paras 19, 33.

¹¹ Defence Office Request for Review of the Registrar’s Decision in Relation to the Assignment of a Local Resource Person Following the Decision of the Pre-Trial Judge Dated 9 November 2012, 15 November 2012.



Prosecutor reiterated his previous position that the matter falls within my authority as President “for the effective functioning of the Tribunal and the good administration of justice”.¹²

7. Following my Decision and Scheduling Order of 21 November 2012,¹³ I received submissions¹⁴ by the parties and responses thereto.¹⁵ On 17 December 2012, I heard orally from the parties.¹⁶ On 18 and 19 December, I also received additional submissions from the parties.¹⁷

FACTS AND CONTENTIONS

8. The material facts are the following: Following a request by the Prosecutor, the Pre-Trial Judge issued an order for confidentiality of certain information. In one of his articles, Dr Nashabe reproduced the protected information. While it is not my function to adjudicate upon Dr Nashabe’s conduct, the Head of Defence Office accepts that there is *prima facie* evidence Dr Nashabe did so deliberately.¹⁸ When the Head of Defence Office sought to retain Dr Nashabe, first as an investigator then as a Local Resource Person, the Registrar opposed such retainer on the grounds that Dr Nashabe had knowingly violated a court order.

¹² Prosecution Response to Defence Office Request for Review of the Registrar’s Decision in Relation to the Assignment of a Local Resource Person following the Decision of the Pre-Trial Judge Dated 9 November 2012, 20 November 2012.

¹³ Decision and Scheduling Order Following Defence Office Request of 15 November 2012, 21 November 2012

¹⁴ Defence Office Submissions on the Merits, 7 December 2012; Registry Submission Regarding the President’s Decision and Scheduling Order Following Defence Office Request of 15 November 2012, Confidential, 7 December 2012 (“Registry Submission”) (a public redacted version was filed on 10 December 2012); Prosecution Submissions Pursuant to Scheduling Order of 21 November 2012, Confidential, 7 December 2012 (“Prosecution Submissions”) (a public redacted version was filed on the same day).

¹⁵ Defence Office Consolidated Response Pursuant to the Scheduling Order of 21 November 2012, Confidential, 14 December 2012 (“Defence Office Response”) (a public redacted version was filed the same day); Registry Response Pursuant to Scheduling Order of 21 November 2012, 14 December 2012 (“Registry Response”); Prosecution Response Pursuant to Scheduling Order of 21 November 2012, 13 December 2012 (“Prosecution Response”).

¹⁶ Confidential Hearing, 17 December 2012 (unrevised version) (“Hearing of 17 December 2012”).

¹⁷ Registry Submission Pursuant to Rule 48(C) Regarding Oral Hearing of 17 December 2012, 18 December 2012 (“Registry Submission of 18 December”); Prosecution Submissions Relating to Head of Defence Office’s Request for Review of the Registrar’s Decision in Relation to the Assignment of a Local Resource Person, dated 15 November 2012, 19 December 2012; Response of the Defence Office to the Observations Filed by the Registry on 18 December 2012, Confidential, 19 December 2012 (a public redacted version was filed the same day).

¹⁸ The Head of Defence advised that the information had appeared on the Tribunal’s public website for a period of six weeks prior to the order.



9. The Head of Defence Office contends that it is his province to make a decision, in the light of the best interests of the Tribunal which include the provision of an effective defence which, in the absence of the accused who are being tried *in absentia*, requires the retainer of a “Local Resource Person.”¹⁹

10. The Registrar asserts that the decision of the Head of Defence Office to arrange to have Dr Nashabe retained by Defence counsel is contrary to the proper interests of the Tribunal and, in effect, that he may veto it by refusing to make funds available.²⁰ He initially advanced three grounds:

- (1) the alleged violation of the confidentiality order by Dr Nashabe;
- (2) an internal registry risk assessment adverse to Dr Nashabe; and
- (3) information contained in a confidential and *ex parte* annex to his submission of 7 December 2012.²¹

11. Since the second document on which the Registrar relied had not been provided to the Head of Defence Office or to me I drew the Registrar’s attention to a decision of the UK Supreme Court²² holding that in analogous circumstances fairness of process required disclosure of any material adverse to the opposing party.²³ The Registrar advised that he would have been willing to provide these documents to the President or a Chamber of the Tribunal if it were in the course of exercising a judicial function as opposed to an administrative function.²⁴ He declined to make them available in the present case.²⁵ However, material that I have not had the opportunity to examine cannot form part of my assessment. I therefore decline to take into account the Registrar’s submission in this regard.

¹⁹ Request for Review, paras 37-38.

²⁰ Registry Submission, para. 48.

²¹ Hearing of 17 December 2012, pp. 36-43.

²² See UK, Supreme Court, *In the matter of A (A Child)* [2012] UKSC 6, 12 December 2012

²³ Hearing of 17 December 2012, pp. 37-38, 40-41.

²⁴ Registry Submissions of 18 December, para 7.

²⁵ *Ibid*



12. Regarding the third ground on which the Registrar relied, i.e., the information contained in the confidential and *ex parte* annex to his submission of 7 December 2012,²⁶ following a request by the Head of Defence Office to receive copy of this material²⁷ the Registrar indicated that he did not wish to share this information with the Head of Defence Office.²⁸ The Tribunal's Statute requires that it act fairly. To act upon material which the Head of Defence Office has not had the opportunity to examine would infringe the *audi alteram partem* rule accepted by civil law and common law jurisdictions alike.²⁹ I therefore disregard that document as well. My assessment will be based on the first argument submitted by the Registrar. As will appear, I do not accept a further argument advanced by the Registrar, in writing and at the oral hearing, that Dr Nashabe is disqualified from retainer because he has shown himself a critic of the Tribunal.

13. The Prosecutor supports the Registrar. Defence counsel have not intervened in these proceedings.

DISCUSSION

I. Nature of the dispute

14. The parties have submitted that the President should deal only with the legality of the Registrar's decision and leave them to debate further what practical result is required.³⁰ Contrary to what was advanced, the issue is not simply whether the decision of the Registrar is

²⁶ Registry Submission, Confidential and *Ex Parte* Annex C.

²⁷ Urgent Request for Access to Annex C of The Registrar's Submission of 7 December 2012, Confidential, 11 December 2012.

²⁸ Registry Submission in Relation to The Defence Office's Urgent Request for Access to Annex C of The Registrar's Submission of 7 December 2012, 12 December 2012, paras 4-5. At the Hearing of 17 December 2012, the Registrar advised that if the President wishes to share this document with the Head of Defence, he will withdraw it, Hearing of 17 December 2012, p. 10.

²⁹ The common law calls it one of the rules of natural justice. See UK, High Court of Justice, *John v Rees* [1970] Ch. 345 at 402 where Sir Robert Megarry warned of the risk of acting on one side's contentions without hearing the other; see also ICTY, *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Motion for Access to Confidential Ex Parte Annex, 15 April 2011, p. 2.

³⁰ Defence Office Response, para. 19, Prosecution Response, para. 2, 4; Registry Response, para. 6. However, the Registrar submits that "the President's review encompasses the fundamental question of whether the Defence Office may hire Mr Nashabe to serve as a local resource person for Defence counsel", Registry Response, para. 8.



challengeable. The general issue is whether and if so to what extent, on the true construction of the Statute of the Tribunal and in the public interest, the law imposes on the Head of Defence Office constraints upon the exercise of his authority, by whom, by what standards and how such constraints should be implemented.

15. In a nutshell, the dispute primarily concerns the respective authorities of the Head of Defence Office and of the Registrar. Article 4(1) of the Annex to Security Council Resolution 1757(2007) states:

The Secretary-General shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Tribunal.

Article 12 of the Statute extends the responsibility of the Registrar further. It provides that: “[u]nder the authority of the President of the Special Tribunal, the Registry shall be responsible for the administration and servicing of the Tribunal” i.e., including the Defence Office created by Article 13, as well as the Chambers and the Office of the Prosecutor.

16. Article 13 of the Statute confers on the Head of Defence Office the power to appoint Office Staff for the Defence Office, stating:

- (1) The Secretary-General, in consultation with the President of the Special Tribunal, shall appoint an independent Head of the Defence Office, who shall be responsible for the appointment of the Office Staff and the drawing up of a list of defence counsel.
- (2) The Defence Office [...] shall protect the rights of the defence, provide support and assistance to defence counsel [...] including [...] collection of evidence and advice [...].

17. Rule 57(D)(x) of the Rules of Procedure and Evidence provides that the Head of Defence Office will “draw up and maintain a list of highly qualified experts, investigators and legal assistants and case managers who may be assigned to assist the Defence”. Article 22(B) of the Directive on the Assignment of Counsel, issued by the Head of Defence Office, also provides



that he may “assign persons assisting counsel, such as legal assistants, consultants, investigators, [...] to provide support for the lead counsel” and “may impose qualification requirements for persons assisting counsel.”

18. The Head of Defence Office contends³¹ that by analogy with Rule 58(A)(v) of the Rules it is his responsibility, not that of the Registrar, to decide whether a potential “person [...] assisting counsel” satisfies him that the person:

has not engaged in conduct, whether in pursuit of his profession or otherwise, which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, likely to diminish public confidence in the Tribunal or the administration of justice, or otherwise brings the Tribunal into disrepute.³²

19. The Registrar by contrast contends that the authority to conduct security and background checks of persons contracted to work with the Tribunal falls solely under his authority, in the light of his responsibility for the administration and servicing of the Tribunal, and is not within the authority of the Defence Office or the Office of the Prosecutor.³³

20. The present issue was raised in August and there is a tentative fixture for the start of trial on 25 March 2013. There is pressing need for a determination. The Statute’s mandate to conduct the proceedings expeditiously³⁴ requires a practical resolution of this matter, which includes addressing the decision of the Head of Defence Office to appoint Dr Nashabe. I must accept responsibility for identifying the border between the functions of the Head of Defence Office and the Registrar and for resolving the present *impasse*.

21. Therefore the issues are:

(1) What are the respective roles of the Head of Defence Office and the Registrar in respect of the appointment of a person assisting counsel?

³¹ Defence Office Response, para. 6.

³² Rule 58(A)(v) STL RPE.

³³ Registry Submission, para. 39.

³⁴ See Arts 21, 28 STL St.



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- (2) Was the Head of Defence Office entitled to appoint Dr Nashabe as a Local Resource Person assisting counsel?
- (3) Was the Registrar entitled to withhold approval to such appointment and thus to issue his decision of 27 July 2012?
- (4) What decision should now be made by me as President?

II. The scheme of the Statute

22. In addition to the Chambers, the Statute establishes three other organs, the heads of each being appointed by the United Nations Secretary-General: the Office of the Prosecutor, the Defence Office, and the Registry. Under Article 11 of the Statute, the task of investigation and prosecution is that of the Prosecutor. Article 13 provides that the task of protecting the rights of the accused and of providing support and assistance to defence counsel and persons entitled to legal assistance is that of the Head of Defence Office. And Article 12 indicates that the task of administering and servicing the Tribunal, including its funds, is that of the Registrar.

23. However, the Statute does not subordinate the Prosecutor, the Head of Defence Office or the Registrar to either of the others. Rather it allocates separate functions to each, plainly in the expectation that where their respective functions come into potential collision there will be consultation and where necessary resolution either administratively by the President under Article 10 of the Statute or by a Chamber acting judicially.

24. It should be stressed that, while there are similarities between the Tribunal and other international or “hybrid” courts and tribunals, our structure mandated by the Statute, adopted through the United Nations Security Council Resolution 1757(2007) under Chapter VII of the United Nations Charter, is different from the others because of the establishment of the Defence Office as a separate organ. This important structural change assists delivery of the right of the accused both to a fair trial and to equality in terms of Article 16 of the Statute. Its creation does limit somewhat the purview of the Registrar’s functions, but also places heavy burdens on the



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Defence Office, which must conduct itself as a careful manager attentive to the broader interests of the Tribunal.

III. Role of the President

25. The President has no judicial role save as a member of the Appeals Chamber. As the Head of Defence Office agrees, I must construe his request as asking the President to exercise administrative authority under Articles 10(1) and 12(1) of the Statute and Rule 32(C) of the Rules of Procedure and Evidence which:

- (1) make the President responsible for the effective functioning of the Tribunal and the good administration of justice;
- (2) place the responsibility of the Registry for the administration and servicing of the Tribunal under the authority of the President;
- (3) require the President to supervise the activities of the Registry.³⁵

26. That raises the question of what approach I am to take. The Registrar submitted I should adopt the practice of other international courts and tribunals according to which administrative decisions are subject to a test of reasonableness³⁶ and so should quash the Registrar's administrative decision only if it reached a conclusion which no sensible person who has properly applied their mind to the issue could have reached.³⁷ Such approach is wholly

³⁵ Art. 10(1) STL St. provides: "The President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice." Art. 12(1) STL St. provides: "Under the authority of the President of the Special Tribunal, the Registry shall be responsible for the administration and servicing of the Tribunal." Rule 32(C) of the Rules provides: "[The President] shall supervise the activities of the Registry."

³⁶ Registry Submission, paras 22-26; *see also* Prosecution Submissions, para. 4.

³⁷ *See, e.g.*, ICTY, *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Request for Review of Decision on Privileged Telephone Calls, 23 March 2012, paras 4-5; ICTR, *The Prosecutor v. Siméon Nchamihigo*, ICTR-2001-63-1, The President's Decision on Siméon Nchamihigo's Appeal Against the Registrar's Decision Denying the Request for the Withdrawal of Lead Counsel, 12 September 2003, p. 5; ICC, *The Prosecutor v Joseph Kony et al*, ICC-02/04-01/05-378, Reasons for the Decision on the Application of Mr Jens Dieckmann of 28 October 2008 for judicial review of his appointment by the Registrar as defence counsel, in accordance with the decision of Pre-Trial Chamber II of 21 October 2008, 10 March 2009, paras 29-33.



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appropriate in cases of judicial review where a non-expert court is called upon to review the legality of the decision of an expert decision-maker. But as I wrote in my separate and partially dissenting opinion on the legality challenges to the Tribunal,³⁸ a reviewing body must select the method of review appropriate to the particular class of case in the light of a variety of factors. In the present case these include:

- (1) the architecture of the Statute, which shares authority among (here) three senior officers, each individually appointed by the United Nations Secretary-General – the Head of Defence Office, the Registrar and the President;
- (2) the fact that there is a state of *impasse* between the Head of Defence Office and the Registrar which must be resolved.

27. I do not agree that the President may not review the Registrar's present decision unless it can be called "irrational/unreasonable," which is one of the familiar criteria for judicial review. Such approach may be appropriate if:

- i) this was the sole decision so there was no collision with a competing decision of the Head of Defence Office; and
- ii) he possessed special expertise *relevant to the present decision* that is not shared by either the Head of Defence Office or the President. In other respects the President would defer to the Registrar: he is, for example, expert in matters of administration and finance with unparalleled ability to weigh competing demands for funds within a large and complex organization.

28. Here the Head of Defence Office has decided that Dr Nashabe should be retained and the Registrar has said he should not. In terms of what I call the architecture and scheme of the Statute neither has authority over the other. The President has certain authority in respect of the

³⁸ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR90.1, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, Separate and Partially Dissenting Opinion of Judge Baragwanath, para. 72.



Registry under Article 12(1) of the Statute and Rule 32 of the Rules and must under Article 10 of the Statute have implicit authority to resolve this demarcation dispute according to his evaluation of what is legally and factually the best decision.

29. That is because it is the President who has been given by Article 10(1) “responsibility for [the Tribunal’s] effective functioning and the good administration of justice”. Certainly when acting administratively I must take care not to act beyond the administrative function and to leave judicial functions to Chambers.

IV. Discussion of principles

A. Preliminary observation

30. As a preliminary matter, I emphasize for future reference that it would be prudent for any organ which perceives the possibility of disagreement with another to raise the issue with that other before embarking on formal dispute resolution procedures. The Senior Management Board, established by Rule 38 of the Rules, and informal meetings may be productive avenues of solving disagreements. In the event of stalemate, the matter may be referred informally to the President, who, in the exercise of his functions under Article 10 of the Statute, may be regarded as the arbiter of intra-organ disputes. Since, in the current circumstances, the formal path has been selected it must be followed to conclusion.

B. The decision-maker

31. With rare exceptions, generally regarded as anomalous, there is no such thing as an unfettered power. All power must be exercised both for a proper purpose and within the limits of the instrument conferring it. The Registrar may no more control substantive decisions of the Prosecutor or the Head of Defence Office simply because he has authority to expend Tribunal funds than they may assert unlimited power of expenditure. Beyond the strict confines of (in the case at hand) financial and security matters interpreted narrowly, which fall squarely under his purview as the organ responsible for administering and servicing the Tribunal under the authority



of the President, the Registrar is required to implement decisions which other organs are mandated to take.

32. In the particular case of “the appointment of the Office staff” of the Defence Office, Article 13 of the Statute *specifically* confides the decision to the Head of Defence Office. While Article 4 of the Annex to Security Council Resolution 1757 conferred on the Registrar a *general* responsibility “for the recruitment and administration of all *support staff*”,³⁹ the Registrar acknowledged that Article 13 of the Statute confers on the Head of Defence Office the task of appointing Defence Office staff⁴⁰ and that Article 13 of the Legal Aid Policy gives decision-making authority in the assignment of consultants to the Head of the Legal Aid Unit, a staff member of the Defence Office.⁴¹ The difference between the Head of Defence Office and the Registrar resolves into the issue of alleged risk to the Tribunal and others, for which he contends and which the Head of Defence Office disputes.

33. There can be no doubt that the Statute of the Tribunal not only permits but requires protection of various interests. Article 12(4), for instance, requires the Registrar to provide measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Article 28 requires the judges, when adopting Rules of Procedure and Evidence, to be guided by the Lebanese Code of Criminal Procedure and by other reference materials reflecting the highest standards of international criminal procedure. The Rules made under Article 28 of the Statute contain elaborate protection for confidentiality of certain parties, especially victims and witnesses, and of certain information.⁴²

³⁹ Emphasis added.

⁴⁰ Hearing of 17 December 2012, pp. 6-8.

⁴¹ Annex B to the Request for Review uses the term “assignment” in reference to the retainer of Dr Nashabe.

⁴² In the *El Sayed* matter, the Appeals Chamber repeatedly emphasized the need to balance Mr El Sayed’s right to access information against the need to *inter alia* protect victims and witnesses and the confidentiality of ongoing investigations. See STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, para. 69; STL, *In the matter of El Sayed*, CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011, para. 50; STL, *In the matter of El Sayed*, CH/AC/2011/02, Order Allowing in Part and Dismissing in Part the Appeal by the



34. Therefore, any recruitment process at the Tribunal must take into account these elements and *carte blanche* to receive confidential information may not be given save to a recipient who is demonstrably able and willing to maintain confidentiality. Thus, proper recruitment procedures require a discerning and effective assessment of security threats and other risks. This is performed for every person who is employed by, or provides services to, the Tribunal.

35. In the present context, the decision-making authority with respect to the assignment of persons assisting counsel, such as a Local Resource Person, lies with the Head of Defence Office. It is he who must accept the responsibility for such assignment and its consequences. However, the organ which in practice conducts the threat and risk assessments is the Registry. There was no evidence of a request by the Defence Office to the Registry to perform such a check. Moreover, the Registrar may take steps to challenge any conduct of the Head of Defence Office which he considers infringes financial rules and/or the security of the Tribunal or third parties. One can understand the Registrar's refusing to countenance an obvious threat to confidentiality by declining, pending definitive determination, to make himself party to it by providing funds for the purpose. But the Registrar is not a censor of the Head of Defence Office and in the event of a dispute that cannot be resolved by agreement it is the Chambers and, in the present context on the basis of the decision of the Pre-Trial Judge, the President who must determine whether the challenge is sustained.⁴³

Prosecutor Against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents, 7 October 2011, para. 34.

⁴³ I note the Registrar's reference to the Tribunal's Financial Regulations and Rules in para. 49 of the Registry Submission, which *inter alia* regulate the disbursement of Tribunal's funds. While they are important they cannot override the provisions of the Statute and must be interpreted in accordance with it.



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C. The engagement of Dr Nashabe

1. Dr Nashabe's conduct

a) Dr Nashabe's criticism of the Tribunal

36. First, I do not accept the contention of the Registrar that to have been a critic of the Tribunal disqualifies the retainer of Dr Nashabe.⁴⁴ He is entitled to express his opinions of the Tribunal and they cannot be used as an argument against his retainer by the Head of Defence Office, not as an employee (who as a Tribunal staff member would owe it a single-minded duty of fidelity), but as a consultant who remains outside the institution. Freedom of expression is guaranteed at both international and domestic levels. In Article 13, the Lebanese Constitution provides: "The freedom to express one's opinion orally or in writing, the freedom of the press, the freedom of assembly, and the freedom of association shall be guaranteed within the limits established by law." This Article is also a reflection of the principle of freedom of speech contained in Article 19 of the Universal Declaration of Human Rights, also referred to in the Preamble of the Lebanese Constitution.

37. The law's approach to freedom of expression of public institutions including the courts and this Tribunal was classically stated by Lord Atkin:

[...] The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.⁴⁵

b) Dr Nashabe's publication of confidential information

38. The Registrar's arguments in relation to Dr Nashabe's violation of a court order to protect confidential information are serious. The Head of Defence Office argues that the absence of

⁴⁴ See Registry Response, para 10 ("Furthermore, he has also published several articles that appear to have been maliciously written with the purpose of undermining the legitimate work of the Tribunal.")

⁴⁵ UK, Privy Council, *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335.



contempt proceedings against Dr Nashabe in this respect suggests that neither the interests of the Tribunal have been adversely affected, nor has Dr Nashabe wilfully interfered in the administration of justice.

39. Because it is not my present role to evaluate Dr Nashabe's conduct I make no comment upon it beyond the fact, acknowledged by the Head of Defence Office, that there is *prima facie* evidence of breach of the order. Because it could signify a preparedness to disregard without justification a court order made to protect confidentiality, I find that the Registrar was correct in principle to adopt a cautious approach to that event.

40. It follows that at this stage it would have been imprudent and thus contrary to the presumed intention of the Statute simply to authorize the retainer of Dr Nashabe to perform without limit the tasks which might be entrusted to, for instance, an investigator who was free of any such allegation.

41. On the other hand, for the Registrar to impose a total ban of any involvement in the Defence case of a Local Resource Person in whom the Head of Defence Office has confidence went too far. Whatever the true characterization of Dr Nashabe's publication of the confidential information, it is a long stride to assert that such conduct disqualifies him from every kind of role as a Local Resource Person.

42. What is contemplated in the framework proposed by the Defence Office is that he will:

- Provide information concerning factual areas of interest;
- Alert counsel to any evidentiary material that counsel may need to collect;
- *Identify* and suggest (potential) witnesses to counsel;
- Cross-reference and summarize relevant factual materials either *provided by counsel* or publicly available;
- Produce reports and memoranda further to the above activities; and



- *Perform any other relevant duties as instructed by counsel.*⁴⁶

Apart from the parts emphasized above,⁴⁷ none of these entails receipt by Dr Nashabe of confidential information. And there is no allegation of conduct possibly disqualifying him from being a supplier, as distinct from recipient, of information.

43. Insofar as the Registrar seems to argue that employment of Dr Nashabe in the light of his violation of the Pre-Trial Judge's order would bring the Tribunal into disrepute,⁴⁸ I find that as long as the necessary safeguards are in place—in particular ensuring that Dr Nashabe gains no access to confidential information as set out below—this fear is speculative and unwarranted.

2. Dr Nashabe's retainer

44. The proposed framework, including the tasks referred to above, entails some form of investigative work together with access to information provided by the Tribunal. In the light of the *prima facie* evidence related to the disclosure of confidential information, it is appropriate to exclude these tasks unless and until a Chamber orders otherwise. I do not see however anything that would prevent appointment of Dr Nashabe to assist Defence counsel on the basis of the funding provided to them for this purpose under the Legal Aid Policy. In this capacity, he would be treated as a third party vis-à-vis the Tribunal's premises and confidential information (which could be provided to him if necessary with the consent of a Judge or Chamber), but would be able to provide relevant information for the benefit of the accused.

45. These conditions appear consistent with the hiring of an expert consultant under Article 13 of the Legal Aid Policy. Under this provision, the Head of the Legal Aid Unit must be satisfied that the expert consultant is suitable for appointment as an expert in the light of his proposed assignment. In this context, I note that the proposed framework did not foresee that the

⁴⁶ Request for Review, Annex D.

⁴⁷ - Identify (potential) witnesses;

- Cross-reference and summarize relevant factual materials [...] provided by counsel;

- Perform any other relevant duties as instructed by counsel.

⁴⁸ Registry Submission, para. 48.



Tribunal would enter in a contract with Dr Nashabe. Rather it would be lead counsel who would contract with him. Moreover, I note lead counsel's responsibility to protect the Tribunal's confidential information in this regard. For instance, paragraph 5 of the Code of Professional Conduct for Counsel Appearing Before the Tribunal states that counsel shall "protect the confidentiality of evidence and proceedings identified as such by the Tribunal" and that, 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."⁴⁹ These provisions may be said to apply to the relation between counsel and expert consultants.

46. I add out of caution that I make no comment on whether Dr Nashabe will or could be called as an expert witness. That will be a matter for counsel and the relevant Chamber.

47. Care must of course be exercised when disbursing substantial amounts of public money. In this case, the proposed framework envisaged up to 8,850 Euros per month of fees to be received by Dr Nashabe. The Head of Defence Office has not shown evidence that a careful procedure was followed to justify such a substantial disbursement. It should do so before deciding on any assignment of Dr Nashabe.

48. It is of course appropriate to remunerate the work of a person used by Defence teams to prepare their case. In the present circumstances, and on the basis of the submissions of the parties, Dr Nashabe should, if his services are indeed considered necessary by counsel, be paid with the financial resources provided by the Tribunal for highly trained individuals with many years of relevant experience pursuant to Article 13.9 and 13.10 of the Legal Aid Policy for the Defence.

⁴⁹ STL, Code of Professional Conduct for Counsel Appearing Before the Tribunal, 28 February 2011, paragraph 5 under *Professional Conduct*



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DISPOSITION**FOR THESE REASONS;****I**

QUASH the Registrar's Decision of 27 July 2012 denying appointment of Dr Omar Nashabe as a Local Resource Person;

ORDER that the Head of the Defence Office may, if requested by Defence counsel, and taking into account, among other factors, security and financial constraints, appoint Dr Omar Nashabe under the following conditions:

1. Dr. Nashabe may provide the following support to Defence teams:
 - i. Provide information concerning factual areas of interest;
 - ii. Alert counsel to any evidentiary material that they may need to collect;
 - iii. Suggest (potential) witnesses to counsel;
 - iv. Cross-reference and summarize relevant publicly available factual materials;
 - v. Produce reports and memoranda further to the above activities.
2. Payment to Dr Nashabe shall be provided by counsel for the Defence from the allotment for experts pursuant to Article 13.9 and 13.10 of the Legal Aid Policy for the Defence, under their authority and responsibility, on the basis of Dr Nashabe's actual contribution to the presentation of their case and within the financial constraints discussed above;
3. Dr. Nashabe shall be treated as a member of the public for the purposes of access to the premises of the Tribunal and information thereof, and pending any contrary decision of a Judge or Chamber, provision of confidential information shall not be



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granted to him unless ordered by a Judge or Chamber, as appropriate, upon reasoned request by counsel;⁵⁰

4. Dr Nashabe shall not use, disclose, or otherwise make accessible to others any information of which he has become aware during the course of his assignment with Defence teams, even after termination of his appointment.

ORDER the Registrar to implement the decision of the Head of Defence Office taken in accordance with the above guidelines.

REMINDE counsel that they are responsible for conduct violating the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, as well as any relevant judicial order, by members of the defence team under their supervision.⁵¹

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

Dated 21 December 2012,

Leidschendam, the Netherlands

Judge David Baragwanath
President



⁵⁰ See, *mutatis mutandis*, Pre-Trial Judge's Decision Relating to the Prosecution Request Seeking measures for Non-Dissemination of Material of 2 May 2012, 25 May 2012.

⁵¹ Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, STL/CC/2012/03, 14 December 2012, Article 6.