SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRESIDENT

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

Before: **Judge David Baragwanath, President**

Registrar: **Mr Herman von Hebel**

Date: **27 March 2013**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

DECISION ON THE REGISTRY APPLICATION PURSUANT TO RULE 48(C) SEEKING CLARIFICATION AND RELIEF REGARDING THE PRESIDENT'S DECISION OF 21 DECEMBER 2012

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux

Registrar:
Mr Herman von Hebel

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

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

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

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

INTRODUCTION

1. Acting as President,[1] by decision issued on 21 December 2012[2] ("Decision of 21 December 2012") I quashed a determination of the Registrar which purported to override the decision of the Head of Defence Office to have Dr Omar Nashabe retained as a Defence expert "Local Resource Person" in Lebanon. I ordered the Registrar to implement the decision of the Head of Defence in accordance with guidelines contained in the Decision of 21 December 2012. On 11 January 2013 the Head of Defence Office[3] assigned Dr Nashabe as an "Expert Consultant" to carry out the work for which the retainer had been sought, namely to assist Defence Counsel in their preparation for the forthcoming trial *in absentia*. On 29 January 2013, Dr Nashabe signed a contract for his retainer by Defence Counsel.

2. By application of 1 March 2013 the Registrar in reliance on Rule 48(C) sought "clarification and relief" related to the Decision of 21 December 2012.[4] He contended in effect:

> (i) The Decision of 21 December 2012 required a formal request by Defence Counsel to have Dr Nashabe assigned as an expert consultant, rather than as a local resource person, so the assignment did not conform with the Decision of 21 December 2012.
>
> (ii) It required the Defence Office to request the Registry to conduct a background and security check of Dr Nashabe before his retainer by Defence Counsel.
>
> (iii) It required the Defence Office to demonstrate that the expert fee had been justified on the basis of a careful procedure.

[1] *See* Arts 10(1), 12(1) STL St.

[2] STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/PRES, Decision on the Head of Defence Office Request for Review of the Registrar's Decision Relating to the Assignment of a Local Resource Person, 21 December 2012 ("Decision of 21 December 2012"). All further references to filings and decisions relate to this case number unless otherwise stated.

[3] Acting under Art. 22(B) of the Directive on the Assignment of Defence Counsel, STL/BD/2009/03/REV.2, as amended 10 November 2010. The Directive was subsequently amended and renamed (Directive on the Appointment and Assignment of Defence Counsel, STL/BD/2009/03/REV.3, as amended 18 March 2013). However, the relevant provisions have not changed in substance.

[4] Registry Submission Pursuant to Rule 48(C) Seeking Clarification and Relief Regarding the President's Decision of 21 December 2012, Confidential, 1 March 2013 ("Registry Submission on Clarification and Relief"), para. 40 (a public redacted version was filed on 8 March 2013).

(iv) It required the Defence Office to pay Dr Nashabe from the "expert allotment" of the Legal Aid Policy of the Defence, and not from the General Temporary Assistance fund reserved for persons assisting counsel.

(v) Dr Nashabe, if assigned as an expert consultant, should be provided only with the privileges, immunities and facilities afforded to an expert, and not to those enjoyed by an employee.

3. The Defence Office and Defence Counsel deny that "clarification and relief" are required and challenge the admissibility of the Registry's request as unauthorized, unnecessary and unjustified.[5]

4. In the Decision of 21 December 2012, I explained the respective roles of the Registrar and the Head of Defence, and emphasized that the establishment of the Defence Office as a separate organ "assists delivery of the right of the accused both to a fair trial and to equality in terms of Article 16 of the Statute", and "does limit somewhat the purview of the Registrar's functions, but also places heavy burdens on the Defence Office, which must conduct itself as a careful manager attentive to the broader interests of the Tribunal."[6]

5. Because of the great importance of the continuing relationships among the persons affected by this decision and the need to define the boundaries of their authority with precision, on 21 March 2013 I conducted an oral hearing to afford counsel the opportunity to respond to my provisional views. That practice, which in some jurisdictions is performed by the provision to counsel of a draft of the proposed decision, has the advantage of ensuing that no significant point has been overlooked. I have reserved for further submissions, and will deliver a separate

[5] *Mémoire en exception d'irrecevabilité*, 7 March 2013 ("Defence Office Motion of Inadmissibility of 7 March"), para. 9 (a public redacted version was filed on the same day); Additional Brief from the Defence Office Subsequent to the Order of the President of 7 March 2013, Public with confidential Annexes A, B and C, 13 March 2013 ("Defence Office Submission of 13 March"), paras 7-13; *Réponse à la requête du Greffier en date du 1er mars 2013*, 14 March 2013 ("Badreddine and Oneissi Response"), paras 3, 7; Sabra Response to Registry Submission Pursuant to Rule 48(C) Seeking Clarification and Relief Regarding the President's Decision of 21 December 2012, 14 March 2013 ("Sabra Response"), paras 2, 14; Ayyash Joinder in Defence and Defence Office Submissions Pursuant to Scheduling Order of 7 March 2013, 14 March 2013 ("Ayyash Response"), para. 2.

[6] Decision of 21 December 2012, para. 24.

decision, on the question whether an interim order for confidentiality made in respect of part of the transcript should be discharged, amended or confirmed.

6. The Tribunal is charged with delivering to the Parties and to the people of Lebanon justice performed according to the highest standards of international criminal law **in a manner that is both fair and expeditious**. As to that I stated:

> The present issue was raised in August [2012] 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 expeditiously 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*.[7]

That is what the Decision of 21 December 2012 sought to do.

ADMISSIBILITY OF THE APPLICATION

7. The Head of Defence challenged the admissibility of the Registrar's application on two grounds: (i) the Decision of 21 December 2012 has the force of *res judicata*; and (ii) the Decision of 21 December 2012 has been implemented by both Parties.

8. Implicitly, according to the Registrar, the President, being "responsible for the effective functioning of the Tribunal and the good administration of Justice" (Article 10(1) of the Statute and Rule 32(B) of the Rules of Procedure and Evidence ("Rules" or "Rule")), has an inherent power to interpret his decisions and to supervise their implementation. Furthermore, the Registrar asserts that his application neither challenges the substance of the Decision of 21 December 2012 nor is an appeal against it.[8] Defence Counsel and the Head of the Defence

[7] Decision of 21 December 2012, para. 20.
[8] Registry Submission pursuant to Rule 48(C) in Relation to the President's Scheduling Order of 7 March 2013, 14 March 2013 ("Registry Submission of 14 March"), para. 4.

Office oppose this conclusion.[9] They argue that there is no legal basis for the application and, the Decision of 21 December 2012 being final, it cannot be challenged in any way.

9. The absence of a specific rule in the Rules of Procedure and Evidence on clarification or interpretation of decisions is not necessarily a bar to the existence of such a power. Rule 3(A)(iii) and (iv) stipulates that the Rules shall be interpreted in a manner consonant with the spirit of the Statute and "the general principles of international criminal law and procedure and, as appropriate, the Lebanese Code of Criminal Procedure".[10]

10. As to international practice, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court ("ICC") have each admitted requests for clarification in exceptional circumstances where uncertainty or vagueness in a decision needed to be dispelled.[11]

11. The Defence Office cites Article 62 of the Lebanese Code of Civil Procedure. This article provides that objection to admissibility includes objections as to capacity or jurisdiction, or objections on the grounds of *res judicata* or expiration of the time limits of the judicial

[9] Defence Office Motion of Inadmissibility of 7 March, paras 1-2; Sabra Response, para. 2; Badreddine and Oneissi Response, para. 3.

[10] 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. 30; 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, paras 24-26; 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, paras 2, 52, 55, 60, 70.

[11] *See* ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Decision on "Prosecution's Preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadžihasanović, Alagić and Kubura of 24 January 2003, 23 May 2003, para. 6 (holding that "[i]f the terms of [the decision] were in need of clarification [...] a decision of clarification would be in the interests of both parties to the case."); *see* ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Legal Representative's Request for Clarification of the Trial Chamber's 18 January 2008 "Decision on Victims' Participation", 2 June 2008; *see also* ICJ, *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Preliminary Objections, (Nigeria v. Cameroon)*, Judgment, I.C.J. Reports 31 (1999), para. 12 (stating that "[t]he question of the admissibility of requests for interpretation of the Court's judgments needs particular attention because of the need to avoid impairing the finality, and delaying the implementation, of these judgments.")

proceedings, or of expiration of a statute of limitation. Since the Decision of 21 December 2012 is final in this matter, the Defence Office submits it is unchallengeable.

12. But Article 427 of the Lebanese Code of Criminal Procedure provides that "[a]ny request for interpretation in relation to a judgment shall fall under the jurisdiction of the court that delivered it. It shall rule thereon after consulting the Public Prosecutor's Office." Lebanese public policy, which is germane to the interpretation of Article 427, is also illustrated by Article 562 of the Lebanese Code of Civil Procedure which states that "the Parties may request the Court which issued the judgment to explain any ambiguity or imprecision it may contain, unless the judgment has been challenged in any way". The rationale for these provisions is that a request for interpretation is *not* challenging the previous decision, but is rather seeking a better understanding as to its import and implementation.

13. The Tribunal's Pre-Trial Judge, seized with a request for clarification,[12] has essentially adopted the same approach.[13]

14. To justify the expenditure of time, money and effort on an application for clarification there must be both uncertainty as to the meaning or the scope of the decision; and need to resolve it. The Criminal Chamber in the Lebanese Court of Cassation has observed that "interpretation would be necessary and the request admissible when a decision contains an ambiguity that renders its implementation impossible or when its operative part contains a confusion that renders the understanding of a Chamber's intention difficult". [14] While the Defence further submits that the Decision of 21 December 2012 has been partly implemented by the parties to the dispute[15] and therefore does not require clarification, in principle a request for interpretation may legitimately be raised at the implementation stage. The Civil Chamber in the Court of Appeals of

[12] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PTJ, Prosecutor's Request for Clarification on the Scope of the Order by the Pre-Trial Judge dated 21 September 2011, 7 October 2011.
[13] STL, *Prosecutor v Ayyash et al.*, STL-11-01/I/PTJ, Order Relating to the Prosecutor's Request for Clarification of the Order of 21 September 2011 to Make Public the Prosecutor's Submissions Concerning the *Ayyash et al* Case, 13 October 2011
[14] Lebanon, Court of Cassation, Criminal Chamber 3, Judgment No. 94/2 (13 January 1994).
[15] Defence Office Motion of Inadmissibility of 7 March, paras 7, 9.

Beirut has held that ambiguity in a decision may appear not just at the beginning of the implementation but also at any time during the application of the decision.[16]

15. A decision on interpretation cannot result in the amendment of the rights and obligations of the Parties as they arise from the original decision.[17]

16. In order to make a finding on whether the Decision of 21 December 2012 requires interpretation in whole or in part, I therefore need to engage with the arguments raised by the Registrar in his application and submissions to which Defence counsel and the Defence Office have responded.

THE ISSUES ADVANCED IN THE REGISTRAR'S APPLICATION

(i) "The Decision of 21 December 2012 required a formal request by Defence Counsel to have Dr Nashabe assigned as an expert consultant, rather than as a local resource person, so the assignment did not conform with the Decision of 21 December 2012."

17. Were it not for the unusual facts mentioned at paragraph 20 below, I would accept the Defence submission that a negative answer is obvious and there can be no basis for seeking clarification of this aspect of the Decision of 21 December 2012. Like any other document, the assignment decision of the Head of Defence is to be read as a whole. It begins in paragraph 1 with a recital of the request by Defence counsel for assignment of Dr Nashabe "as a Local Resource Person". Then in paragraph 4 it notes my Decision of 21 December 2012 which at paragraph 5 is correctly said to permit the Head of Defence Office "to appoint Dr Omar Nashabe". After that and other contextual references the document concludes:

[16] Lebanon, Appeals Chamber of Beirut, Civil Chamber 9, Decision No 2010/308 (11 March 2010)
[17] Lebanon, Court of Cassation, First Civil Chamber, Judgment No. 2009/47 (9 July 2009); Lebanon, Court of Cassation, Civil Chamber 5, Judgment No. 2000/150 (30 November 2000); France, Court of Cassation, Civil Chamber 2, *No. de pourvoi:* 11-26344, (6 December 2012); See also Art. 793 of the Belgian Judicial Code that stipulates: «*Le juge qui a rendu une décision obscure ou ambiguë peut l'interpréter, sans cependant étendre, restreindre ou modifier les droits qu'elle a consacrés*».

Decision

[...] For the above reasons and in light of the President's decision [...] I hereby assign Dr Omar Nashabe [...] as an Expert Consultant.

18. It is plain from the tenor of the Decision of 21 December 2012 that it did *not* adopt "local resource person" as a term of art connoting that Dr Nashabe's role was as a "team member" in the sense of an insider, such as a legal assistant. On the contrary, paragraph 36 makes very clear that he is not "an employee (who as a Tribunal staff member would owe it a single-minded duty of fidelity), but ... a consultant who remains outside the institution." It is because he is to be treated as an outsider that, despite his criticism of the Tribunal, he was not excluded from retainer. Likewise as paragraph 39 records, there is *prima facie* evidence that he breached a confidentiality order of the Tribunal. For that reason I declined to grant him access to confidential information or to the premises of the Tribunal, but explicitly stated that he should be treated as a member of the public. On no basis could the Decision of 21 December 2012 be read as treating him as an insider, and in particular an investigator (which is what the Registrar considers the Defence Office is attempting to do).

19. Read in context there is no inconsistency between Dr Nashabe's being, *as an outsider*, concurrently a "local resource person" and an "expert consultant". The latter is a class of which the former is a specific instance. The Defence sought the latter and received it – he is an outsider who as a "local resource person" is to *provide* local information but is not permitted either to *receive* confidential information or to enter Tribunal premises.

20. But the Registrar advises that at the ICC the term "local resource persons" is used by defence teams as a term of art to embrace persons who conduct investigative duties, not as expert-consultants, but as less experienced investigators and as part of the defence teams.[18] Use of common expressions as terms of art is undesirable, as it is apt to confuse. Moreover, the Legal Services Contract for Expert Consultant made between Lead Defence Counsel and Dr Nashabe

[18] Registry Submission on Clarification and Relief, para. 21.

explicitly calls Dr Nashabe "part of the defence team for the accused",[19] which is inconsistent with his status as "outsider" described in my Decision of 21 December 2012.[20] To avoid any risk of confusion, I am prepared to clarify my decision, and state that Dr Nashabe should only be considered an expert consultant, a *provider* of information rather than an investigator or a "local resource person" in the ICC sense.

(ii) The Decision of 21 December 2012 required the Defence Office to request the Registry to conduct a background and security check of Dr Nashabe before his retainer by Defence Counsel.

21. As to the second issue, the whole hearing before me, including oral argument, was all about security and the Registrar's specific contention that Dr Nashabe presented a security risk. The point is not one requiring clarification. But I will explain why.

22. Paragraph 10 of the Decision of 21 December 2012 recalled as among the Registrar's grounds for resisting Dr Nashabe's appointment "[...] an internal Registry risk assessment adverse to Dr Nashabe". I dealt with that particular risk assessment in paragraph 11 of the Decision of 21 December 2012:

> "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 Court holding that in analogous circumstances fairness of process required disclosure of any material adverse to the opposing party. 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. He declined to make them available in the present case. 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."

23. In short, a security check had already been performed by the Registry but, for reasons which were not explained, the Registrar elected not to show it to me. I accordingly made my

[19] Defence Office Submission of 13 March, Annex C, p. 3, item 6.2. The import of this status is further discussed below, at (v).
[20] *See also* Defence Office Submission of 13 March, Annex A, p. 3 ("At a plain reading, the President has clearly intended for Mr. Nashabe to be a member of the defence team").

decision on the material of which I was seized. I have noted that, because of the *prima facie* evidence that Dr Nashabe had deliberately infringed a suppression order, I declined to permit him to receive confidential material or to enter the premises of the Tribunal. This is the most important consideration in this respect, since – as I discussed above – Dr Nashabe should be treated as a member of the public. But, again, because his role was solely to provide information to the Defence, rather than to receive it from the Tribunal, there was no security reason to override the decision of the Head of Defence to permit Dr Nashabe's retainer. His work and the need to avoid exposure to potentially sensitive material are under the responsibility of Defence Counsel, who would be held to account if anything were to happen.[21]

24. Counsel for the Registry noted that the assignment decision was made by the Head of Defence on 11 January 2013 and said "we understand if no further checks were conducted on Mr Nashabe [at that stage]." She emphasized subsequent events in which however there is no evidence of involvement of Dr Nashabe.

25. But at that stage the Decision of 21 December 2012 had already been delivered and acted upon by the retainer of Dr Nashabe and his performance of work.

26. That is not to say that the Registrar, within his authority and duties as regards security,[22] cannot *proprio motu* initiate additional checks or threat assessments if he apprehends a breach of security. In such a case he would submit his conclusions and supporting evidence to the Head of the Defence Office and/or to the competent Judge or Chamber for consideration of whether the present regime should be judicially amended. He might perhaps apply to the President, in compliance with principles of natural justice, to amend the Decision of 21 December 2012.

27. As noted at paragraph 14 above, a request for interpretation may legitimately be raised at the implementation stage. But the remedy for meeting a change of circumstances is not to seek "clarification" of an aspect of the Decision of 21 December 2012, which is perfectly clear.

[21] Decision of 21 December 2012, para. 45 and Disposition (at p. 19).
[22] Decision of 21 December 2012, para. 31.

(iii) The Decision of 21 December 2012 required the Defence Office to demonstrate that the expert fee had been justified on the basis of a careful procedure.

28. The third issue relates to paragraph 47 of the Decision of 21 December 2012 stating that:

> "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."

The Registrar submits (a) that the Defence Office has not demonstrated that its proposed expert fee was justified,[23] and that (b) since Dr Nashabe is allowed to work up to 22 days per month, the total amount of money he might end up receiving is similar to what he would get as a staff member.[24]

29. The Decision of 21 December 2012 made a simple determination that Dr Nashabe should be hired as an expert consultant pursuant to Section 13.9 of the Legal Aid Policy and paid "with the financial resources provided by the Tribunal for highly trained individuals with many years of relevant experience".[25]

30. The Head of the Legal Aid Unit advises:

> "Following the President's decision, the Legal Aid Unit conducted a comparison of fees used to recruit persons assisting counsel. This showed that a Category B level is reasonable. [...] [T]he Head of Defence Office's assignment decision specifies that the fee shall be in category B. The contract includes a daily fee of € 350, which is well within the limits of said category. It specifies that payment shall be made for a maximum of 22 days per month, for actual work performed.

[23] Registry Submission on Clarification and Relief, para. 29.
[24] Registry Submission on Clarification and Relief, paras 30-31. I note that one of the Annexes filed by the Defence Office (Defence Office Submission of 13 March, Annex A) improperly contains arguments on the merits of this issue which should be contained in his submission (*See* Art. 4 of the Practice Direction on Filings (STL/PD/2010/1/Rev.1, as amended 23 April 2012). Since the Registrar does not in the end pursue the present issue, I will exceptionally consider these arguments but caution the parties against breaching without good cause the directions provided by the Rules and other relevant documents.
[25] Decision of 21 December 2012, paras 45 and 48.

> It should be noted that for the initial SSA contract, the Defence Office proposed a fee of € 8.850 for the retainer of Mr. Nashabe. Notwithstanding the President's decision, the Defence Office notes that the level of that fee was reviewed and agreed by the Registry's Human Resources Section when it implemented the initial SSA contract, in accordance with its own procedures. This review takes into account the experience of the consultant.
>
> It should be noted that Mr Nashabe's fee is subject to taxation. Moreover, this fee excludes any payment for health, dental, and life insurance; social security and disability income protection; retirement benefits, vacation, sick leave, education entitlements etc. This is Mr. Nashabe's individual responsibility."[26]

This establishes that the expert fee has been justified on the basis of a careful procedure.

31. Moreover, I note that Dr Nashabe was hired by the four Defence teams as their common expert consultant. Since he is an expert (and not a member of any one of the four teams), each Defence team could have hired their own expert consultant rather than combining to use only one, thus expending greatly more resources. Dr Nashabe's retainer *for each Defence team* cannot equal 22 days per month, since each team has to agree with the other teams on how his time and expertise needs to be shared. It follows that the Registrar's calculation, according to which the proposed fee is comparable with the fee as a staff member, is misleading.[27]

32. Counsel for the Registry did not seek to offer argument in opposition to this analysis when put to her at the oral hearing. The submissions of the Registrar on this point are without substance.

(iv) The Decision of 21 December 2012 required the Defence Office to pay Dr Nashabe from the "expert allotment" of the Legal Aid Policy of the Defence, and not from the General Temporary Assistance fund reserved for persons assisting counsel.

33. The Registrar complains that the Defence Office has moved funds allocated under General Temporary Assistance ("GTA") funds reserved for persons assisting counsel pursuant to the Legal Aid Policy to pay Dr Nashabe from the "Expert Allotment", thus allegedly defeating

[26] Defence Office Submission of 13 March, Annex A, p. 8-9.
[27] Registry Submission on Clarification and Relief, paras 30-31.

the purpose of the distinction between GTAs and expert consultants.[28] He adds that there are strict provisions on how to transfer funds within the budget of each organ,[29] and that the Defence Office has not shown evidence that a careful procedure was followed to justify such a substantial disbursement of funds.[30]

34. In this respect also there is no need to interpret further my Decision of 21 December 2012. Dr Nashabe should be paid from the funds available for expert consultants;[31] all rules relating to transfer of funds within the budget of each organ must be followed when effectuating such a transfer. Dr Nashabe should be treated as an expert just like any other. The ordinary rules clearly apply.

35. Again, Counsel for the Registry did not seek to offer argument in opposition to this analysis when put to her at the oral hearing.

(v) Dr Nashabe, if assigned as an expert consultant, should be provided only with the privileges, immunities and facilities afforded to an expert, and not to those enjoyed by an employee.

36. This is a new issue, one previously not raised before me when the parties to this litigation made submissions that led to my Decision of 21 December 2012. The Decision made quite clear that Dr Nashabe was not to become an employee of the Tribunal.[32] The Legal Services Contract describes his status as that of an independent contractor.[33] But it also states:

> 6.2 The Contractor shall be considered as part of the defence team [for the four accused], including for the purpose of the application of the "Memorandum of Understanding between the Government of the Lebanese Republic and the Defence Office on the modalities of their cooperation"
>
> 6.3 The contractor shall be furnished with the certificate envisaged in Article 22(2) of the Headquarters Agreement. The Contractor shall only be entitled to those privileges,

[28] Registry Submission on Clarification and Relief, para. 35.
[29] Registry Submission of 14 March, paras 20-22.
[30] Registry Submission on Clarification and Relief, paras 29-31; *see also* Decision of 21 December 2012, para. 47.
[31] Decision of 21 December 2012, para. 48.
[32] Decision of 21 December 2012, paras 36, 44, 45.
[33] Defence Office Submission of 13 March, Annex C, para. 6.1.

immunities and facilities provided to persons assisting counsel under the following instruments:

a) Articles 22 and 33 of the Agreement Between the Kingdom of the Netherlands and the STL concerning the Headquarters of the Special Tribunal for Lebanon;

b) Article 18 of the Memorandum of Understanding between the Government of the Republic of Lebanon and the Special Tribunal for Lebanon concerning the Office of the Special Tribunal in Lebanon; and

c) The Memorandum of Understanding between the Government of the Republic of Lebanon and the Defence Office of the Special Tribunal for Lebanon on the modalities of their cooperation.

37. The Registrar submits that, on the basis of the Decision of 21 December 2012, Dr Nashabe is entitled only to those privileges, immunities and facilities afforded to an expert consultant[34] and not to those of counsel. Such experts are entitled only to privileges and immunities set forth in Article 22 of the Memorandum of Understanding with Lebanon (in the latter country).[35] Dr Nashabe is certainly entitled to such privileges and immunities under my Decision of 21 December 2012, especially paragraphs 36 and 44-45; his contract and other documents should reflect this. He is not expressly entitled to the privileges of Defence counsel provided by Article 18 of the Memorandum of Understanding with Lebanon,[36] unless he falls within the definition of "persons assisting counsel.[37]

38. Does he? Despite the reference in Article 18(3) of the Statute to the Tribunal's Rules they do not shed light on the topic.

39. The issue is one of characterization. That requires me "to seek [a] commonsense solution based on practical considerations".[38]

[34] Registry Submission on Clarification and Relief, paras 36-38.
[35] Memorandum of Understanding between Lebanon and the Special Tribunal of Lebanon concerning the Office of the Special Tribunal for Lebanon, 17 June 2009 ("Memorandum of Understanding with Lebanon").
[36] Art. 18 (2) of the Memorandum of Understanding with Lebanon.
[37] Art. 18 (3) of the Memorandum of Understanding with Lebanon.
[38] United Kingdom, Court of Appeal, *Macmillan Inc v Bishopsgate Trust (No 3)* [1996],1 WLR 387 (2 November 1995), per Staughton LJ, p. 392.

(l) *The terms of the Memorandum of Understanding*

40. Here the practical considerations are:

Experts

(1) Article 22 of the Memorandum of Understanding with Lebanon entitles experts performing functions for the Tribunal to:

(i) unrestricted entry into and exit from Lebanon;

(ii) inviolability of all documents and material relating to the exercise of their Tribunal functions;

(iii) immunity from legal process in respect of words spoken or written and acts performed in the course of their functions for the Tribunal.

Persons assisting counsel

(2) Article 18 of the Memorandum of Understanding with Lebanon entitles Defence counsel and "persons assisting counsel in accordance with the Rules of Procedure and with the permission of the lead counsel" to:

(i) **immunity from personal arrest or detention and from seizure of personal baggage;**

(ii) inviolability of all documents and material relating to the exercise of their Tribunal functions (similar to (1)(ii) above);

(iii) immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in the course of their functions for the Tribunal (similar to (1)(iii) above which refers to "legal process")

(iv) immunity from any immigration restrictions (similar to (1)(i) above).

41. So the essential difference is that "persons assisting counsel in accordance with the Rules of Procedure and with the permission of the lead counsel" have immunity from personal arrest or detention and from seizure of personal baggage; experts do not.

(II) *Policy considerations*

42. Should Dr Nashabe's role be characterized as giving him, or requiring him to receive, such immunity? Immunity of such high order is akin to that conferred on diplomatic agents under the Vienna Convention on Diplomatic Relations, Article 29 (sentence 2) ("He shall not be liable to any form of arrest or detention") and Article 31(1) ("A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State"). He shall also enjoy immunity from its civil and administrative jurisdiction, with irrelevant exceptions.

43. The purpose of both diplomatic immunity and that of counsel and persons assisting counsel is to ensure that persons within narrowly defined professional categories, of such great public importance that they carry a status of absolute trust, can perform their work absolutely free from any interference with their person or their personal baggage.

44. The immunity of counsel is necessarily extended to persons assisting counsel *in their work as counsel*, such as legal officers, interpreters and secretaries whose relationship with the performance of counsel's work is so close that they are to be treated as counsel's *alter ego*; an insider entitled to the same trust and status.[39]

Conclusion

45. Given the Decision of 21 December 2012's conclusion that Dr Nashabe is not to be entrusted with confidential information, he cannot be accorded the insider status required to classify him as within the ambit of a "person assisting counsel" rather than simply as an "expert".

46. Should the Defence consider there is need, in specific circumstances, for additional orders to the Lebanese authorities under UNSC Resolution 1757(2007), Annex, Article 15(1) and (2) in order for counsel to be able properly to discharge their responsibilities, requests in this

[39] Under the Memorandum of Understanding with Lebanon (unlike Art. 25 of the Headquarters Agreement between the United Nations and the Kingdom of the Netherlands) such immunity does not extend to experts.

respect may be filed with the competent Judge or Chamber, for instance under Rule 77(A) of the Rules of Procedure and Evidence.

47. The Registrar succeeds on this new point on which Defence counsel did not seek to be heard orally. It follows that the Legal Services Contract purports to give Dr Nashabe greater protection than the relevant Memorandum of Understanding and the Decision of 21 December 2012 permit.

DISPOSITION

FOR THESE REASONS;

I

ACCEPT as validly filed in relation to Issues i and v the Registry's Application Seeking Clarification and Relief;

DISMISS the arguments of the Registry upon Issues ii-iv;

CLARIFY that:

(1) while Dr Nashabe should be treated as an expert consultant external to the Defence teams; and

(2) for the purposes of the Memorandum of Understanding between Lebanon and the Special Tribunal of Lebanon concerning the Office of the Special Tribunal for Lebanon he is not entitled to the privileges of "persons assisting counsel";

(3) the present ruling does not prevent the Defence from seeking any further judicial order required for the Defence teams to be able properly to discharge their responsibilities;

ORDER the Head of the Defence Office to make the necessary adjustments to the Assignment Decision of 11 January 2013 relating to Dr Nashabe;

ORDER the Registrar to assist the Defence Office in implementing the terms of the present decision as swiftly as possible;

RESERVE judgment on the confidentiality of the oral proceedings before me in the current matter;

REMIND all parties to the proceedings of the obligation to act so as to ensure the fair and expeditious resolution of the matters in dispute.

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

Dated 27 March 2013,

Leidschendam, the Netherlands

Judge David Baragwanath

President