

**THE PRESIDENT**

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

Before: Judge David Baragwanath, President

Acting Registrar: Mr Daryl Mundis

Date: 4 October 2013

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION AND RESCISSION
OF ORDER COMPOSING THE TRIAL CHAMBER**

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

Legal Representatives of Victims:
Mr Peter Haynes
Ms Nada Abdelsater-Abusamra
Mr Mohammad F. Mattar

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



INTRODUCTION

1. I am seized with a motion¹ filed jointly by the Defence in the *Ayyash et al.* case, requesting me to “reconsider and rescind”² my order of 10 September 2013³ in which I re-composed the Trial Chamber.

BACKGROUND

2. After the determination of the United Nations Secretary-General that the Trial Chamber Judges should take office,⁴ President Antonio Cassese first convened the Trial Chamber as of 20 September 2011⁵ pursuant to Article 8 (3) of the Statute of the Special Tribunal for Lebanon (“Statute” and “Tribunal”, respectively).

3. Article 8 (3) of the Statute states that “[a]t the request of the presiding judge of the Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign the alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting”.

4. On the basis of this provision, President Cassese assigned three sitting Judges and two alternate Judges to the Trial Chamber.⁶ The alternate Judges—Judge Walid Akoum and Judge Janet Nosworthy—have thus been required to sit in all hearings and deliberations of the Trial Chamber throughout the past two years.⁷

5. Following the resignation of Judge Robert Roth, Presiding Judge of the Trial Chamber, on 9 September 2013, the four remaining Judges wrote to me that day, requesting that I “take all necessary steps according to Article 8(3) of the Statute of the Tribunal to ensure that the

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, Motion for Reconsideration and Rescission of the President’s “Order on Composition of the Trial Chamber” of 10 September 2013, 23 September 2013 (“Motion”). All further references to filings and decisions relate to this case number unless otherwise stated.

² Motion, para 13.

³ Order on Composition of the Trial Chamber, 10 September 2013 (“Order”).

⁴ See Article 17 (b) of the Annex to UN Security Council Resolution 1757 (2007).

⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I/PRES, Order on Composition of the Trial Chamber, 8 September 2011 (“Order of 8 September 2011”).

⁶ Order of 8 September 2011.

⁷ See Rule 27 of the Rules of Procedure and Evidence (“Rules”).

international Alternate Judge, Judge Janet Nosworthy, is appointed as a Judge of the Trial Chamber”, so as to “allow the Trial Chamber to continue functioning”.⁸

6. Article 10 (1) of the Statute makes the President “responsible for [the Tribunal’s] effective functioning and the good administration of justice”.⁹ Article 16 (4) (c) provides for the accused persons’ right to be tried “without undue delay”. Articles 18 (2) and 28 (2) stress the need for a “fair and expeditious” trial. Article 21 instructs the Tribunal to “take strict measures to prevent any action that may cause unreasonable delay”.

7. Against this clear statutory mandate, I considered in my Order that the Trial Chamber was seized with a number of matters under Rule 89 (E) of the Rules¹⁰ and that the Pre-Trial Judge had set a tentative start date for trial in these proceedings of 13 January 2014.¹¹ I specifically referred to the Trial Chamber being seized by some Defence teams of motions regarding the form of the indictment, *i.e.*, the essential instrument pleading the charges against the accused.¹² In particular, I noted the “vital importance of the Trial Chamber’s work proceeding as efficiently and expeditiously as possible”.¹³

8. I also referred to the fact that the appointment of a new Judge, replacing Judge Nosworthy as the international alternate Judge, falls to the United Nations Secretary-General.¹⁴ This process is not in the hands of the Tribunal, and I was required by the Tribunal’s Statute and Rules to proceed expeditiously and ensure that the Trial Chamber could deal with the matters before it in preparation for trial.

9. In this context, I considered that Article 8 (3) of the Statute can only be read as requiring the President, once the alternate Judges have been appointed “to be present at each stage of trial” (as they were in this case), to then select one of them to “replace a judge if that judge is unable to continue sitting”. There is no discretion for the President to decide whether to effectuate the

⁸ Confidential letter from Judge Janet Nosworthy (Alternate Judge), Judge Walid Akoum (Alternate Judge), Judge Micheline Braidy and Judge David Re to the President, 9 September 2013.

⁹ See also Rule 32 (B) of the Rules. These provisions are in line with similar provisions at various other international criminal tribunals.

¹⁰ Order, p. 2.

¹¹ Order, p. 3.

¹² Order, p. 3.

¹³ Order, p. 3.

¹⁴ See Article 2 (3) (b) of the Annex to UN Security Council Resolution 1757 (2007) and Rule 28 of the Rules.

replacement.¹⁵ Consistent with Article 8 (3) of the Statute, Rule 26 (C) envisages the automatic replacement of a judge—“[i]f a Judge is unable to continue sitting for a long period or permanently, the trial shall continue with the alternate Judge replacing the Judge who is unable to continue sitting”. I thus assigned Judge Nosworthy—the international alternate Judge—to replace Judge Robert Roth (also an international Judge) effective immediately.

DISCUSSION

10. The Defence alleges that my Order assigning the international alternate Judge to replace the Presiding Judge was *ultra vires* the Statute and the Rules and that I should therefore reconsider and rescind it lest it results in an injustice to the four Accused.¹⁶ The Prosecutor responds that this was not the case and that the Motion should be dismissed.¹⁷

11. I first note that neither the Statute nor the Rules foresee that an order of the President composing or re-composing a bench of the Tribunal is open to challenge by the parties.¹⁸ Rule 140 of the Rules, as relied on by the Defence,¹⁹ merely refers to the possibility to reconsider judicial decisions taken by one of the Tribunal’s three Chambers. The President is not a “Chamber” under that Rule. Moreover, my order to re-compose the Trial Chamber was not a judicial decision.

12. I am also not persuaded by the Defence argument that the Motion against my Order can be based on an unwritten inherent authority to reconsider.²⁰ Indeed, the question is not whether such a power exists in the abstract, but whether the administrative decisions that I take pursuant to my responsibilities under Article 10 of the Statute may be challenged by the parties.

13. Apart from the responsibility of coordinating the work of Chambers, Article 10 of the Statute and Rule 32 of the Rules task me with a number of other administrative functions, such

¹⁵ As noted in my Order, the French and Arabic versions of Article 8 (3) of the Statute make it clear that “each stage of trial” may refer to any stage of the proceedings after the Trial Chamber Judges have been convened and the Trial Chamber is seized of judicial matters. I also note the wording of the French version (“*remplacement de tout juge*”).

¹⁶ Motion, para. 1.

¹⁷ Prosecution Response to Motion for Reconsideration and Rescission of the President’s “Order on Composition of the Trial Chamber” of 10 September 2013, 2 October 2013.

¹⁸ Under Rule 25 of the Rules, counsel may apply for the disqualification of a Judge according to the procedures set out in that Rule. However, the present Motion does not challenge the qualification of any of the Judges to sit on the Trial Chamber.

¹⁹ Motion, paras 2-3.

²⁰ See Motion, para. 4.

as issuing Practice Directions addressing detailed aspects of the conduct of proceedings before the Tribunal, representing the Tribunal in international relations, and submitting annual reports to the United Nations Secretary-General and the Government of Lebanon. There is nothing in the Statute or the Rules allowing the parties to remonstrate against my actions in the exercise of these functions.

14. Other international criminal tribunals where the President is required to perform similar functions have consistently upheld the same principle. As noted by the Appeals Chamber of the International Criminal Tribunal for Rwanda, “[t]he composition and re-composition of Trial Chambers by the President is a judicial administrative function, pursuant to the Statute and Rules, formulated for the efficient judicial administrative operation of the Tribunal”.²¹ The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) held that “an order determining the composition of a bench of the Appeals Chamber in a particular case is rendered by the President pursuant to this authority to ‘coordinate the work of the Chambers’ and is thus in essence an administrative matter”.²²

15. Indeed, when deciding a request similar to the present one, the acting President of the ICTY stated that it is “improper for counsel to address the composition of any bench of the Chambers of the International Tribunal”.²³ In sum, the parties may challenge matters of jurisdiction and other preliminary issues, as well as any decision where such right is provided for in the Statute, the Rules or other related instruments—instruments—but the President has no authority to entertain a request for reconsideration or rescission of administrative decisions of the type challenged in this case. I therefore reject the Motion.

²¹ ICTR, *Prosecutor v. Kanyabashi*, ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999 (“*Kanyabashi* Decision”), Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 19; *see also id.* at para. 46; *Kanyabashi* Decision, Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia, para. 19 (holding that the provisions of the ICTR Statute and Rules relating to the assignment of Judges “are all concerned with judicial administration”); *but see* ICC, *Prosecutor v. Katanga et al.*, ICC-01-04-01/07, Decision concerning the Request of Mr Germain Katanga of 14 November 2008 for re-composition of the bench of Trial Chamber II, 21 November 2008 (where the Presidency, under a statutory framework different from that of this Tribunal, entertained a request for the re-composition of the bench because of an alleged lack of necessary qualification of a Judge, but dismissed it on the merits).

²² ICTY, *Prosecutor v. Lukić et al.*, IT-98-32/1-AR11bis.1, Decision on ‘Motion to Disqualify President and Vice-President from Appointing Appeals Chamber and to Disqualify President Judge and Judge Meron from Sitting on Appeals Chamber’, 4 May 2007, p. 1.

²³ ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Order on the Request to the President on the Composition of the Bench of the Appeals Chamber, 12 February 1999.

DISPOSITION

FOR THESE REASONS;

I DISMISS the Motion.

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

Dated 4 October 2013

Leidschendam, the Netherlands



Judge David Baragwanath
President

