

**THE PRESIDING JUDGE OF THE APPEALS CHAMBER**

Case No.: STL-11-01/PT/AC
Before: Judge Ralph Riachy, Presiding
Registrar: Mr Daryl Mundis
Date: 13 November 2013
Original language: English
Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON REQUEST BY DEFENCE FOR MESSRS BADREDDINE AND
ONEISSI FOR AUTHORIZATION TO SEEK RECONSIDERATION OF THE
APPEALS CHAMBER'S DECISION OF 25 OCTOBER 2013**

Prosecutor:
Mr Norman Farrell

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

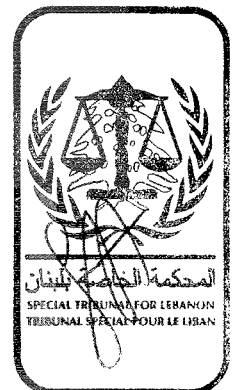
Head of Defence Office:
Mr François Roux

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. In a decision dated 25 October 2013, the Appeals Chamber found an application filed by counsel for Messrs Badreddine and Oneissi against an order of the President inadmissible.¹ It also found the application frivolous and, pursuant to Rule 126 (G) of the Rules of Procedure and Evidence (“Rules”), ordered the Registrar to “withhold payments of fees associated with the production of the Application and the costs thereof”.² Counsel now seek my authorization to file a request for reconsideration of this decision before the Appeals Chamber, pursuant to Rule 140 of the Rules.³ I give such authorization, however, limited in scope as set out below.

DISCUSSION

I. Applicable Law

2. Rule 140 of the Rules states the following:

A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice.

3. I note that the Presiding Judge of the Appeals Chamber elected to recuse himself from the proceedings relating to the Decision for which counsel seeks reconsideration.⁴ Consequently, I exercised the function of Presiding Judge for the purposes of those proceedings and will do so now, given that the matters are related. I also observe that both counsel and the Head of Defence office have made their submissions before me.

4. Rule 140 establishes a bifurcated procedure. A party seeking reconsideration of a decision must first obtain leave of the Presiding Judge to file a reconsideration request. Only if leave is granted may the party file the request before the Chamber. The Presiding Judge is thus

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, Decision on Application by Counsel for Messrs Badreddine and Oneissi Against President’s Order on Composition of the Trial Chamber of 10 September 2013, 25 October 2013 (“Decision”), Disposition. All further references to filings and decisions relate to this case number unless otherwise stated.

² Decision, para. 17, Disposition.

³ Request for Authorisation for Reconsideration of the Decision of the Appeals Chamber of 25 October 2013 (“Request”); *see also* Observations from the Defence Office Relating to the Request for Authorisation for Reconsideration of the Decision of the Appeals Chamber of 25 October 2013, 4 November 2013 (supporting the Request). The Prosecutor informed me that he would not respond to the Request (*see* E-mail of 3 November 2013 to the Legal Officer of the Appeals Chamber, also copied to the Defence).

⁴ Decision, paras 6-8.

given a filtering function to prevent the filing of unwarranted requests. It is his role to undertake a *prima facie* examination of the reconsideration request. If the request is manifestly unfounded, it will be rejected.⁵ My decision is guided by this approach.

5. I also recall the applicable standard for a Chamber to reconsider its own decision; namely, that “reconsideration must remain an exceptional remedy”,⁶ and that “the party seeking reconsideration must show that the decision has resulted in an injustice”, which “[a]t a minimum, [. . .] involves prejudice”.⁷ Such alleged prejudice must be demonstrated on specific grounds, which may include the argument that a decision is “erroneous or [. . .] constituted an abuse of power on the part of the Chamber” or when “new facts or a material change in circumstances” have arisen after the decision is made.⁸

II. Whether leave to seek reconsideration should be granted

6. On a preliminary note, I observe that counsel limit their request to the part of the Decision that ordered the Registrar to withhold payment of the fees associated with their application before the Appeals Chamber.⁹ In particular, counsel do not challenge the Appeals Chamber’s dismissal of their application as inadmissible or the finding that it was frivolous.

7. Counsel first seek permission to file a reconsideration request on the basis that the “Appeals Chamber [. . .] violated the immunity from criminal and civil jurisdiction enjoyed by Counsel for the Defence”, relying on Article 13 of the Document Annexed to Security Council Resolution 1757.¹⁰ I find that the Request is manifestly unfounded in this regard. Under the Document Annexed to Security Council Resolution 1757,¹¹ Defence counsel is granted immunity

⁵ See, e.g., STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Decision Authorising the Badreddine Defence and the Oneissi Defence to File a Request for Reconsideration, 15 May 2012, para. 10; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Decision Authorising the Ayyash Defence and the Sabra Defence to File a Request for Reconsideration, 22 May 2012, para. 6; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, *Décision refusant à la défense de M. Badreddine l’autorisation de déposer une requête en réexamen*, 2 July 2013, para. 11.

⁶ STL, *Prosecutor v. Ayyash et al.*, ST-11-01/PT/AC/R176bis, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2011, para. 23.

⁷ *Id.* at para. 24.

⁸ *Id.* at para. 25.

⁹ Request, para. 1.

¹⁰ Request, para. 2; see also *id.* at paras 6, 17.

¹¹ Contrary to counsel’s argument, this Document, while it was initially the draft of an agreement between Lebanon and the United Nations, is not a treaty. Its provisions were effected through the Security Council’s powers under Chapter VII of the United Nations Charter (see STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1,

vis-à-vis certain actions by the Lebanese authorities. Indeed, Article 13 (1) of the Document mandates the Lebanese government to “ensure that the counsel of a suspect or an accused [. . .] shall not be subjected, *while in Lebanon*, to any measure that may affect the free and independent exercise of his or her functions”.¹² This includes immunity from “criminal or civil jurisdiction”—in Lebanon—“in respect of words spoken or written and acts performed in his or her capacity as counsel”.¹³ However, the order to withhold fees for counsel’s application was not made by the Lebanese authorities but by the Appeals Chamber. Article 13 therefore has no application.

8. Counsel next argue against the *vires* and applicability of Rule 126 (G), which was the legal basis for the Appeals Chamber’s order withholding the fees for the application it found frivolous.¹⁴ Rule 126 (G) states the following:

When a Chamber finds that a motion or other filing is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion or other filing and the costs thereof.

9. I find manifestly unfounded counsel’s first argument that Rule 126 (G) “violates the independence and freedom of the legal profession” as such.¹⁵ Both national jurisdictions¹⁶ and other international tribunals have similar provisions addressing the filing of frivolous or abusive submissions.¹⁷ These provisions are an expression of a court’s inherent power to control the proceedings before it and to reject or otherwise deal with submissions that lack any legal merit and waste the court’s time and resources.¹⁸

10. Counsel next argue that the sanction foreseen in Rule 126 (G) violates principles of equality and non-discrimination, given that the Rule—on its face—concerns only motions or

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, paras 24-31).

¹² Emphasis added.

¹³ Article 13 (2) (b) of the Document Annexed to Security Council Resolution 1757.

¹⁴ Request, paras 2, 7-15.

¹⁵ Request, para. 8.

¹⁶ *See, e.g.*, Criminal Procedure Code, 18 U.S.C.A. § 3162; *cf.* Article 546 of the Lebanese Code of Civil Procedure (applicable to criminal proceedings pursuant to Article 6), which makes counsel liable to pay fees and costs if pursuing abusive litigation.

¹⁷ *See* Rule 73 (D) ICTY RPE; Rule 73 (F) ICTR RPE; Rule 80 (D) MICT RPE, Rule 73 (D) SCSL RPE. While the ICC has no comparable provision, Art. 71 ICC St. generally regulates misconduct before that court (*see also* Rules 171, 172 ICC RPE).

¹⁸ *See* ICTR, *Prosecutor v. Karemera et al.*, ICTR-94-44-PT, Decision on Motion to Vacate Sanctions, 23 February 2005, para. 6.

other applications filed by assigned counsel, paid under the legal aid scheme of Rule 57.¹⁹ I find that this particular argument is not manifestly unfounded, considering that the lack of explicit provision with respect to other counsel, including the Prosecutor and his staff, might *prima facie* create an impression of unfairness.

11. I also find not manifestly unfounded counsel's arguments pertaining to a right to be heard before a decision is taken under Rule 126 (G).²⁰ I note that Rule 57 (H), which allows the Head of Defence Office to withhold the payment of fees if he is not satisfied that counsel meets the required standards, requires that counsel is given an opportunity to be heard. It is therefore not unreasonable for counsel to argue that they should have been heard before the Appeals Chamber took its Decision.

12. I further find manifestly unfounded counsel's remaining arguments:

- Counsel has failed to show the relevance of the lack of a right to appeal against the decision of a Chamber under Rule 126 (G),²¹ given that the sanction is not criminal in nature.²² In addition, in this case, the order withholding fees was made by the Appeals Chamber itself and there is no appeal against its decision.
- It is unclear why according to counsel the concept of a frivolous motion is "vague and imprecise".²³ The Appeals Chamber has previously stated—with reference to Rule 126 (G)—that it "will not tolerate the filing of appeals that lack any serious legal or factual basis".²⁴ I note that this accords with the commonly understood legal definition of the term "frivolous".²⁵
- Contrary to counsel's argument, neither Rule 126 (G) nor the Appeals Chamber in its Decision have delegated to "an administrative organ the task of determining the scope of the

¹⁹ Request, paras 9-11.

²⁰ Request, para. 12.

²¹ Request, para. 12.

²² See, e.g., ICTR, *Nzirorera v. The Prosecutor*, ICTR-98-44-AR73(F), Decision on Counsel's Appeal from Rule 73(F) Decisions, 9 June 2004, p. 2.

²³ Request, para. 13.

²⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.2, Decision on Appeal against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 22.

²⁵ See *Black's Law Dictionary*, 8th ed. (Thomson West 2004), p. 692 ("Lacking a legal basis or legal merit; not serious, not reasonably purposeful").

sanction”.²⁶ The Decision clearly stated that the Registrar should withhold the “fees associated with the production of the Application”.²⁷ The Registrar has the administrative task to calculate these fees. He should do so after consultation with the Head of Defence Office who, under Rule 57,²⁸ has the task of monitoring the performance and work of counsel. But this is not a delegation of the Appeals Chamber’s determination that fees are to be withheld.

- It is unclear what counsel mean when they assert that “[t]here is nothing in Rule 126 (G) which would put an end to [the] withholding of payment, even in the event that the counsel had become less frivolous”.²⁹ Rule 126 (G) addresses the contents of one specific filing which the Chamber finds to be frivolous. Fees are only withheld with respect to the preparation of that filing and any future conduct of counsel is not relevant in this regard.

13. In sum, I grant leave to counsel to seek reconsideration of the Decision, but limited to the grounds I found to be not manifestly unfounded, as set out above. Counsel may file their request within five days of this decision. The Prosecutor, the Head of Defence Office and the Registrar may each file a response within five days of the filing of such reconsideration request. Both the request and any of the responses may not exceed 3,000 words.

²⁶ Request, para. 14.

²⁷ Decision, Disposition.

²⁸ See Rules 57 (B), (G) (i), (H) of the Rules.

²⁹ Request, para. 15.

DISPOSITION

FOR THESE REASONS;

I GRANT the Request in part;

GRANT LEAVE to Defence counsel for Messrs Badreddine and Oneissi to file a request for reconsideration of the Appeals Chamber's decision of 25 October 2013, limited, however, to the grounds that (i) the application of Rule 126 (G) allegedly leads to an unfairness because it appears to apply only to assigned Defence counsel and that (ii) counsel was not heard before the Appeals Chamber made its ruling;

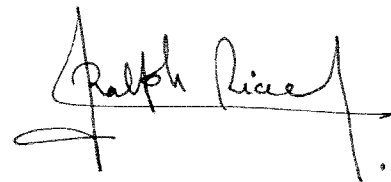
ALLOW counsel to file their request, not exceeding 3,000 words, within five days of this decision;

ALLOW the Prosecutor, the Head of Defence Office and the Registrar to each file a response not exceeding 3,000 words within five days of the submission of the Defence request for reconsideration.

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

Dated 13 November 2013

Leidschendam, the Netherlands



Judge Ralph Riachy
Presiding

