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

THE APPEALS CHAMBER

Case No.:	**STL-11-01/PT/AC**
Before:	**Judge Ralph Riachy, Presiding** **Judge Afif Chamseddine** **Judge Daniel David Ntanda Nsereko** **Judge Ivana Hrdličková**
Registrar:	**Mr Daryl Mundis**
Date:	**10 December 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 COUNSEL FOR MESSRS BADREDDINE AND ONEISSI FOR RECONSIDERATION OF THE APPEALS CHAMBER'S DECISION OF 25 OCTOBER 2013

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux

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

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

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. In a recent decision ("the Decision"), we found an application submitted jointly by Defence counsel for Messrs Badreddine and Oneissi ("Defence") to be frivolous and, under Rule 126 (G) of the Rules of Procedure and Evidence ("Rules"), ordered the Registrar to withhold payment for the fees associated with the production of the application.[1] We are now seized with a request by the Defence to reconsider this Decision pursuant to Rule 140 of the Rules.[2]

2. We reject the Request because the Defence has not demonstrated that the Decision was erroneous and resulted in an injustice.

BACKGROUND

3. In the Decision, we dismissed an application filed by the Defence that was directed against an order by the President re-composing the Trial Chamber following the resignation of its Presiding Judge.[3] In addition to finding the application inadmissible, we also found that it was frivolous and ordered the Registrar to "withhold payments of fees associated with the production of the Application and the costs thereof".[4]

4. The Defence subsequently sought authorization from the Presiding Judge of the Appeals Chamber in this matter, Judge Riachy, to seek reconsideration of the Decision with respect to the order on fees.[5] Such authorization was granted but limited in scope. In particular, the Presiding

[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, para. 17, Disposition. All further references to filings and decisions relate to this case number unless otherwise stated.

[2] Request for Reconsideration of the Appeals Chamber's Decision of 25 October 2013, 18 November 2013 ("Request"), para. 1.

[3] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, Order on Composition of the Trial Chamber, 10 September 2013; Decision, para. 13, Disposition.

[4] Decision, para. 17, Disposition. It is our understanding that this order, for a number of technical reasons, has not been fully implemented yet (*see* E-mails from Deputy Registrar to Legal Officer of the Appeals Chamber, 27 November 2013, 9 December 2013). For sake of clarification, we recall that a request for reconsideration, just like an appeal, does not suspend the execution of an order, unless such suspension is explicitly granted by the Chamber (*see* ICTY, *Prosecutor v. Prlić*, IT-04-74-T, Decision on Request for Reconsideration, or in the Alternative, for Certification to Appeal the 1 February 2010 Decision Applying Rule 73 (D) of the Rules to the Prlić Defence, 28 June 2010, pp. 4, 6; *see also* ICTR, *Munyagishari v. The Prosecutor*, ICTR-05-89-AR11*bis*, Decision on Bernard Munyagishari's Motion for Reconsideration of Prior Reconsideration Decisions, 24 July 2013, p. 3).

[5] Request for Authorisation for Reconsideration of the Decision of the Appeals Chamber of 25 October 2013, 1 November 2013.

Judge found a number of the Defence submissions "manifestly unfounded".[6] He consequently granted 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[.][7]

The Presiding Judge also permitted the Prosecutor, the Head of Defence Office and the Registrar to each file a response to the request for reconsideration.[8]

5. The Defence then filed the Request to which both the Head of Defence Office and the Prosecutor responded.[9] The Registrar informed the Chamber that he would not make any submissions.[10]

DISCUSSION

I. Preliminary Issues

A. Composition of the Appeals Chamber

6. The Decision that is subject to the request for reconsideration was taken by the Appeals Chamber sitting with four Judges. This was because the Presiding Judge of the Appeals Chamber, Judge Baragwanath, elected to recuse himself from the proceedings given that the original order against which the Defence application was directed was made by him in his capacity as President.[11] Consequently, the Request, which seeks reconsideration of the Decision, must be decided by the Appeals Chamber with the same composition of four Judges, without the participation of Judge Baragwanath.

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[6] 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, 13 November 2013 ("Decision Granting Leave"), paras 7-9, 12.
[7] *Id.* at Disposition.
[8] *Ibid.*
[9] Request; Observations from the Defence Office Relating to the Request for Reconsideration of the Appeals Chamber's Decision of 25 October 2013, 25 November 2013 ("HDO Observations"); Prosecution Response to "Requête en réexamen de la Décision de la Chambre d'appel du 25 Octobre 2013", 25 November 2013 ("Prosecutor's Response").
[10] E-mail from Registry Legal Office to Legal Officer of the Appeals Chamber, 25 November 2013.
[11] *See* Decision, paras 6-8.

B. Scope of the reconsideration request

7. As set out above, the Presiding Judge granted leave to seek reconsideration only with respect to two matters relating to the application of Rule 126 (G).[12] He explicitly rejected as manifestly unfounded the Defence arguments concerning an alleged violation of their immunity from legal process.[13] These arguments were based on Article 13 of the Document Annexed to Security Council Resolution 1757, which regulates, *inter alia*, the relationship between the Tribunal and Lebanon.[14]

8. Counsel now seek to resurrect the immunity argument through subterfuge, camouflaging their claim by relying on the similar Article 22 of the Headquarters Agreement between the United Nations and the Netherlands.[15] But, as also noted by the Prosecutor,[16] they were not granted leave to seek reconsideration based on the issue of immunity. Consequently, and in accordance with Rule 140, we hold that this issue is not properly before us. We also find that such an attempt to circumvent the Decision Granting Leave is disingenuous and borders on the abusive. A reconsideration request before the Appeals Chamber is not a forum to advance arguments for which leave was not granted by the Presiding Judge, or to present new arguments that were not litigated previously before him. We disapprove of such practice and summarily dismiss the Request in this respect.

II. Applicable Law

9. Rule 140 provides:

> 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.

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[12] Decision Granting Leave, Disposition.
[13] Decision Granting Leave, para. 7.
[14] Article 13 reads in relevant part: "(2) [C]ounsel shall be accorded: [...] (c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. [...]".
[15] Request, paras 3, 5-7 (referring to the Agreement between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the Special Tribunal for Lebanon, 21 December 2007). Article 22 of that Agreement reads in relevant part: "(1) Counsel shall enjoy the following [...] immunities [...]: (c) immunity from legal process of every kind in respect of words spoken or written and all acts performed by them in their official capacity [...].
[16] Prosecutor's Response, para. 2

10. We have previously held that reconsideration is an exceptional measure and subject to strict requirements.[17] A party seeking the remedy must demonstrate that reconsideration is necessary to avoid an injustice. What constitutes an injustice is case-dependent, but "[a]t a minimum, it involves prejudice."[18] The party must allege prejudice on specific grounds, which may include that a decision is "erroneous or [. . .] constituted an abuse of power on the part of the Chamber" or that "new facts or a material change in circumstances" have arisen after the decision is made.[19] We recall that "the presence of these grounds is not sufficient per se. The party seeking reconsideration must also show that they resulted in prejudice".[20]

11. 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.

III. The merits of the Request

12. Counsel seek reconsideration of our decision to withhold their fees for filing a frivolous application on two grounds. They first argue that a sanction under Rule 126 (G) only applies to assigned counsel (*i.e.* counsel funded by the Tribunal's legal aid scheme) and not to appointed counsel (*i.e.* counsel paid for by an accused) or counsel for the Prosecutor.[21] In counsel's view, this "is a clear breach of the principle of equality before the law" and is "discriminatory".[22] The Prosecutor disagrees, arguing that "the Rules empower the Tribunal to sanction any counsel who files frivolous motions".[23]

13. Counsel next argue that our decision breached the "adversarial principle" because we did not hear them before imposing the sanction.[24] This assertion is supported by the Head of Defence Office.[25]

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[17] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/R176*bis*, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, 18 July 2011 ("Rule 176 *bis* Reconsideration Decision"), para. 23; *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.1, *Corrected Version of* Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 19.
[18] Rule 176 *bis* Reconsideration Decision, para. 24.
[19] *Id.* at para. 25.
[20] *Id.* at para. 26.
[21] Request, paras 9-12.
[22] Request, para. 13.
[23] Prosecutor's Response, para. 3; *see also* paras 4-6. The Head of Defence Office does not make submissions on this issue.
[24] Request, paras 14-16.

A. Whether Rule 126 (G) is discriminatory

14. The Defence argument that Rule 126 (G)—and, by extension, our Decision—are discriminatory rests on the premise that this Rule is applicable to assigned counsel only. However, this is not the case. To start with, we never made such a holding in our Decision. Rather, we addressed the specific issue before us—a frivolous filing by counsel paid under the legal aid scheme. Filings by other counsel were not at issue.

15. In addition, Rule 126 (G) may not be construed as limiting the court's power to sanction counsel practicing before this Tribunal to assigned counsel. We first note that the Rule relates to the court's inherent power to control its own proceedings.[26] Article 21 of the Statute mandates the Chambers to take "strict measures to prevent any action that may cause unreasonable delay". Article 28 authorizes the Judges to draft appropriate Rules to implement this mandate. Accordingly, Rule 126 (G) is one way of expressing a Chamber's power to protect the integrity of its proceedings by imposing sanctions for dilatory or abusive tactics. Such tactics include the filing of submissions that are frivolous or are an abuse of process.[27]

16. Furthermore, while the wording of Rule 126 (G) could suggest that sanctions for the filing of frivolous or abusive submissions may only be imposed assigned counsel, the Rule does not have such effect. It merely recognizes the Tribunal's obligation to ensure that taxpayer-funded public resources allocated to a Defence team under the legal aid scheme are not wasted on the production of frivolous or abusive motions. However, this does not mean that the court's inherent powers to impose sanctions in response to such submissions do not extend to other counsel.

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[25] HDO Observations, para. 2. The Prosecutor does not respond on this issue.

[26] *See* ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Order on the Motion to Withdraw as Counsel Due to Conflict of Interest, 24 June 1999, p. 3 (considering for the International Criminal Tribunal for the former Yugoslavia "the inherent power which the Tribunal has, deriving from its judicial function and from the provisions of Articles 20 and 21 of its Statute, to control its proceedings in such a way as to ensure that justice is done and, particularly in relation to matters of practice, that the trial proceeds fairly and expeditiously"); *see also* Regulation 29 ICC Reg (empowering the Chamber to make any order to ensure compliance with the Regulations or court orders and clarifying that this is without prejudice to Chamber's inherent powers).

[27] In this regard, we reject counsel's and the Head of Defence Office's arguments raised elsewhere as to an alleged "chilling effect" of the Rule (Request, para. 15; HDO Observations, para. 4). The Presiding Judge denied leave with respect to this more general argument, which challenges the Rule as such (*see* Decision Granting Leave, para. 9). In any event, counsel's freedom of expression and/or professional freedom and independence exist within the boundaries of counsel's obligations as officers of the court. Freedom of expression cannot be the justification for filing motions that are frivolous or are an abuse of process.

17. In this context, we recall the equivalent legal provisions at other international criminal tribunals. In particular, the rules of the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Mechanism for International Criminal Tribunals make clear that sanctions for the filing of frivolous or abusive submissions may be imposed on *all* counsel.[28] National jurisdictions also follow a similar approach.[29] Rule 126 (G) therefore cannot be read as restricting the court's powers by excluding sanctions for the filing of frivolous or abusive submissions by appointed counsel or by Prosecution counsel.[30] The means for effecting those sanctions must naturally be different because these counsel are not remunerated through the legal aid scheme. For instance, appointed counsel are paid by the accused directly. Any sanction would therefore have to be tailored to the specific circumstances of each case.[31]

18. In sum, Rule 126 (G) is not discriminatory. Nor was our Decision. We reject the Defence arguments in this regard.

B. Whether counsel had a right to be heard

19. Counsel further attack Rule 126 (G) because it provides for the withholding of their fees without affording them an opportunity to be heard.[32] However, as noted above, the Decision was

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[28] *See* Rule 73 (F) ICTR RPE ("[…] [A] Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof."); Rule 46 (C) SCSL RPE ("Counsel who bring motions, or conduct other activities, that in the opinion of a Chamber are either frivolous or constitute abuse of process may be sanctioned for those actions as the Chamber may direct. Sanctions may include fines upon counsel; non-payment, in whole or in part, of fees associated with the motion or its costs, or such other sanctions as the Chamber may direct."); Rule 73 (D) SCSL RPE ("[…] [W]hen a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of all or part of the fees associated with the production of that motion and/or costs thereof."); Rule 80 (D) MICT RPE ("[…] [A] Trial Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Trial Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof."); *but see* Rule 73 (D) ICTY RPE ("[…] [W]hen a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion and/or costs thereof.") The previous version of the ICTY Rule, contained then in Rule 46 (C), was identical to the current wording of the ICTR Rule (*see* Rule 46 (C) ICTY RPE until 28 July 2004).

[29] *See, e.g.,* Criminal Procedure Code, 18 U.S.C. § 3162 (United States).

[30] *Cf.* ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, para. 16 (holding, based on the Chamber's inherent powers, that the court's code of conduct applicable to Defence lawyers should "where applicable and to the extent possible, also apply to members of the Prosecution").

[31] *See* ICTY, *Prosecutor v. Šešelj*, IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003, para. 5 (holding with respect to a self-represented accused that while the sanction of withholding fees could not be applied to him, the court could impose other sanctions such as the refusal to accept a filing at all); *cf.* ICTY, *Prosecutor v. Stakić*, IT-97-24-AR73.4, Decision on the Prosecution Motion Seeking Leave to Appeal the Decision of Trial Chamber II Ordering an Identification Parade, 28 June 2002, p. 3 (finding a Prosecution application "frivolous"). Both ICTY decisions were based on the wording of the relevant Rule then in force (*see above* fn. 28).

[32] Request, paras 14-16.

based on our inherent power to control the proceedings before us and in particular, to prevent the filing of applications that we find devoid of any merit. In this respect, the Decision was ancillary to our ruling on the merits of the Defence application.[33] Counsel have not demonstrated that there is an obligation on the part of the Chamber to hear from them before making such a finding.

20. As pointed out by the Presiding Judge, the Defence has not challenged our finding that their application was frivolous.[34] The Defence now argues that "if it had been heard beforehand, it would have naturally challenged that characterisation and that is precisely the matter of the principle which is raised".[35] However, counsel ignore that the Appeals Chamber's order was based on its own determination that the application submitted by the Defence was not simply unpersuasive on the merits but also frivolous. It would be pointless for the Chamber to hear counsel on whether they consider that their submission is frivolous or not. This question is inextricably linked to the merits of the submission, on which the Chamber has already decided. To hear counsel would therefore merely reopen consideration on the application itself. The same applies to the sanction imposed as a consequence. Counsel are *a fortiori* not entitled to be heard on this issue.

21. The Head of Defence Office refers to Rules 57 (H) and 60 of the Rules, arguing that because these Rules provide counsel with a right to be heard before certain measures against them are taken, the same must apply to Rule 126 (G).[36] We disagree. These Rules address different matters that go generally to the performance or conduct of counsel as such. To be able to evaluate alleged issues of performance or conduct covered by these Rules, decision-makers would generally need information that is not already before them. However, Rule 126 (G) deals with specific filings. As explained above, in such instances, everything relevant to the Chamber's decision—the filing(s)—is already before it.

22. In sum, counsel have no right to be heard with respect to sanctions imposed under Rule 126 (G).

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[33] *See* ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions to be of "No Effect", 24 May 2005, para. 12 ("The sanctions orders are not substantive. They are merely ancillary or consequential to the substantive motions. They reflect the conclusion by the Trial Chamber that bringing those motions was frivolous or was an abuse of process.")
[34] Decision Granting Leave, para. 6.
[35] Request, para. 16.
[36] HDO Observations, paras 5-7.

IV. Conclusion

23. We reject the Defence Request. Counsel have not shown an error in our Decision resulting in prejudice to them. On a more general note, we stress that we have not taken our decision to impose the sanction lightly.[37] When warranted, as in this case, such sanctions are necessary to safeguard the fair and expeditious conduct of our proceedings.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

DISMISSES the Request.

Done in Arabic, English and French, the English version being authoritative.
Dated 10 December 2013
Leidschendam, the Netherlands

Judge Ralph Riachy
Presiding

[37] *See, e.g.*, ICTR, *Prosecutor v. Kanyarukiga*, ICTR-2002-78-R11*bis*, Decision on Request to Admit Additional Evidence of 1 August 2008, 1 September 2008, para. 12 (recalling that "the power to impose sanctions should be exercised cautiously"); *see also* ICTR, *Karera v. The Prosecutor*, ICTR-01-74-A, Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 29 October 2008, para. 14; ICTR, *Karemera et al. v. The Prosecutor*, ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009, para. 21.