

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 23 October 2015

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON DEFENCE REQUEST TO MODIFY THE CONDITIONS OF
ASSIGNMENT OF OMAR NASHABE IN PRESIDENT'S DECISIONS OF 21
DECEMBER 2012 AND 27 MARCH 2013**

Office of the Prosecutor:

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& Mr Alexander Hugh Milne

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Defence Office:

Mr François Roux

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Youssef
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Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. This decision concerns the assignment of Mr Omar Nashabe to assist Defence counsel in their preparations for trial and whether the Trial Chamber should alter the conditions imposed by the former President of the Special Tribunal, Judge David Baragwanath, on this assignment. The Trial Chamber has decided that it has the power to do this, and that some valid fair trial points have been raised. It is, however, not convinced, at this time, that it should. It would be prepared to allow Mr Nashabe access to specified confidential information on a case by case basis, but subject to a security risk assessment.

PROCEDURAL BACKGROUND

2. Mr Omar Nashabe is a Lebanese political columnist, in whose name, on 1 March 2011, an article was published in *Al Akhbar*, a Lebanese print and electronic publication.¹ The article extracted a portion of a transcript of a hearing on 14 January 2011 that the Pre-Trial Judge, in a decision on 23 February 2011, had ordered to remain confidential and redacted from the public transcript and broadcast. The article breached the Pre-Trial Judge's non-publication order.

3. The Pre-Trial Judge had extracted the passage and ordered 'that the redacted text... is confidential as of the date and time this Order is received. As such, disclosure of the relevant passages by any person or organisation is regulated by Rule 60*bis* of the Rules of Procedure and Evidence of this Tribunal'.² The article referred to the Pre-Trial Judge's non-publication order by both date and content.³

4. Fifteen months later, on 1 May 2012, Mr Nashabe—at the invitation of the Head of Defence Office—signed a service contract of eight months with the Special Tribunal under which he would undertake investigative work with Defence counsel. On 12 May 2012, the then Registrar, Mr Herman von Hebel, terminated the contract on the basis that Mr Nashabe had knowingly violated a judicial order. On 13 July 2012, the Head of the Defence Office informed the Registrar that he intended to assign Mr Omar Nashabe as a 'local resource

¹ STL-11-01/PT/PRES, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0428, Registry further submission in relation to the President's second interim Decision of 10 September 2012, 21 September 2012, Confidential Annex A. According to the *Al-Akhbar* website, he was 'the director of Al-Akhbar's research unit', www.english.al-akhbar.com/node/220. He is also a member of the part-time faculty of the Lebanese Arab University's School of Arts and Sciences, sas.lau.edu.lb/social-sciences/people/part-time-faculty.php.

² Rule 60 *bis* regulates contempt and obstruction of justice, generally.

³ CH/PTJ/2011/04, F0045, Confidential Order to Redact the Public Transcript and the Public Broadcast of the Hearing of 14 January 2011 in the Matter of Mr. Jamil El Sayed, 23 February 2011.

person' in Lebanon to assist Defence counsel. The Registrar again opposed the assignment and refused to permit payment to Mr Nashabe under the proposed contract.

5. This impasse between the Registrar and Head of Defence Office was resolved in two decisions of the President—of 21 December 2012 and 27 March 2013.⁴ In his first decision, Judge Baragwanath ordered:

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 granted to him unless ordered by a Judge or Chamber, as appropriate, upon reasoned request by counsel [footnote omitted];
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.

6. In the second relevant decision—of 21 March 2013—the President, at the Registrar's request, clarified this decision, holding:

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

⁴ STL-11-01/PT/PRES, F0624, 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; F0821, Decision on the Registry Application pursuant to Rule 48(C) Seeking Clarification and Relief regarding the President's Decision of 21 December 2012, 27 March 2013. The President also issued F0408, Second Interim Decision, 10 September 2012; and F1618, Decision on Head of Defence Office "Request to Change the Conditions Imposed by the Decisions of 21 December 2012 and 27 March 2013 Relating to the Assignment of Mr Nashabe", 14 July 2014. The full procedural background is set out in these four decisions.

- (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;

7. On 8 May 2013, the Pre-Trial Judge, who was then seised of the case, denied a motion from the Defence of Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, ordering the disclosure to Mr Nashabe of certain documents relating to a Prosecution witness.⁵ The Pre-Trial Judge held that, pursuant to the President’s decision, Mr Nashabe ‘is a member of the public and ... in principle that he is not permitted to receive confidential material’.⁶

8. On 14 July 2014, Judge Baragwanath dismissed a request from the Head of Defence Office to change the conditions of assignment and to allow Mr Nashabe to perform, as an ‘expert consultant’, the functions of ‘analyst-rapporteur’. Judge Baragwanath held that the Head of Defence Office had failed to demonstrate any change in circumstances or new fact warranting reconsideration of his two previous decisions. However, ‘any assertion that fair trial rights of the Defence are prejudiced may be raised by Defence counsel before the Trial Chamber’.⁷

9. Fourteen months later, on 17 September 2015, the Defence of Mr Mustafa Amine Badreddine, Mr Hassan Habib Merhi and Mr Oneissi, filed a joint motion before the Trial Chamber requesting a change in the conditions of Mr Nashabe’s assignment.⁸ They sought an order from the Trial Chamber to authorise the Head of Defence Office to allow Defence counsel to seek to modify Judge Baragwanath’s orders—as highlighted in bold below—first in relation to the parameters of his tasks, and second referable to his status *vis-à-vis* the Special Tribunal and Lebanon:⁹

⁵ STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0887, Decision on the Defence Request of 8 February 2013 for Authorisation of Disclosure of Certain Documents, confidential, *ex parte*, 8 May 2013. Leave for certification to appeal the decision was refused in F0950, Decision on the Defence Request of 15 May 2013 for Certification to Appeal the ‘Décision relative à la Requête de la Défense du 8 février 2013 aux fins d’autoriser la communication de certains documents’, confidential, *ex parte*, 11 June 2013.

⁶ Decision of 8 May 2013, para. 5.

⁷ STL-11-01/PT/PRES, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1618, Decision on Head of Defence “Request to Change the Conditions Imposed by the Decisions of 21 December 2012 and 27 March 2013 Relating to the Assignment of Mr Nashabe”, 14 July 2014, para. 25.

⁸ STL-11-01/T/TC, F2201, Requête de la Défense de MM. Badreddine, Merhi et Oneissi aux fins de modification des conditions imposées à la commission d’office de M. Omar Nashabe par les Décisions du Président du Tribunal des 21 décembre 2012 et 27 mars 2013, 17 September 2015.

⁹ Defence submissions, para. 21.

Defence counsel to entrust to their expert consultant, Mr Nashabe, evidentiary materials and confidential procedural documents from the *Ayyash et al.* case for the strict needs of their investigations;

- i. to provide information concerning factual areas of interest;
- ii. to alert counsel to any evidentiary material that counsel may need to collect and, **on instruction from counsel, perform any administrative or other task to collect that material in conformity with the applicable procedural rules;**
- iii. **to suggest to counsel and, on instruction from counsel, meet and question (potential) witnesses;**¹⁰
- iv. **analyse relevant factual materials provided by counsel and, on instruction from counsel, perform any task to verify the authenticity and credibility thereof;**¹¹
- v. **to assist the members of the defence teams in their missions in the field;**
and
- vi. to produce reports and memoranda further to the above activities.

Mr Nashabe to be entitled to the immunities granted to persons assisting counsel.¹²

10. The Prosecution filed submissions opposing the request, and in response to an invitation from the Trial Chamber, the Registrar and Head of the Defence Office also filed submissions, respectively opposing and supporting the Defence motion.¹³ On 15, 16 and 17 October 2015, the Trial Chamber heard further in-court submissions from the six concerned parties and, additionally, from the Legal Representative of Victims.

¹⁰ Condition iii. of Judge Baragwanath's orders of 21 December 2012 read 'Suggest (potential) witnesses to counsel'.

¹¹ Condition iv. of Judge Baragwanath's orders read 'Cross-reference and summarize relevant publicly available factual materials'.

¹² Judge Baragwanath's orders in respect of Mr Nashabe's status *vis-à-vis* Lebanon and the Special Tribunal stated, '(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"'.
¹³ F2239, Prosecution Submissions on the Badreddine, Merhi and Oneissi Defence Teams Joint Request concerning the Conditions of Assignment of Mr. Omar Nashabe, 1 October 2015; F2236, Registry Submissions pursuant to Rule 48 (C) regarding Defence Request of 17 September 2015: Seeking to Modify the Conditions for Nashabe's Appointment, 1 October 2015; F2234, Observations from the Head of Defence Office in support of the Request from the Defence of Messrs Badreddine, Merhi and Oneissi for modification of the conditions imposed on the assignment of Mr Nashabe, 1 October 2015.

SUBMISSIONS

11. The Defence motion asks the Trial Chamber to vary the terms of Judge Baragwanath's orders about Mr Nashabe's assignment, and most particularly concerning his access to 'confidential procedural documents'. As a consequence of this, counsel argue that Mr Nashabe's status should be altered to grant him certain immunities commensurate with his new position. A change in status to 'persons assisting counsel' would make Mr Nashabe subject to Article 18 of the Memorandum of Understanding between Lebanon and the Special Tribunal for Lebanon Concerning the Office of the Special Tribunal in Lebanon. That provides for immunity from arrest and detention and seizure of personal baggage and guarantees the inviolability of all documents and material relating to the exercise of his or her functions as counsel.

12. Judge Baragwanath, however, imposed his conditions on Mr Nashabe's assignment because the publication, on 1 March 2011, of the redacted details of the court hearing breached the Pre-Trial Judge's non-publication order. Judge Baragwanath 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'.¹⁴ In his decision of 21 December 2012, Judge Baragwanath also noted 'the fact, acknowledged by the Head of Defence Office, that there is *prima facie* evidence of a breach of the order'.¹⁵

Defence submissions

13. Defence counsel posed two written arguments in support of their request. The first is that the fairness of the trial 'has been called into question'. In support of this, they argue that the Prosecution case has grown with unforeseen political dimensions and new actors and the Prosecution is now presenting its case on telecommunications and the attribution of mobile telephone numbers to the Accused. The Defence is in an intensive counter-investigative stage and needs to provide Mr Nashabe with confidential documents, without seeking the Trial Chamber's permission to do so. The restrictions upon his assignment significantly affect the conduct of Defence investigations and hence the fairness of the trial.¹⁶

¹⁴ Decision of 27 March 2013, para. 23.

¹⁵ Decision of 21 December 2012, para. 39.

¹⁶ Defence submissions, paras 11-13.

14. Second, the conditions imposed by the President are no longer tenable. These conditions were based upon allegations of Mr Nashabe's conduct that were never the subject of any proceedings. Moreover, the allegations are old, and he has been working with the Defence for over two years with 'no reported incidents'. His work 'has been accomplished with the greatest discretion and has never been publicly disclosed'.¹⁷ Defence counsel wish to entrust confidential information to Mr Nashabe for analytical and investigative work and thus significantly strengthen Defence capabilities for investigations and preparations for trial. Consequently, he should be afforded the necessary immunities to protect the confidentiality of the documents.¹⁸

15. In their in-court submissions, counsel for Mr Badreddine specified that they were not seeking reconsideration of Judge Baragwanath's decision, but rather to lift the restrictions in his orders.¹⁹ Counsel for Mr Merhi stated that the Trial Chamber, as the Chamber guaranteeing a fair trial, was the competent authority to address the issue. It would be too time-consuming to address Mr Nashabe having access to documents on a case by case basis.²⁰ And, Judge Baragwanath's decisions were administrative in nature.²¹

16. Defence counsel also posed a practical example of the difficulties they were encountering by virtue of the restrictions on Mr Nashabe's assignment, namely, in not being able to reveal to him the names of witnesses granted protective measures under Rule 133, such as pseudonyms.²² In their oral submissions, Defence counsel spoke highly of the quality of Mr Nashabe's assistance to their teams.

Head of Defence Office's submissions

17. The Head of Defence Office supported the motion. He argued, first, that the fairness of the proceedings requires that the allegation of a reported violation of a confidentiality order is no longer taken into consideration. Four years after the incident, the Registrar had established neither the supposedly censurable nature of Mr Nashabe's conduct nor any criminal intent. He is entitled to the presumption of innocence. Second, the restrictions have a disproportionate

¹⁷ Defence submissions, para. 17.

¹⁸ Defence submissions, paras 17-19.

¹⁹ Transcript of 14 October 2015, p. 57. See also submissions of Mr Aouini for Mr Merhi, p. 67.

²⁰ Transcript of proceedings of 14 October 2015, pp 61, 64-65, 67. See also submissions of Mr Hassan for Mr Oneissi, pp 69-71.

²¹ Transcript of 14 October 2015, p. 71, submissions of Mr Aouini for Mr Merhi. See also submission of Mr Roux, Head of Defence Office, p. 73.

²² Transcript of 15 October 2015, pp 25-26, submissions of Mr Korkmaz for Mr Badreddine.

effect on the right of the Accused to prepare his defence. Third, Mr Nashabe has always complied with his contractual obligations, including a clause that he must refrain from journalistic activities while engaged with Defence counsel. Finally, the Head of Defence Office is at the disposal of the Trial Chamber and Defence counsel to discuss any modalities for the introduction of supplementary measures in relation to confidentiality and traceability of documents emanating from the Special Tribunal.²³

18. In oral submissions, the Defence Office submitted that the Trial Chamber would be committing a miscarriage of justice if it declined jurisdiction.²⁴

Prosecution's submissions

19. The Prosecution opposed the motion, arguing that the Defence had not demonstrated that the conditions imposed on Mr Nashabe's engagement had impacted the fairness of the trial. The Defence had elected not to seek judicial permission to share confidential information with Mr Nashabe, and had offered no evidence of any prejudice to its trial preparations. The Defence had not provided any basis to modify the President's conditions. Further, the Trial Chamber is not empowered to review the President's decisions on this matter. The Head of Defence Office has not answered the questions posed by the President in his decision of 21 December 2012²⁵ as to why Defence counsel cannot secure the necessary assistance from another source and what steps have been taken to mitigate this situation, and what are the nature and extent of the alleged prejudice, including a precise description of how the fair trial rights of the Defence are affected.²⁶

20. Prosecution counsel, in oral submissions, stated that the Prosecution did not question the Trial Chamber's inherent authority to address matters relating to the fairness of proceedings.²⁷ However, the Trial Chamber should not substitute a general power of review over the administrative decisions of the Registrar and President, but should limit itself to matters closely related to the fairness of the proceedings.²⁸ Counsel also expressly questioned

²³ Defence Office observations, paras 16-27.

²⁴ Transcript of 14 October 2015, p. 72.

²⁵ At para. 18.

²⁶ Prosecution response, paras 9-35.

²⁷ Transcript of 14 October 2015, p. 85.

²⁸ Transcript of 15 October 2015, p. 56.

Mr Nashabe's qualifications to assist Defence counsel at this stage of the proceedings, stating that he was specialised in forensic science and not in telecommunications.²⁹

Registrar's submissions

21. The Registrar also opposed the motion. He argued, first, that the Defence had failed to exhaust the available remedies before seeking the Trial Chamber's intervention; the Trial Chamber could only exercise its inherent power to intervene once available remedies had been exhausted, and here the Defence had failed to seek a modification from the President of the orders. Second, a decision favourable to the Defence would create a *de facto* appointment by the Special Tribunal, contrary to the Rules and interests of the organisation, of a new category of person having all the privileges and immunities of staff or those assisting counsel, but without the commensurate responsibilities. There was *prima facie* evidence that Mr Nashabe had breached a confidentiality order of the Pre-Trial Judge, without any indication that Defence counsel or the Head of Defence Office had attempted to ensure that Mr Nashabe will not present a risk to the Special Tribunal or any victims or witnesses if placed in this new role. Finally, the Defence has failed to show that the conditions imposed on Mr Nashabe have had a disproportionate impact upon the fairness of the proceedings.³⁰

22. In oral submissions, the Registrar submitted that Judge Baragwanth's decision was 'functional' by virtue of his office, and that the issue could go before a subsequent President. He agreed that the Trial Chamber has the inherent and implied power to intervene in fair trial issues, but this does not necessarily mean that it 'should grasp at that authority or take on that authority too quickly or assume that jurisdiction too quickly'.³¹

23. The Registrar summarised his submissions—if the Trial Chamber were minded to change the conditions of assignment—as, first, to ensure a security risk assessment was undertaken (one that the Defence Office can perform), second, to ensure a risk assessment with respect to information relating to witnesses and victims that the Defence intends to provide to Mr Nashabe, and third, to examine the contractual relationship between Mr Nashabe and the Special Tribunal as a whole.³²

Legal Representative of Victims

²⁹ Transcript of 15 October 2015, pp 57-59.

³⁰ Registry submissions, paras 2-13.

³¹ Transcript, 14 October 2015, pp 78-79.

³² Transcript, 15 October 2015, pp 48-49.

24. The Legal Representative of Victims submitted in court that he would oppose a blanket relaxation on the conditions of Mr Nashabe's assignment such as to permit him open access to all information relating to participating victims who have protective measures and documents relating to them. It is open to the Defence, however, to make any application for such access on a case by case basis, and the Legal Representative should be consulted if this is done.³³

Possible security assessment of Mr Nashabe

25. In oral submissions, as noted, the Registrar suggested that a further security risk assessment could be performed, in his words, 'to conduct afresh a full-blown risk security assessment with input from Dr Nashabe'. This should occur before the Trial Chamber decided whether it could intervene in the manner sought. No 'full-blown security clearance' had ever been done. An assessment of any change in the circumstances on risk to witnesses and victims was necessary—the Special Tribunal's Victims and Witnesses Unit could provide relevant information.³⁴ Defence counsel did not respond specifically to this suggestion, but the Defence Office opposed it in general terms, saying that the allegations regarding the publication of 1 March 2011 were four years old and 'obsolete'.³⁵ The Registrar reiterated that the risk assessment was necessary; he and the Head of Defence Office could work out the modalities between themselves.³⁶

DISCUSSION

Legal test

26. Article 16 of the Statute of the Special Tribunal, 'Rights of the accused', provides accused persons with certain rights under international human rights law, for example, under Article 16 (4) (b), 'to have adequate time and facilities for the preparation of his or her defence[...]'. Article 16 (1) provides the basic right 'to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of witnesses and victims'. Moreover, the Trial Chamber, under Rule 130 (A), 'after hearing the parties, may give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial'.

³³ Transcript, 16 October 2015, p. 31.

³⁴ Transcript, 15 October 2015, pp 3-6.

³⁵ Transcript, 15 October 2015, pp 39-45, especially p. 44.

³⁶ Transcript, 15 October 2015, p. 53.

27. Nothing in the Statute or Rules or any other regulation, practice direction, or directive regulates the issue identified in the Defence motion, namely, whether the Trial Chamber may intervene after another Judge or Chamber has made an order—but has done so in the absence of any express statutory provision on the issue—on a matter that may affect the fairness of the trial.

28. The threshold issue therefore is whether a Chamber, in the interest of justice and to guarantee a fair trial, may vary the administrative or judicial orders of another Judge or Chamber. The answer to this is ‘yes’. The Prosecution, Defence counsel, Head of Defence Office, the Registrar, and, implicitly, the Legal Representative of Victims all agree on this point. Judge Baragwanath himself held this. The second issue, therefore, is whether the Trial Chamber should intervene and whether, if the Registrar is correct, that it can only do so after the available measures are exhausted.

Inherent and implied powers of international courts and tribunals

29. To elaborate on the first issue; an international court or tribunal has the inherent or implied power—in the absence of any express statutory provision—to control its own proceedings to ensure the integrity of the proceedings and that they are fair. This is consistent with the Trial Chamber’s duties under Article 16 and Rule 130 (A).

30. International courts and tribunals have identified—in the absence of express statutory powers—‘inherent powers’ necessary to exercise their functions. The International Court of Justice elaborated on these in the *Northern Cameroons* and *Nuclear Test* cases. In the latter, it found that:³⁷

the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the “inherent limitations on the exercise of the judicial function” of the Court, and to “maintain its judicial character”.³⁸ Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

³⁷ ICJ, *Nuclear Tests Case, New Zealand v. France*, Judgment, I.C.J. Reports 1974, p. 457, at para. 23.

³⁸ Referring to ICJ, *Northern Cameroons*, Judgment, I.C.J. Reports 1963, at p. 29.

31. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) followed this reasoning. For example, in *Blaškić*, on the issue of findings regarding the failure of a State to observe the provisions of its Statute or Rules of Procedure and Evidence, it held that the ‘International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded.’³⁹ It has also held that these inherent powers empower the ICTY’s plenary of judges to make rules criminalizing contempt of the Tribunal, finding that, ‘[a]s an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice. The content of that inherent power may be discerned by reference to the usual sources of international law’.⁴⁰

32. International courts and tribunals, on a number of occasions—and in the absence of express statutory regulation on the point of contention—have intervened to ensure a fair trial.⁴¹ On the other hand, they have also declined to intervene after identifying the existence of this principle.⁴²

³⁹ ICTY, *Prosecutor v. Blaškić*, IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997. In *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, at para. 322, the Appeals Chamber held that this inherent power extended to evaluating the testimony of Defence witnesses ‘in its quest for the truth and for the purpose of ensuring a fair trial’, this power being ‘inherent in the jurisdiction of the International Tribunal, as it is within the jurisdiction of any criminal court, national or international’.

⁴⁰ ICTY, *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 13. At the International Criminal Tribunal for Rwanda (ICTR), in *Joseph Kanyabashi v. The Prosecutor*, ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999, Judge Shahabuddeen, in Dissenting Opinion of Judge Shahabuddeen, at p. 17, stated that ‘Without that residual competence, no court can function completely’—referring to a court’s inherent competence in the event of silence in the written rules to ensure the exercise of its own jurisdiction.

⁴¹ For example, in *Prosecutor v. Kunarac, Kovač and Vuković*, IT-96-23-PT & IT-96-23/1-PT, Decision on the Request of the Accused Radomir Kovač to allow Mr. Milan Vujin to Appear as Co-Counsel Acting *pro bono*, 14 March 2000, at para. 13, an ICTY Trial Chamber held the inherent power ‘by necessity to include the power to refuse audience to counsel, notwithstanding that he may otherwise be qualified’ under the Rules, ‘but who is for other reasons not a fit and proper person to appear before the Tribunal’. See also, ICTR, *Prosecutor v. Nyiramasuhuko and Ntahobali*, ICTR-97-21-T, Decision on a Preliminary Motion by the Defence for the Assignment of a Co-Counsel to Pauline Nyiramasuhuko, 13 March 1998, para. 5, about the assignment of co-counsel where the Registrar had refused to assign one.

⁴² For example, the ICTR Appeals Chamber, in *Nahimana, Barayagwiza and Ngeze v. Prosecutor*, ICTR-99-52-A, Decision on Hassan Ngeze’s Motion to Set Aside President Mōse’s Decision and Request to Consummate his Marriage, 6 December 2005, at p. 4, holding that the Appeals Chamber has a statutory duty to ensure the fairness of the proceedings on appeal and thus has the jurisdiction to review the decisions of the President and Registrar, but that it ‘should not be used as a substitute for a general power of review which has not been expressly provided by the Rules’ [of Detention].

33. If, however, the matter is regulated elsewhere—such as where the President of the Tribunal is given a specific power of review—the ICTY Appeals Chamber has held that ‘a Trial Chamber may only step in under its inherent power to ensure that proceedings are fair once all available remedies are exhausted’.⁴³

34. The Trial Chamber is satisfied that these are the applicable legal principles and will follow them. The Trial Chamber may intervene in exercising its inherent powers, pursuant to Article 16 of the Statute of the Special Tribunal, and in the absence of any specific statutory provision, to ensure a fair trial and to maintain the integrity of its proceedings. The Trial Chamber may, undoubtedly, in the interests of ensuring a fair trial, alter the effect of any decision made by the Pre-Trial Judge during the pre-trial phase of a trial.⁴⁴ The same principle must apply to decisions of the President—made during that period—where there is no express statutory review of those decisions, and leaving the decision to stand could affect the right of the accused to a fair trial.

Have all available remedies been exhausted?

35. The Registrar submitted that the Trial Chamber may only intervene, in those circumstances, when all available remedies have been exhausted. Here, this must mean those within the President’s power. The Trial Chamber is satisfied—in the circumstances—that all available remedies before the President have been exhausted.

36. The Trial Chamber received jurisdiction to proceed to trial almost two years ago, on 28 October 2013, with the transfer of the case-file from the Pre-Trial Judge under Rule 95. The trial commenced on 16 January 2014 and, after joinder of Mr Merhi to the case of the other four on 11 February 2014, the joined case adjourned, resuming its hearing on 18 June 2014. The Trial Chamber has now heard or received the evidence of 171 witnesses, 87 live and the remainder via Rules 155, 156, 158 and 161. Some 931 exhibits, totalling over twenty-

⁴³ ICTY, *Prosecutor v. Šešelji*, IT-03-67-T, Decision on the Registry Submission Pursuant to Rule 33(B) Following the President’s Decision of 17 December 2008, 9 April 2009, para. 20; ICTY, *Prosecutor v. Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on “Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel”, 29 January 2007, p. 3; ICTY, *Prosecutor v. Delić*, IT-04-83-PT, Decision on Request for Review, 8 June 2005, para. 7.

⁴⁴ Noting of course, the Pre-Trial Judge’s exclusive jurisdiction under Rules 93 (questioning of anonymous witnesses), 117 (*in camera* hearings on security interests of States and other international entities) and 118 (submissions related to information never subject to disclosure without consent of the provider) as provided under Rule 130 (B). See also, STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1424, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014, paras 62-69.

three thousand pages in English,⁴⁵ have been so far accepted into evidence. It has sat on 177 days and there are over forty-one thousand pages of transcript, comprised of three versions for the official languages of the Special Tribunal for each day's transcript. The Prosecution case is at an advanced stage. President Baragwanath made his relevant orders during the pre-trial phase when the case was before the Pre-Trial Judge.

37. The long procedural history concerning Mr Nashabe's assignment stems from the then-Registrar's decision in July 2012 to overturn the decision of the Head of Defence Office on Mr Nashabe's assignment. Judge Baragwanath issued four relevant decisions, and the Pre-Trial Judge one. As noted, the trial is well-advanced, and the last time the issue was litigated before the President—in July 2014—he ruled that 'any assertion that fair trial rights of the Defence are prejudiced may be raised by Defence counsel before the Trial Chamber'. Judge Baragwanath's decision of 21 December 2012 was a judicial review of the administrative decision of the Registrar of 27 July 2012—denying the appointment of Mr Nashabe as a local resource person—quashing the decision.

38. His decision of 27 March 2013 clarified that earlier decision. The decision was to quash the Registrar's decision and, after review, substituting his own. In this decision, he held that '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'. He reasoned: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 respect may be filed with the competent Judge or Chamber, for instance under Rule 77(A) of the Rules of Procedure and Evidence.

39. This order presumes that Defence counsel may approach whichever Chamber is seised of the case seeking an appropriate judicial order in relation to assistance to Defence counsel in their preparations for trial (or for that matter, appeal). And in the conclusion to his decision of 14 July 2014, he directly specified that 'Any assertion that fair trial rights of the Defence are prejudiced may be raised by Defence counsel before the Trial Chamber'.⁴⁷

⁴⁵ 18,931 are in Arabic, 591 are in French, 350 are in Spanish, 196 are in multiple languages, and there are another 5395 pages of exhibits such as models and photographs.

⁴⁶ Decision of 27 March 2013, para. 46 and Disposition.

⁴⁷ Decision of 14 July 2014, para. 25.

40. The appropriate forum for the application, in practical terms—as is recognised by Judge Baragwanath’s two orders—depends upon both whether all available remedies have been exhausted and which Judge or Chamber can best do justice to whether ‘the fair trial rights of the Defence are prejudiced’. The order is of course Judge Baragwanath’s to vary, although, technically, the Registrar submitted that the current President could vary the terms of Judge Baragwanath’s order because it was made as a function of office.⁴⁸ The Trial Chamber, however—being of the view that all available remedies have been exhausted—does not need to decide this issue. Nor does it have to decide, as Defence counsel submitted, that Judge Baragwanath had acted administratively rather than judicially.⁴⁹

41. Judge Baragwanath, for all intents and purposes in his last decision, of July 2014, was stating that he was no longer the appropriate forum for any such relief. That was fifteen months ago. And taking their cue from this statement, Defence counsel pursued their relief before the Trial Chamber as a fair trial issue, rather than before the President. Moreover, on the most practical level, it is difficult to see how the President, who is not involved in the trial—now in a very advanced stage—could form a view as to whether the present conditions of Mr Nashabe’s assignment are preventing the three Accused from receiving a fair trial. The question is a very technical one, as is evidenced by the detail in the written and oral submissions, and is closely connected with the evidence being adduced at trial. In these circumstances, the President, could probably only reasonably be anticipated to refer the issue to the Trial Chamber for determination.

42. The Trial Chamber therefore finds that Defence counsel—for all intents and purposes—have exhausted all available remedies before the President (former and present). The Trial Chamber is therefore prepared to accept, in the circumstances, that all available remedies have been exhausted and that it has the power to intervene in the matter, pursuant to the combination of Article 16, Rule 130 (A), and exercising its inherent powers.

Should the Trial Chamber intervene?

43. The Trial Chamber agrees with the Head of Defence Office that refusing to accept jurisdiction at this point in the trial could amount to a miscarriage of justice. But it does not automatically follow that the relief sought will be granted. So what therefore are the options if

⁴⁸ Transcript, 14 October 2015, pp 78-79.

⁴⁹ Transcript, 14 October 2015, p. 71, submissions of Mr Aouini for Mr Merhi. See also, submission of Mr Roux, Head of Defence Office, p. 72.

it intervenes? A review *de novo* of Judge Baragwanath's decision? A substitution of his decision with the Trial Chamber's own? Or, perhaps, a *de novo* decision of the Trial Chamber?

44. The Trial Chamber could, if it wished, in the circumstances, make a *de novo* assessment and substitute its own decision. The Trial Chamber, however, will treat the application as a request to alter the conditions of Mr Nashabe's assignment by adding its own conditions to Judge Baragwanath's orders, even if the effect, technically, would be to alter in some way the consequence of those orders.

45. Two issues arise from this. First, whether the terms of Mr Nashabe's assignment are prejudicing the Defence preparations for trial, and second, if the Trial Chamber is prepared to alter them, whether his status *vis-à-vis* the Special Tribunal should also be changed to give him the benefit of the immunities attaching to 'persons assisting counsel'. On the first, the Trial Chamber is not convinced of actual prejudice, at the moment, to Defence preparations for trial. On the second, the Trial Chamber will not intervene to change Mr Nashabe's relationship with the Special Tribunal.

Access to confidential material. On a case by case basis?

46. The Trial Chamber has carefully examined the submissions and arguments of Defence counsel and the Head of Defence Office, but is not persuaded that it should intervene in the manner suggested, namely, to make the blanket change to the conditions of the assignment.

47. Judge Baragwanath, in July 2014, declined to alter the conditions; he was not satisfied of any change in circumstances or any new fact warranting a change. Defence counsel posed general arguments before the Trial Chamber but presented only one specific scenario said to cause some difficulty in their using Mr Nashabe's services, namely their inability to brief him with confidential information relating to protected witnesses and victims. But this is neither a change in circumstances nor a new fact. This has been the situation since Mr Nashabe contracted with Defence counsel over three years ago, in July 2012. The fact that he has not—so far as Defence counsel are aware—breached any confidentiality, likewise, is not a new fact or change in circumstances. Mr Nashabe is contractually bound not to do so and merely performing contractual duties cannot amount to a material change in circumstances.

48. This is not, however, the end of the matter. Even in the absence of any change in circumstances, the Trial Chamber must independently inquire as to whether there has been any breach of the fair trial rights of the Accused.

49. The Trial Chamber has carefully examined the issues raised by Defence counsel. It accepts that fair trial points have been raised, but it is not convinced that these *currently* affect the fairness of the proceedings.

50. The motion was filed only on 17 September 2015 (and by counsel for three of the five Accused) and well after the conclusion of the Prosecution's evidence relating to the areas in which Mr Nashabe is said to have specific expertise, namely general and political evidence. Furthermore, Defence counsel put nothing concrete before the Trial Chamber to suggest any prejudice to their preparations in relation to the telecommunications evidence or the attribution of mobile telephone usage to any of the Accused.

51. Defence preparations for trial, however, naturally extend beyond the Prosecution case and evidence, and Defence counsel must have the necessary resources to investigate and to mount their case. The Trial Chamber recognises that circumstances could arise where Mr Nashabe's expertise could assist Defence counsel in their trial preparations, and that these could extend into areas beyond those referred to in Judge Baragwanath's orders.

52. Three sets of Defence counsel rely upon Mr Nashabe's services and say that they are very pleased with the quality of his work. To assist Defence counsel in their preparation for trial, the Trial Chamber would be prepared, in appropriate circumstances, to allow Mr Nashabe access to confidential information. This, however, would have to be on a case by case basis. For the same reasons identified by Judge Baragwanath—directly relating to the *Al-Akhbar* publication—the Trial Chamber is not prepared to allow Mr Nashabe the access to confidential material in the manner sought by counsel for three of the Accused.

53. Consistent with Judge Baragwanath's three decisions, the Trial Chamber is satisfied that it may determine, on a case by case basis, any Defence application to permit Mr Nashabe access to confidential information not covered by Judge Baragwanath's orders. The Trial Chamber is not convinced that this would impose onerous conditions upon Defence counsel. Defence counsel and the Head of Defence Office put nothing compelling before the Trial Chamber demonstrating how making applications on a case by case basis would be onerous.

Indeed the only example was before the Pre-Trial Judge in May 2013; none have been made since.

Mr Nashabe's status *vis-à-vis* the Special Tribunal - immunities

54. Defence counsel also sought to fundamentally alter the status of Mr Nashabe *vis-à-vis* the Special Tribunal and Lebanon by granting him immunities normally given to 'persons assisting counsel'. According to the Registrar, however, this would create a *de facto* appointment to a new category of persons providing services to the Tribunal.⁵⁰

55. The Trial Chamber, having carefully examined the arguments, is not prepared to alter Mr Nashabe's status in the manner sought, irrespective of whether he is granted access to confidential material on a case by case basis.

56. The issue of immunities first arose as a result of Judge Baragwanath's decision of 27 March 2013, where he clarified—at the Registrar's request—that, as Mr Nashabe was not to be entrusted with confidential information, he could not be accorded the 'insider status required to classify him within the ambit of a "person assisting counsel" rather than simply as an "expert"'.⁵¹

57. The appointment or assignment of 'persons assisting counsel'—defined as legal officers, consultants, investigators, analysts, resource persons, case managers, interpreters and legal interns' providing support to lead counsel—is governed by Article 22 *bis* of the Directive on the Appointment and Assignment of Defence Counsel (issued by the Head of Defence Office). Article 22 *bis* (C) provides that the Head of Defence Office shall ensure that all such persons meet the criteria in Rule 58 (A) ((ii) to (iv), are qualified, and pass a security screening conducted by the Registry 'on the basis of a Regulation setting forth criteria and a procedure, as agreed between the Registrar and Head of Defence Office'. Conflict should be resolved by mutual agreement between the two and, failing that, by the President. No Regulations, however, have been made.⁵² But more pertinently, Mr Nashabe is not covered by this Directive and his contract is with Defence counsel rather than with the Special Tribunal.

58. Were he subject to this Directive, Mr Nashabe would be entitled to the immunities granted in the Memorandum of Understanding between Lebanon and the Special Tribunal of

⁵⁰ Registry submissions, para. 6.

⁵¹ Decision of 27 March 2013, para. 45.

⁵² Article 22 *bis* was inserted by amendment on 18 March 2013.

Lebanon concerning the Office of the Special Tribunal for Lebanon. The Memorandum would entitle him to the privileges of ‘persons assisting counsel’, Article 18 of which provides ‘persons assisting counsel in accordance with the Rules of Procedure and with the permission of the lead counsel’ with immunity (in Lebanon) from personal arrest or detention and from seizure of personal baggage.⁵³

59. Judge Baragwanath was not prepared to create a special category for Mr Nashabe, and neither is the Trial Chamber. No valid reasons have been presented to justify taking this course. If Mr Nashabe is granted access—on a case by case basis—to confidential information, Defence counsel, the Head of Defence Office and the Registrar may work out between themselves the modalities of his access to this material. This can be done without granting Mr Nashabe the immunities specified in the Directive and the Memorandum.

Security risk assessment

60. The Registrar, in the hearing, suggested that either he or the Head of Defence Office could have a security risk assessment conducted on Mr Nashabe—preferably with his consent and input—and that the Trial Chamber should view such a report before deciding to alter any of Judge Baragwanath’s conditions of assignment.

61. The Trial Chamber agrees. It shares Judge Baragwanath’s concerns about the deliberate breach of Judge Fransen’s order of 23 February 2011 evident in the article published in *Al Akhbar* on 1 March 2011, under Mr Nashabe’s name. If the allegation that Mr Nashabe wrote the article is correct, officials of the Special Tribunal, including its judges would be justified in having grave concerns about allowing him access to confidential information, especially relating to victims and witnesses. Great caution should therefore be exercised before taking this step. The fact that no security breaches have been reported in the intervening years is only one consideration, because balanced against this is that—due to the strict terms of his assignment—Mr Nashabe has not had any official access to confidential information over that period.

62. Given the Trial Chamber’s duty to protect witnesses and participating victims (under Rule 133), and the statutory role of the Special Tribunal’s Victims and Witnesses Unit and its

⁵³ In the absence of any statutory guidance on the issue of Mr Nashabe’s immunities, Judge Baragwanath partly sourced his review on the need ‘to seek [a] commonsense solution based on practical considerations’; Decision of 27 March 2013, para. 39 (referring in footnote 38 to United Kingdom, Court of Appeal, *Macmillan Inc v. Bishopsgate Trust (No 3)* [1996], 1 WLR 387 (2 November 1995), per Staughton LJ, p. 392).

Victim's Participation Unit, both should be consulted—on a case specific basis—before Mr Nashabe could be granted access to confidential victim and witness information. The Trial Chamber is reluctant to allow Mr Nashabe this access without further information about any security risks. It is not prepared to grant Mr Nashabe access to confidential information without him undergoing a security risk assessment.

63. Further, in any future application for access, the Trial Chamber will consider whether it will require Mr Nashabe to provide an undertaking in relation to misuse of the Special Tribunal's confidential information, and assurances that this access would not be abused and compromise the security of the Special Tribunal in the widest sense—including that of its staff, victims and witnesses and its information.

64. Granting Mr Nashabe access to confidential information would be contingent upon the Trial Chamber receiving a positive security risk assessment. The Trial Chamber leaves it to the Registrar and Head of Defence Office to determine between themselves the modalities and responsibilities as to how this would be done.

CONCLUSION

65. The Trial Chamber finds that it could, in the circumstances, intervene in relation to the terms of Mr Nashabe's retainer with Defence counsel. Notwithstanding that Defence counsel could potentially seek relief from the President, pursuant to Judge Baragwanath's decisions of 2012 and 2013, the Trial Chamber has the inherent powers—in combination with Article 16 of the Statute and Rule 130 (A)—to intervene to ensure the integrity of the proceedings and to guarantee a fair trial. Defence counsel, in seeking relief from the Trial Chamber, have, in the specific circumstances and for all practical intents and purposes, exhausted all available remedies—specifically those of the President, as is demonstrated by Judge Baragwanath's refusal to intervene in July 2014 when last approached by the Head of Defence Office.

66. Defence counsel have raised some valid fair trial points, namely, whether the conditions of the assignment are constricting their preparations for trial. The Trial Chamber has carefully examined all the material put before it by Defence counsel and, in the hearing, posed specific questions to counsel seeking practical examples of how the assignment conditions were impacting on Defence preparations for trial and hence the rights of the Accused to a fair trial. Defence counsel raised general concerns but gave only one specific example, namely, that they could not provide Mr Nashabe with information relating to

protected witnesses, including their names. They did not, however, specify how this had, in any particular situation, hampered or prejudiced their preparations for trial. The Trial Chamber is therefore not convinced that the issues raised presently affect the fairness of the proceedings. It is not prepared to alter the conditions of Mr Nashabe's assignment in the general manner suggested.

67. As valid fair trial points have been raised, however, and consistent with Judge Baragwanath's three decisions, the Trial Chamber is satisfied that it may determine, on a case by case basis, any Defence application to permit Mr Nashabe access to confidential information not covered by Judge Baragwanath's orders. If necessary, appropriate remedial orders can be made. The Trial Chamber is not convinced that this would impose onerous conditions upon Defence counsel. Nor is it prepared to create the novel category of someone assisting Defence counsel who is not subject to the Directive on the Appointment and Assignment of Defence Counsel, but who is nonetheless entitled to the immunities that a 'person assisting counsel' receives under the Directive. If a future application is made to grant Mr Nashabe access to otherwise confidential information, the Trial Chamber will consider, at the appropriate time, the modalities of permitting the access.

68. The Trial Chamber must balance the interests of the Special Tribunal's security and particularly protective orders made in relation to victims and witnesses with those of the Defence in employing this *particular* expert-consultant. It shares Judge Baragwanath's concerns about the article published on 1 March 2011 under Mr Nashabe's name. The Trial Chamber is therefore not prepared to grant Mr Nashabe access to confidential information without seeing a security risk assessment, but leaves it to the Registrar and Head of Defence Office to determine between themselves the modalities and responsibilities.

69. The Trial Chamber therefore dismisses the application but holds that it will review on a case by case basis any Defence requests to allow Mr Nashabe access to otherwise confidential information. This would be subject to the Trial Chamber receiving a positive security risk assessment report, and, in respect of participating victims, to receiving input from their Legal Representative.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the application as set out in paragraph 9, but holds that it will consider any future application to allow Mr Omar Nashabe access to specified material, on a case by case basis.

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

Leidschendam,
The Netherlands
23 October 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

