



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE APPEALS CHAMBER**

**Case No:** STL-11-01/T/AC/AR126.10

**Before:** Judge Ivana Hrdličková, Presiding  
Judge Ralph Riachy, Judge Rapporteur  
Judge Afif Chamseddine  
Judge Daniel David Ntanda Nsereko

**Registrar:** Mr Daryl Mundis

**Date:** 3 May 2016

**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 INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S  
DECISION REGARDING THE CONDITIONS OF ASSIGNMENT OF DEFENCE EXPERT  
CONSULTANT**

**Prosecutor:**  
Mr Norman Farrell

**Head of Defence Office:**  
Mr François Roux

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

**Counsel for Mr Salim Jamil Ayyash:**  
Mr Eugene O'Sullivan, Mr Emile Aoun &  
Mr Thomas Hannis

**Counsel for Mr Mustafa Amine Badreddine:**  
Mr Antoine Korkmaz, Mr Iain Edwards &  
Ms Mylène Dimitri

**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 Yasser  
Hassan & Ms Natalie von Wistinghausen

**Counsel for Mr Assad Hassan Sabra:**  
Mr David Young, Mr Guénaél Mettraux  
Mr Geoffrey Roberts



## **INTRODUCTION**

1. The Appeals Chamber is seized of an interlocutory appeal filed by counsel for Messrs Badreddine, Merhi and Oneissi (collectively, “the Defence”)<sup>1</sup> against the Trial Chamber’s decision dismissing the Defence’s request to modify the conditions imposed by the President on Mr Omar Nashabe’s service as an expert consultant for the Defence.<sup>2</sup> In particular, the Defence challenges Mr Nashabe’s lack of access to confidential material in the *Ayyash et al.* case, and the fact that such access must be sought from the Trial Chamber on a case-by-case basis and, in certain circumstances, after hearing from the Legal Representative of Victims (“LRV”), the Victims’ Participation Unit (“VPU”) and the Victims and Witnesses Unit (“VWU”).<sup>3</sup> Having considered the Parties’ submissions, the Appeals Chamber dismisses the Appeal.

## **BACKGROUND**

2. A full procedural history of the proceedings is provided in the Impugned Decision.<sup>4</sup> In sum, on 1 May 2012, Mr Omar Nashabe, a Lebanese journalist, signed a service contract with the Tribunal under which he would undertake investigative work for Defence counsel.<sup>5</sup> The Registrar terminated the contract a few days later on the ground that, in a newspaper article he authored, Mr Nashabe knowingly violated a judicial order issued by the Pre-Trial Judge which prohibited the publication of certain confidential information contained in the transcript of a hearing held on 14 January 2011.<sup>6</sup> The Registrar also opposed the assignment of Mr Nashabe by the Head of Defence Office (“HDO”) as a local resource person in Lebanon to assist Defence counsel.<sup>7</sup>

3. The HDO brought the matter before the President—Judge Baragwanath at the time—who ruled that in the circumstances Mr Nashabe could be appointed by the HDO as an external expert consultant, if so requested by Defence counsel, but that he could not have access to confidential

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<sup>1</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.10, F0001, Appellate Brief from the Defence for Messrs Badreddine, Merhi and Oneissi Against the Trial Chamber Decision of 23 October 2015, 29 February 2016 (“Appeal”). All further references to filings and decisions relate to this case number unless otherwise stated.

<sup>2</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2286, 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, 23 October 2015 (“Impugned Decision”).

<sup>3</sup> Appeal, paras 17, 32, 40.

<sup>4</sup> Impugned Decision, paras 2-10.

<sup>5</sup> *Id.* at para. 4.

<sup>6</sup> *Id.* at paras 2-4.

<sup>7</sup> *Id.* at para. 4.

information unless otherwise ordered by a Judge or Chamber.<sup>8</sup> The President subsequently dismissed a request by the HDO seeking a change in these conditions to permit Mr Nashabe to perform the functions of an “analyst-rapporteur” for the Defence, to be given access to confidential information and to be granted the privileges, immunities and facilities provided to persons assisting counsel.<sup>9</sup>

4. More than a year later, the Defence filed a joint motion before the Trial Chamber requesting that the conditions of Mr Nashabe’s assignment be modified.<sup>10</sup> In particular, the Defence sought an order authorizing the HDO to broaden the scope of Mr Nashabe’s work for counsel, to permit him to access certain confidential information and to afford him the immunities given to persons assisting counsel.<sup>11</sup> The Prosecutor, the Registrar and the LRV opposed the request.<sup>12</sup>

5. In the Impugned Decision, the Trial Chamber dismissed the Defence Request, but held that it would consider any future application to allow Mr Nashabe access to specified material on a case-by-case basis and after consultation with the VWU, the VPU and the LRV, if necessary.<sup>13</sup>

6. Following a request by the Defence for certification of the Impugned Decision for appeal, the Trial Chamber, by majority, certified the following issue for appeal:

Whether the conditions that the Trial Chamber imposed on Defence counsel in the exercise of their functions in conjunction with their expert consultant constitute an illegal and inappropriate interference in the strategy of the Defence and undermine its independence.<sup>14</sup>

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<sup>8</sup> STL, *Prosecutor v. Ayyash et al.*, 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 (“Decision of 21 December 2012”); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES, 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 (“Decision of 27 March 2013”).

<sup>9</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PRES, F1618, Decision on the 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 (“Decision of 14 July 2014”).

<sup>10</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2201, Request from the Defence for Messrs Badreddine, Merhi and Oneissi for Modification of the Conditions Imposed on the Assignment of Mr Omar Nashabe by Decisions of the President of the Tribunal of 21 December 2012 and 27 March 2012, 17 September 2015 (“Defence Request”).

<sup>11</sup> Defence Request, paras 1, 21.

<sup>12</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2239, Prosecution Submissions on the Badreddine, Merhi, and Oneissi Defence Teams Joint Request Concerning the Conditions on the Assignment of Mr. Omar Nashabe, 1 October 2015; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, 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; STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 16 October 2015, pp. 29-32.

<sup>13</sup> Impugned Decision, paras 62, 64, 67-69.

<sup>14</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2461, Decision Certifying for Appeal the Trial Chamber’s Decision of 23 October 2015 Regarding the Conditions of Assignment of Omar Nashabe, 19 February 2016 (“Certification Decision”). The Trial Chamber did not certify its decision with respect to the immunities requested by

7. The Defence filed the Appeal on 29 February 2016. It asks that the Impugned Decision be reversed and that the restrictions as regards the transmission of confidential information to Mr Nashabe be lifted.<sup>15</sup> The Prosecutor responds that the Appeal should be dismissed.<sup>16</sup>

8. The LRV requests that he be permitted to respond to the Appeal. He submits that the Trial Chamber did not err in maintaining the restrictions on Mr Nashabe and requiring that the LRV be consulted when the Defence requests that Mr Nashabe be granted access to confidential information related to participating victims.<sup>17</sup> The Defence responds to the LRV request to make submissions, arguing that the LRV does not have standing to file a response to its Appeal.<sup>18</sup>

9. The Head of Defence Office submits observations in support of the Appeal.<sup>19</sup> The Prosecutor argues that the Observations should be dismissed on grounds of untimeliness and requests clarification as to their status under the Tribunal's Rules of Procedure and Evidence ("Rules").<sup>20</sup>

10. Judge Baragwanath requested his excusal from this interlocutory appeal in light of the decisions he took when President.<sup>21</sup> The Panel designated by the current President to consider this matter, pursuant to Rule 25 (B) of the Rules, granted Judge Baragwanath's request.<sup>22</sup> In a memorandum addressed to the Parties and the LRV, the President stated that, because there are no

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the Defence for Mr Nashabe. Therefore, the Appeals Chamber will not address this matter (*see, e.g., STL, Prosecutor v. Ayyash et al., STL-11-01/T/AC/AR126.6, F0003, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on the Oneissi Defence's Request for Disclosure Regarding a Computer", 12 May 2014, para. 11.*)

<sup>15</sup> Appeal, para. 39.

<sup>16</sup> F0006, Prosecution Response to "Mémoire d'appel de la Défense de MM. Badreddine, Merhi et Oneissi à l'encontre de la Décision de la Chambre de première instance du 23 octobre 2015", 11 March 2016 ("Prosecutor's Response").

<sup>17</sup> F0004, Response of the Legal Representative of Victims to the Appellate Brief from the Defence for Messrs Badreddine, Merhi, and Oneissi relating to the Trial Chamber Decision of 23 October 2015, 9 March 2016 ("LRV Response").

<sup>18</sup> F0010, Reply by the Defence for Messrs Badreddine, Merhi and Oneissi to the Response of the Legal Representative of Victims to the Appellate Brief Relating to the Trial Chamber Decision of 23 October 2015, 22 March 2016 ("Defence Reply to LRV Response").

<sup>19</sup> F0011, Observations from the Head of Defence Office in Support of the Appellate Brief of the Defence for Messrs Badreddine, Merhi and Oneissi against the Decision of the Trial Chamber of 23 October 2015, 29 March 2016 ("HDO Observations").

<sup>20</sup> F0012, Prosecution Submissions on the "Observations du Chef du Bureau de la Défense au soutien du Mémoire d'appel de la Défense de MM. Badreddine, Merhi et Oneissi à l'encontre de la Décision de la Chambre de première instance du 23 Octobre 2015", 11 April 2016 ("Prosecutor's Submissions on HDO Observations").

<sup>21</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PRES/AR126.10/R25, F0002, Memorandum to the President - Request by Judge Baragwanath to President Under Rule 25 (B) of the Tribunal's Rules of Procedure and Evidence to be Excused from Sitting on Appeal from Decision of Trial Chamber of 23 October 2015, 7 March 2016.

<sup>22</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/OTH/AR126.10/R25, F0005, Decision on Judge Baragwanath's Request to be Excused, 11 March 2016.

alternate Judges assigned to the Appeals Chamber, she could not assign another Judge to replace Judge Baragwanath.<sup>23</sup>

11. Pursuant to Rule 36 of the Rules, the Presiding Judge designated Judge Riachy as the Judge Rapporteur in this matter.

## **DISCUSSION**

### **I. Preliminary issues**

#### ***A. Composition of the Appeals Chamber***

12. Pursuant to Article 8 (1) (c) of the Tribunal's Statute, the Appeals Chamber is ordinarily composed of five judges. However, in light of Judge Baragwanath's excusal from this interlocutory appeal, and the impossibility of assigning another Judge to replace him,<sup>24</sup> only four Judges of the Appeals Chamber now remain to hear the appeal. In these circumstances, and in line with our previous practice, we find that we are properly seized of the appeal.<sup>25</sup> This is dictated by the principle of necessity, because it is the only available course of action which allows for the appeal to be heard and to avoid a denial of justice.<sup>26</sup>

#### ***B. Request for an oral hearing***

13. In its Appeal, the Defence requests a public hearing to make oral submissions, citing the importance of the interlocutory appeal's subject matter and the complex nature of the facts.<sup>27</sup> The Prosecutor responds that the request should be dismissed.<sup>28</sup> Under Rule 187 (A) of the Rules, an interlocutory appeal may be determined entirely on the basis of the written briefs. We have previously held that it is for the party requesting a hearing to demonstrate why the issues on appeal

<sup>23</sup> STL-11-01/T/PRES/AR126.10/R25, F0007, Internal Memorandum - Decision of Panel Designated Under Rule 25 of the Tribunal's Rules of Procedure and Evidence to Determine Judge Baragwanath's Request to be Excused from Sitting on Appeal, 14 March 2016 ("President's Memorandum").

<sup>24</sup> See President's Memorandum; see also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F1178, 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 ("*Ayyash et al.* Composition Appeal Decision"), para. 8 ("[N]one of [the Appeals Chamber's] members can be replaced by an alternate Judge. Moreover, unlike other international tribunals, the Statute of this Tribunal does not provide for the appointment of a Judge from the other Chambers to temporarily serve on the Appeals Chamber.").

<sup>25</sup> *Ayyash et al.* Composition Appeal Decision, para. 8; STL, *In the matter of El Sayed*, CH-AC-2010-01, Decision on the Application to Challenge the Order of the President of the Appeals Chamber to Stay the Order of the Pre-Trial Judge and to Call upon Amicus Curiae, 8 November 2010 ("*El Sayed* Composition Appeal Decision"), para. 17.

<sup>26</sup> *Ayyash et al.* Composition Appeal Decision, para. 8; *El Sayed* Composition Appeal Decision, paras 14, 15, 17.

<sup>27</sup> Appeal, para. 3.

<sup>28</sup> Prosecutor's Response, para. 6.

cannot be effectively addressed through those briefs.<sup>29</sup> Here, the Defence has provided nothing specific to substantiate its arguments in this regard. Consequently, we reject the request.

### ***C. Response by the Legal Representative of Victims***

14. The LRV seeks leave to respond to the Appeal, arguing that he has legal standing to do so.<sup>30</sup> He submits that, while the Statute and Rules are silent on whether he has a right to respond to interlocutory appeals filed by the Parties, the Appeals Chamber has previously permitted the LRV to lodge an interlocutory appeal under certain circumstances.<sup>31</sup> The LRV asserts that the issue on appeal significantly affects the personal interests of participating victims and the Appeals Chamber should therefore allow him to be heard in response.<sup>32</sup> The Defence contends that the LRV does not have standing to file submissions in response to interlocutory appeals.<sup>33</sup> It also argues that the victims' personal interests are not affected and that the LRV's failure to object to the Defence Request before the Trial Chamber bars him from making submissions on appeal.<sup>34</sup>

15. Article 17 of the Statute provides that:

[w]here the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Rule 87 (D) of the Rules specifies that, “[a]t the appeal stage, subject to the authorisation of the Appeals Chamber, after hearing the Parties, a victim participating in proceedings may participate in a manner deemed appropriate by the Appeals Chamber”. We hold that this provision applies to both appeals against judgments and interlocutory appeals. Indeed, the Statute does not limit the participation of the victims participating in the proceedings (“VPPs”) to specific procedural stages

<sup>29</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.2, F0008, 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. 8; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.1, F0012, *Corrected Version of Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial In Absentia Decision*, 1 November 2012 (“*In Absentia Appeal Decision*”), para. 7 (explaining that Rule 187 of the Rules is similar to those of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Court, and that the Appeals Chamber has adopted the approach taken by the ICTR Appeals Chamber with regard to oral hearings in interlocutory appeals); see also STL, *In the Case Against New TV S.A.L. and Khayat*, STL-14-05/PT/AP/AR126.1, F0011, Decision on Urgent Request for Suspensive Effect of the Appeal, Request for Leave to Reply and Request for Appeal Hearing, 22 August 2014, para. 26.

<sup>30</sup> LRV Response, paras 1-6, 21.

<sup>31</sup> *Id.* at para. 2.

<sup>32</sup> *Id.* at paras 2-6.

<sup>33</sup> Defence Reply to LRV Response, paras 3-6, 16.

<sup>34</sup> *Id.* at paras 7-15.

but rather leaves the scope of the VPPs' participation to the discretion of a Chamber. We therefore must determine whether permitting the LRV to respond to the Appeal is appropriate in the circumstances of this case.

16. In this context, we recall the Appeals Chamber's previous holding that VPPs have a limited right to file interlocutory appeals in specific cases where their personal interests are affected.<sup>35</sup> This includes, in particular, decisions on applications for status as a VPP, decisions on the modalities of victims' participation in the proceedings and decisions on protective measures for VPPs and the variation of such measures.<sup>36</sup> While that holding concerned the right of the LRV to file an interlocutory appeal, pursuant to Article 17 of the Statute and Rule 87 (D) of the Rules, we consider that similar reasoning applies to his right to respond to an interlocutory appeal filed by one of the Parties.

17. In the proceedings before us, the matter on appeal affects the VPPs' personal interests in two ways. First, a Defence request to grant Mr Nashabe access to confidential information could potentially result in his receiving information concerning the identity of VPPs. Second, the Trial Chamber crafted a system under which the LRV has to be consulted in all cases where the Defence makes requests that could lead to such information being made available to Mr Nashabe.<sup>37</sup> The Trial Chamber therefore regulated the modalities of the VPPs' participation in the proceedings. Indeed, the LRV was significantly involved in the litigation leading to the Impugned Decision. While the LRV did not respond to the Defence's initial request to modify the conditions of Mr Nashabe's assignment, the Trial Chamber subsequently invited him to make submissions on how the request may affect the personal interests of VPPs.<sup>38</sup> Moreover, the Defence argues in its Appeal that requiring consultation of the LRV when requests for disclosure of confidential information to Mr Nashabe concern VPPs amounts to an additional restriction causing illegal arbitrary interference in the Defence's strategy.<sup>39</sup>

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<sup>35</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 ("LRV Appeal Decision"), paras 10-18. This holding was by majority, Judges Riachy and Nsereko dissenting.

<sup>36</sup> LRV Appeal Decision, para. 15.

<sup>37</sup> Impugned Decision, paras 62, 69.

<sup>38</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 16 October 2015, pp. 2-3.

<sup>39</sup> Appeal, paras 32-34.

18. We therefore find that the LRV has standing to respond to the Appeal, to the extent that the response concerns Defence arguments relating to issues that significantly affect the personal interests of the VPPs as set out above.

19. We note that the LRV has included in his filing such response submissions, without waiting to hear whether authorization was granted to make them in the first place. This was improper. Analogous to a request for leave to file a reply, the LRV should have requested leave to file a response first. Only after obtaining such leave, should he have filed the substance of the response. Otherwise, Rule 87 of the Rules would be circumvented because the LRV could in effect place his response on the case record even in instances where he was not permitted to do so.<sup>40</sup> However, in the present case, in the interests of judicial economy, we exceptionally accept the LRV's response as is, given that it is limited to responding to those arguments that significantly affect the VPPs interests. Nevertheless, we remind the LRV to adhere to the proper procedure in the future. In sum, we permit the LRV to make submissions in response to the Appeal.

#### ***D. Observations by the Head of Defence Office***

20. The HDO submits observations in support of the Appeal in general—but without further elaboration—and the Defence's request for an oral hearing on the matter.<sup>41</sup> The Prosecutor argues that the Observations should be dismissed for lack of timeliness.<sup>42</sup> He also seeks clarification as to the status of the Observations under the Rules and a Party's ability to respond or reply to them, as the case may be.<sup>43</sup> Finally, the Prosecutor states that, in any event, he does not make submissions on the substance of the Observations, as they add nothing new to the Appeal.<sup>44</sup>

21. Rule 57 (F) of the Rules gives the HDO the right to be heard, *proprio motu*, on “matters of general interest to defence teams, the fairness of the proceedings or the rights of a suspect or accused”. Additionally, under the Practice Direction on the Role of the Head of Defence Office in

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<sup>40</sup> LRV Appeal Decision, para. 5 (with reference to the relevant case-law from the ICTY).

<sup>41</sup> HDO Observations, paras 22-24.

<sup>42</sup> Prosecutor's Submissions on HDO Observations, paras 2-5.

<sup>43</sup> *Id.* at paras 6-7.

<sup>44</sup> *Id.* at para. 8.



Proceedings before the Tribunal,<sup>45</sup> the HDO must inform the Chamber in advance if he considers that it is in the interests of justice for him to make written submissions *proprio motu*.<sup>46</sup>

22. While both Rule 57 (F) of the Rules and the Practice Direction are silent on the timing of submissions by the HDO, we find it appropriate to give guidance in this regard. We note that the HDO's right of audience—albeit in relation to a limited range of issues—is similar to that of the Parties to the proceedings. Moreover, we consider that the HDO, who protects the rights of the Defence and is primarily responsible for providing support and assistance to Defence counsel,<sup>47</sup> cannot enjoy rights which go beyond those of the Parties. Accordingly, his submissions must comply with the same time limits and leave requirements as those that are applicable to Defence counsel and the Prosecutor. Otherwise, unfairness could arise, because the HDO would be able to augment the filings of the Parties even when they themselves could not do so. This also carries the potential of delaying the proceedings.

23. Therefore, in the interests of fairness and the expeditiousness of the proceedings, we hold that on appeal the HDO must submit written *proprio motu* observations within the time limit applicable to responses to the appeal brief.<sup>48</sup> If the HDO seeks to make observations on a response filed by a Party, he must first request leave to do so, consistent with the regime applicable to the Parties.<sup>49</sup> In both cases, if a Party wishes to respond to submissions made by the HDO, it must first request leave to do so, within the time limit applicable to requests for leave to file a reply.

24. In this case, we find that the HDO should have filed his Observations within the time limit applicable to responses to interlocutory appeals which have been certified; that is, within ten days of the Appeal.<sup>50</sup> However, he did so 18 days after this time limit had already expired. We dismiss them for that reason. While the applicable time limit is only clarified in this decision, we find that no unfairness arises, given that the HDO does not make any substantive submissions in his observations and they would have thus been of no assistance to the Appeals Chamber in reaching its decision.

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<sup>45</sup> STL, Practice Direction on the Role of the Head of Defence Office in Proceedings before the Tribunal, STL/PD/2011/04, 30 March 2011, Section 2, para. 8.

<sup>46</sup> We note that the HDO has failed to meet this requirement in the present proceedings.

<sup>47</sup> Article 13 (2) STL St.

<sup>48</sup> See STL, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Special Tribunal for Lebanon, STL/PD/2013/07/Rev.1, 13 June 2013 ("Practice Direction on Filings before Appeals Chamber").

<sup>49</sup> Practice Direction on Filings before Appeals Chamber.

<sup>50</sup> Practice Direction on Filings before Appeals Chamber, Art. 10 (2).

## II. Standard of review

25. We have previously held that the Trial Chamber enjoys considerable discretion in relation to the management of the proceedings before it.<sup>51</sup> This includes the assessment of how to ensure respect for the rights of an accused, in particular the right to have adequate time and facilities to prepare his defence. The Impugned Decision, in which the Trial Chamber determined the conditions under which the Defence can use the assistance of Mr Nashabe, is therefore a discretionary decision to which we accord deference if it complies with settled principles.<sup>52</sup> Such deference is based on the recognition of the Trial Chamber's organic familiarity with the day-to-day conduct of the proceedings and the practical demands of the case.<sup>53</sup> As we have held before, on appellate review the issue is not whether or not we agree with the Impugned Decision, but whether the Trial Chamber is shown to have exercised its discretion correctly.<sup>54</sup> Accordingly, we will not interfere with the Impugned Decision unless the Trial Chamber has committed a discernible error. Such error exists where the Trial Chamber: (i) based its decision on an incorrect interpretation of the governing law; (ii) made a patently incorrect finding of fact; or (iii) reached a decision so unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>55</sup>

## III. Merits of the Appeal

26. Before addressing the individual grounds of appeal raised by the Defence, we find it useful to recall the original Defence Request made before the Trial Chamber and the relevant points of the Impugned Decision.

27. In its request, the Defence sought an order from the Trial Chamber allowing it to entrust Mr Nashabe with "evidentiary materials and confidential procedural documents in the *Ayyash et al.* case for the strict needs of their investigations".<sup>56</sup> The Defence asserted that such an order would constitute a modification of the terms of Mr Nashabe's assignment put in place by the former

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<sup>51</sup> See, e.g., *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.8, F0008, Decision on Appeal by Counsel for Mr Merhi Against the Trial Chamber's Decision on the Resumption of Trial Proceedings, 5 June 2014 ("Trial Schedule Appeal Decision"), para. 4.

<sup>52</sup> Trial Schedule Appeal Decision, para. 4; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.5, F0003, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judge's "Decision on Sabra's Tenth and Eleventh Motions for Disclosure", 6 November 2013 ("Disclosure Appeal Decision"), para. 9; *In Absentia* Appeal Decision, para. 5.

<sup>53</sup> Trial Schedule Appeal Decision, para. 4; Disclosure Appeal Decision, para. 9.

<sup>54</sup> Trial Schedule Appeal Decision, para. 4; Disclosure Appeal Decision, para. 9 (with reference to the relevant case-law of this and other courts and tribunals).

<sup>55</sup> Trial Schedule Appeal Decision, para. 4; Disclosure Appeal Decision, para. 9 (with reference to the relevant case-law of this and other courts and tribunals).

<sup>56</sup> Defence Request, para. 21; see also *id.* at para. 1.

President.<sup>57</sup> The Defence clarified that “it [was] not requesting the Chamber to annul the administrative decisions of the President or the Registrar, but rather to examine the effect the situation generated has on the fairness of the proceedings, under the present circumstances of the case, through the conditions imposed by the President’s decisions”.<sup>58</sup>

28. The Trial Chamber read the Defence Request as an application to alter the conditions of Mr Nashabe’s assignment.<sup>59</sup> It identified the relevant question to be: were the conditions prejudicing the Defence’s preparations for trial?<sup>60</sup> In addressing this question, the Trial Chamber concluded first that the Defence had shown neither a material change in circumstances nor a new fact arising since the former President’s decision of 14 July 2014 declining to alter the conditions.<sup>61</sup> However, the Trial Chamber reasoned that “[e]ven in the absence of any change in circumstances, [it] must independently inquire as to whether there has been any breach of the fair trial rights of the Accused”.<sup>62</sup> In this regard, the Trial Chamber accepted that the Defence had raised “fair trial points”, but found that these did not “*currently* affect the fairness of the proceedings”.<sup>63</sup> Consequently, the Trial Chamber decided it would not modify the existing conditions of Mr Nashabe’s assignment.<sup>64</sup>

29. Looking forward, the Trial Chamber acknowledged that circumstances might arise where Mr Nashabe’s expertise could assist the Defence in areas “beyond those referred to in Judge Baragwanath’s orders”.<sup>65</sup> Accordingly, the Trial Chamber stated that it would be prepared, when appropriate, to allow Mr Nashabe access to confidential information.<sup>66</sup> The Trial Chamber held that, for the same reasons given by the former President when he set the conditions of Mr Nashabe’s assignment—namely, concerns arising from Mr Nashabe’s alleged breach of the Pre-Trial Judge’s non-publication order—, it would determine the scope of Mr Nashabe’s access on a case-by-case basis.<sup>67</sup> It observed that the Defence had not shown how such approach would be onerous.<sup>68</sup>

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<sup>57</sup> Defence Request, para. 13.

<sup>58</sup> *Id.* at para. 14.

<sup>59</sup> Impugned Decision, para. 44.

<sup>60</sup> *Id.* at para. 45.

<sup>61</sup> *Id.* at para. 47.

<sup>62</sup> *Id.* at para. 48.

<sup>63</sup> *Id.* at para. 49 (emphasis in the original); *see also id.* at para. 66.

<sup>64</sup> *Id.* at para. 66.

<sup>65</sup> *Id.* at para. 51.

<sup>66</sup> *Id.* at para. 52.

<sup>67</sup> *Id.* at paras 52-53.

<sup>68</sup> *Id.* at para. 53.

30. The Trial Chamber then elaborated on this case-by-case approach.<sup>69</sup> It held that any order granting Mr Nashabe access to confidential information would be contingent upon a positive security risk assessment, the modalities of which would be determined by the Registrar and HDO.<sup>70</sup> Moreover, in dealing with any future application, the Trial Chamber would consider requiring Mr Nashabe to provide an undertaking and assurances regarding the use of the confidential information in question.<sup>71</sup> Finally, the Trial Chamber decided that, given its duty to protect witnesses and participating victims and the statutory roles of the VWU and VPU, these Units and the LRV should be consulted before Mr Nashabe receives access to confidential victim and witness information.<sup>72</sup>

***A. Whether the Trial Chamber erred by applying improper assessment criteria***

31. In its first ground of appeal, the Defence claims that, when examining the Defence Request, the Trial Chamber applied “[e]rroneous assessment criteria”.<sup>73</sup> The Defence alleges two legal errors in this respect, which we will address in turn.

32. First, the Defence argues that the Trial Chamber erred by requiring it to demonstrate a change in circumstances or new fact warranting a modification of the conditions of Mr Nashabe’s assignment imposed by the President’s decisions.<sup>74</sup> It contends that this was an improper criterion, normally reserved for requests for reconsideration under Rule 140 of the Rules.<sup>75</sup> While the Defence states that “the Chamber in fact then seems to have ignored that criterion and merely base[d] its refusal to lift the restrictions [...] on Omar Nashabe’s alleged violation of an order [...] and the lack of demonstration of any specific prejudice”, it submits that the Trial Chamber’s initial focus on the improper criterion led the Chamber to summarily reject Defence arguments on these points.<sup>76</sup> The Trial Chamber’s entire examination was thus invalidated.<sup>77</sup> In response, the Prosecutor contends that the Trial Chamber did not require a change of circumstances or a new a fact; rather, the Chamber made clear that it must independently assess a possible breach of fair trial rights.<sup>78</sup>

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<sup>69</sup> Impugned Decision, paras 60-64.

<sup>70</sup> *Id.* at para. 64.

<sup>71</sup> *Id.* at para. 63.

<sup>72</sup> *Id.* at paras 62, 69.

<sup>73</sup> Appeal, para. 18.

<sup>74</sup> *Id.* at para. 19.

<sup>75</sup> *Id.* at para. 19.

<sup>76</sup> *Id.* at para. 20.

<sup>77</sup> *Id.* at para. 20.

<sup>78</sup> Prosecutor’s Response, para. 9.

33. We find that the Trial Chamber did not apply any improper criteria in its assessment of the Defence Request. While the Trial Chamber did not make clear why it first inquired whether the Defence had demonstrated a change of circumstances or a new fact—a requirement that is ordinarily applicable to requests for reconsideration<sup>79</sup>—the Chamber nevertheless stated in plain terms that, even in the absence of such a demonstration, it must conduct its own inquiry into the possibility of a breach of fair trial rights.<sup>80</sup>

34. The Defence fails to substantiate its assertion that, when conducting this inquiry, the Trial Chamber ignored the Defence’s prejudice arguments, as well as those concerning Mr Nashabe’s alleged violation of the Pre-Trial Judge’s non-publication order, because it had purportedly already dismissed them by applying the improper criterion.<sup>81</sup> Moreover, we consider that the Trial Chamber did in fact deal with these arguments. The Trial Chamber explained that it had evaluated “the issues raised by Defence counsel” but “was not convinced that these *currently* affect the fairness of the proceedings”.<sup>82</sup> In this respect, it reasoned that the Defence Request was filed after the conclusion of Prosecution evidence relating to Mr Nashabe’s supposed areas of expertise, and that the Defence had put nothing concrete before the Trial Chamber indicating prejudice to Defence preparations regarding the telecommunications evidence and the attribution of mobile telephone usage to the Accused.<sup>83</sup> These reasons directly addressed the Defence’s general prejudice claims.<sup>84</sup> Further, the Trial Chamber found that, while the Defence presented one specific example of supposed prejudice—its inability to provide Mr Nashabe with information relating to protected witnesses—it did not show how this situation had actually prejudiced its trial preparations.<sup>85</sup> Then, in deciding to rule on future Defence applications concerning Mr Nashabe’s access on a case-by-case basis, the Trial Chamber expressly addressed the Defence’s argument, in regards to Mr Nashabe’s alleged violation of the order, that his more recent conduct justified a modification of the conditions of his assignment.<sup>86</sup> Accordingly, we reject the Defence’s contention that the Trial Chamber ignored Defence arguments on the fairness of the proceedings.

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<sup>79</sup> See, e.g., STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F1258, Decision on Request by Counsel for Messrs Badreddine and Oneissi for Reconsideration of the Appeals Chamber’s Decision of 25 October 2013, 10 December 2013, para. 10.

<sup>80</sup> Impugned Decision, para. 48.

<sup>81</sup> Appeal, para. 20.

<sup>82</sup> Impugned Decision, para. 49.

<sup>83</sup> *Id.* at para. 50.

<sup>84</sup> See Defence Request, paras 11-13.

<sup>85</sup> Impugned Decision, para. 66.

<sup>86</sup> *Id.* at para. 61.

35. Second, the Defence argues that the Trial Chamber failed to conduct a “proportionality analysis”, which would have involved assessing the need for and proportionality of the restrictions imposed on the Defence in its working relationship with Mr Nashabe in view of fair trial requirements.<sup>87</sup> According to the Defence, the Trial Chamber instead “reversed the burden of proof” by obligating the Defence to prove specific prejudice resulting from the conditions of Mr Nashabe’s assignment, as well as requiring it to prove that applying for access to confidential information on a case-by-basis would be onerous.<sup>88</sup> The Prosecutor submits that, as the Defence based its request on the alleged unfairness caused by the conditions of Mr Nashabe’s assignment, the Defence bore the burden of demonstrating this alleged unfairness.<sup>89</sup>

36. As it concedes, the Defence sought modification of conditions which had long been in place pursuant to an administrative decision of the former President.<sup>90</sup> In essence, the Defence claimed that the conditions were, at the time of the Defence Request, “disproportionately infringing on the fairness of the proceedings” and that the Trial Chamber should intervene.<sup>91</sup> In these circumstances, as the moving party, the Defence was responsible for showing any unfairness. Requiring it to do so was not reversing the “burden of proof”, which in any case is an inapposite concept in this procedural context. Indeed, the Trial Chamber was entitled to require that the Defence demonstrate actual prejudice arising from the existing conditions of Mr Nashabe’s assignment prior to conducting any proportionality analysis.

37. The same reasoning holds with respect to the Defence’s assertion that the Trial Chamber erred in requiring it to show that applying for Mr Nashabe to be granted access to confidential information on a case-by-basis would be onerous.<sup>92</sup> Indeed, the Trial Chamber’s willingness to consider future applications on a case-by-case basis merely preserved the *status quo*, as set out in the President’s relevant decisions. In this regard, the Trial Chamber did not impose new conditions on Mr Nashabe’s assignment. Accordingly, the Defence bore the burden of persuading the Trial Chamber that a case-by-case approach prejudiced its trial preparations.

38. For these reasons, we find that the Defence has failed to demonstrate that the Trial Chamber erred in its approach when assessing the Defence Request.

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<sup>87</sup> Appeal, para. 21.

<sup>88</sup> *Id.* at para. 22.

<sup>89</sup> Prosecutor’s Response, para. 10.

<sup>90</sup> Appeal, paras 18-19.

<sup>91</sup> Defence Request, para. 2.

<sup>92</sup> Appeal, para. 22.

***B. Whether the Trial Chamber erred in its assessment of the facts underlying the restrictions imposed on Mr Nashabe's service***

39. In its second ground of appeal, the Defence submits that the Trial Chamber erred in law by failing to take into account the fact that Mr Nashabe was not prosecuted or convicted for his alleged breach of the Pre-Trial Judge's non-publication order,<sup>93</sup> Mr Nashabe's professionalism in the performance of his duties for the Defence over several years,<sup>94</sup> and Defence counsel's professional responsibilities and ethical obligations regarding the disclosure of confidential material to Mr Nashabe.<sup>95</sup> The Prosecutor responds that the Defence failed to show that the Trial Chamber erred in its consideration of Mr Nashabe's alleged breach of the order,<sup>96</sup> that the Trial Chamber did not err in declining to alter Mr Nashabe's conditions of service based on his level of professionalism in his service for the Defence, since he did not have access to confidential information during this time period,<sup>97</sup> and that the Defence's submissions about Defence counsel's professional obligations are irrelevant.<sup>98</sup> The LRV similarly contends that, when considering whether to employ an individual, the Tribunal does not merely look at whether that person has been prosecuted or convicted for breaching a Tribunal confidentiality order,<sup>99</sup> that the Trial Chamber did not err in declining to take Mr Nashabe's professionalism into account<sup>100</sup> and that the Trial Chamber's duty to protect witnesses, victims and confidential information cannot be subordinated to arguments concerning Defence counsel's professional and ethical obligations.<sup>101</sup>

40. On a preliminary point, while the Defence characterizes all of the alleged errors in the Impugned Decision as errors of law, some of these actually relate in part to the Trial Chamber's factual findings.<sup>102</sup> Consequently, these are, in relevant part, more accurately characterized as alleged errors of fact and will therefore be assessed according to the standard of review applicable to such errors.

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<sup>93</sup> Appeal, paras 23-24.

<sup>94</sup> *Id.* at para. 25.

<sup>95</sup> *Id.* at paras 26-27.

<sup>96</sup> Prosecutor's Response, paras 14-16.

<sup>97</sup> *Id.* at para. 17.

<sup>98</sup> *Id.* at paras 18-19.

<sup>99</sup> LRV Response, paras 9-13.

<sup>100</sup> *Id.* at para. 14.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Cf.* Prosecutor's Response, para. 13.

**1. Alleged error by failing to consider that Mr Nashabe was not prosecuted or convicted for the alleged breach of a Tribunal confidentiality order**

41. The Defence first argues that the Trial Chamber “ignored” the fact that the allegations against Mr Nashabe were never the subject of prosecution or conviction and therefore claims that the conditions imposed on Mr Nashabe’s service are merely based on “unadjudicated claims”.<sup>103</sup> In particular, the Defence points to the Trial Chamber’s statement that “[i]f the allegation that Mr Nashabe wrote the article is correct, officials of the Special Tribunal, [...] would be justified in having grave concerns about allowing him access to confidential information especially relating to victims and witnesses”.<sup>104</sup>

42. We first note that the Defence’s argument regarding the “unadjudicated claims” against Mr Nashabe is somewhat unclear. The Defence seems to suggest that the Trial Chamber conceded that the allegations against Mr Nashabe were unsubstantiated and that the Impugned Decision was thus based on a merely hypothetical breach of confidentiality. However, while the passage cited by the Defence may be interpreted in that way when viewed in isolation, other parts of the Impugned Decision clearly refer to the publication of the article by Mr Nashabe in unequivocal terms.<sup>105</sup> Moreover, the Defence does not dispute Mr Nashabe’s authorship of the article in question.

43. We are also not persuaded by the Defence’s argument that the Trial Chamber, when assessing the security risks posed by Mr Nashabe’s access to confidential Tribunal information, could only consider a final conviction for contempt of court. This assertion, in particular the Defence’s reference to the “presumption of innocence”,<sup>106</sup> is misguided in this context. The Trial Chamber did not set out to determine Mr Nashabe’s criminal responsibility. Rather, it considered whether his access to confidential Tribunal information would pose a security risk and, depending on the magnitude of this risk, what the consequences would or might be with respect to his assignment. While a conviction under Rule 60 *bis* of the Rules for contempt and obstruction of justice would justify finding a person ineligible to be entrusted with confidential material, this does not mean that contemptuous conduct in the absence of a conviction cannot, in and of itself, be a sufficient basis for the same finding. Even in the absence of a conviction, the Trial Chamber was therefore fully within its discretion to rely on Mr Nashabe’s authorship of the article breaching the

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<sup>103</sup> Appeal, paras. 23-24.

<sup>104</sup> Impugned Decision, para. 16.

<sup>105</sup> See, e.g., Impugned Decision, paras 2-3.

<sup>106</sup> Appeal, para. 23.



Pre-Trial Judge's non-publication order. Thus, the Trial Chamber did not err by taking this article into account in the Impugned Decision.

44. The Trial Chamber was also not required to reach a different conclusion in light of Article 23 *bis* of the Directive on the Appointment and Assignment of Defence Counsel.<sup>107</sup> As a preliminary point, we note that while the Directive is primarily directed to the Head of Defence Office, it provides the Trial Chamber with useful guidance when ruling on how to ensure the fairness of the proceedings. In any event, applying the Directive does not lead to a different outcome. First, under the existing conditions, Mr Nashabe does not have the status of a "person assisting counsel" under Articles 22 and 23 *bis* (A) of the Directive. Rather, he has the status of an expert consultant.<sup>108</sup> The Directive is therefore not *per se* applicable to Mr Nashabe's situation. In any event, while Article 23 *bis* permits the HDO to deny appointment of counsel or persons assisting counsel in cases of a "final conviction" under Rule 60 *bis* of the Rules, this is only *one* of the grounds on which the Head of Defence Office may deny such appointment. Indeed, under Article 23 *bis* (E) he may also deny a request for appointment "where the requirements under Article 22 *bis* are not met". For example, Article 22 *bis* (C) incorporates *mutatis mutandis* the requirement in Rule 58 (A) (v) that the person in question "has not engaged in conduct, whether in pursuit of his profession or otherwise, which is [...] prejudicial to the administration of justice [...]". It is therefore clear that factors other than a final conviction for contempt can be taken into account, notably Mr Nashabe's authorship of an article in breach of the Pre-Trial Judge's non-publication order.

45. Consequently, we consider that the Trial Chamber did not err in law by considering factors other than a final conviction under Rule 60 *bis* of the Rules, namely the indications that Mr Nashabe breached the Pre-Trial Judge's non-publication order.

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<sup>107</sup> *Contra* Appeal, para. 24; see STL, Directive on the Appointment and Assignment of Defence Counsel (adopted 20 March 2009, as amended 20 February 2015), STL/BD/2009/03/Rev.4 ("Directive").

<sup>108</sup> Decision of 21 December 2012, para. 45; Impugned Decision, para. 57.

## **2. Mr Nashabe's professionalism in his service for the Defence**

46. The Defence next argues that the Trial Chamber failed to consider that Mr Nashabe had carried out his work for the Defence with professionalism and without disclosing any confidential information, over a number of years.<sup>109</sup>

47. We find that the Defence mischaracterizes the Impugned Decision when it asserts that the Trial Chamber did not consider Mr Nashabe's professionalism because it was not a new fact. Although the Trial Chamber initially stated that Mr Nashabe's professionalism did not constitute a new fact,<sup>110</sup> it nevertheless discussed arguments about Mr Nashabe's professionalism elsewhere,<sup>111</sup> explicitly considering his professionalism when assessing the need for a security risk assessment.<sup>112</sup> Indeed, the Defence itself makes reference to this second instance.<sup>113</sup> We therefore dismiss this aspect of the Defence's argument.

48. The Defence also claims that the Trial Chamber failed to consider its submissions on the absence of any confidentiality breaches, based on the Chamber's assertion that Mr Nashabe had lacked access to confidential information during his service due to the current conditions of his employment.<sup>114</sup> In particular, the Defence contends that the Trial Chamber misunderstood its submissions on the lack of security breaches, and argues that the Defence Request was in fact referring to confidential information provided by Defence counsel regarding Defence activities and strategy, falling within the scope of professional confidentiality.<sup>115</sup> However, we note that the Defence Request claimed generally that there had been "no reported incidents" during Mr Nashabe's service, and that "his work on behalf of the defence teams [...] had never been publicly disclosed".<sup>116</sup> In light of the general language used in the Defence Request and the failure to substantiate this submission before the Trial Chamber, we find that the Chamber was not unreasonable in interpreting the submission as referring specifically to the information to which Mr Nashabe did not have access.<sup>117</sup>

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<sup>109</sup> Appeal, para. 25.

<sup>110</sup> Impugned Decision, para. 47.

<sup>111</sup> *Id.* at para. 52.

<sup>112</sup> *Id.* at para. 61.

<sup>113</sup> Appeal, para. 25, fn. 61, referring to Impugned Decision, para. 61.

<sup>114</sup> Appeal, para. 25.

<sup>115</sup> *Ibid.*

<sup>116</sup> Defence Request, para. 17.

<sup>117</sup> Impugned Decision, para. 61.

49. For these reasons, we dismiss the Defence's argument that the Trial Chamber erred by failing to consider Mr Nashabe's professionalism in his service for the Defence.

### **3. Defence counsel's professional responsibilities and ethical obligations**

50. Finally, the Defence argues that the Trial Chamber disregarded the "safeguard" provided by Defence counsel's professional and ethical responsibilities when disclosing confidential information to Mr Nashabe.<sup>118</sup> In particular, it refers to counsel's obligations under the Code of Professional Conduct for Counsel Appearing before the Tribunal.<sup>119</sup>

51. However, we note that the Defence did not advance these arguments in any detail before the Trial Chamber. Indeed, the Defence Request merely stated that the "transmission [of confidential information] would take place [...] under the control and responsibility of counsel" and that "this restriction is a sufficient safeguard".<sup>120</sup> The Defence did not provide further argument, for example by elaborating on the sources and scope of counsel's responsibility and how this could specifically mitigate any potential risks as regards Mr Nashabe's access to confidential information.<sup>121</sup> In this respect, we note that the Trial Chamber carefully reviewed and balanced the risks involved in granting Mr Nashabe access to confidential information, based on information and arguments placed before it by the Parties. The Defence cannot now complain that the Trial Chamber failed to take into account an argument that was not fully substantiated in the proceedings before it.<sup>122</sup> In any event, we reiterate the well-established principle that, although the Trial Chamber must provide a reasoned opinion for its decisions, it is not required to articulate every step of its reasoning in doing so.<sup>123</sup>

52. We therefore find that the Defence failed to show that the Trial Chamber erred in disregarding the "safeguard" of Defence counsel's professional and ethical obligations.

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<sup>118</sup> Appeal, paras 26-27.

<sup>119</sup> *Id.* at para. 27.

<sup>120</sup> Defence Request, para. 18.

<sup>121</sup> *Ibid.*

<sup>122</sup> See ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 20; see also STL, Practice Direction on Filing of Documents before the Special Tribunal for Lebanon, STL/PD/2010/01/Rev.2, 14 June 2013, Art. 4 (1), in particular Art. 4 (1) (e).

<sup>123</sup> See ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.1 & IT-95-5/18-AR72.2 & IT-95-5/18-AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission, Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 30; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 25.

***C. Whether the Trial Chamber erred in imposing inappropriate restrictions that are disproportionate in light of their impact on the fairness of the proceedings***

53. Under this ground of appeal, the Defence argues that the Trial Chamber erred in its assessment of the impact of the restrictions on Mr Nashabe, in terms of the fairness of the proceedings.<sup>124</sup> The Defence alleges two legal errors in this respect, which we will address in turn.

54. First, the Defence argues that the Trial Chamber did not analyse in a reasonable manner the prejudice it suffered due to Mr Nashabe's strict working conditions.<sup>125</sup> Specifically, the Defence claims that the Trial Chamber "pretended to be unaware" that Mr Nashabe's terms of reference relate to the Defence's investigations.<sup>126</sup> The Defence also alleges that the Trial Chamber erred by focusing on how Mr Nashabe's expert opinion was useful to those investigations.<sup>127</sup> Finally, the Defence submits that the Trial Chamber failed to take into account the large amount of confidential information in the present case file, which can only be provided to Mr Nashabe with the Chamber's approval.<sup>128</sup>

55. The Prosecutor responds that the Defence mischaracterizes the Impugned Decision, as the issue to resolve was whether the conditions imposed actually violated the fair trial rights of the Accused.<sup>129</sup> The Prosecutor asserts that the Defence has not established that the Trial Chamber erred in its assessment of the Defence's prejudice arguments.<sup>130</sup> In particular, the Prosecutor contends that the Trial Chamber did not err in rejecting the Defence's claim that its ability to provide Mr Nashabe with information on "attribution witnesses" was prejudiced, as the Defence could still seek to do so.<sup>131</sup>

56. We find that the Trial Chamber did not err in assessing the impact of the conditions on Mr Nashabe's assignment. We recall that because the Defence sought a modification of these long-standing conditions, it bore the burden of persuading the Trial Chamber that the conditions were unfair.<sup>132</sup> As we concluded above, the Trial Chamber's finding that the Defence failed to show *current* prejudice was based on an evaluation of the Defence's relevant submissions before the Trial

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<sup>124</sup> Appeal, para. 28.

<sup>125</sup> *Id.* at para. 31.

<sup>126</sup> *Id.* at para. 28.

<sup>127</sup> *Id.* at para. 29.

<sup>128</sup> *Id.* at para. 30.

<sup>129</sup> Prosecutor's Response, para. 21

<sup>130</sup> *Id.* at paras 24-25.

<sup>131</sup> *Id.* at para.25.

<sup>132</sup> See above paras 36-37.

Chamber.<sup>133</sup> The Defence's assertion that the Trial Chamber ignored its submissions on Defence investigations is incorrect. When the Trial Chamber explained that it was willing to allow Mr Nashabe access to confidential information on a case-by-case basis, it expressly acknowledged that the Defence must have the necessary resources to conduct investigations and that Mr Nashabe might be able to assist the Defence in ways not contemplated by the President's decisions.<sup>134</sup> Moreover, in its evaluation of the Defence's arguments, the Trial Chamber did not require the Defence to demonstrate that Mr Nashabe was useful to its investigations. The Trial Chamber simply addressed the Defence's arguments on prejudice, which described in general terms areas in which Mr Nashabe might provide assistance, and found none persuasive. This was entirely reasonable.

57. Moreover, the Defence's argument that the Trial Chamber erred by failing to recognize the large amount of confidential information which Mr Nashabe cannot access without judicial approval is not persuasive. In its submissions before the Trial Chamber, the Defence identified no specific instances in which it was prejudiced by Mr Nashabe's lack of access to confidential information. It is insufficient to point out that there is a significant quantity of confidential information in the case. Moreover, the Defence fails to show that the Trial Chamber, in finding that there was nothing concrete suggesting current prejudice to Defence preparations, ignored the existence of confidential information in the case. The Defence's arguments are entirely unsubstantiated in this regard and we accordingly reject them.

58. Second, the Defence argues that the Trial Chamber erred in holding that ruling on Mr Nashabe's access to confidential information on a case-by-case basis would not be excessively onerous.<sup>135</sup> It contends that, in reaching this conclusion, the Trial Chamber failed to take into account the problems cited by the Defence.<sup>136</sup> The Prosecution asserts that, for the same reasons it gives in response to the Defence's first argument under this ground, the Trial Chamber did not err in this regard.<sup>137</sup>

59. We find that the Defence has failed to show that the Trial Chamber erred in concluding that case-by-case applications would not be excessively onerous for the Defence. The Defence merely makes unsupported and speculative claims that the conditions imposed prevent it from promptly

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<sup>133</sup> See above para. 34; Impugned Decision, paras 46, 49-50.

<sup>134</sup> Impugned Decision, paras 51-52.

<sup>135</sup> Appeal, para. 31 (referring to Impugned Decision, para. 53).

<sup>136</sup> Appeal, para. 31 (referring to STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 14 October 2015, pp. 59, 65).

<sup>137</sup> Prosecutor's Response, para. 26.

obtaining information and opinions from Mr Nashabe; make it impossible to utilize his services on a daily basis; and preclude it from consulting with him to prepare future cross-examinations.<sup>138</sup> Indeed, the Defence possessed the ability to request confidential information for Mr Nashabe in specific cases, but did so only once, in 2013 before the Pre-Trial Judge.<sup>139</sup> It has not demonstrated that case-by-case determinations are particularly burdensome or ineffective to such an extent that they ever actually hindered its work. Finally, the Defence's claim that it previously made the Trial Chamber aware of problems is incorrect; the oral submissions referred to in support of this argument were, again, assertions of hypothetical situations the Defence *may* face, not ones it had *already* encountered.<sup>140</sup>

60. For these reasons, we find that the Trial Chamber did not err in its assessment of the conditions on Mr Nashabe's assignment as they relate to the fairness of the proceedings.

***D. Whether the Trial Chamber's case-by-case approach constitutes an illegal arbitrary interference with the Defence's strategy***

61. Under this ground of appeal, the Defence submits that the Trial Chamber created an arbitrary system of supervision over Defence analyses and investigations by obliging it to approach the Trial Chamber each time it intends to provide Mr Nashabe with confidential information, as well as requiring hearing from the VWU, VPU and LRV.<sup>141</sup> The Defence also claims that the Trial Chamber failed to set any legal criterion for its assessment.<sup>142</sup> This system constitutes, in the Defence's view, undue interference with the Defence's strategy and infringes upon the independence of counsel and the right to a fair trial.<sup>143</sup> The Defence further alleges that the Trial Chamber committed a legal error in not considering its submissions relating to counsel's free discretionary choice and *intuitu personae* of persons assisting them, which is a necessary corollary to the principle of independence of counsel.<sup>144</sup> It further submits that the Trial Chamber violated the equality of arms principle insofar as the Prosecution does not have to justify to the Chamber the choice of its associates or to give reasons for investigating any kind of information.<sup>145</sup>

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<sup>138</sup> Appeal, para. 31.

<sup>139</sup> Impugned Decision, para. 53.

<sup>140</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 14 October 2015, pp. 59, 65.

<sup>141</sup> Appeal, para. 32.

<sup>142</sup> *Id.* at paras 32, 37.

<sup>143</sup> *Id.* at paras 32-34.

<sup>144</sup> *Id.* at para. 35.

<sup>145</sup> *Id.* at para. 36.

62. The Prosecutor responds that the Trial Chamber did not impose additional restrictions on the Defence; it merely established a general procedural framework consistent with the conditions which had already been imposed by the former President.<sup>146</sup> He further submits that the case-by-case process would not necessitate that the Defence reveal its strategy, nor require the Trial Chamber to rule on the reasonableness or necessity of Defence investigations or analyses.<sup>147</sup> The Prosecutor also posits that, if necessary, the Defence could make such submissions *ex parte* the Prosecution or other participants in the proceedings.<sup>148</sup> The Prosecutor finally argues that the Defence has not demonstrated any violation of the equality of arms or how this principle even applies to the present situation.<sup>149</sup> He also notes that, if similar circumstances arose with respect to individuals whom the Prosecution sought to engage, imposing such conditions on the Prosecution would be appropriate.<sup>150</sup>

63. The LRV submits that the Trial Chamber did not err in law by requiring that the LRV be consulted in relation to requests for disclosure to Mr Nashabe of information concerning participating victims.<sup>151</sup> On the contrary, the Trial Chamber was merely giving effect to Articles 16 and 17 of the Statute.<sup>152</sup>

64. We first recall that, pursuant to the former President's decision, Mr Nashabe was to 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[.]<sup>153</sup>

In the light of this decision, the Trial Chamber did not impose any *additional* restrictions in holding that it may determine any Defence application to permit Mr Nashabe access to confidential information on a case-by-case basis. Rather, it maintained the system already in place, which permits the Defence to seek such access when and if needed.

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<sup>146</sup> Prosecutor's Response, paras 27, 29.

<sup>147</sup> *Id.* at paras 30-31.

<sup>148</sup> *Id.* at para. 31.

<sup>149</sup> *Id.* at para. 32.

<sup>150</sup> *Id.* at para. 32.

<sup>151</sup> LRV Response, para. 20.

<sup>152</sup> *Id.* at paras 19-20.

<sup>153</sup> Decision of 21 December 2012, Disposition.

65. Similarly, the Defence has not demonstrated how the Trial Chamber's determination that it would consult with the LRV, VWU and VPU on a case-specific basis, when considering Defence requests to grant Mr Nashabe access to confidential information, constitutes an additional restriction on the Defence. On the contrary, the Trial Chamber simply gave effect to Article 17 of the Statute, which allows for the VPPs to be heard when their personal interests are affected, as long as this is not prejudicial to or inconsistent with the rights of the accused. As indicated above,<sup>154</sup> requests for providing Mr Nashabe with confidential information about VPPs have the potential to affect the VPPs' interests. The Defence has not shown how hearing the LRV in such circumstances would prejudice the Accused in this case. Indeed, the Defence has not explained how this would give the LRV "a potential right of scrutiny" over Defence activities.<sup>155</sup> Further, hearing from the LRV, as well as from those responsible for the safety of victims and witnesses, is not in itself a restriction on Mr Nashabe's conditions of assignment. Rather, it merely permits the Trial Chamber to make an informed assessment when weighing Defence interests against the need to protect the safety and security of victims and witnesses.

66. Further, the Defence fails to substantiate how the Trial Chamber's willingness to consider Defence requests in this manner creates an arbitrary system of supervision over the conduct of Defence analyses and investigations. In this respect, the Trial Chamber held specifically that "[i]f a *future* application is made to grant Mr Nashabe access to otherwise confidential information, the Chamber will consider, at the appropriate time, the modalities of permitting the access".<sup>156</sup> We note that the Defence has never brought a specific request to grant Mr Nashabe access to confidential information before the Trial Chamber. Therefore, the Defence's assertions on how the Trial Chamber would carry out an assessment of the matter are entirely speculative. Moreover, the Trial Chamber held that it "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".<sup>157</sup> It is thus clear that the Trial Chamber intends to evaluate any future Defence requests for Mr Nashabe to access confidential information in light of the Defence's interests as well as other legitimate interests, which is neither arbitrary nor improper.

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<sup>154</sup> See above para. 17.

<sup>155</sup> Appeal, para. 38.

<sup>156</sup> Impugned Decision, para. 67 (emphasis added).

<sup>157</sup> *Id.* at para. 68.



67. The Defence also fails to substantiate its assertion that the Trial Chamber’s case-by-case approach violates the Defence’s fair trial rights, including the independence of counsel, by compelling the Defence to reveal or justify its strategy whenever confidential information is concerned. Nowhere in the Impugned Decision did the Trial Chamber require the Defence to “explain in detail what it intends to do with [the confidential] information”.<sup>158</sup> This argument is entirely based on speculation, as the Defence has yet to file before the Trial Chamber any specific request to grant Mr Nashabe access to confidential information. Moreover, the Defence has failed to explain how the Trial Chamber’s decision to allow the LRV to be heard on the issue, when appropriate, would involve revealing Defence strategy to the LRV.

68. With respect to the Defence’s arguments that the Trial Chamber ignored its submissions regarding counsel’s discretion in composing their teams, we find, reading the Impugned Decision as a whole, that the Trial Chamber did not question Defence counsel’s discretion in selecting persons to assist them. Indeed, the Trial Chamber did not stop Mr Nashabe from working for the Defence, but set out a procedure under which it will consider his access to confidential information in the future.

69. We reject the Defence’s suggestion that the Chamber cannot do so. Independence of counsel and their freedom to choose their associates, while well-established, are not absolute. Allowing counsel to share confidential material with whomever they choose, without any possible judicial supervision, would defeat the purpose of protective measures and the classification of certain documents as confidential. The fact that Article 23 *bis* of the Directive empowers the HDO to refuse to give effect to Defence appointments does not constrict the Trial Chamber’s power and responsibility to assess, in terms of victim and witness protection, the access that a Defence expert consultant may be given to confidential Tribunal material. As previously stated,<sup>159</sup> the Defence has not demonstrated that the Trial Chamber erred when it considered that Mr Nashabe wrote an article which breached the Pre-Trial Judge’s non-publication order.

70. Finally, contrary to the Defence’s assertion,<sup>160</sup> the Trial Chamber did not require the Defence to justify its choice of working with Mr Nashabe. The Trial Chamber merely decided to

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<sup>158</sup> *Contra* Appeal, para. 33.

<sup>159</sup> *See* above para. 44.

<sup>160</sup> Appeal, para. 35.

consider requests concerning Mr Nashabe's access to confidential information on a case-by-case basis.

71. The Defence has also failed to substantiate its claim that the Trial Chamber's approach in regulating Mr Nashabe's access to confidential information violates the equality of arms between the Parties. The Defence asserts speculatively that the Prosecution does not have to justify to the Trial Chamber "the choice of its associates",<sup>161</sup> but makes no submissions on how the Chamber has addressed or would address the same or a similar situation involving the Prosecution.

72. In sum, the Defence failed to show how the Trial Chamber's approach constitutes an arbitrary or otherwise improper interference in the Defence's strategy or investigations, and we therefore reject its arguments in this respect.

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<sup>161</sup> Appeal, para. 36.

**DISPOSITION**

**FOR THESE REASONS;**

**THE APPEALS CHAMBER;**

**DECIDING** unanimously;

**DISMISSES** the Appeal in its entirety.

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

Dated 3 May 2016

Leidschendam, the Netherlands



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Judge Ivana Hrdličková  
Presiding Judge

