



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE PRESIDENT****SPECIAL TRIBUNAL FOR LEBANON**

**Case No:** STL-18-10/MISC.2/PRES  
**Before:** Judge Ivana Hrdličková, President  
**Registrar:** Mr Daryl Mundis  
**Date:** 20 December 2019  
**Original language:** English  
**Classification:** Public - with confidential annex

**THE PROSECUTOR**  
**v.**  
**SALIM JAMIL AYYASH**

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**APPLICATION UNDER RULE 25 (C) TO DISQUALIFY JUDGE CHAMSEDDINE  
FROM RECONSIDERATION OF ‘DECISION ON “APPEAL AGAINST DECISION  
OF PRESIDENT CONVENING TRIAL CHAMBER II”’**

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**Prosecutor:**  
Mr Norman Farrell

**Head of Defence Office:**  
Ms Dorothée Le Fraper du Hellen



1. On 6 November 2019, the President, Judge Ivana Hrdličková, issued an order convening Trial Chamber II.<sup>1</sup> On 26 November 2019, I filed an appeal against that decision and the President's decision—of an unknown date—requesting the Secretary-General of the United Nations to appoint judges to a second Trial Chamber.<sup>2</sup> On 13 December 2019, an Appeals Chamber of four judges, equally divided on the admissibility of my appeal, dismissed it on the basis that in these circumstances the original decision had to stand.<sup>3</sup>

2. The Appeals Chamber of four judges that determined my appeal however, was invalidly constituted as Judge Afif Chamseddine should have sought to excuse himself from sitting in the matter pursuant to Rule 25 (A) of the Special Tribunal's Rules of Procedure and Evidence. The rule states that a 'Judge may not sit in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might appear to affect the Judge's impartiality'.

3. I have thus today filed an application before the Appeals Chamber to reconsider its decision, delivered as it was by an invalidly constituted bench.<sup>4</sup>

4. I make this application with the greatest reluctance and respect for my judicial colleagues. Consistent, however, with my oath of office, and the requirement that I act both according to law and my conscience, I have no other choice. It is my duty as an independent judge to do so.

5. Judge Chamseddine has a demonstrable interest in the connected case of STL-18-10, *Prosecutor v. Ayyash*, as is shown by his attempted intervention during witness testimony during the trial of STL-11-01/T/TC, *Prosecutor v. Ayyash and others*. The witness concerned is the subject of the indictment in STL-18-10.

6. This is no peripheral matter. The issue of constituting a second Trial Chamber to hear the case, and its constitution—and all ancillary legal matters including whether it was lawfully effected—is fundamental to the course of justice. The facts are set out in the confidential annex

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<sup>1</sup> STL, *Prosecutor v. Samil Jamil Ayyash*, STL-18-10/I/PRES, F0056, Order Convening Trial Chamber II, 6 November 2019.

<sup>2</sup> STL-18-10/MISC.2/AC, F0001, Appeal Against Decision of President Convening Trial Chamber II, 26 November 2019.

<sup>3</sup> STL-18-10/MISC.2/AC, F0006, Decision on "Appeal Against Decision of President Convening Trial Chamber II", 13 December 2019.

<sup>4</sup> Application to Reconsider Decision on "Appeal Against Decision of President Convening Trial Chamber II, 19 December 2019.

which contains an affidavit that I have deposed. The Registrar has reviewed it in draft form and agrees with its factual accuracy, and will provide an affidavit if a panel requires one. I have no objection to the affidavit being reclassified as ‘public’ at the appropriate time.

7. The international test for judicial disqualification derives from the case of *Furundžija* at the International Criminal Tribunal for the former Yugoslavia, where its Appeals Chamber held,<sup>5</sup>

... there is a general rule that a Judge should be not only subjectively free from bias but also there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias...

A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the “reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”

8. One relevant question here is whether an Accused person would want to know if a judge deciding an appeal relating to legality of an order composing the bench to hear the Accused’s criminal case had a personal interest in relation to an alleged victim of one of the counts on the indictment. The answer to this must be ‘yes’. This then raises the question of whether there is either actual bias or the appearance of bias. In my respectful view, both are present.

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<sup>5</sup> ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, paras. 189-190 (with internal footnotes omitted).

9. Judge Chamseddine should have sought to excuse himself from deciding any matters relating to one of the victims in that case. Trial Chamber II has been created to deal with connected cases, and the instrument of its creation, namely the President's order, is part of a 'case' under Rule 25 (A). No matters connected with the relevant witness' evidence have yet been the subject of appellate proceedings in the case of STL-11-01/T/TC, *Prosecutor v. Ayyash and others*.

10. A Panel of Judges, established under Rule 25 (C) should decide the application under Rule 25 (A). For obvious reasons its composition cannot include any of the President, the three Trial Chamber judges, and the two alternate judges.

11. So far as I can tell, there are no precedents in international criminal law cases on point here, presumably because there have been no reports of judges behaving in such a manner. In this sense it is unique.<sup>6</sup>

12. I have several times asked the President of the Special Tribunal to provide me with access to independent legal advice, in relation to matters such as this. She has refused each request. Thus, in the absence of such advice I have no option other than to bring an application before the President for Judge Chamseddine's disqualification.

13. Finally, it is useful to add something from the preface to the *Bangalore Principles of Judicial Conduct*, namely,<sup>7</sup>

A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on its rights and freedoms under the law. These observations apply both domestically within the context of each nation State and globally, viewing the global judiciary as one great bastion of the rule of law throughout the world. Ensuring the integrity of the global judiciary is thus a task to which much energy, skill and experience must be devoted.

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<sup>6</sup> International Defence counsel, Mr Michael Karnavas, has a good overview on the international practice in judicial disqualification applications (up to 2014), see *Judicial Ethics in the International Tribunals* Drawn from Michael G. Karnavas's lecture at the ADC-ICTY's 12th Defence Symposium, [http://michaelgkarnavas.net/files/JudicialEthicsLecture\\_24Jan14.pdf](http://michaelgkarnavas.net/files/JudicialEthicsLecture_24Jan14.pdf). He has divided the case-law into five categories, namely: *ex parte* communications; actual bias; a judge's ethical obligation to disclose; actual bias and improper conduct; and, corruption, impartiality and fitness to sit as a judge.

<sup>7</sup> Preface to "*Commentary on the Bangalore Principles of Judicial Conduct*", The Judicial Integrity Group, March 2007.

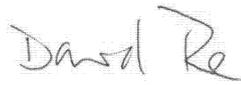
14. This application must be determined according to these universally recognized principles.

**RELIEF SOUGHT**

Accordingly, the President is requested to:

Appoint a panel under Rule 25 (C) to determine this application that Judge Chamseddine be disqualified from hearing a reconsideration of ‘Decision on “Appeal Against Decision of President Convening Trial Chamber II”’ order of 6 November 2019.

Leidschendam,  
The Netherlands  
20 December 2019



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Judge David Re  
Presiding Judge  
Trial Chamber

