Judge Fights for Another Trial at the Special Tribunal for Lebanon

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From the rarefied corridors of The Hague's international criminal courts, messy judicial infighting and discontent over working conditions are spilling into the public sphere.

Earlier this year, Marlise Simons at the New York Times broke the story that 15 judges of the International Criminal Court were demanding a 26 percent pay rise to their existing tax-free salary. Given that each judge receives roughly $200,000 USD for their work, that's no small matter and would put them closer to the salary earned by judges at the International Court of Justice.

Leading the charge is none other than the Court's President, Judge Chile Eboe-Osuji. He was elected by his peers to the position in March last year. The pay dispute is currently before the International Labour Organisation Administrative Tribunal, and despite coming under fire for what has been seen as an unreasonable demand that is out of touch with public expectations and the Court's perpetual budget problems, he and his colleagues are pushing ahead. As recently as 2 weeks ago, President Eboe-Osuji attempted to 'set the record straight' on why the claim had been filed.

But pay disputes are only one example of discontent in the ICC Chambers. Douglas Guilfoyle observed over at *EJIL:Talk!* that there are "worrying signs of a lack of collegiality" between the judges, such as Judge Ibañez Carranza complaining about being overlooked to preside over the *Gbagbo and Blé Goudé* appeal. Kevin Jon Heller took it as a sign that "things are bad at the Court".

But now another fight has broken out, this time at the Special Tribunal for Lebanon. Judge David Re, from Australia, is claiming that the Tribunal's President improperly convened the trial chamber that would hear the Tribunal's newest case. He even took the extraordinary and unprecedented step of filing an application to contest its composition.

Judge Re, along with his two colleagues Judge Janet Nosworthy and Judge Micheline Braidy, is currently sitting on the case of *Ayyash et al*. They are joined by two 'alternate judges' in the event that a main judge is unable to continue. The trial commenced in January 2014, and after 415 trial days, wrapped up in September last year. Since then, the judges have been in deliberations trying to figure out whether the accused are guilty or not. According to Judge Re, the verdict will be delivered "in the near future".

Just as *Ayyash et al* appeared to be reaching the end of its long road, a new indictment—also against Ayyash—was confirmed and made public on 16 September, marking the start of a new trial procedure. It also set off a high-level

dispute between Judge Re and the President of the Tribunal, Judge Ivana Hrdličková.

On 6 November, President Hrdličková formally issued an order convening a new trial chamber to hear the latest *Ayyash* case. Two of the Tribunal's existing judges—Judge Walid Akoum and Judge Nicola Lettieri—were assigned to the chamber, as well as Judge Anna Bednarek—a Tribunal outsider who previously worked as a judge in Poland and Kosovo. The order followed the United Nations Secretary-General officially appointing Judges Akoum, Lettieri, and Bednarek to the Chamber, a decision made at the recommendation of President Hrdličková.

Judge Akoum and Judge Lettieri are the alternate judges in the nearly-finalised *Ayyash et al* trial. Neither Judge Re, nor Judges Nosworthy and Braidy, were appointed to the new Trial Chamber.

The Special Tribunal for Lebanon has been given a mandate until February 2021 to complete its work. Given the newest case, this may be extended. International criminal trials are lengthy and complex, so any mandate extension will probably add many years to the Tribunal's life. After the verdict in *Ayyash et al* is delivered, and without being allocated any new trials, the future deployment of that Trial Chamber is uncertain.

A couple of weeks after President Hrdličková's order, on 25 November a document entitled 'Urgent Application to Revoke Order Convening Trial Chamber II' was publicly filed with the Tribunal's Registry by Judge Re. He claimed that President Hrdličková failed to consult with the other judges on the appointment of the new trial chamber. Under the internal rules of the Tribunal, he argued, the President was required to consult the Tribunal's 'Council of Judges'—of which he is a member—"on all major questions relating to the functioning of the Tribunal".

Judge Re also claimed that the President mistakenly believed that the three judges who are deliberating on the *Ayyash et al* case did not have the capacity to start deciding matters in the new case. According to Judge Re, President Hrdličková didn't ask the three judges, and in any event, they can manage two trials at once.

Criminal trials are a contest between two parties: the Prosecution and the Defence. For a judge to commence proceedings challenging another judge's decision to constitute a Chamber for a case they are not assigned to is unheard of.

But the public was not to know that Judge Re was unhappy with President Hrdličková's conduct until some time later. As soon as his 'Urgent Application' was filed—according to Judge Re—President Hrdličková reclassified it as confidential, meaning that it would not appear in the Tribunal's public records database.

Within 24 hours, Judge Re had publicly filed an additional 'Appeal Against Decision of President Convening Trial Chamber II', in which he further made the remarkable request that the Appeals Chamber prevent Judge Bednarek from being sworn-in as a new Judge—scheduled to take place the next day—until his appeal could be decided. Judge Re also asked the Appeals Chamber to declare void President Hrdličková's order constituting the new trial chamber and "require the President to engage in proper consultations—and in writing" with his Trial Chamber and consult the Council of Judges "as Rule 37(B) mandates".

President Hrdličková also reclassified Judge Re's 'Appeal' as confidential.

In the public eye, everything therefore appeared to be ticking along as normal. Judge Bednarek took her solemn declaration on 27 November, officially installing her as a judge. Pictures released by the STL show her dressed in her black and red robes, holding up her right hand as she reads her oath of office to the Tribunal's Registrar. In another photo, Judge Re sits behind her on the bench, his face expressionless, looking straight ahead. He had clearly not succeeded in stopping the proceedings.

Behind the scenes, President Hrdličková was requesting her colleagues allow her not to sit on Judge Re's appeal. After all, it was her decision that he was contesting. Under the Tribunal's rules, this required a special panel of judges to be convened to decide the matter, even though—unlike most questions in international criminal law—this one had an obvious answer.

The next day, on 28 November, the Appeals Chamber decided that Judge Re's 'Appeal' should be public, as he had originally intended. For the first time, lawyers, governments, and the general public were able to see what he thought of President Hrdličková's decision. But his initial 'Urgent Application' remained hidden, awaiting President Hrdličková's assessment.

Spurred on by the Appeals Chamber's decision to publish his 'Appeal' on the Court's public database, Judge Re filed another application on 29 November for the

Court's public database, Judge Re filed another application on 29 November for the attention of President Hrdličková. This was a Friday. This time, he sought she lift the confidentiality of his 'Urgent Application' on the basis that it contained nothing that his now-public 'Appeal' did not. Citing the International Covenant on Civil and Political Rights for support, he added that the general principle of criminal proceedings is that they should be open.

Later that day, President Hrdličková issued her decision on Judge Re's 'Urgent Application'. "It is a general principle recognised in the jurisprudence of this and other international tribunals", she wrote, "that a President's administrative decisions are not generally subject to any form of review". What's more, she added, there is nothing in the Tribunal's statute or rules that give fellow judges the right to challenge the decisions of the President. She therefore rejected Judge Re's 'Urgent Application' as "frivolous".

Between lawyers, calling an application "frivolous" is strong language and somewhat comparable to "lacking any foundation in law". Between judges, it is arguably even stronger.

In the same decision, President Hrdličková also lifted the confidentiality on Judge Re's 'Urgent Application'. She noted that since the Appeals Chamber had classified his 'Appeal' as public, the issue of whether the 'Urgent Application' should remain under seal was moot. First time, the full extent of Judge Re's grievances were out in the open. Leaving work that night, court staff probably wondered whether Monday would bring any more developments.

It did. With two days to work on his own case, Monday saw Judge Re file some 'further submissions' in which he elaborated on three main reasons why he thought President Hrdličková's conduct fell foul of the Tribunal's rules. In her decision of 29 November, he claimed, the President "ignored the substance" of his application. He also argued that none of the cases she cited supported her assessment that his claim was inadmissible and frivolous.

Not long after, the special panel of judges that was deciding whether President Hrdličková should be recused from Judge Re's appeal determined what everyone probably expected: President Hrdličková did not have to sit on the case. But this also left the matter in the hands of only four judges. Only in rare circumstances are judicial benches comprised of an even number of judges, to eliminate the chance of a court being split 50/50. Judge Re's case was one of them.

On 13 December, the four-judge Appeals Chamber delivered its decision on Judge Re's appeal. Split equally down the middle, half of the appeals judges decided that it did not have jurisdiction to hear the case. It was unprecedented, Judges Riachy and Chamseddine wrote, that an international criminal judge had sought to judicially challenge a decision of their court's President. They found nothing that established Judge Re's right to contest the composition of the new Trial Chamber. Judges Baragwanath and Nsereko took a different view, concluding that the Appeals Chamber had an inherent jurisdiction that would allow the appeal to be heard.

Yet as the Tribunal's rules require a decision of the majority of judges, the judges also found themselves in an unprecedented situation of a different kind: was Judge Re successful or not? On the basis that Judge Re had failed "to convince the required majority of Judges that the appeal should be upheld", they decided that President Hrdličková's original decision was sound.

But for Judge Re, this was not the end of the matter. Even after his attempts to stop the new Trial Chamber being convened were denied by both President Hrdličková *and* the Appeals Chamber, Judge Re filed yet another two applications on 20 December 2019.

The first was an application for the Appeals Chamber to reconsider its decision of 13 December. Claiming that he filed it with 'the greatest reluctance'; forced to do so by his oath of office ('… I have no other choice. It is my duty as an independent judge to do so'), Judge Re argued that one of the Appeals Judges (who decided his original appeal was inadmissible)—Judge Chamseddine—should have recused himself from the appeal. Just *why* Judge Re thought Judge Chamseddine should recuse himself is contained in a confidential annex, although Judge Re did elaborate a little bit in his second filing of that day.

That second filing was an application for Judge Chamseddine to recuse himself from the reconsideration. It was filed, Judge Re once again noted, 'with the greatest reluctance and respect for my judicial colleagues'. He claimed that Judge Chamseddine had a 'demonstrable interest' in the outcome of the new case, and therefore should have been disqualified from hearing it and all matters related to it. The grounds for this remarkable accusation are contained in a confidential affidavit.

It's interesting to note Judge Re's also claimed that the Tribunal's Registrar—Daryl Mundis—has apparently reviewed a draft of Judge Re's affidavit and 'agrees with its factual accuracy'. Yet it appears that Judge Re has filed no affidavit from the Registrar to this effect.

No doubt this will not be the end of this matter.

2019 was not a good year for the international criminal law bench. Pay disputes and judicial infighting have arguably demonstrated that international criminal judges need to display greater humility and collegiality. Some may think that the reputation of the ICC and the STL have been badly tarnished by the conduct of some of their judicial officers.

There is a lot to be said for the proposition that judges need to always display the highest levels of professionalism and humbleness; keeping internal disagreements and discontent inside chambers to maintain the public's faith in their cool-headedness. One can only hope that 2020 will usher in a period of self-reflection on whether making judicial fracas public does more harm than good. It is, one might think, sorely needed.

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