

# Judge David Re Cautioned against Further Litigation, Proceeds with Further Litigation



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If the Special Tribunal for Lebanon's (STL) judiciary was hoping for a relaxed Christmas break and a slow January, they have been sorely disappointed.

In a remarkable twist to the saga surrounding the appointment of judges to the Tribunal's newest Trial Chamber, Judge David Re has been cautioned against further litigation by the President of the Special Tribunal for Lebanon, Judge Ivana Hrdličková—and subsequently filed further litigation.

On 25 November last year, Judge Re launched proceedings challenging the appointment of judges to the STL's Trial Chamber 2. Judge Re is presiding over Trial Chamber 1, which is currently in deliberations on the *Ayyash et al* case which will issue its judgment “[in the near future](#)”.

For various reasons, Judge Re believed that the appointment process fell afoul of the Tribunal's internal rules. He subsequently [filed a series of proceedings](#) in the new *Ayyash* case challenging the constitution of Trial Chamber 2, including taking the remarkable step of attempting to stop a new judge from being sworn-in.

I recounted the development of these proceedings in [an earlier blog post on \*Opinio Juris\*](#).

Judge Re was unsuccessful on all counts, both at first instance and on appeal.

In its [decision](#) of 13 December last year, the Appeals Chamber—extraordinarily constituted by only four judges due to President Hrdličková being conflicted out on the basis that it was her decision that was impugned by Judge Re—was split 50/50 on the issue of whether it had jurisdiction to hear Judge Re's objections. It thus dismissed them on the basis that he had failed to “convince the required majority of Judges that the appeal should be upheld”.

One of the judges who decided against him was Judge Afif Chamseddine.

But Judge Re was not content with letting the Appeals Chamber have the last say. Just before Christmas, on 20 December 2019, he filed a further two applications relating to its decision to deny him his requests.

The first was an [application](#) for the Appeals Chamber to reconsider its rejection of his complaints, should his second application be successful.

That second [application](#) argued that Judge Chamseddine should be recused from hearing the reconsideration. Judge Re claimed that Judge Chamseddine had a

“demonstrable interest” in the outcome of the new *Ayyash* trial, and thus should be recused from hearing his application as an ancillary proceeding, and should not have sat on his original appeal. According to Judge Re, the Appeals Chamber was constituted by an “invalidly constituted bench”.

Judge Re filed a confidential affidavit containing evidence purportedly supporting his argument for the recusal of Judge Chamseddine. It has not been made public, despite Judge Re **noting** that he had no objection to it being made public “at the appropriate time”.

What exactly Judge Re had in mind when he referred to the “appropriate time” is not clear. No doubt if the affidavit is made public, this saga will continue for some time yet.

In the latest developments to this controversial and unusual tale, President Hrdličková issued her **decision** on Judge Re’s recusal application on 17 January 2020.

President Hrdličková rejected Judge Re’s application as completely inadmissible. First, President Hrdličková decided, only parties—and *not* judges—have standing to institute requests for the disqualification and withdrawal of judges under Rule 25 and there were no exceptional circumstances to warrant a departure from this rule.

Moreover, President Hrdličková continued, it was not in the “interests of justice” to otherwise entertain Judge Re’s application. Among other things, President Hrdličková decided that Judge Re was aware of the grounds upon which he would argue for Judge Chamseddine’s recusal from his appeal *prior* to the Appeals Chamber issuing its decision.

In other words, if he objected to the constitution of the Appeals bench, he should have raised them prior to his appeal being decided, instead of expecting Judge Chamseddine to recuse himself, as he **claimed** to have done.

Further, President Hrdličková found that Judge Re’s application did “not contain submissions addressing any ‘serious legal basis’ that would favour the admissibility and adjudication of a request for the disqualification of a Judge”.

No public interest is served”, President Hrdličková continued, “by diverting further Tribunal resources” to Judge Re’s application.

The STL’s 2019 budget was approved at €55.1 million. It is not apparent how many resources were spent on addressing Judge Re’s applications. It is also not apparent where they were diverted from, nor whether the decision in *Ayyash et al* has been delayed as a result.

But in a remarkable twist, President Hrdličková went further, admonishing Judge Re for his conduct of the application and its basis.

In a manner reminiscent of her 29 November [decision](#) rejecting Judge Re’s originating application challenging the appointment of judges to Trial Chamber 2, she again observed that his application was “frivolous”.

This is the second time that President Hrdličková has criticised applications lodged by Judge Re with this term, forcefully rejecting his claims as legally baseless.

She also “cautioned” Judge Re “against further such litigation”; an unprecedented warning shot fired against a judicial colleague in a formal, and public, decision.

Exactly what President Hrdličková meant by “such litigation” is not clear. However, it is reasonable to conclude that she was referring to further proceedings related to her decision not to entertain Judge Re’s request for the recusal of Judge Chamseddine. Whether the warning also extended more broadly to further litigation challenging the appointment of judges to Trial Chamber 2 is an open question.

In any event, President Hrdličková’s plea for caution appears to have been discounted by Judge Re, who decided to continue to litigate his grievance.

On 21 January, he filed [yet another appeal](#), this time against President Hrdličková’s decision to reject his request for the recusal of Judge Chamseddine.

In it, he accused the President of breaching the “fundamental rule” of “judicial impartiality” by—he claimed—effectively deciding an appeal against her own decision.

He also claimed that he was “bringing this appeal to ensure public trust in the integrity of the Special Tribunal’s judicial process”.

Public trust’ is a notoriously vague term. Just who the ‘public’ is, and what it thinks about the STL’s judicial processes as a result of President Hrdličková’s decision, are questions that are impossible to answer. Similarly, whether Judge Re’s disregard for the wishes of the President of the Tribunal he serves have given the ‘public’ confidence in the integrity of the STL’s judiciary is debatable.

Judge Re has now publicly accused two colleagues—President Hrdličková and Judge Chamseddine—of violating the principle of judicial impartiality. He has claimed that Judge Chamseddine demonstrated actual bias; and President Hrdličková “appears” to demonstrate actual bias—in part on the basis that she ‘cautioned’ him against further litigation and “quite unnecessarily” dismissed his application as frivolous.

Relying upon principles of “natural justice”, and claiming the President engaged in “flawed legal reasoning” and considered “irrelevant and extraneous considerations”, Judge Re asked the Appeals Chamber to reverse President Hrdličková’s decision of 17 January, and appoint a panel to consider his request for Judge Chamseddine’s recusal.

The Appeals Chamber decided to address *both* Judge Re’s application for reconsideration (filed 20 December 2019), and his appeal against President Hrdličková’s decision (filed 21 January 2020). It is somewhat peculiar that the Chamber decided to address the 20 December application, because it was conditional on Judge Chamseddine’s recusal—which did not occur.

Once again, Judge Re was unsuccessful. The Appeals Chamber unanimously decided that Judge Re had failed to demonstrate that he had suffered an injustice, noting his delay in objecting to the constitution of the Chamber. It also unanimously rejected his 21 January 2020 application as ‘moot’.

Judge David Baragwanath nevertheless filed a concurring opinion in which he observed that the bench should not have included Judge Chamseddine.

This would appear to be the end of this unique and controversial chapter in the STI’s history save for President Hrdličková’s observation that her decision “causes

STES HISTORY, SAVE FOR PRESIDENT HRDLÍČKOVÁ'S OBSERVATION THAT HER DECISION "CAUSES no prejudice to the Parties". Whether the parties—specifically the Prosecution and the Defence—seek the recusal of Judge Chamseddine under Rule 25 is a matter for them. Some may read this recognition as an invitation; others merely a statement of the obvious and a clarification that the rights of the parties have not been affected by the outcome of Judge Re's proceedings.

Also at issue is whether Judge Re will now seek for his confidential affidavit detailing his allegations against Judge Chamseddine to be made public.

Judge Re has now failed in all his efforts to have the constitution of Trial Chamber 2 reviewed, and Judge Chamseddine recused from hearing his appeals.

It is not clear what legal avenues are available for President Hrdličková now that Judge Re has decided to ignore her "caution".

At the end of the day, it may not matter whether legal avenues exist.

But regardless of what—if anything—happens next, one can hope that judges of all international courts resolve to display the highest degrees of professionalism, collegiality, and legal reasoning in 2020.



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