



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE PRESIDENT**

**Case No.:** STL-11-01/T/PRES

**Before:** Judge Ivana Hrdličková, President

**Registrar:** Mr Daryl Mundis

**Date:** 25 April 2018

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH  
HASSAN HABIB MERHI  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

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**ORDER ON THE COMPOSITION OF A PANEL DESIGNATED PURSUANT TO  
RULE 25 (C)**

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**Office of the Prosecutor:**

Mr Norman Farrell &amp; Mr Nigél Povoas

**Defence Office:**

Ms Héleyn Uñac

**Legal Representatives of****Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar  
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis  
& Mr Chad Mair**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini,  
Ms Dorothee Le Fraper du Hellen  
& Mr Jad Youssef 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 Geoffrey Roberts  
& Ms Sarah Bafadhel

## I. BACKGROUND

1. On 13 April 2018, the Registry distributed a motion filed by the Oneissi Defence pursuant to Rule 25 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) on 12 April 2018, seeking the disqualification and withdrawal of the three Trial Chamber Judges: Presiding Judge David Re, Judge Janet Nosworthy and Judge Micheline Braidy.<sup>1</sup>
2. On 13 April 2018, pursuant to Rule 25 (C) of the Rules and in accordance with the Practice Direction on Designation of Panel in Matters of Excusal and Disqualification of Judges,<sup>2</sup> I designated a Panel to determine the Disqualification Motion, composed of Judge Daniel David Ntanda Nsereko, Judge Walid Akoum, and Judge Nicola Lettieri,<sup>3</sup> none of whom sought to be excused pursuant to Rule 25 (B) of the Rules.
3. On 16 April 2018, the Panel issued an order inviting Judge Re, Judge Nosworthy and Judge Braidy to submit their views on the Disqualification Motion in writing by 18 April 2018.<sup>4</sup>
4. On 18 April 2018, Judges Re and Nosworthy filed before me a joint application requesting that I (1) set aside the Order Designating a Panel and (2) “re-designate a Panel composed of another international judge and another Lebanese judge who are next on the roster of judges to hear matters involving the disqualification of judges”.<sup>5</sup>
5. On 19 April 2018, I issued an order inviting Judge Akoum, Judge Lettieri and the Oneissi Defence to submit their views on the Joint Application of Judges Re and Nosworthy, in writing, by 23 April 2018.<sup>6</sup>
6. On 20 April 2018, Judges Akoum and Lettieri filed submissions jointly before me, outlining their views on the matter and requesting that I “excuse [them] from exercising

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<sup>1</sup> Public Redacted Version of Oneissi Defence Rule 25 Motion for the Disqualification and Withdrawal of Presiding Judge David Re, Judge Janet Nosworthy, and Judge Micheline Braidy, 12 April 2018 (“Disqualification Motion”).

<sup>2</sup> STL-PD-2015-08-Rev.1, Practice Direction on Designation of Panel in Matters of Excusal and Disqualification of Judges, 28 February 2018 (“Practice Direction”).

<sup>3</sup> Order Designating Panel Pursuant to Rule 25 (C), 13 April 2018 (“Order Designating a Panel”).

<sup>4</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/OTH/R25, Order Inviting Judges’ Views Pursuant to Rule 25 (C), 16 April 2018.

<sup>5</sup> Application by Judges Re and Nosworthy to Set Aside the President’s Designation of Alternate Judges Akoum and Lettieri to a Panel Designated Pursuant to Rule 25 (C) on the Oneissi Defence’s Application to Disqualify the Three Trial Chamber Judges, 18 April 2018 (“Joint Application of Judges Re and Nosworthy”), para. 21.

<sup>6</sup> Order Seeking Submissions on the Application to Set Aside the Designation of Judges to a Panel Designated Pursuant to Rule 25 (C), 19 April 2018 (“Order Seeking Submissions”).

[their] functions as members of the Panel designated to adjudicate the [Disqualification Motion] in accordance with Rule 25 (B) of the Rules”.<sup>7</sup> The Oneissi Defence indicated on 23 April 2018 that they took note of the “decision” of Judges Akoum and Lettieri and that the Joint Application of Judges Re and Nosworthy emphasizes the grounds and the reasoning which led to the Disqualification Motion.<sup>8</sup>

## II. RELEVANT PROVISIONS

7. Rule 25 of the Rules states relevantly as follows:

(B) A Judge seeking to be excused from exercising functions upon the grounds specified in paragraph (A) or for any other serious reason shall make a request in writing to the President. The President shall designate a panel of three Judges in accordance with the relevant Practice Direction to determine whether the Judge should be excused. If the Panel decides that the Judge should be excused, the President shall assign a replacement Judge.

(C) A Party may apply to the President for the disqualification and withdrawal of a Judge upon grounds specified in paragraph (A). The President shall designate a panel of three Judges in accordance with the relevant Practice Direction to determine whether the Judge should be disqualified. The Panel shall take into account the Judge’s views. If the Panel decides to grant the application, the President shall assign a replacement Judge.

## III. DISCUSSION

8. I have considered, in full, the Joint Application of Judges Re and Nosworthy, together with the written views of Judges Akoum and Lettieri, and the Oneissi Defence.

9. It is useful to recall the unique circumstances of this matter in their full context:

(i) The Oneissi Defence have sought the disqualification of three Trial Chamber Judges in the *Ayyash et al.* case, in an exercise of the procedural rights afforded to the Parties by Rule 25 (C) of the Rules.

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<sup>7</sup> Submissions by Judges Akoum and Lettieri, 20 April 2018.

<sup>8</sup> Observations from the Oneissi Defence Filed Pursuant to the President’s Order Dated 19 April 2018, 23 April 2018 (“Oneissi Defence Observations”), para. 1.

- (ii) In accordance with the requirements of Rule 25 (C), I exercised my administrative functions under that Rule to constitute a Panel to determine the Disqualification Motion which, in accordance with the Practice Direction, was composed of Judges Nsereko, Akoum and Lettieri.<sup>9</sup>
- (iii) Neither Judge Akoum nor Judge Lettieri sought to be excused from determining the Disqualification Motion pursuant to Rule 25 (B) of the Rules before exercising functions as members of the Panel designated to adjudicate the Disqualification Motion.<sup>10</sup>
- (iv) Judges Re and Nosworthy have challenged the composition of the Panel to include Judges Akoum and Lettieri, Alternate Judges assigned to the *Ayyash et al.* trial, and have requested that I re-designate the Panel.<sup>11</sup>
- (v) Judges Akoum and Lettieri, while contesting the challenge to their designation to the Panel, nevertheless “request that the President excuse us from exercising our functions as members of the Panel designated to adjudicate the [Disqualification Motion] in accordance with Rule 25 (B)”,<sup>12</sup> and that I “assign replacement Judges accordingly”.<sup>13</sup>
- (vi) The Oneissi Defence have merely noted the “decision” of Judges Akoum and Lettieri and submitted that the Joint Application of Judges Re and Nosworthy emphasizes the grounds and reasoning leading to the Disqualification Motion.<sup>14</sup>

10. Rule 25 was amended in 2015, with paragraph (C) inserted to provide for a procedure by which “[a] Party may apply to the President for the disqualification and withdrawal of a Judge”, subsequent to which the President would designate a Panel of three Judges to determine the application.<sup>15</sup> As I have previously noted, however, neither the Statute nor the Rules make provisions for the procedure applicable to a request by a Judge subject to an

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<sup>9</sup> Order Designating a Panel, para. 3, *citing* Practice Direction, Art. 1 (2), (4), Annex 1: Roster of Judges on Panels under Rule 25 (B) and (C) of the Rules (March 2018-February 2021).

<sup>10</sup> *See* Order Seeking Submissions, para. 2.

<sup>11</sup> Joint Application of Judges Re and Nosworthy, para. 21.

<sup>12</sup> Submissions by Judges Akoum and Lettieri, para. 11.

<sup>13</sup> Submissions by Judges Akoum and Lettieri, para. 9. *See also id.*, para. 10.

<sup>14</sup> Oneissi Defence Observations, para. 1.

<sup>15</sup> *See* STL, Summary of Approved Rule Amendment Proposals Pursuant to Rule 5 (I) of the Special Tribunal for Lebanon’s Rules of Procedure and Evidence, Plenary of Judges, February 2015 (“Summary of Rule Amendments”), p. 3.

application for his or her disqualification under Rule 25 (C) that an order designating a panel under Rule 25 (C) be set aside and a panel re-designated.<sup>16</sup> I have held that in such circumstances, the good administration of justice and the principle of transparency nonetheless demanded that Judges Re and Nosworthy should be afforded the right to express their concerns and have them considered.<sup>17</sup> In my view, this is essential to guaranteeing that proceedings conducted before the panel envisaged by Rule 25 (C) respect the fundamental principles of fairness and transparency, which in turn ensures that the determination of applications pursuant to that Rule is likewise fair and transparent for the applicant Party.

11. Permitting and considering the request of Judges Re and Nosworthy, however, should not be conflated with applying Rule 25 (C) by analogy to their request. Such a request is not an application by a “Party” within the meaning of Rule 25 (C). This much is clear from Rule 2 (A) of the Rules, which expressly restricts the definition of the term “Party” to the Prosecutor or the Defence.<sup>18</sup> Indeed, no specific mechanism is provided for under Rule 25 to accommodate the Application of Judges Re and Nosworthy.

12. Likewise, the Rules do not make provisions for the “request [of Judges Akoum and Lettieri] that *the President* excuse [them] from exercising [their] functions as members of the Panel designated to adjudicate the [Disqualification Motion] in accordance with Rule 25 (B) of the Rules”,<sup>19</sup> which was submitted pursuant to my Order Seeking Submissions. Under Rule 25 (B), requests from Judges to be excused from exercising functions should be determined by a *Panel of three Judges* and made upon the “*grounds specified in Rule 25 (A) or for any other serious reason*”.<sup>20</sup> In the instant case, the joint request of Judges Akoum and Lettieri follows the exercise of their functions as members of the Panel designated under Rule 25 (C) and is based on “the interests of both equanimity and further expediting resolution of the [Disqualification Motion]”.

13. The current situation, in which the views of Judges Re, Nosworthy, Akoum and Lettieri, and the Oneissi Defence are before me, in my opinion, is not envisaged by the provisions of Rule 25 (B) or (C).

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<sup>16</sup> See Order Designating a Panel, para. 5.

<sup>17</sup> Order Seeking Submissions, para. 5.

<sup>18</sup> Rule 2 (A), STL RPE.

<sup>19</sup> Submissions by Judges Akoum and Lettieri, para. 11 (emphasis added). See *id.*, para. 9.

<sup>20</sup> Rule 25 (B), STL RPE (emphasis added).

14. I am mindful of the need “[t]o avoid wasteful litigation” in the context of proceedings relating to the excusal and disqualification of Judges,<sup>21</sup> just as the interests of justice generally require that all litigation be managed carefully to ensure that proceedings advance fairly, efficiently and effectively without detriment to the procedural rights and entitlements of the Parties. I also consider the following factors as relevant considerations:

- (i) That the request by Judges Re and Nosworthy to set aside the Order Designating a Panel is *ultra vires* the procedures envisaged under Rule 25 (C);
- (ii) That Judges Akoum and Lettieri now request that I excuse them from exercising their functions as members of the Panel seized of the Disqualification Motion, while also contesting the challenge to their designation; and
- (iii) My responsibility, as President of the Tribunal, to coordinate the work of Chambers and be responsible for the effective functioning of the Tribunal and the good administration of justice, as enshrined in Article 10 (1) of the Tribunal’s Statute and Rule 32 (B) of the Rules.

15. The situation before me is *sui generis*, with no provisions providing guidance as to the role of the President in resolving the matter. Nonetheless, I consider that my responsibilities as President under Article 10 (1) of the Statute and Rule 32 (B) of the Rules require me to assess the most fair and efficient procedure to apply to these circumstances in their totality.

16. I am uniquely seized of submissions filed by Judges Re, Nosworthy, Akoum and Lettieri that ultimately seek that I designate the next available Lebanese Judge and international Judge on the roster for the determination of the Disqualification Motion in place of Judges Akoum and Lettieri. This course of action is not opposed by the Oneissi Defence, the Party that originated the Disqualification Motion with respect of which the Panel composed of Judges Nsereko, Akoum and Lettieri was designated, giving rise to the present matter. I note that this course of action would facilitate the timely determination of the Disqualification Motion by avoiding the risk of delay inherent in further litigation. Finally, it has the added benefit of preserving the serenity of justice, by ensuring fairness to all concerned.

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<sup>21</sup> Summary of Rule Amendments, p. 4.

17. For these reasons, I am of the view that it is in the interests of the good administration of justice – and in particular, the fairness and expeditiousness of the proceedings – that the Panel designated pursuant to Rule 25 (C) now be composed of Judge Nsereko, together with the next available Lebanese Judge and international Judge on the roster after Judges Akoum and Lettieri.

18. I note that the next available Lebanese Judge is Judge Afif Chamseddine and the next international Judge is Judge David Baragwanath.<sup>22</sup> I also note that the Presiding Judge of the Panel shall be determined according to precedence under Rule 30 (B) of the Rules.<sup>23</sup>

19. Therefore, in conformity with the roster, I order that the Panel designated to determine the Motion for Disqualification be composed of Judge Afif Chamseddine, Judge Daniel David Ntanda Nsereko and Judge David Baragwanath.

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<sup>22</sup> See Practice Direction, Annex 1: Roster of Judges on Panels under Rule 25 (B) and (C) of the Rules (March 2018-February 2021).

<sup>23</sup> Practice Direction, Art. 1 (4).

## DISPOSITION

**FOR THESE REASONS;**

**PURSUANT** to Rules 25 (C) and 32 (B) of the Rules, and the Practice Direction,

**I**

**ORDER** that the Panel designated to determine the Disqualification Motion now be composed as follows:

Judge David Baragwanath, Presiding

Judge Afif Chamseddine

Judge Daniel David Ntanda Nsereko.

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

Dated 25 April 2018

Leidschendam, the Netherlands



Judge Ivana Hrdličková

President

