BEFORE THE PANEL DESIGNATED UNDER RULE 25 (C)

SPECIAL TRIBUNAL FOR LEBANON

Case No:	**STL-11-01/T/OTH/R25**
Before:	**Judge David Baragwanath, Presiding** **Judge Afif Chamseddine** **Judge Daniel David Ntanda Nsereko**
Registrar:	**Mr Daryl Mundis**
Date:	**1 May 2018**
Filing Party:	**Defence Counsel - Oneissi**
Original language:	**English**
Classification:	**Public**

PROSECUTOR
v.
SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

Oneissi Defence Request for Leave to Reply to Rule 25(C) Views of Judges David Re, Janet Nosworthy and Micheline Braidy

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Office of the Prosecutor:
Mr Norman Farrell & Mr Nigel 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 Dorothée 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. Introduction

1. The Defence for Hussein Hassan Oneissi (the "Defence") hereby seeks leave to reply to the Views of Judges David Re, Janet Nosworthy and Micheline Braidy, filed pursuant to Rule 25(C) (the "Views").[1] It is respectfully submitted that it is in the interests of justice to allow the Defence to address a number of factual inaccuracies and omissions of significance contained in the Views.

2. Further, in the interests of a fair, efficient and expeditious resolution of these proceedings, the Defence hereby respectfully submits its Reply to the Views.

II. Submissions

A. Application for Leave to Reply

3. Given that these proceedings, which concern the question of the impartiality of Presiding Judge Re, Judge Nosworthy, and Judge Braidy, go to the heart of Mr Oneissi's fundamental fair trial rights, the Defence respectfully submits that it should be granted leave to reply to the Views.

4. The Views contain several inaccuracies and omissions, which are addressed in the Reply, below. The Defence submits that it is of paramount importance that the Panel be fully apprised of the relevant facts, in their entirety and in their proper context.

5. While Rule 25(C) does not expressly envisage a right of reply to the Views, it is submitted that it is in the interests of justice, and in line with the principles of natural justice, for the Defence to be granted leave to reply.

6. To this end, the Defence notes the following comments made by a Panel designated pursuant to a previous STL Rule 25(C) application: "In principle, after having been properly seised of a request, in order to rule, a judge examines the arguments contained therein, in a response and *in any reply*, when such is authorised in accordance with Rule 8 of the Rules [emphasis added]".[2] In support of this, the Panel cited several examples of disqualification

[1] STL, *Prosecutor v Ayyash et al*., STL-11-01/T/OTH/R25, F3641, Views of Judges David Re, Janet Nosworthy and Micheline Braidy to a Rule 25 Panel Concerning the Oneissi Defence Application for Disqualification, 26 April 2018 ("Views").

[2] STL, *In the Case Against Akhbar Beirut S.A.L. Ibrahim Mouhamed Ali Al Amin*, STL-14-06/PT/OTH/R25, F0062, Decision on the Motion for Disqualification of Judge Lettieri, 5 September 2014, para. 16.

proceedings before the *ad hoc* tribunals, where applicants' Replies were accepted and considered.[3]

7. While Rule 8 of the Rules specifically concerns motions filed by a "Party", it is submitted that the spirit of this Rule – which envisages the moving party being granted right of reply, or as it were, the last word on the matter – should be followed here.

8. The Defence further respectfully requests, in the interests of justice and the expeditious resolution of these proceedings, that the Panel accept the Defence Reply. In the *Mladić* case before the ICTY, the Acting President, stating that he "consider[ed] that [he] would benefit from submissions in reply on the issue to adjudicate" Mladić's Rule 15 (i.e. the ICTY's Rule 25 counterpart) application, granted his Motion for leave to reply, and accepted his reply, attached as an annex to the Motion, as validly filed.[4]

B. The Defence Reply

9. At the outset, the Defence does not accept the suggestion that its Rule 25(C) Application contains "factual inaccuracies and misrepresentations", and is confident that the Panel will appreciate that this allegation is simply not borne out by the facts.[5]

10. Conversely, the Views contain several significant factual inaccuracies and omissions in relation to the Trial Chamber's conduct leading up to the Scheduling Order of 11 April 2018 (the "Scheduling Order"), issued prior to the start of the Defence case, in which it ordered the filing of final trial briefs by 4 June 2018.[6]

11. Firstly, in the Views, it is suggested that the Defence was "partly incorrect" to submit that the Scheduling Order was issued before allowing the Defence Teams and the Legal Representative of Victims (the "LRV") to respond to the Prosecution's submissions concerning the filing of final trial briefs,[7] and that the Trial Chamber was "fully informed when it issued the scheduling order of the views of all affected by it".[8] This suggestion is at

[3] Ibid., footnote 31.
[4] ICTY, *Prosecutor v. Ratko Mladić,* T-09-92-AR73.6, IT-09-92-AR73.7, Decision on Ratko Mladić's Motion for Disqualification of Judge Theodor Meron, 26 October 2016, footnote 30.
[5] Views, para. 7.
[6] STL, *Prosecutor v Ayyash et al*., STL-11-01/T/TC, F3623, Scheduling Order for Final Trial Briefs and Closing Arguments Under Rule 147, 11 April 2018, para. 8.
[7] Views, paras 55-56.
[8] Ibid.

odds not only with the Defence's Rule 25(C) Application[9] and a joint Defence Team Request for Reconsideration of the Scheduling Order,[10] but also with the LRV's Observations on the matter.[11]

12. Furthermore, during the Pre-Defence Conference of 22 March 2018, Presiding Judge Re stated: "[…] in terms of the reality of the timetable for setting the timetable for final trial briefs, which we won't set today, of course, but we will reflect upon that and receive the Prosecution submissions and any responses […] from the Defence about simultaneous versus consecutive [emphasis added]."[12] Contrary to those comments, the Trial Chamber issued the Scheduling Order prior to receiving any such responses.

13. Further, in the Views, it is repeatedly suggested that the Trial Chamber had "agreed to the rescheduling of Professor Sporer's testimony to the week of 16 April".[13] Yet this suggestion omits relevant facts. The Defence filed its Witness Schedule only after consulting and obtaining the agreement of the Prosecution, and after repeated attempts by the Defence – via email and phone – to contact the Trial Chamber and confirm the scheduling of Professor Sporer's testimony.[14] These attempts went unanswered. It was only after the Witness Schedule was filed, scheduling Professor Sporer's testimony for 16 April, that the Defence was informed – by the Court Management Services Section, rather than the Trial Chamber – that a hearing would take place on 17 April.[15]

14. It is also suggested in the Views that the Trial Chamber was "await[ing] information from the Defence" on the availability of General Jamil El Sayed;[16] that the Defence has not "come back" to the Trial Chamber with a "reasonable approach" to the scheduling of his testimony;[17] and that the Defence has not "formally informed" the Trial Chamber of the

[9] STL, *Prosecutor v Ayyash et al.*, STL-11-01/T/PRES, F3628, 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 ("Rule 25(C) Application"), para. 23.

[10] STL, *Prosecutor v Ayyash et al.*, STL-11-01/T/TC, F3627, Joint Defence Request for Reconsideration of the Scheduling Order for Final Trial Briefs and Closing Arguments under Rule 147, 12 April 2018, paras 9-13.

[11] STL, *Prosecutor v Ayyash et al.*, STL-11-01/T/TC, F3626, Observations of the Legal Representatives of Victims to the Prosecution Submission for All Final Briefs to be Filed No Earlier Than 27 July 2018, 11 April 2018, para. 12.

[12] 20180322_STL-11-01_T_T425_OFF_PUB_EN, 59:11-16.

[13] Views, paras 50, 62, "Chronology of Relevant Matters", at 10 April 2018.

[14] Annex A, Email to Trial Chamber Legal Officer, 26 March 2018.

[15] Annex B, Email from CMSS, 11 April 2018.

[16] Views, para. 62.

[17] Ibid, para. 72.

results of its contacts with General El Sayed.[18] The Trial Chamber suggests that it is in this context – i.e. the Defence's supposed failure to inform the Trial Chamber in relation to General El Sayed's availability – that the Scheduling Order was made.[19]

15. Again, this is factually inaccurate. At the Pre-Defence Conference, Presiding Judge Re stated, in relation to scheduling of the Defence case, that the Trial Chamber "[would] be in contact with the parties informally and if necessary in a case management meeting to firm this up or otherwise before we issue a formal order, and we will hear back from [the Defence] as soon as possible about Mr. El Sayed."[20] The Views unfortunately omit to make clear that shortly thereafter, the Defence duly informed the Trial Chamber, via email, that General El Sayed would be unable to testify in April.[21] Again, the Defence received no response to this email; nor was any further case management meeting held. Instead, the Trial Chamber issued the Scheduling Order, setting a deadline for final briefs that fell three weeks before General El Sayed's projected availability to testify for the Defence.

16. The Trial Chamber describes the above conduct as a "simply routine" exercise of "diligent judicial case management".[22] This description is simply not borne out by the facts.

17. It is also submitted in the Views that the Defence's submission – that the scheduling order is "most exceptional" in setting a timeline for the filing of final trial briefs before the Defence Case had begun – was "simply incorrect".[23] It is further submitted that the Scheduling Order was "routine" and "not inconsistent with current international practice".[24]

18. That the Judges Views' cite no more than two cases – the ICC case of *Ntaganda* and *Ongwen* – in support of this submission is notable to say the least. In any event, the relevant circumstances of these two cases are significantly and obviously distinguishable from the situation at hand.

19. In those cases, the respective Trial Chambers issued timetables for the submission of Defence final trial briefs for twelve weeks and six weeks, respectively, after the close of the

[18] Ibid, para. 73.
[19] Ibid, paras 70-74.
[20] 20180322_STL-11-01_T_T425_OFF_PUB_EN, 59:3-6.
[21] Annex A.
[22] Views, para. 100.
[23] Ibid, para. 80.
[24] Ibid, para. 65.

evidence.[25] The obvious difference here is that those timetables effectively set indeterminate deadlines that will only be crystalised at the close of evidence. The issuance of these timetables is incomparable to that of the STL Trial Chamber's Scheduling Order, issued prior to the start of the Defence case, which set a strict date for the submission of final trial briefs – 4 June 2018 – that would fall weeks before a Defence witness's projected availability to testify. The conduct of the *Ntaganda* and *Ongwen* Trial Chambers could indeed be considered as "reveal[ing] careful judicial management directed at ensuring a fair, expeditious and public trial".[26] Unfortunately for Mr Oneissi, this is far more than can be said for the conduct of the STL Trial Chamber.

20. The Trial Chamber also downplays the significance of the de facto email dismissal of the Defence's Reclassification Request, describing it as a "routine communication" in relation to the redaction of "two-and-a-half lines from the document".[27] Yet, as the Trial Chamber is fully aware,[28] those lines concern the very essence of Professor Sporer's testimony[29] and a decision on this issue is linked to the question of whether the most significant part of Professor Sporer's testimony will be held in public session,[30] in full respect of Mr Oneissi's right to a public hearing.

21. Furthermore, in the Views, the Defence is misquoted and accused of making the "incorrect" assertion "that the Trial Chamber is cognisant that the Oneissi Defence intends to seek the admission into evidence of underlying material which Professor Sporer relied on in his report under Rule 155".[31] In fact, the Defence stated that the Chamber was "fully cognisant that the Defence *may* seek the admission of [the] underlying material [emphasis added]" – as evidenced in the cited transcript and Response to Rule 161(B) Notice.[32] It is noteworthy that during the Pre-Defence Conference of 22 March 2018, the Presiding Judge expressly stated, in the context of "the intention of the Oneissi Defence […]

[25] Ibid, paras 65-66, footnote 43.
[26] Ibid, para. 32.
[27] Ibid, para. 30.
[28] Ibid, para. 93.
[29] 25(C) Application, Annex A, para. 13.
[30] Of course, in full respect of existing and undisputed protective measures.
[31] Views, para. 63.
[32] 25(C) Application, para. 26, footnote 22.

tendering [the underlying material]", that the Trial Chamber would allow an amendment of the Rule 128 Witness List without application.[33]

III. Relief Requested

22. For the above reasons, and for those detailed in the Rule 25(C) Application, the Defence respectfully requests that the Panel:

a) GRANT leave to Reply to the Views; and

b) GRANT the Rule 25(C) Application.

Submitted this 1st Day of May 2018

VINCENT COURCELLE-LABROUSSE
Lead Counsel for Hussein Hassan Oneissi

YASSER HASSAN
Co-Counsel for Hussein Hassan Oneissi

NATALIE von WISTINGHAUSEN
Co-Counsel for Hussein Hassan Oneissi

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[33] 20180322_STL-11-01_T_T425_OFF_PUB_EN, 15:3-8.