

**THE PANEL DESIGNATED UNDER RULE 25 (B)**

**Case No:** STL-18-10/MISC.2/OTH/R25

**Before:** Judge Daniel Fransen, Presiding  
Judge Afif Chamseddine  
Judge Daniel David Ntanda Nsereko

**Registrar:** Mr Daryl Mundis

**Date:** 4 December 2019

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH**

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**DECISION ON EXCUSAL OF PRESIDENT HRDLIČKOVÀ**

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**Office of the Prosecutor:**

Mr Norman Farrell

**Defence Office:**

Ms Dorothée Le Fraper du Hellen



## I. INTRODUCTION

1. The President has submitted an Internal Memorandum<sup>1</sup> to “recuse” herself from sitting on an Appeal filed by Judge David Re against the Order of the President convening Trial Chamber II (the “Appeal”).<sup>2</sup>
2. In light of the content of the President’s Internal Memorandum, the Vice President, acting under Rule 25 (F) of the Rule of Procedure and Evidence (the “Rules”), has treated the matter as a request for excusal under Rule 25(B) of the Rules and has formed a panel composed of Judges Daniel Fransen, Afif Chamseddine and Daniel David Ntanda Nsereko (the “Panel”) to decide on the Request.<sup>3</sup>
3. Having examined the Request, the Panel concludes that it is well-founded and grants it.

## II. APPLICABLE LAW

4. The Panel recalls that the procedure for excusal is governed by Rule 25 of the Rules, which states at paragraphs (A) and (B) that:
  - (A) 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 affect or appear to affect the Judge’s impartiality.
  - (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. [...]
5. As set forth in the Tribunal’s jurisprudence, Rule 25 (A) of the Rules lays down two cumulative requirements which could prevent a Judge from sitting in a case. The first requirement is that of a “personal interest” or “any association” between the Judge and the relevant case<sup>4</sup>. The second requirement is that “it must be demonstrated that such an association or interest has an effect on the Judge’s impartiality or the appearance of his [or her]

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<sup>1</sup> STL, *Prosecutor v. Salim Jamil Ayyash*, STL-18-10/MISC.2/AC, F0003, Internal Memorandum from the President, 27 November 2019 (“Request”).

<sup>2</sup> STL, *Prosecutor v. Salim Jamil Ayyash*, STL-18-10/MISC.2/AC, F0001, Appeal against Decision of President Convening Trial Chamber II, 26 November 2019.

<sup>3</sup> STL, *Prosecutor v. Salim Jamil Ayyash*, STL-18-10/MISC.2/PRES, F0002, Order Designating Panel Pursuant to Rule 25 (B), 28 November 2019.

<sup>4</sup> STL, CH/PRES/2010/08, Decision on Mr El Sayed’s Motion for the Disqualification of Judge Riachy from the Appeals Chamber Pursuant to Rule 25, 5 November 2010 (“Decision on Disqualification of Judge Riachy”), para. 13.

impartiality”.<sup>5</sup> Moreover, Rule 25 (B) provides that, in addition to the grounds set forth in Rule 25 (A), a Judge may seek to be excused “for any other serious reason”.

### III. DISCUSSION

6. The Panel notes that the present matter concerns the President’s association with a case, which might affect, or appear to affect, her impartiality. The Panel recalls that the impartiality of judges is one of the tenets of the administration of justice, adopted by the majority of legal systems as well as Lebanon,<sup>6</sup> and included in all the founding instruments of other international tribunals.<sup>7</sup> The principle is put in jeopardy when a judge has, or has had, any association with the case, which might affect, or appear to affect, that judge’s impartiality.

7. As held by previous panels designated under Rule 25 of the Rules, the test commonly employed when analyzing an appearance of bias involves viewing the facts through a “hypothetical fair-minded observer with sufficient knowledge of the actual circumstances to make a reasonable judgement”.<sup>8</sup>

8. The Panel considers that it is inherent to the process of appellate review for an impugned decision to be reviewed by a body other than the one who issued it.<sup>9</sup> This separation is not fully respected in case the person who issued a decision sits on the appeal ruling on that decision.

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<sup>5</sup> *Id.* at para. 16.

<sup>6</sup> Lebanon, Code of Civil Procedure, Art. 120; France, Code of Criminal Procedure, Art. 668; Germany, Code of Criminal Procedure, ss. 22-24; Italy, Code of Criminal Procedure, Arts. 34-36; Canada, Supreme Court, *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484, 26 September 1997; United Kingdom, High Court of Justice, King’s Bench Division, *R v. Sussex Justices, Ex parte McCarthy*, [1924] KB 256, [1923] EWHC KB 1, 9 November 1923; United States, Judiciary and Judicial Procedure, 28 U.S.C. § 455 (a) and (b); South Africa, Supreme Court, *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, Judgement on Recusal Application, 1999 (7) BCLR 725 (CC), 3 June 1999.

<sup>7</sup> See Art. 17 (2) ICJ St.; Art. 13 ICTY St.; Art. 12 ICTR St.; Rule 15 (A) ICTY and ICTR RPE; Art. 41 ICC St.; Rule 34 ICC RPE; Art. 11 (2) RSCSL St.; Art. 9 (1) IRMCT St.

<sup>8</sup> STL, *In the Case Against Akhbar Beirut S.A.L. & Ibrahim Mohamed Ali Al Amin*, STL-14-06/PT/OTH/R25.2, F0051, Decision on Motion for the Disqualification of Judge Fransen, 12 August 2014, para. 33, *citing* Decision on Disqualification of Judge Riachy, para. 31.<sup>8</sup> See Lebanon, Code of Civil Procedure, Art. 120; France, Code of Criminal Procedure, Art. 668; Germany, Code of Criminal Procedure, s. 23 (1); Italy, Code of Criminal Procedure, Art. 34.

<sup>9</sup> See Lebanon, Code of Civil Procedure, Art. 120; France, Code of Criminal Procedure, Art. 668; Germany, Code of Criminal Procedure, s. 23 (1); Italy, Code of Criminal Procedure, Art. 34.

9. The Panel notes the President's statement that since the appeal relates to the Order issued in her capacity as President, "it is apparent that [she] cannot participate in the determination of that appeal or ancillary issues arising from it".<sup>10</sup>

10. In light of the foregoing, the Panel is of the view that a "hypothetical fair-minded observer" with sufficient knowledge of the circumstances of the case might raise the issue of the apparent impartiality of the President if she ruled on the Appeal against her own Order convening Trial Chamber II, due to her association with the case.

#### IV. DISPOSITION

**FOR THESE REASONS,**

**PURSUANT** to Rule 25 of the Rules,

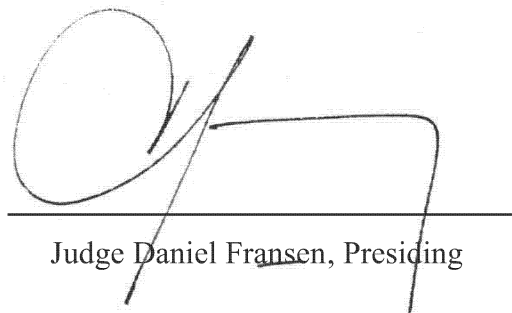
**THE PANEL,**

**GRANTS** the President's Request to be excused from sitting on the Appeal.


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

Dated 4 December 2019


Leidschendam, the Netherlands



Judge Daniel Fransen, Presiding



Judge Afif Chamseddine



Judge Daniel David Ntanda Nsereko



<sup>10</sup> Request, para. 2.