



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 16 May 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**ORDER TO THE ONEISSI DEFENCE TO PROVIDE A SUMMARY OF FACTS OF
MR JAMIL EL-SAYYED'S EXPECTED TESTIMONY**

Office of the Prosecutor:
Mr Norman Farrell & Mr Nigel Povoas

Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

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



BACKGROUND

1. The Prosecution closed its case on 7 February 2018.¹ On 7 March 2018, the Trial Chamber delivered a decision, under Rule 167 of the Special Tribunal's Rules of Procedure and Evidence,² on an application by the Defence of Mr Hussein Hassan Oneissi to acquit him on all counts charged in the amended consolidated indictment.³ Of the four Accused, only the Oneissi Defence has elected to call a case.

2. On the Trial Chamber's order,⁴ counsel for Mr Oneissi filed their initial witness and exhibit lists on 7 March 2018.⁵ The Oneissi Defence intends to call two *viva voce* (live) witnesses—an expert witness, Professor Siegfried Ludwig Sporer (Witness DHO-001), and Mr Jamil El-Sayyed (Witness DHO-002). Professor Sporer commenced his evidence on Monday 14 May, and has testified to a lengthy expert report that the Oneissi Defence disclosed to the Trial Chamber and the Parties on 7 March 2018. Mr El-Sayyed, according to the Oneissi Defence, is expected to testify on political events in Lebanon before the assassination of the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005.

3. Mr El-Sayyed and the documents related to his expected evidence were added to the Oneissi Defence's witness and exhibit lists on 8 March 2018.⁶ After the Trial Chamber heard submissions from the Prosecution and the Oneissi Defence during Pre-Defence Conferences held on 8 and 22 March 2018,⁷ counsel for Mr Oneissi filed further updated lists expanding on the political topics covered by the witness's expected evidence.⁸

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, transcript of 7 February 2018, p. 69.

² Rule 167 (A) states that 'At the close of the Prosecutor's case, the Trial Chamber shall, by oral or written decision and after hearing submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count.'

³ Decision on the Oneissi Defence Application for a Judgment of Acquittal under Rule 167 (A), transcript of 7 March 2018, pp 3-52. No other Accused made applications under the Rule.

⁴ F3583, Scheduling Order to the Defence under Rule 128, 23 February 2018, para. 7.

⁵ F3596/A01, Annex A to Defence for Hussein Hassan Oneissi Submission Pursuant to the Trial Chamber's Scheduling Order of 23 February 2018, 7 March 2018 (confidential); F3596/A02, Annex B to Defence for Hussein Hassan Oneissi Submission Pursuant to the Trial Chamber's Scheduling Order of 23 February 2018, 7 March 2018 (confidential).

⁶ F3596/A01, Updated Annex A to Defence for Hussein Hassan Oneissi Submission Pursuant to the Trial Chamber's Scheduling Order of 23 February 2018, 8 March 2018 (confidential, a public redacted version was filed on 12 April 2018); F3596/A02, Updated Annex B to Defence for Hussein Hassan Oneissi Submission Pursuant to the Trial Chamber's Scheduling Order of 23 February 2018, 8 March 2018 (confidential).

⁷ See transcript of 8 March 2018, pp 27-34; transcript of 22 March 2018, pp 17-28.

⁸ F3596/A01, Second Updated Annex A to Defence for Hussein Hassan Oneissi Submission Pursuant to the Trial Chamber's Scheduling Order of 23 February 2018, 29 March 2018 (confidential, a public redacted version was filed on 12 April 2018); F3650/A05, Annex E to the Defence for Hussein Hassan Oneissi Request for

4. On 9 May 2018, counsel for Mr Oneissi informed the Trial Chamber that Mr El-Sayyed could testify on 5 and 6 June 2018.⁹ The Oneissi Defence's most recent witness list (its fourth) shows that Mr El-Sayyed's evidence-in-chief is estimated for three days, and he is expected to testify,

on the political situation in Lebanon preceding Mr Hariri's assassination. In particular, his testimony will touch upon: the political situation in Lebanon in 2000-2005; the regional situation related to Lebanon in 1999-2005; relations between Syria and Lebanon; relations between Rafik Hariri and Syria; relations between Rafik Hariri and Bashar Al-Assad (including meetings of 3 December 2003 and 26 August 2004); Syrian representatives in Lebanon (including Rustom Ghazaleh); relations between Rafik Hariri and Rustom Ghazaleh, Emile Lahoud, Jamil Al Sayed, and Hassan Nasrallah; relations between Syria and Walid Jumblatt; Resolution 1559; the extension of Emile Lahoud's mandate; the Bristol group; the resignation of Rafik Hariri in October 2004; preparation of the legislative elections in 2005; the attempted assassination against Marwan Hamade.¹⁰

5. The material listed in the Oneissi Defence's latest exhibit list related to Mr El-Sayyed comprises 66 items, namely,

- 25 statements from Mr El-Sayyed—including witness statements, suspect statements, transcripts of interviews by the United Nations International Independent Investigation Commission (UNIIC) and the Lebanese authorities some years ago, totalling 1,061 pages in multiple languages;
- three audio recordings (of 4 hours and 30 minutes) of Mr El-Sayyed's interviews by UNIIC investigators; and
- 38 other documents—including investigators' notes, memoranda, legal submissions and letters—of 450 pages in multiple languages.¹¹

Amendments to the Rule 128 Witness and Exhibit Lists and for the Admission of Documents Used by DHO-001, 7 May 2018 (confidential) ('Oneissi Defence witness list of 7 May 2018'); F3650/A06, Annex F to the Defence for Hussein Hassan Oneissi Request for Amendments to the Rule 128 Witness and Exhibit Lists and for the Admission of Documents Used by DHO-001, 7 May 2018 (confidential) ('Oneissi Defence exhibit list of 7 May 2018').

⁹ Letter by counsel for Mr Oneissi to the Trial Chamber, the Prosecution and the Legal Representatives of Victims, copying the other Defence counsel. *See also* F3656, Observations de la Défense en réponse à l'Ordonnance portant calendrier délivrée par le Juge Rapporteur le 8 mai 2018, 10 May 2018 ('Oneissi Defence observations'), para. 23.

¹⁰ Oneissi Defence witness list of 7 May 2018, item 2.

¹¹ Oneissi Defence exhibit list of 7 May 2018, items 24-89.

6. In a scheduling order to resume the trial, the Presiding Judge noted that the Trial Chamber cannot assess the probative value of Mr El-Sayyed's intended evidence to the Defence case (*i.e.* what it proves), as the Oneissi Defence has not yet informed the Trial Chamber of the substance of his intended testimony.¹²

7. The Oneissi Defence, however, submits that what it provided in bullet-point form in its witness list is in every respect consistent with the practice adopted by the Prosecution and approved by the Trial Chamber for witnesses testifying on the political situation in Lebanon preceding Mr Hariri's assassination. Particularly, Mr Marwan Hamade (Witness PRH038), Mr Walid Jumblatt (Witness PRH684) and Mr Fouad Siniora (Witness PRH108) testified for several months between November 2014 and May 2015 notwithstanding that the Prosecution had not demonstrated the relevance and probative value of these witnesses' evidence.¹³

8. The Prosecution responds that it had provided lengthy submissions on the relevance and probative value of their evidence before calling 'political witnesses', but also that the evidence was also tied to the timing, significance and reasons behind the evolution of covert network activity. Moreover, the Prosecution had disclosed the witness statements well in advance of the testimony, whereas the Oneissi Defence is refusing to set out the substance of Mr El-Sayyed's evidence or any justification for calling him to testify.¹⁴

DISCUSSION AND ORDER

9. Contrary to the Oneissi Defence's argument, the Trial Chamber heard lengthy submissions from Prosecution counsel in relation to the relevance and probative value of this evidence,¹⁵ and Defence responses,¹⁶ before it decided to hear evidence relevant to the political situation in Lebanon preceding Mr Hariri's assassination.

10. The Trial Chamber held that this evidence could provide background and give context to much of the other evidence adduced by the Prosecution, and even by the Defence. It also concluded that the evidence could help explain the wider circumstances leading to Mr Hariri's

¹² F3652, Scheduling Order to Resume the Trial on 14 May 2018, 8 May 2018, para. 5.

¹³ Oneissi Defence observations, paras 13-22.

¹⁴ F3661, Prosecution Response to Oneissi Defence "Observations de la Défense en réponse à l'Ordonnance portant calendrier délivrée par le Juge Rapporteur le 8 mai 2018", 14 May 2018, paras 3-5. The Trial Chamber, under Rule 9 (A) (i), ordered the Prosecution to respond, particularly in relation to paragraphs 13-22 of the Oneissi Defence observations, if it wishes so, by 11:00 am on Monday 14 May 2018. This was communicated to the Parties and the Legal Representatives of Victims by the Trial Chamber's senior legal office via email at 12:58 on Friday 11 May 2018.

¹⁵ See transcript of 13 November 2014, pp 34-67.

¹⁶ See transcript of 13 November 2014, pp 68-83, 87-102; transcript of 14 November 2014, pp 2-10.

assassination, and, in general, could also be used to explain the non-private motives for the commission of any offence that the Trial Chamber could find proven.¹⁷ The evidence of a witness for the Defence, logically, cannot serve the same purpose.¹⁸

11. Further, Rule 112 (A) (ii) ‘Disclosure by the Defence’ provides that,

At the end of the Prosecutor’s case, following a Defence election to present its case, within the time-limit prescribed by the Pre-Trial Judge or the Trial Chamber, but not less than one week prior to the commencement of the Defence case, the Defence shall ... provide to the Prosecutor copies of statements if any, of all witnesses whom the Defence intends to call to testify at trial, and copies of all statements taken in accordance with Rules 93, 123, 125, 155, 156, 157 and 158, which the Defence intends to present at trial. Copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses.

12. Rule 128 (i) (b) ‘Functions that May Be Exercised after Close of the Prosecutor’s Case’ further foresees that,

After the close of the Prosecutor’s case and upon a Defence election to present its case, the Trial Chamber shall order the Defence to file ... a summary of the facts on which each witness is expected to testify.

13. The Trial Chamber considers the practice established by the trial chambers of the International Criminal Tribunal for the former Yugoslavia guiding with respect to the sufficiency of Defence witness summaries. In essence, Defence witness summaries should be sufficiently detailed to allow the Prosecution to properly prepare for cross-examination and assist the judges’ preparation to hear the witness’s evidence. The mere indication of topics that a witness may address is insufficient without an accompanying summary of the facts on which he will testify.¹⁹

¹⁷ Decision on the scope of Mr Marwan Hamade’s evidence, transcript of 14 November 2014, p. 50; transcript of 17 November 2014, pp 2-15, in particular pp 10-11. See similarly STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1802, Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events, 30 December 2014, para. 30; F1785, Corrected Version of Decision on the Prosecution Motion for Admission under Rule 155 of Written Statements in Lieu of Oral Testimony Relating to Rafik Hariri’s Movements and Political Events’ of 11 December 2014, 13 January 2015, para. 13; Decision on Adding Mr Walid Jumblatt and Mr Ali Mohammad Hamade to the Prosecution’s Witness List, transcript of 9 December 2014, pp 7-13.

¹⁸ Oneissi Defence observations, para. 22.

¹⁹ ICTY, IT-98-29/1-T, *Prosecutor v. Dragomir Milošević*, Decision on the Prosecution’s Motion for Defence Compliance with Rule 65 ter (G), 26 June 2007, pp 3-4; IT-04-74-T, *Prosecutor v. Prlić et al.*, Decision on

14. The summary in the Oneissi Defence's updated witness list—as with the Defence of any Accused—has to comply with Rule 128 (i) (b). So far, however, it is limited to listing specific political topics and events encompassing six years of political developments in Lebanon and the surrounding region. This 'summary' is of topics, not facts. But opinions must be based upon facts and the Trial Chamber does not yet know the facts to which Mr El-Sayyed will testify. Without this information the Trial Chamber can neither assess the probative value of the testimony nor its potential length, nor hence schedule it.

15. If Mr El-Sayyed were to testify on many of the issues covered in the 1,500 odd pages of statements and other documents, it is obvious that his evidence could take weeks to complete. And the Trial Chamber is currently in the dark as to what facts—which may or may not appear somewhere in these 1,500 pages—will be the subject of his evidence. The statements, documents and the audio recordings simply do not reveal the specific facts to which Mr El-Sayyed is supposed to testify. This lack of information impedes the Trial Chamber's ability to prepare for his evidence and to question him, and the Prosecution's to prepare for cross-examination, and therefore the expediency of the trial proceedings.

16. Counsel for Mr Oneissi have met Mr El-Sayyed 'several times' and discussed the areas of his testimony, but have not prepared a statement for his proposed testimony,²⁰ so they must be able to inform the Trial Chamber of the facts that they wish Mr El-Sayyed to testify to. Irrespective of whether the Defence is obliged to take a witness's statement before calling them to testify—and the Trial Chamber is not determining this as a matter of law—the Parties and the Trial Chamber must be prepared well in advance of Mr El-Sayyed's testimony.²¹

17. The Trial Chamber accordingly **orders** the Oneissi Defence to file a summary of facts on which Mr El-Sayyed will testify **by Monday 28 May 2018**.

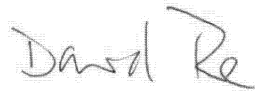
Prosecution Motion for the Provision of an Adequate Summary for the Forthcoming Testimony of Slobodan Božić, 22 January 2009, p. 5; IT-04-75-T, *Prosecutor v. Hadžić*, Decision on Prosecution Motion Requesting the Defence to Submit a Revised Rule 65 *ter* Witness List and Witness Summaries and for Disclosure in Accordance with Rule 67 (A) (ii) and the Trial Chamber's Orders, 25 July 2014, paras 13, 22-26; IT-04-75-T, *Prosecutor v. Hadžić*, Decision on Defence Motion for Admission of Evidence of DGH-051 Pursuant to Rule 92 *ter*, 28 November 2014, paras 8, 11.

²⁰ Transcript of 8 March 2018, p. 31.

²¹ Transcript of 8 March 2018, pp 28-29.

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

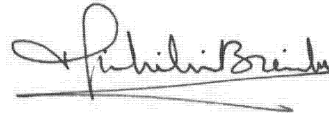
Leidschendam,
The Netherlands
16 May 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

