



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: 7 September 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**QUESTIONS FOR PARTIES AND LEGAL REPRESENTATIVES OF VICTIMS TO
ANSWER IN THEIR ORAL CLOSING ARGUMENTS ARISING FROM THEIR
WRITTEN FINAL TRIAL BRIEFS**

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:
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Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yasser
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Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Geoffrey Roberts &
Ms Sarah Bafadhel



1. The Prosecution, the Legal Representatives of Victims, and counsel acting for the four Accused filed their written final trial briefs, respectively on 16 July and 13 August 2018.¹ The Trial Chamber will hear their oral closing arguments between Tuesday 11 September and Friday 21 September.

2. The Trial Chamber has carefully examined the briefs and directs the Parties and the Legal Representatives of Victims to address the following questions in their oral closing arguments. The questions refer to the relevant paragraph in the respective brief.

Prosecution

3. The amended consolidated indictment, at paragraphs 23, 27 and 28, alleges that Mr Hussein Hassan Oneissi was ‘Mohammed’, while the Prosecution brief states, at paragraph 518, that the Trial Chamber ‘does not need to establish the precise identity’ of the ‘Mohammed’ who lured Mr Ahmed Abu Adass away from his home (see also paragraph 730 of the Prosecution brief which does not link Mr Oneissi with ‘Mohammed’). Is the Prosecution conceding that it has not proved that Mr Oneissi was ‘Mohammed’? And if so, what effect does this have on its case against Mr Oneissi?

4. In relation to paragraph 26 which states that the Trial Chamber need not find that the Accused ‘were acting on behalf of or at the behest of any organisation, leader, state or entity’,

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3712, The Legal Representative of Victims Final Trial Brief, With Annexes A and B, 16 July 2018 (confidential, with public annexes A and B); F3713, Final Trial Brief, 16 July 2018 (confidential, with confidential annexes A, B, C.1&C.2, D-G); F3718, Ayyash Defence Final Trial Brief, 13 August 2018 (confidential, with confidential annexes A-D); F3719, Mémoire final de la Défense de Hassan Habib Merhi, 13 August 2018 (confidential, with confidential annexes A-M); F3720, Sabra Defence Final Brief, 13 August 2018 (confidential, with confidential annexes A-D); F3721, Defence for Hussein Hassan Oneissi Final Trial Brief, 13 August 2018 (confidential, with confidential annex A). Redacted and corrected versions were subsequently filed. See F3712/PRV, *Public Redacted Version of: The Legal Representative of Victims Final Trial Brief, with Annexes A and B*, 19 July 2018; F3713/COR, *Corrected Version of the Prosecution Final Trial Brief*, filed 16 July 2018, 27 July 2018 (confidential); F3713/A06/COR, *Corrected Version of Annex F—Glossary*, filed 16 July 2018, 27 July 2018 (confidential); F3713/COR/PRV, *Redacted Corrected Version of the Prosecution Final Trial Brief*, filed 16 July 2018 & filed corrected 27 July 2018, 7 August 2018; F3719/CRG/A01, *Annexe A* (confidential), 5 September 2018; F3719/COR, *Version corrigée de : Mémoire final de la Défense de Hassan Habib Merhi*, 5 September 2018 (confidential); F3719/COR/PRV, *Version publique et expurgée de la version corrigée de : Mémoire final de la Défense de Hassan Habib Merhi*, 5 September 2018 (with public annexes B, E, F-M, and public redacted annexes A, C and D); F3718/PRV, *Public Redacted Version of Ayyash Defence Final Trial Brief*, 31 August 2018 (with public annexes A and D, and public redacted annexes B and C); F3721/COR, *Corrected Version of ‘Defence for Hussein Hassan Oneissi Final Trial Brief’*, 23 August 2018 (confidential); F3721/COR/A01, *Corrected Version of ‘Annex A to Defence for Hussein Hassan Oneissi Final Trial Brief’*, 23 August 2018 (confidential); F3721/COR/PRV, *Public Redacted Version of the “Corrected Version of ‘Defence for Hussein Hassan Oneissi Final Trial Brief’”*, filed on 13 August 2018 and corrected on 23 August 2018, 3 September 2018; F3721/COR/A01/PRV, *Public Redacted Version of the “Corrected Version of ‘Annex A to Defence for Hussein Hassan Oneissi Final Trial Brief’”*, filed on 13 August 2018 and corrected on 23 August 2018, 3 September 2018.

is a finding on the Accused's non-personal motive essential for the Trial Chamber to enter any finding of guilt against any of the four Accused?

5. If the Trial Chamber were not satisfied beyond reasonable doubt of the guilt of Mr Oneissi and Mr Assad Hassan Sabra, what flow-on effect, if any, would there be in relation to Mr Hassan Habib Merhi's pleaded role, given that he is alleged to have coordinated their activities?

6. The amended consolidated indictment (paragraph 23) pleads that Mr Oneissi and Mr Sabra were responsible for locating an individual suitable for making the false claim of responsibility for the attack. If the Trial Chamber cannot be satisfied beyond reasonable doubt of their involvement in this, what effect would this have on their pleaded involvement (paragraphs 44, 64, 66, 68 and 70) on 14 February 2005 in relation to delivering the video and making calls to Reuters and Al-Jazeera?

7. In particular, in these circumstances, what is the evidence that could prove their knowledge of the attack on Mr Hariri before it occurred, given that the amended consolidated indictment (e.g. at paragraph 48(c)) pleads that they joined the pleaded conspiracy at the latest on 'the morning of 14 February 2005 prior to the attack'?

8. At paragraph 315 (2), the Prosecution suggests that seven mobiles attributed to Mr Salim Jamil Ayyash moved from his former residence in Haret Hreik to Hadath and that Mr Ayyash himself moved there. Counsel for Mr Ayyash, at paragraphs 494 and 498 of their brief, state that this is merely a suggestion. What is the Prosecution's response to this?

9. At paragraph 327, footnoted to the evidence of Mr Gary Platt (footnote 608), it is asserted that the users of the pleaded green, blue and yellow networks 'had prior knowledge of the meeting between HARIRI and NASRALLAH on the night of 21 December 2004 and of its location within Haret Hreik'. What evidence is there for this assertion?

10. The brief, at paragraphs 380, 383, 388, 393 and 625, and specifically at paragraph 387, states that the four mobile networks were controlled by the 'same entity'. What was this entity?

11. Is the Prosecution now alleging, as stated at paragraph 434 of the Sabra brief, that the Syrian President Mr Bashar Al-Assad, the then Syrian Military Intelligence Chief in Lebanon,

Mr Rhustom Ghazaleh, and ‘the head of the central unit for liaison and coordination in Hezbollah’,² Mr Wafik Safa, were co-conspirators in the plot to murder Mr Hariri?

12. Paragraph 552 of the Prosecution brief alleges that inactivity of the purple and associated purple mobiles for a period of 48 to 72 hours before 18 January 2005 is consistent with ‘participation in the creation of the videotape of the false claim of responsibility’. Where is the evidence for this assertion? Further, it was not pleaded in the amended consolidated indictment or pre-trial brief. What legal consequences flow from this? And is this alleged to be a material fact?

13. Is there any evidence, apart from the hearsay attributed to the Secretary-General of Hezbollah, Mr Hassan Nasrallah, in the statement of the deceased witness Mr Wissam Al-Hassan (exhibit P2122) that the green network of three mobiles ‘belonged to Hezbollah’? (see Prosecution brief at paragraph 325).

14. Identify the evidence supporting the assertion, in relation to ‘East of Airport activity’, referred to at paragraphs 837 to 841, that this area was ‘potentially suitable’ to ‘undertake and conceal covert preparatory activity or equipment related to the conspiracy such as that required to prepare the VBIED’ (i.e. vehicle borne improvised explosive device).

15. Further, this is pleaded in neither the amended consolidated indictment nor the Prosecution’s pre-trial brief. What is the legal effect of this non-pleading? Is the Trial Chamber being invited to make a positive finding on this allegation? And if so, is it alleged to be a material fact that must have been pleaded?

16. At paragraphs 860 to 863, regarding the alleged trip of the blue mobile 742 on 18 and 19 January 2005 to Anjar, in Lebanon close to the Syrian border, this allegation is not pleaded in the amended consolidated indictment or the Prosecution’s pre-trial brief. What is the legal effect of this non-pleading? Is the Trial Chamber invited to make a positive finding on this allegation? And if so, is it alleged to be a material fact that must be pleaded?

17. In relation to the findings of which the Trial Chamber must be satisfied beyond reasonable doubt before it could convict the Accused, does the Prosecution agree with the list set out in the Oneissi brief at paragraphs 664 to 665 relating to cell site analysis, and that Mr Oneissi was the *sole* user of mobile 095?

² See exhibit P2091.

18. Paragraph 1047 of the Prosecution brief refers to the abduction and ‘presumed murder’ of Mr Ahmed Abu Adass (see also the Sabra brief at paragraph 53). Is it intended to suggest that Mr Merhi, Mr Oneissi and Mr Sabra are implicated in this? And, if so, where is the supporting evidence?

19. At paragraphs 1078 to 1080, the brief refers to CCTV (closed circuit television) footage of what could be the Mitsubishi canter allegedly carrying the explosives that were used in the attack. Does the Trial Chamber have to be satisfied beyond reasonable doubt that the canter is in fact depicted in the evidence referred to here?

20. What is meant—in paragraph 1151—by ‘the confirmed Indictment also includes Article 3 modes of liability for all Counts, including accomplice liability for Counts 6-9. While the Chamber can find the Accused guilty on all Counts pursuant to the modes of responsibility provided in the [Lebanese Criminal Code], Article 3 modes have not been withdrawn’? In this regard, respond to the Sabra brief at paragraphs 811 and 812, and the Oneissi brief at paragraphs 644 to 648.

21. Why does the Prosecution allege in the sub-heading preceding paragraph 1094, that the attack could only have been carried out ‘being led by a sophisticated military actor’? And what is meant by that expression?

22. Exhibits P775 and P778 are two lists from Alfa regarding cell tower information. How should the Trial Chamber assess these documents and how much evidentiary weight, if any, should it attribute to these two exhibits taking into account the alleged deficiencies pointed out by the Oneissi brief, at paragraphs 55 to 68?

23. Exhibit P775 is a list of Alfa cell towers, and exhibit P778 is a document with cell tower information including azimuth values, geographic coordinates, sector values, and tower type. The Oneissi brief, at paragraphs 55 to 68, argue that they are not ‘business records’ and that the data is inaccurate, of unknown provenance and does not reflect the Alfa network as it was in 2004 to 2005 and the two documents contradict each other. What is the Prosecution’s response to this?

24. Is motive a requirement for the crime of terrorism under Article 314 of the Lebanese Criminal Code and Article 6 of the Lebanese Law of 11 January 1958 on ‘Increasing the penalties for sedition, war and interfaith struggle’?

25. Is there any legal significance about when the purple mobiles were ‘discovered’, referred to in paragraph 104 of the Sabra brief?

26. From what evidence could the Trial Chamber infer and thus find proven beyond reasonable doubt that Mr Merhi was aware that the assassination of Mr Hariri was to occur on 14 February 2005 (see Merhi brief at paragraph 431).

27. The Merhi brief, at paragraphs 372 to 377 states that the Prosecution expert witness, Mr John Edward Philips, provided evidence that the green mobile 071 (allegedly used by Mr Merhi) was isolated from both the surveillance of Mr Hariri’s movements before the attack, and the attack itself, and was isolated from the call flows in the red, blue and green networks. Respond to the Merhi Defence argument that Mr Merhi therefore could not have been party to the assassination.

28. In a case based mainly on circumstantial evidence, even if corroboration is not required as a matter of law, is it nonetheless desirable—in order to ensure a safe conviction and to protect the rights of the Accused to a fair trial?

29. Are there any circumstances in which corroboration is required as a matter of law or practice and is a closed list, which may not be extended, or does any requirement of corroboration otherwise depend on the facts of each case in order to guarantee a fair trial?

Legal Representatives of Victims

30. Paragraph 88 (iv) of the brief suggests that the four Accused and Mr Mustafa Amine Badreddine ‘plotted and executed’ the assassination of Mr Rafik Hariri. Is this intended to invite the Trial Chamber to make such a finding?

31. Paragraph 90 states that the assassination was the ‘work of a political organisation, which killed for its political beliefs’. What is the evidence for this and what political organisation is implicated?

32. In relation to the statement in paragraph 129 that the Trial Chamber should give ‘significant weight’ to the evidence and report of the victimologist, Professor Dr Rianne Letschert, in relation to the gravity of the crimes and the harms suffered by victims of the attack, what findings should the Trial Chamber make in this respect? And, explain the legal relationship between the gravity of the crimes and the harms suffered and the crimes charged in the amended consolidated indictment. Does this only relate to sentencing in the event of a conviction?

33. The Trial Chamber, at paragraph 662 of the brief, is asked to make findings about the failure of the relevant Lebanese authorities in relation to the investigation. Why? And, further, the same question arises in relation to the invitation, at paragraph 670, to find that these failures ‘led directly to additional distress and suffering’.

Counsel for Mr Salim Jamil Ayyash

34. It is submitted, at paragraph 44, that no weight can be given to Professor Letschert’s evidence. Why?

Counsel for Mr Hassan Habib Merhi

35. The brief, at paragraph 75, suggests that the Trial Chamber should ignore references in the Prosecution brief footnotes to exhibits P1780, 1781 and 1782 on the basis that they are akin to submissions and are not evidence. As the Trial Chamber received them into evidence as demonstrative exhibits, why should it not treat them as such in reading the Prosecution brief?

36. In relation to Mr Wissam Al-Hassan and the allegation at paragraph 364 that he ‘had an interest in providing certain lines of inquiry in order to avoid becoming a suspect himself’ (referring to a United Nations International Independent Investigation Commission internal memorandum, exhibit 5D426) where is the evidence for this, and in particular, that he knew that he was a potential suspect?

37. Regarding the legal submissions related to the starting dates of conspiracies, referred to in paragraphs 405 and 412, why is the Prosecution legally required to nominate a positive starting date or a theory supporting that nominated date?

38. On what basis is it submitted, in paragraph 441, that the amended consolidated indictment does not plead the purchase of the Mitsubishi center in Tripoli?

Counsel for Mr Hussein Hassan Oneissi

39. At paragraph 43 the brief asks the Trial Chamber to exclude the evidence of Witness PRH 707 under Rule 149 (D).³ Can the Trial Chamber, at this stage of the proceedings and having heard the witness’s extensive evidence, utilise Rule 149 (D) as opposed to diminish the weight that can be given to all (or parts) of his evidence, even to zero? How does this submission stand, for example, with that at paragraphs 91 to 93 of the brief in which it is

³ Rule 149 (D) allows the Trial Chamber to ‘exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial’.

submitted that the Trial Chamber should disregard Mr Andrew Fahey's conclusions, as opposed to excluding his evidence?

40. At paragraph 191 the brief states that the Prosecution 'simply resorts to falsehoods'. This must be properly particularised insofar as it may constitute an allegation of misconduct against Prosecution counsel.

41. At paragraph 632 the brief refers to a meeting between Mr Hariri and the Syrian President on 25 August 2004 stating positively that the 'alleged threats never occurred', footnoted to the evidence of Mr Jamil El-Sayyed (footnote 1394). Recognising that both the Prosecution and Defence evidence of the meeting and what was said is hearsay, how can this be positively asserted as a matter of fact that it did not occur, as opposed to a statement that the witness had simply not heard about any threats?

42. The brief states, at paragraph 647, that the Appeals Chamber's Interlocutory Decision on the Applicable Law⁴ 'is binding' on the Trial Chamber. What is the legal source for this assertion?

Counsel for Mr Assad Hassan Sabra

43. Regarding the nature of the facts of which the Trial Chamber must be satisfied beyond reasonable doubt to convict an Accused person referred to at paragraphs 4 to 5 of the brief, the Prosecution in its brief (at paragraph 45) states that this does not apply to all material facts pleaded. Do the Sabra Defence and the Prosecution disagree on this point?

44. Paragraph 51 refers to the Prosecution stating in its final trial brief (at paragraphs 552 and 621) that the users of the purple mobiles were implicated in the creation of the videotape of the false claim of responsibility. This was not pleaded. What legal consequences, if any, arise from this?

45. Paragraph 104 refers to the 'discovery' of the purple mobiles, only in 2008. How does it matter, either legally or evidentially, when the existence of the calls between the three purple mobiles was discovered?

46. What is meant at paragraph 272 by 'Bed-and-breakfast analysis'—used in relation to Mr Andrew Donaldson's analysis of personal mobile purple 018, allegedly attributed to Mr Sabra?

⁴ STL-11-01/I/AC/R176bis, F0936/COR, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011.

47. What are the legal sources for the proposition in paragraph 427 that ‘the motive for committing a terrorist act is an additional requirement for this offence under customary international law’? Is the brief suggesting that the Trial Chamber should apply customary international law (whatever it may be) in defining the crime of terrorism under the Lebanese law? And if so, on what basis?

48. The brief, at paragraph 428, states that the amended consolidated indictment is defective because it failed to plead a motive as an element of the offence contrary to Lebanese law of committing a terrorist act by means of an explosive device. The Sabra Defence, however, did not raise this in its challenge to the form of the indictment filed in 2012 and decided in 2013⁵ and the trial was conducted without this being raised. Why, by its silence during the trial, has the Sabra Defence not waived this issue?

49. Further, given Article 192 of the Lebanese Criminal Code states that motive is not an element of an offence except in cases specified by law, what is the legal source for the proposition that motive is an element of the offence as set out in Article 314 of the Lebanese Criminal Code and Article 6 of the Lebanese Law of 11 January 1958 on ‘Increasing the penalties for sedition, war and interfaith struggle’?

50. What is the legal consequence to the Sabra Defence, if the Prosecution did not plead—as is alleged at paragraph 434 of the Sabra brief—that President Al-Assad, Mr Rhustom Ghazaleh and Mr Wafik Safa were co-conspirators in the plot to murder Mr Hariri? Identify the prejudice to the Defence if this is in fact the Prosecution allegation.

51. In relation to the ‘but for’ causality test referred to in paragraph 822 as a requirement under Lebanese law between an accomplice and a perpetrator, is there any legal support for this apart from the case referred to in footnote 1537, namely *Aliya* (2002)?

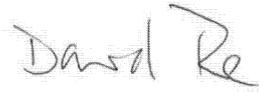
52. The brief complains, at paragraphs 431 to 432, of the Prosecution’s failure to plead the identity of the users of sixteen mobiles. What legal consequences flow from this?

53. At paragraphs 440 to 452 of the brief, complaint is made of the Prosecution’s ‘failure to plead and prove the role of Hezbollah’. Should this have been pleaded as a material fact, and if so, what consequences flow from this?

⁵ STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0304, Sabra's Preliminary Motion Challenging the Form of the Indictment, 25 June 2012 (confidential with confidential annexes) A public redacted version of the motion was filed on the same day. F0952, Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013.

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

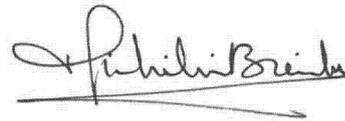
Leidschendam,
The Netherlands
7 September 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

