

BEFORE 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

The Registrar: Mr Daryl Mundis

Date: 30 September 2016

Filing party: The Defence - Oneissi

Original language: French

Classification: Public

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

SUBMISSIONS PURSUANT TO THE ORDER OF THE CHAMBER
DATED 22 SEPTEMBER 2016

Office of the Prosecutor:
Mr Norman Farrell

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

Defence Office:
Mr François Roux

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Khalil

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

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 Guenaël Mettraux &
Mr Geoffrey Roberts



1. On 22 September 2016,¹ the Trial Chamber ordered Defence counsel to file submissions setting out their positions on what, in their view, would be the most suitable solution to ensure they may fairly and equitably meet the evidence led by the Prosecution in support of the allegations relating to Mr Badreddine and his role in what the Prosecution presents as a conspiracy.
2. The solutions referred to by the Chamber include notably the possibility of appointing an *amicus curiae*, as provided for by Rule 131 of the Rules of Procedure and Evidence. The Chamber stated that the *amicus* would assist the Chamber by assisting the Defence teams. The *amicus* would therefore have the role of challenging the evidence specific to Mr Badreddine's role with respect to the charges laid against the four Accused.² The Chamber also emphasized that this was one of several options and referred to Rule 130 (A), under which the Chamber is free to give any directions it considers necessary and desirable to ensure a fair, impartial and expeditious trial.³
3. The Chamber held that it could receive evidence relating to Mr Badreddine's alleged participation, despite his death.⁴
4. The Oneissi Defence has re-examined the situation since the filings of 26 July and 17 August 2016⁵ and now finds, all other things being equal, that in the context of a trial held *in absentia* it is not its role to conduct defence by proxy, whether directly or indirectly, on behalf of someone who is deceased.

¹ STL-11-01/T/TC, F2728, *Prosecutor v. Ayyash et al.*, Order to Defence and Invitation to Prosecution and Participating Victims and Head of Defence Office to File Submissions on the Possible Appointment of *Amicus Curiae*, 22 September 2016 ("Order of the Chamber").

² Order of the Chamber, para. 6.

³ *Ibid.*

⁴ STL-11-01/T/TC, F2675, Decision on the Admission of the Statement of Mr Timothy Holford (Witness PRH400) and Annexed Documents, 29 July 2016; STL-11-01/T/TC, F2713, Decision Amending the Consolidated Indictment, 7 September 2016, paras 46 to 53.

⁵ STL-11-01/T/TC, F2668, Response to the Prosecution Submission of the Consolidated Amended Indictment Pursuant to the Trial Chamber's Order of 11 July 2016, 26 July 2016, see in particular paras 38-39; STL-11-01/T/TC, F2693, Sur-reply to the Observations of the Legal Representative of Victims and to the Consolidated Prosecution Reply to the Defence Response to the Prosecution Submission of the Consolidated Amended Indictment, 17 August 2016, see in particular paras 18-19.

5. It points out in that regard that in the event of an *amicus curiae* being appointed, it will not have any dealings with that *amicus*.

6. It is incumbent upon the Trial Chamber to examine in the context of the hearing, from an inculpatory as well as an exculpatory perspective, the evidence which will continue to be presented against Mr Badreddine's alleged participation. The Oneissi Defence notes that provision is made for this under the terms of the Statute and the Rules of this Tribunal.

7. It will be recalled in this regard that the United Nations Secretary-General, in his report on the establishment of a special tribunal for Lebanon, stated: "the trial process before the special tribunal is inspired by the civil law system in the following two respects, the active role of the judges and the conduct of trials in absentia: (a) The judges of the special tribunal will take a more active role in the conduct of the trial process and the examination of witnesses [...]"⁶

8. The power to examine the facts in the context of the hearing goes hand in hand with the institution of a trial *in absentia*.

9. Article 20(2) of the Statute of this Tribunal sets forth that "[u]nless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence." Rule 145 (A) of the Rules also provides for such a mechanism, whereby the judges of the Chamber question the witness before the party calling the witness.

10. During the status conference held on 29 October 2013,⁷ the Chamber decided that the interests of justice required it to choose the mechanism provided for under Rule 145 (B) rather than turning to Rule 145 (A) to question the witnesses. According to Rule 145 (B), the witness shall first be questioned by the party calling them, before being cross-examined by the other party, should it decide to exercise that right, whereas the judges of the Chamber may put questions at any time. At the time, the Chamber had not yet been seized of the case file, and the reasons given referred, on the one hand, to the limited time that would be available to the Chamber to familiarise itself with the case file from the moment it was

⁶ S/2006/893, Report of the Secretary-General on the establishment of a special tribunal for Lebanon, 15 November 2006, para. 32.

⁷ 20131029_STL-11-01_PT_T26_OFF_CONF_FR, pp. 4 and 5.

received to the date that was scheduled for the start of the trial, and on the other, to the anticipated number of witnesses and exhibits.

11. The circumstances are different today: the case has been transferred to the Chamber, and the trial has been underway for more than two years, during which time part of the Prosecution's evidence has been presented and discussed. Today the Chamber therefore has sufficient knowledge of the case file to question witnesses, which, moreover, the judges regularly do in the context of the proceedings. Furthermore, the evidence concerned relates to Mr Badreddine's alleged role, in other words 35 Prosecution witnesses,⁸ 11 of whom it is anticipated will testify *viva voce*. The volume of evidence is therefore not comparable to that which led the Chamber to have recourse to Rule 145 (B).

12. During the status conference in October 2013, the Chamber had already noted that Rule 145 (C) gave it the power to change the mode of proceeding "wherever required by the interests of justice."⁹

13. Mr Badreddine's death represents a radical change of circumstances, with the Prosecution presenting inculpatory evidence in court against Mr Badreddine, an ex-accused, who is deceased, whose interests are no longer being represented. The Prosecution submits that the acts it attributes to him are inextricably linked to the acts attributed to the remaining Accused,¹⁰ and the evidence led in support of those acts cannot be admitted without having been subject to close scrutiny.

14. The Oneissi Defence therefore considers that it is the responsibility of the Chamber to conduct that examination itself, in an independent and impartial manner, and that it is in the interests of justice, for the witnesses questioned in relation to Mr Badreddine's role, to make use of the mechanism provided for in Rule 145 (A).

30 September 2016,

⁸ According to information provided by the Prosecutor to date: PRH708, PRH244, PRH273, PRH602, PRH663, PRH298, PRH369, PRH605, PRH359, PRH338, PRH243, PRH447, PRH470, PRH691, PRH440, PRH609, PRH700, PRH330, PRH603, PRH604, PRH043, PRH329, PRH367, PRH116, PRH403, PRH085, PRH049, PRH423, PRH666, PRH497, PRH523, PRH531, PRH556, PRH679, PRH577. See STL-11-01/T/TC, F2626, Prosecution Notice of Updated Revised Witness List, 20 June 2016, Annex A.

⁹ 20131029_STL-11-01_PT_T26_OFF_CONF_FR, p. 5, line 12.

¹⁰ Order of the Chamber, para. 2.

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