



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

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: 13 April 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ALLOWING PROFESSOR SIEGFRIED LUDWIG
SPORER (WITNESS DHO-001) TO GIVE EXPERT OPINION
EVIDENCE AND ADMITTING, IN PART, HIS EXPERT REPORT**

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 Oneïssi:
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



INTRODUCTION AND BACKGROUND

1. Counsel for the Accused, Mr Hussein Hassan Oneissi, have elected to present a short Defence case. According to their updated witness list, filed under Rule 128 of the Special Tribunal’s Rules of Procedure and Evidence, they intend to call only two witnesses, Professor Siegfried Ludwig Sporer and Mr Jamil Mohammad El Sayed. Professor Sporer will testify on Tuesday, 17 April 2018.¹

2. On 21 March 2018, the Oneissi Defence filed an application asking the Trial Chamber to declare Professor Sporer an expert witness and to admit his expert report—disclosed on 7 March 2018—into evidence.² The Prosecution responded by filing a notice under Rule 161 (B) ‘Testimony of Expert Witnesses’ which requires it to state whether it accepts the report or statement, wishes to cross-examine the expert, or challenges the expert’s qualifications or the report itself.³ While not challenging Professor Sporer’s expert qualifications, the Prosecution objected to the admission into evidence of specific portions of his report.⁴ The Oneissi Defence responded to this notice.⁵

APPLICABLE LAW

3. The Trial Chamber has previously held that a decision on whether to qualify a witness as an expert under Rule 161 rests on whether he or she is:

‘a person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute.’ Accordingly, to determine whether a person is an expert, the Trial Chamber should consider past and current professional experience and training, publications and other relevant information, as described in a *curriculum vitae* or other pertinent documents accompanying the report.⁶

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3596/A01, Second Updated Annex A to Defence for Hussein Hassan Oneissi Submissions 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).

² F3605, Defence for Hussein Hassan Oneissi Rule 161 (A) Disclosure Notice and Request for the Admission into Evidence of Prof Sporer’s Expert Report, 21 March 2018 (confidential) (‘Oneissi Defence application’).

³ Rule 161 (B) provides that ‘[w]ithin thirty days of disclosure of the statement of the expert witness, or such other time prescribed by the [...] Trial Chamber, the opposing Party shall file a notice indicating whether (i) it accepts the expert witness statement; (ii) it wishes to cross-examine the expert witness; or (iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the report and, if so, which parts’.

⁴ F3621, Prosecution’s Rule 161 (B) Notice in relation to Witness DHO-001 Siegfried Ludwig Sporer and Request to Strike Portions of the Report, 6 April 2018 (confidential with confidential annexes A-E).

⁵ F3624, Defence for Hussein Hassan Oneissi Response to Prosecution’s Rule 161(B) Notice in relation to Prof Siegfried Ludwig Sporer, 11 April 2018 (confidential) (‘Oneissi Defence response’).

⁶ F2549, Decision Allowing Mr Gary Platt (Witness PRH147) to Give Expert Opinion Evidence, 13 April 2016, para. 4.

DISCUSSION AND DECISION

Professor Sporer's qualifications as an expert

4. The Prosecution does not oppose qualifying Professor Sporer as an expert. The Trial Chamber has carefully reviewed Professor Sporer's *curriculum vitae*, his qualifications, experience and list of publications,⁷ and is satisfied that, because he possesses 'specialized knowledge, skill or training' which could assist the Trial Chamber, he may testify as an expert witness.

Submissions and admitting Professor Sporer's expert report

5. With regard to Professor Sporer's 'expert report', however, the Prosecution opposes the admission of certain parts on the grounds that they: (i) rely on witness statements and documents that are not admitted into evidence; (ii) incorrectly or inaccurately represent the evidence of witnesses; (iii) fall outside of the Professor's stated expertise, and in certain cases, contain conclusions which fall within the Trial Chamber's sole purview; and (iv) lack the relevance required for admission into evidence.⁸ The Prosecution submits that, insofar as the Oneissi Defence is permitted to rely on the challenged portions of the report, it wishes to cross-examine the witness.⁹

6. According to the Oneissi Defence, the Prosecution seeks to unjustifiably limit Professor Sporer's expertise and mischaracterises as speculation his application of the relevant science to the case. Further, the report reflects the delineation between Professor Sporer's function as an expert and the Trial Chamber's judicial functions. The Prosecution's objections do not warrant excluding the challenged portions, but either go to their weight—for those relying on untendered material—or concern matters that the Prosecution can explore with the witness in cross-examination.

7. Moreover, the Oneissi Defence intends to tender the documents referenced in the report, except those providing information contained in 'alternative versions', or material already in evidence. Excluding these portions because the underlying material—which will

⁷ The Oneissi Defence disclosed Professor Sporer's *curriculum vitae* and a list of his publications, along with his expert report, on 7 March 2018. See disclosure batch 3519.

⁸ The portions for which admission is opposed are identified, respectively, in annexes A, B, C and D to the Prosecution Rule 161 notice. The Prosecution has highlighted, in annex E, all the challenged parts of the report.

⁹ Prosecution notice under Rule 161, paras 3-8, 11-24.

have been tendered into evidence—has not yet been admitted, would be contrary to Mr Oneissi’s right to equality or arms.¹⁰

8. In response to the Prosecution, in its annex B, pointing out factual errors in Professor Sporer’s report, the Oneissi Defence acknowledges the misattribution of witness statements, incorrect references and a ‘minor mistake’, but submits that the Professor can correct them during his testimony. In one instance he has already prepared a ‘corrected version’ of the relevant page. If necessary, the report can be amended at a later stage.¹¹

Portions of report relying on documents and witness statements not in evidence and for which no application has been made to tender them into evidence

9. The Trial Chamber agrees with the Prosecution that those portions of the report which rely on documents or witness statements that either have not been received into evidence, do not appear on the Oneissi Defence’s witness or exhibit list, *or for which no application has been made to tender them into evidence*, are currently inadmissible. These are identified in annex A to the Prosecution’s notice.

10. In contrast to the approach taken here by the Oneissi Defence in respect of Professor Sporer’s report, the Prosecution tendered into evidence the source material referenced in its reports—documents and witness statements—including those of its investigators and analysts, Mr Gary Platt and Mr Andrew Donaldson. The Trial Chamber was thus satisfied—after hearing from the Parties—that the source material used in the Prosecution’s reports was relevant and probative and hence admissible under Rule 149 (C).

11. Moreover, Mr Donaldson amended his report to delete references to anticipated witness testimony (statements) and documents that the Trial Chamber did not receive into evidence or which were withdrawn from the Prosecution’s witness and exhibit lists, and their final reports reflect these changes.¹² Professor Sporer’s report, by contrast, refers to numerous documents for which no application has been made to admit the documents into evidence. The Trial Chamber is thus unaware of which of these documents and statements the Professor relied upon is admissible and on what basis under Rule 149 (C).

¹⁰ Oneissi Defence response, paras 2-10, 16-18, 25-32, 41.

¹¹ Oneissi Defence response, paras 12-15, 19-24.

¹² See, e.g., exhibit P1953 ‘Evidence of Telephone Attribution – Assad Hassan Sabra’, Version 4, dated 18 August 2017.

12. The Oneissi Defence has listed in its updated exhibit list 36 documents that it apparently intends to tender into evidence, which appear to be connected with Professor Sporer's evidence. However two fundamental challenges arise with this approach.

13. The first is that at least 25 of the documents appear to be witness statements, yet none are on the Oneissi Defence's witness list, which contains only the names of Professor Sporer and Mr El-Sayyed. Rule 128 (i) (e) requires the Defence to file a witness list which indicates whether the witness will testify in person or under another Rules such as Rule 155 (a statement admitted without oral testimony), Rule 156 (a statement admitted with cross-examination) or Rule 158 (a statement of an unavailable witness).

14. The Trial Chamber has consistently held that it will not (generally) receive witness statements into evidence under Rule 154—which permits it to admit relevant and probative documents¹³—and the Oneissi Defence has filed no applications to tender any of the statements into evidence under Rules 155, 156 or 158.

15. The second challenge relates to the documents which are not witness statements and may be admissible under Rule 154. The Oneissi Defence filed its updated exhibit list on 8 March 2018 and Professor Sporer is scheduled to testify on 17 April 2018, yet it has made no application to tender *any* of the documents into evidence, explaining how the documents are relevant and have probative value.

16. The Oneissi Defence case was scheduled to run between 10 and 20 April 2018 and the Trial Chamber has ordered the filing of final trial briefs on 4 June 2018.¹⁴ The proceedings are adversarial, meaning that each Party conducts its own investigations and presents its own evidence in court, including calling witnesses and tendering documents under Rule 154.

17. The Trial Chamber can only receive relevant and probative evidence, but the evidentiary onus of demonstrating that the proposed evidence is relevant and has some probative value rests with the Party moving for its admission. The Oneissi Defence, like the Prosecution in its own case, must move the Trial Chamber to receive relevant and probative evidence. But the opposing Party may object and Rule 8 (A) allows an opposing Party

¹³ See, e.g., F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017, para. 84; F3439, Decision Partly Granting Second Sabra Defence Motion for the Admission of Documents relating to Ahmed Abu Adass – The Selection of Ahmed Abu Adass, 30 November 2017, para. 11; F3444, Decision Partly Granting Fifth Sabra Defence Motion for the Admission of Documents relating to Mr Ahmed Abu Adass – The False Claim of Responsibility, 30 November 2017, para. 24.

¹⁴ F3623, Scheduling Order for Final Trial Briefs and Closing Arguments under Rule 147, 11 April 2018.

fourteen days to respond to a motion. Yet no motions have been filed for the admission of any of the pieces of evidence listed on the exhibit list explaining their relevance and probative value.

18. With regard to the methodology used and scientific sources supporting any expert opinion, the Trial Chamber's view is that it suffices that they are clearly indicated in the report and accessible.¹⁵ However, concerning the expert's application of their own expertise, the 'case material' relied upon must actually be in evidence. When analysing the underlying material, Professor Sporer referred to 'witnesses'. However, some of this apparent source material has neither been tendered for admission nor admitted into evidence, meaning that it does not originate from 'witnesses' whose evidence is on the trial record. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has held that,

an expert opinion is relevant only if the facts upon which it is based are true. [...] It is for the Trial Chamber to determine whether the factual basis for an expert opinion is truthful. The determination is made in the light of all the evidence given.¹⁶

19. But to make such an assessment, the material the expert relied upon must be in evidence. For all of these reasons, the Trial Chamber therefore rejects the admission into evidence of those portions of the report that rely on untendered evidence—and for which no application has been made to admit it into evidence, explaining its relevance and probative value—as identified in annex A to the Prosecution Rule 161 notice, in relation to items 1-8, 9-12, and 17-18.

20. However, the Trial Chamber will not reject the portions of the reports relying on alternative versions of tendered material or information which is already in evidence. The Oneissi Defence, however, must ensure that Professor Sporer prepares a corrected version of the relevant passages before his testimony relying on the relevant admitted evidence and properly reflecting its content.¹⁷

Portions of the report purportedly outside of Professor Sporer's area of expertise

21. The Prosecution claims that certain passages—listed in its annex C—are outside of Professor Sporer's expertise, amount to speculation, or encroach upon the Trial Chamber's

¹⁵ ICTY, *Prosecutor v. Gotovina*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 August 2009, para. 10.

¹⁶ ICTY, *Prosecutor v. Delalić*, IT-96-21-A, Judgement, 20 February 2001, para. 594.

¹⁷ Annex A to Prosecution Rule 161 notice, items 13, 14, 15, 16.

judicial functions. The Trial Chamber has held that the content of an expert witness statement or report must fall within the expert witness area of expertise. Further, an expert witness should not offer his or her opinion on the criminal liability of the accused, as this is a matter that falls within a Chamber's competence.¹⁸

22. The Trial Chamber will of course draw its own conclusions based on all the evidence received at trial, irrespective of an expert witness' personal opinion(s).¹⁹ In this respect Professor Sporer has several times specified in the report that a certain statement amounts 'only to a very personal view', a personal impression or that a certain analysis is open for the 'court' to consider. While the Trial Chamber considers that some passages in the report may stray into areas outside the witness's expertise or suggest or point to conclusions that are within the Trial Chamber's domain, it will exercise its discretion to admit them into evidence. Statements that fall outside the area of expertise will be treated as the witness's personal opinions and weighed accordingly.²⁰

Inaccuracies

23. The Oneissi Defence in its response acknowledged most of the errors in the passages identified by the Prosecution—in its annex B—as inaccurately or incorrectly reflecting Prosecution evidence. These should accordingly be corrected.

24. Apart from those concerning passages found inadmissible for relying on untendered evidence, the Trial Chamber instructs the Oneissi Defence to have Professor Sporer correct them and file a corrected version of the report. With regard to any other portion or observation the Prosecution claims to be erroneous, the Prosecution may either challenge these during cross-examination or make appropriate submissions. The Trial Chamber does not find that any other portion of the report lacks the relevance or the probative value required for admission into evidence under Rule 149 (C) and will not exclude any on this basis.

¹⁸ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1610, Decision on Expert Witness PRH120, Professor Fouad Hussein Ayoub, and Expert Witness PRH508, Dr. Issam Mansour, 7 July 2014, para 5 and references contained therein.

¹⁹ ICTY, *Prosecutor v. Galić*, IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 6.

²⁰ F3126, Interim Decision on Joint Defence Motion *in Limine* to Exclude Evidence of Analyst Mr Andrew Donaldson, 5 May 2017, para. 10.

CONFIDENTIALITY

25. Reiterating the public nature of these proceedings, the Parties should file redacted versions of their filings.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES that Professor Siegfried Ludwig Sporer (Witness DHO-001) is qualified under Rule 161 to provide expert opinion evidence;

DECIDES THAT IT WILL ADMIT INTO EVIDENCE the report with ERN 1DT4-2237-1DT4-2433—in the absence of any proper application to admit the underlying material into evidence—with the exception of the portions identified in annex A to the Prosecution notice under Rule 161, in relation to items 1-8, 9-12, 17-18, as highlighted in annex E in paragraphs 2.6.1—including figure 2.05; 3.1.1 (the first five highlighted lines); 3.1.2; 3.4.1 (the second highlighted passage on page 42); 4.1; 4.1.1; 4.5.1; 4.7 (four highlighted lines on page 82); 5.3 (the three last highlighted lines on page 90 and the highlighted passages on page 91)—including figures 5.03 and 5.04—and 6.2;

ORDERS the Oneissi Defence to have Professor Sporer correct his report as described in paragraphs 20 and 24 of the decision before he testifies; and

ORDERS the Parties to file redacted versions of their filings in due course.

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

Leidschendam,
The Netherlands
13 April 2018

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

