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:	**14 May 2018**
Original language:	**English**
Classification:	**Public**

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

DECISION DENYING CERTIFICATION TO APPEAL DECISION UNDER RULE 167 NOT TO ACQUIT HUSSEIN HASSAN ONEISSI AND TO STAY THE TRIAL – WITH A SHORT SEPARATE OPINION OF JUDGE DAVID RE

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

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

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

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée 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. In a decision delivered in court on 7 March 2018 the Trial Chamber denied an application by counsel for the Accused, Mr Hussein Hassan Oneissi, to enter a judgement of acquittal under Rule 167 of the Special Tribunal's Rules of Procedure and Evidence on all counts pleaded against him in the amended consolidated indictment.[1]

2. Counsel for Mr Oneissi seek certification to file an interlocutory appeal under Rule 126 (C) posing two issues for appeal. They also seek a stay of the proceedings pending the determination of this application.[2] The Prosecution opposes the motion and the Legal Representative of Victims filed observations opposing the application for a stay and partly opposing the application for certification.[3]

3. Procedurally, on 2 February 2018, upon counsel for the Accused, Mr Hassan Habib Merhi, notifying the Trial Chamber that they did not wish to cross-examine any further Prosecution witnesses, the Trial Chamber issued a scheduling order specifying that the Prosecution should close its case on 7 February 2018 and that it would hear submissions under Rule 167 on 20 and 21 February 2018.[4]

4. The Prosecution closed its case in court on 7 February 2018. The Oneissi Defence then formally notified the Trial Chamber that it was making an application under Rule 167 seeking an acquittal. This was opposed by the Prosecution. The Trial Chamber then received written[5] and oral submissions[6] on the application and issued its decision on 7 March 2018. It

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[1] STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, transcript of 7 March 2018, pp 3-52 ('Rule 167 decision').

[2] F3603, Request for Certification of the Chamber's Decision of 7 March 2018 Dismissing the Application for the Acquittal of Mr Oneissi Filed Pursuant to Rule 167, 14 March 2018 (confidential, a public redacted version was filed on 15 March 2018) ('Defence application').

[3] F3613, Prosecution Response to Oneissi Defence "Requête en certification de la decision de la Chambre en date du 7 mars 2018 rejetant la demande d'acquittement de M. Oneissi déposée en application de l'article 167", 29 March 2018 ('Prosecution response'); F3612, The Legal Representative of Victims Observations on "Requête en certification de la decision de la Chambre en date du 7 mars 2018 rejetant la demande d'acquittement de M. Oneissi déposée en application de l'article 167", 29 March 2018 ('Legal Representative of Victims' observations').

[4] F3549, Scheduling Order Regarding Close of Prosecution Case and Defence Submissions under Rule 167, 2 February 2018.

[5] Pursuant to an oral order, *see* transcript of 22 February 2018, pp 9-10; *see* F3586, Soumissions additionnelles de la Défense de M. Oneissi en application de l'article 167 et de l'ordonnance orale de la Chambre de première instance en date du 22 février 2018, 27 February 2018 (confidential, corrected version and public redacted version of the corrected version were filed on 5 March 2018); F3587, Prosecution Further Submissions in Response to an Oneissi Defence Application for Acquittal Under Rule 167, 27 February 2018 (confidential, corrected and public redacted versions were filed on 1 March 2018).

[6] Transcript of 21 February 2018, pp 39-121; transcript of 22 February 2018, pp 4-7, 20-39, including from the Prosecution in relation to the Accused, Mr Salim Jamil Ayyash.

also issued scheduling orders under Rule 128 ordering the Defence to file relevant witness and exhibits lists if counsel for the four Accused elected to call a defence case.[7] It held Pre-Defence Conferences under Rule 129 on 8 and 22 March 2018.

5. Of the four Accused, however, only the Oneissi Defence has elected to call a case. This case consists only of two witnesses—an expert witness, Professor Siegfried Ludwig Sporer, who is expected to testify at most for a day or two, and his expert report—and Mr Jamil El-Sayyed, who may testify for up to a week[8] on political events in Lebanon before the assassination of the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005.

6. The Trial Chamber, naturally, had intended to issue this decision before Professor Sporer's evidence was due to start on 17 April 2018. It had scheduled the hearing of the Oneissi Defence case between 10 and 20 April 2018,[9] and had expected the Defence to complete its case within that period. Having lost four weeks of potential hearing time as a result of an intervention by the Oneissi Defence during which the Trial Chamber was prevented from exercising its judicial functions[10] the Trial Chamber has now rescheduled Professor Sporer's evidence for Monday 14 May 2018.[11]

LEGAL PRINCIPLES – CERTIFICATION FOR INTERLOCUTORY APPEAL

7. The Trial Chamber, under Rule 126 (C), must certify a decision for interlocutory appeal when:

[7] F3583, Scheduling Order to the Defence under Rule 128, 23 February 2018; F3593, Order Scheduling Pre-Defence Conference on Thursday 8 March 2018 and Dismissing Oneissi and Sabra Applications to Suspend Orders under Rule 128 to File Witness and Exhibit Lists, 6 March 2018.
[8] On the Trial Chamber's estimate, based upon the information and time estimates so far provided by the Parties.
[9] F3608, Scheduling Order for Hearing the Oneissi Defence case between 10 and 20 April 2018, 23 March 2018.
[10] On 13 April 2018 the Oneissi Defence filed an unsuccessful application under Rule 25 (A) to disqualify the three Trial Chamber judges. *See* STL-11-01/T/PRES, F3628, Oneissi Defence Rule 25 Motion for the Disqualification and Withdrawal of Presiding Judge David Re, Judge Janet Nosworthy, and Judge Micheline Braidy, 12 April 2018 (confidential with confidential annexes A-C, a public redacted version of the motion was filed on the same day). It was dismissed by a Panel on 4 May 2018. *See* STL-11-01/T/OTH/R25, F3645, Decision on Oneissi Defence Rule 25 Motion for the Disqualification and Withdrawal of Presiding Judge David Re, Judge Janet Nosworthy, and Judge Micheline Braidy, 4 May 2018. Rule 25 (D), however, prevented the three judges from participating in the proceeding pending resolution of the application, and neither of the two Panels appointed by the President to determine the application made an order under the Rule permitting the trial to continue. The two Panels were designated by STL-11-01/T/PRES, F3630, Order Designating a Panel pursuant to Rule 25 (C), 13 April 2018; and F3639, Order on the Composition of a Panel Designated Pursuant to Rule 25 (C), 25 April 2018.
[11] STL-11-01/T/TC, F3652, Scheduling Order to Resume the Trial on 14 May 2018, 8 May 2018.

the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The Trial Chamber must ensure that the issue meets the Rule's strict requirements: leave to appeal is exceptional; the issue must be precise and have an adequate legal or factual basis. Certification is concerned not with whether a decision was correctly reasoned but with whether the Rule is satisfied. Once both requirements of Rule 126 (C) have been met, the Trial Chamber has no discretion to refuse certification.[12]

ISSUES POSED FOR INTERLOCUTORY APPEAL

9. Mr Oneissi is charged as a co-conspirator in count 1 and as an accomplice to the crimes charged in counts 6 to 9 of the amended consolidated indictment.[13] In its decision delivered in court the Trial Chamber found that there was sufficient evidence upon which it *could* convict Mr Oneissi on each count charged in the amended consolidated indictment. The Trial Chamber stated that it had reviewed the entirety of the evidence and was satisfied that the Prosecution had adduced sufficient evidence from which Mr Oneissi *could* be convicted on each count.[14] It emphasised, however, that it 'could still acquit Mr Oneissi at the end of the trial even if the Defence adduces no further evidence'.[15]

10. In their oral and written arguments counsel for Mr Oneissi made submissions concerning the legal requirements for accessorial liability as set out in an interlocutory decision the Appeals Chamber issued in 2011,[16] and specifically pertaining to the

[12] STL-11-01/PT/AC/AR126.1, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0012, Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 8; STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal Against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, paras 11-15; STL-11-01/PT/AC/AR126.5, F0003, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judge's "Decision on Sabra's Tenth and Eleventh Motions for Disclosure", 6 November 2013, para. 7; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra,* F1798, Decision on Application for Certification of Decision Regarding the Scope of Marwan Hamade's Evidence, 18 December 2014, para. 13; F1841, Decision on 'The Defence for Hussein Hasan Oneissi Request for Certification of the "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" of 30 December 2014', 3 February 2015, para. 6; F2069, Decision Denying Certification to Appeal the Trial Chamber's Decision on Issuing a Summons to Witness 012, 10 July 2015, para. 5.

[13] Namely, and to summarise, conspiracy aimed at committing a terrorist act, and being an accomplice to committing a terrorist act with an explosive device, and the intentional homicide of Mr Rafik Hariri and 21 others, and the intentional attempted homicide of 226 people.

[14] Rule 167 decision, transcript of 7 March 2018, pp 50-52.

[15] Rule 167 decision, transcript of 7 March 2018, p. 51.

[16] STL-11-01/I/AC/R176 *bis*, F0936, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011.

interpretation of Article 219 of the Lebanese Criminal Code ('accomplices and concealers'), which the Trial Chamber must apply under Articles 2 and 3 of the Statute of the Special Tribunal. Relevantly, the Trial Chamber held that 'it should follow this decision unless there are persuasive reasons not to, for example, if the Appeals Chamber had erred in law, or if Lebanese law had changed between February 2011 and now'.[17] The Trial Chamber then followed the decision, but held that it could revisit this if necessary and 'receive fuller submissions from the Parties in their final trial briefs and submissions'.[18]

11. The Oneissi Defence consequently has posed the following two issues for certification for interlocutory appeal,

> **Issue one:**
>
> Did the Trial Chamber err in considering, "for the purposes of its decision under Rule 167", that "the Appeals Chamber's interpretation, that an accomplice must have known that the perpetrator intended to commit a particular crime to prove their knowledge, is reasonable" but that it could, if necessary, "revisit the issue and receive fuller submissions from the parties in their final trial briefs and submissions"; and
>
> **Issue two:**
>
> Did the Trial Chamber err in concluding that the conditions required under Rule 167 to obtain an acquittal had not been met, without specifically ruling on the evidence presented by the parties or responding to the arguments put forward by the Defence regarding the lack of evidence presented by the Prosecution in support of the elements of the crimes of which Mr Oneissi is accused.

First issue – legal error in relation to accomplice liability under Article 219 of the Lebanese Criminal Code – submissions and decision

12. In support of the first issue the Oneissi Defence argued that the decision produced legal uncertainty for the Defence, and hence prejudice, arguing that,

> The court therefore considers itself free to amend the scope of the material and intentional elements of the crimes of which Mr Oneissi is accused up to the judgement stage, and the

[17] Rule 167 decision, transcript of 7 March 2018, p. 42.
[18] Rule 167 decision, transcript of 7 March 2018, p. 47.

> Chamber is thereby assuming a power which deprives the parties of any legal security with respect to the applicable law.[19]

13. The decision has therefore created legal uncertainty, which is contrary to established international human rights principles and it endangers the fairness and expeditiousness of the trial.[20]

14. In response to this, the Prosecution pointed out that the issue posed was speculative and in any event the Appeals Chamber itself in a decision in 2012 refusing to reconsider the 2011 interlocutory decision had held,

> In the Interlocutory Decision, the Appeals Chamber only pronounced on questions of law. It did so in the abstract and without regard to any specific case or specific facts. It will still be for the Trial Chamber to apply and shape the relevant legal principles in the light of the charges contained in the indictment and the evidence adduced by the parties. This judgement will be subject to an appeal and the Appeals Chamber will revisit any legal issue that might be raised by such an appeal under Article 26 of the Statute.[21]

15. The Trial Chamber followed the Appeals Chamber's decision on the application of Article 219 of the Lebanese Criminal Code. Contrary to the Oneissi Defence's suggestion the Trial Chamber neither found nor considered 'itself free to amend' the law in the manner suggested in this first issue. The Trial Chamber's decision merely left open the possibility of receiving further submissions, if necessary, on the correct interpretation of Article 219 in final trial submissions. The Trial Chamber has not stated that it will reassess its decision on Article 219. The Trial Chamber emphasises that absent unforeseen circumstances, such as a change in the relevant Lebanese law, it will continue to apply the definition of Article 219—as set out in the Appeals Chamber decision—and already adopted in the Rule 167 decision.

16. There is, accordingly, no legal uncertainty, and the issue does not arise from the decision and cannot be certified for interlocutory appeal. The Trial Chamber, in essence, did not disagree with the Oneissi Defence's submissions on the ambit of Article 219, and adopted a more restricted interpretation than that argued by the Prosecution, which cannot prejudice Mr Oneissi. So the issue as framed—namely, the mere possibility that the Trial Chamber

[19] Defence application, para. 13.
[20] Defence application, paras 12-24.
[21] Prosecution response, paras 7-9, referring to STL-11-01/PT/AC/R176bis, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra,* F0327, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, 18 July 2012, para. 37 (internal footnotes omitted).

could hear further legal submissions on the application of the law—could not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

Second issue – insufficiency of reasoning in the Rule 167 decision – submissions and decision

17. The Oneissi Defence argues, in essence, that the Trial Chamber failed to provide sufficient reasoning for its decision not to acquit Mr Oneissi or, in other words, to find that there was a sufficiency of evidence upon which it *could* convict. The Trial Chamber, it is claimed, should have addressed in more detail the Defence arguments that the evidence was insufficient to convict Mr Oneissi on any count in the amended consolidated indictment.[22]

18. The Prosecution responded stating that the Oneissi Defence's arguments, if accepted, meant that it had a right to appeal a negative finding under Rule 167 when the Rules of Procedure and Evidence do not provide for this. Only an appeal against an acquittal is permitted without certification.[23]

19. The Legal Representative of Victims opposed this second issue arguing that the Appeals Chamber could not actually resolve the issue posed—an insufficiency of reasoning—as it would only lead to circular appeals.[24] Further, neither international human rights law nor the case law of the international criminal courts and tribunals requires a Trial Chamber to provide the extended reasoning the Oneissi Defence claims is necessary in a decision rejecting an application under Rule 167.[25]

20. In the Trial Chamber's view the issue posed for interlocutory appeal, namely an alleged insufficiency of reasoning in determining that a sufficiency of evidence exists on the Prosecution case, cannot significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In its decision—consistently with international criminal law practice in providing reasons in decisions *rejecting* applications under Rules equivalent to Rule 167—the Trial Chamber noted that it 'will provide what are necessarily brief reasons as to whether the Prosecution has called sufficient evidence upon which the Trial Chamber "could" … convict Mr Oneissi on any of the counts on the indictment'.[26]

[22] Defence application, paras 25-39.
[23] Prosecution response, paras 10-15.
[24] Quoting the Presiding Judge, *see* transcript of 22 March 2018, p. 38.
[25] Legal Representative of Victims' observations, paras 14-21.
[26] Rule 167 decision, transcript of 7 March 2018, p. 9.

21. The issue posed for interlocutory appeal invites the Appeals Chamber to find that the Trial Chamber's reasoning was deficient. This would entail the Appeals Chamber remitting the decision to the Trial Chamber, ordering it to provide fuller reasons for its decision. However, the Trial Chamber providing fuller reasons on whether the Prosecution has led sufficient evidence not to acquit an Accused under Rule 167, could not produce the apparent desired result of an acquittal[27]—which must of course be fully reasoned with careful reference to the evidence.

22. The Trial Chamber has already carefully reviewed the entirety of the Prosecution case, including evidence adduced by the Defence, and is satisfied that the Prosecution has produced sufficient evidence from which the Trial Chamber *could* convict Mr Oneissi on each count. A remittal from the Appeals Chamber ordering greater reasoning of the same decision would neither change the decision nor expedite the trial. Providing more reasoning on an application under Rule 167 could not of itself affect the outcome of the trial. To the contrary, it would only delay the proceedings while producing the same result, namely, a finding of sufficiency of evidence. But additionally, the Oneissi Defence could then seek to appeal this second decision, thus further delaying the proceedings. In these circumstances the issue meets neither the first nor the second part of the test in Rule 126 (C) and cannot be certified for interlocutory appeal. In assessing the second part of the test the Trial Chamber has also factored in the three weeks of trial hearing time lost as a result of the Oneissi Defence's unsuccessful application to disqualify the three judges, referred to in paragraph 6 above.

23. Alternatively—and this does not appear to have been sought as a remedy in the issue posed—although the Defence submissions allude to this as the ultimate aim,[28] as Mr Oneissi is charged as a co-conspirator with four other named alleged conspirators, the Appeals Chamber could—hypothetically—enter a judgement of acquittal for itself after having carefully reviewed the entirety of the evidence before the Trial Chamber. That is of some 300 witnesses, 3,048 exhibits totalling 142,492 pages, and 34,644 pages of transcript (in English)[29] and then determining for itself that there was insufficient evidence to find that a Trial Chamber *could* convict Mr Oneissi on any of the counts charged, and then entering for itself a fully reasoned judgement of acquittal.

[27] *See* Defence application, para. 42.
[28] *See* Defence application, para. 42.
[29] To 22 February 2018.

24. A proper review of the trial record—accompanied by a reasoned judgement—would take many months if not more than a year to complete.[30] For this reason alone the application for certification must fail the second part of the test under Rule 126 (C), as there could in these circumstances be no 'immediate resolution' by the Appeal Chamber.

25. Finally, the Trial Chamber notes, but without deciding, the issue of the legality of whether an Appeals Chamber may enter what would effectively amount to a first instance judgement of acquittal where Article 26 (1) of the Statute provides the Prosecutor with a right of appeal from an acquittal.

APPLICATION TO STAY THE PROCEEDINGS

26. Although the application to stay the proceedings must fall with the non-certification of the two issues, the Trial Chamber makes the following observations, and notes that the conditions for staying the proceedings have not been met.

27. The Trial Chamber has inherent jurisdiction to stay the proceedings,[31] but granting such an exceptional measure is discretionary and case specific.[32] The strict conditions justifying a suspension include that the duration of the suspension is reasonable and that the appeal has reasonable prospects of success. A party may show 'good cause' by demonstrating that suspension is necessary to preserve the object of an appeal.[33] A stay of proceedings is a 'drastic remedy', necessary only if: (i) the essential preconditions of a fair trial are missing, and (ii) there is no sufficient indication that this will be resolved during the trial process.[34]

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[30] The Trial Chamber notes that Appeals Chamber decisions under Rule 126 (C) are normally delivered several months after the decision certifying the issues for interlocutory appeal. Of the twelve relevant decisions the shortest period has been 24 days in STL-11-01/T/AC, F0008-AR126.8, Decision on Appeal by Counsel for Mr Merhi against the Trial Chamber's Decision on the Resumption of Trial Proceedings, 5 June 2014, while the longest has been 74 days in STL-11-01/T/AC, F0013- AR126.10, Decision on Interlocutory Appeal against the Trial Chamber's Decision Regarding the Conditions of Assignment of Defence Expert Consultant, 3 May 2016; the others have taken respectively 30, 32, 41, 42, 51, 53, 54, 68, 70 and 71 days to resolve.

[31] CH/AC/2010/02, *In the Matter of El Sayed*, F0026, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 46.

[32] STL-11-01/T/AC/AR126.11, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0011-AR126.11, Reasons for Decision on Badreddine Defence Request for Suspensive Effect of its Interlocutory Appeal Against the Trial Chamber's Decision Regarding Mr Badreddine's Death, 23 June 2016 ('Decision on Interlocutory Appeal Regarding Badreddine's Death'), para. 5. *See also* STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1270, Decision on Defence Motion to Stay the Proceedings, 17 December 2013 ('Decision of 17 December 2013'), para. 9.

[33] Decision on Interlocutory Appeal Regarding Badreddine's Death, paras 6-7.

[34] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1901, Decision on Prosecution Motion to Amend its Exhibit List and Oneissi Defence Request to Stay the Proceedings, 13 April 2015, para. 48; Decision of 17 December 2013, paras 9-13.

28. The Legal Representative of Victims submitted that the first issue amounts only to a legal submission which does not affect the evidence and that suspending the trial would likely delay the trial for several months. The participating victims, two of whom have died during the trial, have an interest in an expeditious outcome. It would also be advantageous to the Accused to continue with the trial.[35]

29. The Trial Chamber agrees with these observations that the trial could continue if the first issue were certified.

30. The Prosecution also argued that expeditiousness was better served by hearing the Defence case and completing the trial and that the legal grounds for a stay are not made out. It submitted that the Defence has not demonstrated that a stay of the proceedings is necessary to avoid irreparable prejudice or that it would be unfair for them to prepare and present the evidence of their two witnesses pending any potential interlocutory appeal.[36]

31. In its submissions, the Oneissi Defence argued that Mr Oneissi would be acquitted if the appeal were successful, thus obviating the need to call an exculpatory defence.[37]

32. However, so far as the Trial Chamber can ascertain, the summary thus far filed in relation to Mr El-Sayyed's evidence does not reveal any exculpatory evidence regarding Mr Oneissi and his pleaded role in the conspiracy alleged, nor provide sufficient evidence for the Trial Chamber to evaluate the ambit of the expected testimony or how it relates to any evidence received from Prosecution witnesses on similar topics.[38] And further the expert report is only partially exculpatory, and even then only in the sense that it presents an expert opinion on a particular topic that the Trial Chamber is already well aware of and will in any event carefully consider in its judgement.

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[35] Legal Representative of Victims' observations, paras 2, 10-13, 22.
[36] Prosecution response, paras 16-18.
[37] Defence application, paras 40-43.
[38] F3596, 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). The summary states only that Mr El-Sayyed 'will 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'.

33. But most fundamentally, neither issue posed for interlocutory appeal is strictly directed at achieving an acquittal; the first goes only to an abstract legal point but in circumstances where there is no legal uncertainty and hence prejudice to the Accused, while the second seeks not an acquittal but merely more reasoning on why Mr Oneissi was not acquitted. A stay in these circumstances, even if the certification were granted, would be unwarranted.

34. Finally, because Mr Oneissi is charged in count one of the amended consolidated indictment with participating in a conspiracy with the other three accused persons, staying the proceedings against him would stay the trial against all four accused. Although the Oneissi Defence has not explicitly sought to sever the proceedings against Mr Oneissi the practical effect of staying the proceedings against him would be to stay the trial as Mr Oneissi's role in the conspiracy cannot be separated from that of the other three accused. Severing the case against Mr Oneissi would significantly delay the proceedings and could even result in the Trial Chamber having to deliver two separate judgements. That would be inconsistent with the statutory rights of the Accused to receive a fair and expeditious trial.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the application for certification for interlocutory appeal and the application to stay the proceedings.

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

Leidschendam,
The Netherlands
14 May 2018

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy

SEPARATE OPINION OF JUDGE DAVID RE

1. The Trial Chamber, at paragraph 25 of its decision, and in relation to the issue of an Appeals Chamber acquitting an Accused on all counts on an indictment on a Defence interlocutory appeal under Rule 126 (C), noted,

> Finally, the Trial Chamber notes, but without deciding, the issue of the legality of whether an Appeals Chamber may enter what would effectively amount to a first instance judgement of acquittal where Article 26 (1) of the Statute provides the Prosecutor with a right of appeal from an acquittal.

To this I add the following observation:

2. The effect of a non-appealable 'first instance' judgement of acquittal by an Appeals Chamber would be to deprive the Prosecutor of his or her statutory right to appeal such a judgement under Article 26 (1), that is, to have another chamber review its correctness and possibly reverse it. This may breach Article 26 (1).

3. This observation, while not necessary to decide the Oneissi Defence application, may be worth considering in any future similar application. In this respect I note that no international criminal court or tribunal using similar procedural rules to the Special Tribunal provides an Accused with an appeal as of right against a negative finding by a Trial Chamber on an application for an acquittal at the close of the Prosecution's case. Further, so far as I can ascertain, no Appeals Chamber of an international criminal court or tribunal has entered a full acquittal on appeal from a 'no case to answer' decision.[1]

David Re

Judge David Re

[1] *See, e.g.,* ICTY, *Prosecutor v. Mladić*, IT-09-92-AR73.4, Public Redacted Version of Decision on Defence Interlocutory Appeal from the Trial Chamber Rule 98 *bis* Decision, 24 July 2014; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.9, Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, 11 December 2012 (both dismissing the respective Accused's appeal against the Trial Chamber's denial of a judgement of acquittal).