



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: 31 August 2018

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**REASONS FOR THE TRIAL CHAMBER'S DECISION DISMISSING THE MERHI
AND ONEISSI DEFENCE APPLICATION TO STRIKE THE PROSECUTION
FINAL TRIAL BRIEF FROM THE RECORD**

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 & 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



PROCEDURAL BACKGROUND

1. Rule 147 (B) of the Special Tribunal’s Rules of Procedure and Evidence provides that at the close of a case, the Parties and the victims participating in the proceedings *may* file a final trial brief, followed by closing arguments.
2. The Trial Chamber issued a revised scheduling order on 12 June 2018 scheduling the submission of written final trial briefs for 16 July for the Prosecution and Legal Representatives of Victims and 13 August for the Defence.¹ The Prosecution and Legal Representatives of Victims filed their final written submissions on 16 July.² The Prosecution’s brief is 393 pages and contains 2,489 footnotes, and its annex B—of 251 pages—contains thousands of specific references to the transcript and exhibits relating to the evidence of a Prosecution witness, Mr Gary Platt.
3. But on Friday 27 July, ten days after receiving the Prosecution’s final trial brief, counsel for Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi jointly moved the Trial Chamber to strike it from the record for allegedly containing 94 vague and imprecise footnotes, and to order the Prosecution to refile its final trial brief with more specific references in these footnotes. They sought an extra five days from any refile to file their Defence briefs.³
4. The Prosecution’s response to the motion would have been due on Tuesday, 14 August, *a day after the Defence briefs were due for filing*. The Trial Chamber dismissed the Defence motion on Tuesday 31 July, notifying the Parties by email of this decision, stating that it would provide written reasons after the judicial recess.⁴ As a result, the Prosecution did not respond to the motion. These are the written reasons for the emailed decision.

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3687, Order Rescheduling Final Trial Briefs and Closing Arguments, 12 June 2018 (‘Order Rescheduling Final Submissions’), para. 18.

² F3712, The Legal Representative of Victims Final Trial Brief, with annexes A and B, 16 July 2018 (confidential) (public redacted version filed on 19 July 2018); F3713, Prosecution Final Trial Brief, 16 July 2018 (confidential) (corrected version filed on 27 July 2018 and public redacted corrected version filed on 7 August 2018) (‘Prosecution final trial brief’).

³ F3716, Urgent Motion to Strike the Prosecution Final Brief from the Record and Seeking an Order from the Trial Chamber to the Prosecution to Refile its Final Brief, 27 July 2018 (confidential) (‘Defence motion’).

⁴ Email from the Trial Chamber’s senior legal officer to the Parties and Legal Representatives of Victims, 31 July 2018.

SUBMISSIONS

5. The Merhi and Oneissi Defence argue that the Prosecution failed to provide specific references to transcripts in at least 94 footnotes of its final trial brief. In particular, they argue that these footnotes are impermissibly vague and imprecise, and refer to large portions of the transcript without identifying which support the Prosecution's submissions. For example, the footnote to paragraph 662 cites over 87 pages of transcript, footnote 1434 refers to annex B of the Prosecution brief which in turn cites over 277 pages of transcript, and the footnote to paragraph 771 cites over 35 pages of transcript.⁵

6. This practice, it is argued, prejudices the Defence as it precludes it from effectively verifying the accuracy of the Prosecution's allegations.⁶ International criminal procedural law provides that a party must refer to precise extracts of the transcripts in a notice of appeal and appeal brief and, by analogy, this should be applied to the Parties' final trial briefs.⁷

7. The Defence also contends that the footnotes contain references to submissions in court by Prosecution representatives, which is not evidence. This circumvents the word count authorised, as these legal and factual submissions should have been included in the body of the final trial brief. The Defence moves the Trial Chamber to order the Prosecution to refile its final trial brief with more specific references in the identified footnotes within five days and then to allow counsel for the Defence to file their final trial briefs five days later.⁸

REASONS FOR THE DECISION

8. Rule 147 'Closing Arguments' allows the Parties and the participating victims to present closing arguments. They *may* also file a written final trial brief no later than five days before closing arguments.

9. Closing written and oral submissions are important and established features of international criminal trials. The written final trial briefs allow the Parties and participating victims to summarise the evidence, and make legal and factual arguments about whether the Prosecution has proved its case against the Accused beyond reasonable doubt. They should

⁵ Defence motion, paras 7 (a), 8-9, annex A.

⁶ Defence motion, para. 12.

⁷ Defence motion, para. 11 (referring to ICTR, *Ndindabahizi v. The Prosecutor*, ICTR-01-71-A, Appeals Judgement, 16 January 2007 ('*Ndindabahizi Appeals Judgement*'), para. 12; ICTR, *Gacumbitsi v. The Prosecutor*, ICTR-2001-64-A, Appeals Judgement, 7 July 2006 ('*Gacumbitsi Appeals Judgement*'), para. 10; ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Judgement, 17 December 2004 ('*Kordić and Čerkez Appeals Judgement*'), para. 23).

⁸ Defence motion, paras 1, 7 (b), 14.

bring the matters most relevant to the Party to a chamber's attention before any oral closing arguments, thus helping to better focus the oral submissions. In essence, the purpose of final trial briefs is for the Parties to argue their cases succinctly and to assist the Trial Chamber in determining the charges in an indictment. And, if done properly, a final trial brief may provide indispensable assistance to a chamber in its deliberations.

10. The Rules, however, do not require the Parties to file a final trial brief. Indeed, short cases such as a contempt trial of several days may not require a final trial brief. That appears to be the policy reason why Rule 147 (B) does not mandate the filing of written closing briefs.

11. Rule 147 is based on the equivalent Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Residual Mechanism for Criminal Tribunals (MICT), and the Special Court for Sierra Leone and its Residual Mechanism (SCSL and RSCSL).⁹ Rule 141(2) of the International Criminal Court's (ICC) Rules of Procedure and Evidence states that the Presiding Judge shall invite the Prosecution and Defence to make closing statements; it does not refer to closing briefs, but the ICC's practice has been to invite the Parties to file written closing briefs.

12. The Trial Chamber has reviewed the international criminal procedural law referred to by the Defence. These authorities, however, do not require Parties to provide precise references to transcripts or exhibits in final written submissions at the end of a trial. Rather, relevant practice directions from the Special Tribunal and other international criminal tribunals, and case law, support the principle that specificity is required in appeal briefs and notices of appeal to facilitate an Appeals Chamber's consideration of arguments advanced by the Parties.¹⁰

13. As an example of a recent statement relating to final trial briefs, the ICC Trial Chamber's Presiding Judge in *Ongwen* stated in his 'Directions on Closing Briefs and Closing

⁹ See ICTY Rule 86; ICTR Rule 86; MICT Rule 103; SCSL Rule 86; RSCSL Rule 86. These rules mirror the Special Tribunal's Rule 147 with the exception that they provide that: a party 'shall' file a final trial brief (not later than five days prior to presenting a closing argument), instead of 'may'.

¹⁰ See STL/PD/2013/07/Rev.1, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Special Tribunal for Lebanon, 13 June 2013, Articles 3-5; MICT, MICT/10, Practice Direction on Requirements and Procedures for Appeals, 6 August 2013, paras 2, 5-6, 29; ICTY, IT/201, Practice Direction on Formal Requirements for Appeals from Judgement, 7 March 2002, paras 1, 4-5, 13; ICTR, Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, paras 1, 4-5, 9; *Ndindabahizi* Appeals Judgement, para. 12; *Gacumbitsi* Appeals Judgement, para. 10; *Kordić and Čerkez* Appeals Judgement, para. 23.

Statements’ that final trial briefs are ‘merely an additional assistance for the Chamber’s benefit’ and that ‘the legal nature of the closing briefs is such that they have no independent evidentiary value – the Statute and the Rules do not even require that a closing brief be received during trial proceedings.’¹¹ The Trial Chamber naturally agrees that such briefs have ‘no independent evidentiary value’, but describing them as ‘merely an additional assistance’ undervalues their role at the conclusion of long and complex proceedings.

14. In this trial the Trial Chamber has received the evidence of 307 witnesses and 3,131 exhibits—of 144,915 pages—and with a transcript (in English) of 35,868 pages.¹² In these circumstances, the Trial Chamber views carefully argued written final trial briefs as essential to providing a fair trial to the rights of the Accused and the interests of the Prosecution and to allowing the participating victims to express their views and concerns.

15. However, the issue here is whether any perceived deficiencies in the Prosecution’s brief have caused such prejudice to the Defence as to necessitate the Trial Chamber ordering the Prosecution to correct and refile its brief. Specific itemized complaint is made of vagueness in relation to 94 of 2,489 footnotes (or approximately 0.038% of the total). Ordering the entire filing removed from the record would therefore be an extreme remedy.

16. The Trial Chamber agrees that to assist it, as well as the Parties and the participating victims, final trial briefs need the requisite specificity in footnote references. The Trial Chamber has reviewed the specific footnotes referred to in the Defence motion. Some footnotes refer to many pages of transcript, and in this respect the Trial Chamber agrees with the Defence submission that these footnote references could have been more focussed. However, most footnotes which refer to transcripts listed in annex B of the Prosecution’s final trial brief also refer to additional exhibits and or specific transcript pages.¹³ Therefore, substantively, even if the Trial Chamber considered that additional specificity in the final trial brief references was required, these additional references provide further focus to these footnotes.

¹¹ ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1226, Directions on Closing Briefs and Closing Statements, 13 April 2018, paras 3, 6.

¹² The transcript amounts to 91,116 pages in the Special Tribunal’s three official languages (English, French and Arabic combined).

¹³ See, e.g., Prosecution final trial brief, fns 608, 618, 620, 867, 922, 931-932, 947, 950, 965, 972, 1011, 1019, 1023, 1030, 1034, 1036, 1314, 1320, 1325, 1431, 1434, 1462, 1469, 1473, 1507, 1520, 1554-1555, 1579, 1587, 1590, 1594, 1637, 1662-1663, 1720, 1722, 1729, 1732, 1765-1767, 1816, 1861, 1890, 1893-1895, 1904-1905, 1977-1978, 1982, 1991, 1996, 2007, 2020, 2030, 2033, 2053-2056, 2058, 2071, 2075, 2084, 2108.

17. However, there is nothing impermissible in itself in a Party citing many pages of transcript in support of a pleaded material fact if the supporting evidence is contained in those pages. It is not necessary to cite every page. Substantively therefore, the references in the Prosecution's final trial brief are not so vague or imprecise to justify striking the entire document from the record. And in any event, even if they were of that allegedly poor quality, any prejudice would be too minor to warrant the remedy sought.

18. Further, counsel acting for Mr Merhi and Mr Oneissi, having acted for the Accused throughout the trial must know the evidence by now. They must be familiar both with the evidence the Prosecution has described in its brief and where it was led in the case. In these circumstances, some footnotes citing large passages rather than specific lines of transcript in the Prosecution's final trial brief cannot of itself cause prejudice.

19. Moreover, the Defence has ample opportunity to respond to the Prosecution's final submissions, including whether it failed to substantiate its case, in light of its references or otherwise, in its own written and oral closing submissions. Further—and balancing the application against the consequences of making the order sought—acceding to this by ordering the drastic remedy would cause an unreasonable delay to the proceedings, especially in circumstances where the Trial Chamber has already had to change its scheduled dates for receiving the written and oral submissions.¹⁴

20. The Trial Chamber therefore does not consider that the Defence has suffered any prejudice. In fact, had the final trial briefs been submitted by the Parties and participating victims simultaneously, as originally ordered by the Trial Chamber,¹⁵ the Defence could not have filed this application and would have made these arguments either in response or in oral closing arguments. The same applies now.

21. Regarding the argument that the Prosecution included legal and factual submissions in the footnotes of its final trial brief thereby circumventing the allotted word count, the Trial Chamber reiterates that it will not rely on summaries or submissions made by the Parties or

¹⁴ See F3715, Revised Order Scheduling Closing Arguments in the Weeks of 3 to 14 September 2018, 27 July 2018; Order Rescheduling Final Submissions, paras 3, 5-7; F3623, Scheduling Order for Final Trial Briefs and Closing Arguments under Rule 147, 11 April 2018 ('Scheduling Order for Final Submissions'). The Trial Chamber notes that it had to suspend its original 11 April 2018 scheduling order and reschedule final submissions in an order of 12 June 2018 due to the Oneissi Defence's unsuccessful application to disqualify the three Trial Chamber judges (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 Brady, 4 May 2018).

¹⁵ Scheduling Order for Final Submissions, para. 8.

the Legal Representatives of Victims during the proceedings as *evidence* in its judgment.¹⁶ This is self-evident.

22. In its deliberations, the Trial Chamber must review the entire trial record—which includes oral and documentary evidence and submissions. Final submissions, whether oral or written, allow the Parties and participating victims to flag any particular evidence or arguments for the Trial Chamber’s consideration. The Parties have discretion over what they wish to highlight and a Party or participant may refer to in-court submissions in its final brief, in the text or the footnotes. The Defence has not provided any cogent reasons to support this argument and it is therefore dismissed.

23. Finally, the Defence filed the motion after 4 pm on Friday, 27 July, and it was distributed only on Monday 30 July after the judicial recess had started.¹⁷ The Defence did not provide any reasons for its delay in filing the motion, ten days after the Prosecution submitted its final trial brief, and during the official judicial recess. And significantly, the Defence did not seek an expedited decision from the Trial Chamber. Unless the Trial Chamber had abridged the time for the Prosecution to respond, the response would have been due the day *after* the 13 August deadline for filing the Defence final trial briefs. The motion would have been moot by then.

Confidentiality

24. The Defence motion was filed confidentially because the Prosecution’s final trial brief is confidential, but the Defence submits that its motion can be filed publicly if a public redacted version of the Prosecution’s final brief is filed.¹⁸ A public redacted version of the Prosecution’s final trial brief was filed on 7 August. The Trial Chamber reiterates the principle of the public nature of proceedings before the Special Tribunal, and that documents should, wherever possible, be filed publicly. Therefore the Trial Chamber orders that the motion be reclassified as public.

¹⁶ See, e.g., STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2541, Decision on In-Court Summaries of Evidence, 7 April 2016, paras 15-16, 18-20, 24, 38.

¹⁷ The Merhi Defence’s legal officer sent courtesy copies of the Defence motion to the Parties, Legal Representatives of Victims and the Trial Chamber’s legal officers on Friday, 27 July 2018, at 16:42.

¹⁸ Defence motion, para. 13.

DISPOSITION

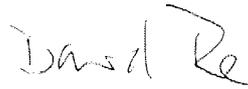
FOR THESE REASONS, the Trial Chamber:

DISMISSED the Defence motion; and

ORDERS that the Defence motion be reclassified as public.

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

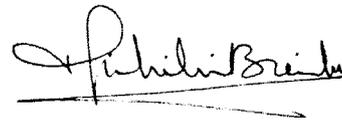
Leidschendam,
The Netherlands
31 August 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

