

The Centre for the Study of Human Rights & the Middle East Centre at LSE

THE SPECIAL TRIBUNAL FOR LEBANON: A CRITICAL PERSPECTIVE

Introduction

Today starts the Special Tribunal for Lebanon (STL) created by the UN Security Council in 2007 to try the alleged assassins of then former Lebanese Prime Minister Rafic Hariri.

STL Judges, the Registrar, the Prosecutor and the Head of the Defense Office were appointed by the Secretary General of the United Nations. The prosecution has accused five alleged members of Hezbollah and its investigations are on-going. Defense counsels were named by the Head of the Defense Office after the court decided to try the indicted *in absentia* because they are not in custody and were not found in Lebanon.

This international tribunal is the first such tribunal to try persons on terrorism charges or charges related to a “terrorist act”. It is also the first international tribunal to try persons *in absentia* since the 1945/6 Nuremberg trials.

The indictment and its supporting elements were filed by the STL Prosecutor in over one million pages, mostly about telecommunication data and analysis and so called “circumstantial evidence”... «un ensemble volumineux de pièces»¹ according to the Pre-Trial Judge.

After a brief discussion of the background and creation of the STL, I will present an overview of the indictment and the prosecution’s pre-trial brief. This will be followed by an examination of some of the main challenges facing the STL Defense counsels.

As a consultant for STL Defense counsels, I am bound by confidentiality and will refer only to declassified and public documents.

I. Background

On February 14, 2005, a massive explosion on Beirut's Mediterranean coastline took the life of former Lebanese Prime Minister Rafic Hariri and 22 people who were accompanying him or happened to be at the site of the blast. The explosion also injured 220 persons and damaged public and private property in a 500 meter radius. The DNA evidence later collected from the crime scene suggests that the assassination might have been the act of a young male suicide bomber².

¹ Version Expurgée de la Version Corrigée du Rapport du Juge de la Mise en Etat Etabli Conformément à l’Article 95 (A) du Règlement de Procédure et de Preuve. December 11, 2013. Paragraph 75, page 30.

² UN News Center (December 18, 2006), UN probe into murder of former Lebanese leader nears sensitive stage – inquiry chief <http://www.un.org/apps/news/story.asp?NewsID=21034&Cr=leban&Cr1=>

On February 15, 2005, just one day after the assassination of Hariri, the Security Council showed extraordinary concern and requested the Secretary-General "to follow closely the situation in Lebanon and to report urgently on the circumstances, causes and consequences of this terrorist act."³ Pursuant to this statement, UN Secretary General Kofi Annan dispatched a fact-finding mission to Beirut. The mission, headed by Peter Fitzgerald, an Irish deputy police Commissioner, concluded on March 24, 2005, that "the Lebanese security services and the Syrian Military Intelligence bear the primary responsibility for the lack of security, protection, and law and order in Lebanon"⁴.

The Security Council passed Resolution 1595 on April 7, 2005, ordering the establishment of an international independent commission to assist the Lebanese authorities in their investigation of what it termed the "terrorist act of February 14, 2005", and help identify its "perpetrators, sponsors, organizers and accomplices"⁵. Because of the terms by which the UNIIIC was established the STL is the first international tribunal to try persons on terrorism charges.

Berlin's prosecutor Detlev Mehlis was appointed on May 13, 2005 as head of the Commission, and on October 20, 2005, the Security Council received Mehlis' first report on the Hariri assassination, in which the Commission concluded that "there is converging evidence pointing at both Lebanese and Syrian involvement in this terrorist act"⁶. However, evidence gathered by the Commission proved insufficient to support indictments of Syrian officials or anyone else for Hariri's murder. Mehlis expressed otherwise⁷. He had recommended the arrest of eight Lebanese, four of whom remained behind bars for almost four years and were later released by the Tribunal on the grounds that there was no credible evidence against them. The detention of two of them was considered arbitrary by the Geneva based Human Rights Committee in 2007⁸.

³ Statement by the President of the Security Council on February 15, 2005, S/PRST/2005/4. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/238/46/PDF/N0523846.pdf?OpenElement>

⁴ Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri. March 24, 2005; <http://www.stl-tsl.org/en/documents/un-documents/un-fact-finding-mission/Report-of-the-Fact-finding-Mission-to-Lebanon>

⁵ S/RES/1595(2005) [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=s/res/1595\(2005\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=s/res/1595(2005)&Lang=E)

⁶ Report of the UNIIIC, October 19, 2005. Page 2, paragraph 8; <http://www.stl-tsl.org/en/documents/un-documents/reports-of-the-uniic/Report-of-the-International-Independent-Investigation-Commission-established-pursuant-to-Security-Council-resolution>

⁷ Mehlis, in an interview for The Wall Street Journal, went on record in 2007 to say "When I left we were ready to name suspects" The Wall Street Journal, January 26, 2007. Interview with Detlev Mehlis by Michael Young.

Republished on NowLebanon on February 7, 2008: <http://nowlebanon.com/NewsArchiveDetails.aspx?ID=29771>

⁸ Report of the Working Group on Arbitrary Detention, January 10, 2008, A/HRC/7/4. Page 8 (Jamil Sayed and Raymond Azar). <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement>

On December 15, 2005, Mehlis resigned⁹, and on January 11, 2006, he was replaced by Serge Brammertz. The Commission's mandate under Brammertz was widened¹⁰, and it submitted six reports to the Security Council. The Commissioner underlined the fact that the inquiry made sense only if it led to a judicial process and if it committed itself to a Special Tribunal. However, after two years of criminal investigations, the evidence gathered remained insufficient to issue indictments. The only substantial sign of progress in Brammertz's investigation appeared in his third report in which he confirmed the theory of a suicide bombing to assassinate Hariri¹¹. Brammertz stepped down on January 1st, 2008 and was replaced by Daniel Bellemare. UN Secretary General Ban Kin Moon named Bellemare¹² as Commissioner; Bellemare then metamorphosed into the Prosecutor of the Special Tribunal upon its launch.

On March 29, 2006 the Security Council passed Resolution 1664 creating an International Tribunal. It requested Secretary-General Kofi Annan to negotiate an agreement with the Lebanese Government "aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice"¹³.

From a constitutional point of view, it should be noted that by the time an agreement was signed in February 2007 between the UN and the Lebanese government setting up the Special Tribunal, there had been a devastating war in July-August 2006 and six ministers had resigned from the government. The Speaker of Parliament, Nabih Berri, said that signing the agreement was unconstitutional. After the signing there were then four months of stalemate during which parliament failed to convene. Thereafter on May 30, 2007, Western powers decided to bypass the Lebanese Constitution by considering the Agreement between Lebanon and the UN on establishing the Tribunal legally binding in spite of the absence of a vote by the parliament.

What makes this tribunal even more special is its mandate, which is by far the narrowest of any international tribunal. It has no jurisdiction to address serious crimes and human rights violations committed against thousands in Lebanon in recent years or decades,

⁹ Shehadi, Nadim & Wilmshurst, Elizabeth (2007), The Special Tribunal for Lebanon: The UN on Trial? Chatham House, Middle East/International Law Briefing Paper, MEP/IL BP 07/01. Page 5.

¹⁰ The Commission would assist the Lebanese authorities in the investigation of 14 other terrorist attacks committed in Lebanon since October 2004, and of the assassination of the Minister for Industry, Pierre Gemayel, on 21 November 2006 and the Ain Alaq bombings of 13 February 2007. As well as investigating each attack, the Commission established possible linkages between them and the Hariri assassination.

¹¹ Fifth Report of The UN IIIC, September 25, 2006; <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/ReportsoftheUNIIC/2006-09-25%20UNIIC%20Report-EN.pdf>

¹² November 16, 2007; The Secretary General SG/A/1109 <http://www.un.org/News/Press/docs/2007/sga1109.doc.htm>

¹³ Security Council Resolution 1664, March 29, 2006; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/290/16/PDF/N0629016.pdf?OpenElement>

implying that the justice being promoted is so severely and obviously selective that it may contribute to further disagreements among Lebanese.

The mandate¹⁴ of the Special Tribunal is limited to investigating and then prosecuting the perpetrators of the terrorist assassination of Hariri and 22 others. It has jurisdiction over other assassinations and assassination attempts committed between 1 October 2004 and 12 December 2005¹⁵, only if the STL finds them to be connected¹⁶ to the assassination of Hariri and of a similar nature and gravity. On 30 June 2011, Pre-Trial Judge Daniel Fransen received a request from the Office of the Prosecutor to determine whether or not the three attacks relating to former ministers Marwan Hamadeh and Elias El-Murr and politician George Hawi were connected to the attack of 14 February 2005. On August 5, 2011 Judge Fransen ruled that the Prosecutor had presented *prima facie* evidence that each of the three cases were connected, and were thus within the Tribunal's jurisdiction. The decision on connectedness remains confidential "to protect the victims and potential witnesses" according to the STL spokesperson¹⁷. Judge Fransen's rulings do not mean that an indictment will necessarily be issued, and it is for the Prosecutor to determine whether there is sufficient evidence to support an indictment in any of these three connected cases. Since 2011 the prosecutor has not filed any indictments in the connected cases.

Before presenting the main contents of the STL indictment and the Prosecutor's pretrial brief, it is perhaps important to note that a substantial part of the STL Prosecutor's confidential documents were leaked to the Media before the indictment was made public. On May 23, 2009 *Der Spiegel* published a controversial report that included confidential UNIIIC records. The report's author, journalist Erich Folath, claimed that he "has learned from sources close to the tribunal and verified by examining internal documents, that the Hariri case is about to take a sensational turn. Intensive investigations in Lebanon are all pointing to a new conclusion: that it was not the Syrians, but instead special forces of the Lebanese Shiite organization Hezbollah that planned and executed the diabolical attack. Tribunal prosecutor Bellemare and his judges apparently want to hold back this information, which they have been aware of for about a month"¹⁸. Bellemare refused to comment. The

¹⁴ defined by Article 1 of the STL Statute (Annex Resolution 1757)

¹⁵ or a later date to be determined by the UN and Lebanon with the consent of the Security Council

¹⁶ The factors which may determine such a connection include, according to Article 1, "a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators".

¹⁷ August 19, 2011: <http://www.stl-tsl.org/en/media/press-releases/19-08-2011-pre-trial-judge-rules-on-connected-cases>

¹⁸ *Der Spiegel* (May 23, 2009) Folath, E. "New Evidence Points to Hezbollah in Hariri Murder". <http://www.spiegel.de/international/world/0,1518,626412,00.html>

actual STL indictment that was made public in August 2011 included information that was almost identical to a Canadian Media report (Canadian Broadcasting Corporation- CBC) of late 2010¹⁹. The report referred to investigators who worked with Bellemare and showed copies of confidential investigation records, claiming that "CBC News has obtained cell phone and other telecommunications evidence that is at the core of the case". The report concluded that telecommunications analysis led to "the single biggest breakthrough the commission had accomplished since its formation"²⁰.

On April 9, 2013, the website of Hariri's "Al-Mustaqbal" newspaper published a list of names under the heading "Secret witnesses in the Special Tribunal for Lebanon (Group #1)." The paper later released a statement claiming its website had been hacked. An online group that calls itself "Journalists for the Truth" and Al-Akhbar newspaper had also published alleged STL witnesses' identities and photographs in January 2013²¹.

STL President Judge David Baragwanath ordered the investigation of these alleged leaks on April 29, 2013. The investigation, which may lead to pressing contempt charges, is restricted to alleged leaks in local Media, and will not probe the *Der Spiegel* and CBC alleged leaks²².

Last week (on January 8, 2014) the Israeli newspaper Yedioth Ahronoth published information that was apparently leaked from the STL Prosecutor's office to Ronen Solomon who was identified by the newspaper as "an Israeli intelligence analyst and researcher specializing in Hezbollah's security and intelligence mechanisms"²³. The leaked document allegedly included "private details of [Mustafa Badreddine]'s family, his social circles, and business affairs" and the author claims that "Hezbollah's operations high command would prefer (that this information) remained hidden"²⁴. He further claims that "investigators tracked his (Badreddine) conversations from 2000 to 2008". One day later (on January 10, 2014), Kuwaiti newspaper "Al-Jarida" reported that "according to a senior source in Jerusalem", Israeli intelligence provided the Special Tribunal for Lebanon information "proving Hezbollah's involvement in the assassination of former Lebanese Prime Minister Rafic Hariri in 2005"²⁵.

¹⁹ MacDonald, N. (November 21, 2010) CBC Investigation: Who Killed Lebanon's Rafik Hariri? CBC News Special Report. <http://www.cbc.ca/world/story/2010/11/19/f-rfa-macdonald-lebanon-hariri.html>

²⁰ Ibid.

²¹ April 9, 2013, Al-Akhbar English; <http://english.al-akhbar.com/node/15485>

²² STL President's April 29, 2013's "Decision on Allegations of Contempt" http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/other-filings/other/f0021_r60bis

²³ "What ties Hezbollah to Hariri's Murder?" by Roi Kais – Ynet News <http://www.ynetnews.com/articles/0,7340,L-4474558,00.html>

²⁴ Ibid.

²⁵ AlJarida, January 10, 2014:

<http://www.aljarida.com/news/index/2012641625/%D8%A5%D8%B3%D8%B1%D8%A7%D8%A6%D9%8A%>

II. The indictment

The prosecutor submitted an initial indictment on January 17, 2011 and amended it three times (March 11, May 6, and June 10) before the Pre-Trial Judge confirmed it on June 28, 2011. Since then, the indictment has been amended twice on November 8, 2012 and on April 17, 2013.

The indictment and accompanying arrest warrants were transmitted to the Lebanese authorities on June 30, 2011. The four individuals named in the initial indictment are: Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra. On June 5, 2013 the Pre-Trial Judge confirmed a second indictment submitted by the Prosecutor accusing Hassan Habib Merhi. On December 18, 2013, the Prosecution sent a request to join the Merhi case to the Ayyash, Badreddine, Oneissi and Sabra case. These five men are allegedly active members of Hezbollah.

On August 17, 2012, the Prosecution requested the Pre-Trial Judge to accept the submission of an amended indictment²⁶. The Pre-Trial Judge granted the Prosecution's request (on October 25, 2012), and an amended indictment was filed on November 8, 2012. However, the Prosecution again requested leave to amend the indictment on February 6, 2013²⁷. The Pre-Trial Judge granted the leave (on April 12, 2013), and on April 17, 2013, a new signed copy of this amended indictment was filed²⁸ and a redacted version was published on June 21, 2013.

Defense counsels had filed requests to nullify the amended indictment claiming that it lacks sufficient details supporting the material facts in the crimes charged and is therefore defective. Counsels also requested further and better particularization of the Prosecution case. However, the trial chamber dismissed the defense counsel's requests on June 12, 2013²⁹.

[D9%84-%D8%B2%D9%88%D8%AF%D8%AA-%C2%AB%D8%A7%D9%84%D9%85%D8%AD%D9%83%D9%85%D8%A9-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A%D8%A9%C2%BB-%D8%A8%D9%88%D8%AB%D8%A7%D8%A6%D9%82-%D8%AA%D8%A4%D9%83%D8%AF-%D8%AA%D9%88%D8%B1%D8%B7-%C2%AB%D8%AD%D8%B2%D8%A8-%D8%A7%D9%84%D9%84%D9%87%C2%BB-%D9%81%D9%8A-%D8%A7%D8%BA%D8%AA%D9%8A%D8%A7%D9%84-%D8%A7%D9%84%D8%AD%D8%B1%D9%8A%D8%B1%D9%8A](http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f0952); and as reported in Ynet News on January 10, 2014: <http://www.ynetnews.com/articles/0,7340,L-4475277,00.html>

²⁶ Prosecution Request for Leave to Amend the Indictment Pursuant to Rule 71(A), confidential, 17 August 2012, with a public redacted version filed on 18 September 2012.

²⁷ Prosecution Request for Leave to Include Further Amendments to its Proposed Amended Indictment, February 6, 2013

²⁸ Prosecution's Filing of the Signed Version of the Amended Indictment in Compliance with the Pre-Trial Judge's Decision of April 12, 2013 & Request for Amended Arrest Warrants and Orders Requests for Transfer and Detention, April 17, 2013

²⁹ <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f0952>

Circumstantial evidence beyond reasonable doubt?

Before examining the details of the basis of the indictment, it is perhaps crucial to mention that the Pre-Trial Judge notes that the indictment and its one million pages of supporting elements rely to a large extent on circumstantial evidence "which works logically by inference and deduction"³⁰. In light of his verifications, the Pre-Trial Judge deems that this evidence is "sufficiently credible and relevant to review the Indictment initially"³¹; however he also states that in order to lead to a conviction, it will "have to be shown to be established beyond reasonable doubt by the Trial Chamber"³². The Pre-Trial Judge further notes that the Prosecution failed to provide "indications as to the motives of the attack"³³ of February 14, 2005.

In the following parts of this seminar I present a summary of the Prosecutor's statements in the indictment and in the pre-trial brief and the position of the Defense counsels on these claims: (1) the alleged identity of the accused; (2) alleged telephone networks and attribution of SIM cards to the accused; (3) alleged activities preceding the February 14, 2005 attack; (4) the February 14, 2005 attack; (5) the alleged activities following the February 14, 2005 attack; and (6) the alleged pattern of criminal behavior.

(1) Allegations on the identity of the accused

The Prosecutor submitted two types of information about the identity of Salim Ayyash, Mustapha Badreddine, Hussein Oneissi, Assad Sabra, and Hassan Merhi: biographical information and information about their religious and political affiliation.

Article 59 of the indictment³⁴ reads: "All four Accused are supporters of Hezbollah, which is a political and military organization in Lebanon". It then further claims that "in the past, the military wing of Hezbollah has been implicated in terrorist acts. Persons trained by the military wing have the capability to carry out a terrorist attack, whether or not on its behalf".

The same article also states that "BADREDDINE and AYYASH are related to each other through marriage and together to a certain Imad MUGHNIYAH: they are brothers-in-law.

³⁰ Indictment, paragraph 3

³¹ Paragraph 37 of the June 28, 2011 Decision by the Pre-Trial Judge relating to the examination of the indictment. The Pre-Trial Judge reconfirms his position in his report submitted on December 11, 2013, paragraph 36; <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/pre-trial-judge/fl182>

³² Article 16 paragraph 3(c) of the STL Statute

³³ Paragraph 96 of the June 28, 2011 Decision by the Pre-Trial Judge relating to the examination of the indictment. The Pre-Trial Judge reconfirms his position in his report submitted on December 11, 2013, paragraph 36.

³⁴ STL Indictment, June 10, 2011. Pages 22 & 23. <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/indictments/f0007>

Imad MUGHNIYAH was a founding member of Hezbollah and in charge of its military wing from 1983 until he was killed in Damascus on 12 February 2008. He was wanted internationally for terrorist offences". Mughniyah had been on the FBI's most wanted list since the 1980s, "long before al-Qaida and Osama bin Laden became bywords for terrorism"³⁵. However, it is not clear how the family ties of the accused are relevant to the case. Paragraph 'c' of the same article further states that, "based on their experience, training and affiliation with Hezbollah, therefore, it is reasonable to conclude that BADREDDINE and AYYASH had the capability to undertake the 14 February 2005 attack". Hence, what the prosecutor is actually saying in the indictment are two different things: that the indicted are *supporters* of Hezbollah and that they are *affiliated* to and were *trained* by Hezbollah.

Ayyash

The Prosecutor states that Ayyash is a Muslim Shiite and that he is a supporter of Hezbollah. The Defense Counsels for Ayyash state that the prosecution does not present evidence beyond reasonable doubt about these biographical allegations.

Three prosecutor witnesses confirm the affiliation of Ayyash to Hezbollah (PRH385³⁶, PRH096 and an unidentified person); however, prosecution witness PRH112 could not fully confirm the affiliation of Ayyash to Hezbollah but assumed that he is a sympathizer of Hezbollah because of his religious identity (Muslim Shiite)³⁷. The prosecution also based its allegation of the affiliation of Ayyash to Hezbollah on an excerpt of a publication by Deputy Secretary General of the party Sheikh Naim Kassem³⁸ in which the name Salim Ayyash is not mentioned.

Badreddine

The Prosecutor relies on witness PRH329 to state that Badreddine is an active member of Hezbollah and that he was incarcerated in Kuwait for political reasons. The Prosecutor further alleges that Badreddine used the following aliases: Safi Badr, Sami Issa, and Elias Fouad Saab. He relies on the statements of 13 witnesses³⁹ to prove this and to show similar

³⁵ Ian Black, "Profile: Imad Mughniyah"; The Guardian (February 13, 2008);

<http://www.theguardian.com/world/2008/feb/13/israelandthepalestinians.terrorism>

³⁶ PRH stands for "Prosecution Rafic Hariri", it is a code used to identify the Prosecutor's witnesses

³⁷ Page 15, paragraph 42 of The Pre-Trial Judge's report submitted on December 11, 2013; <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/pre-trial-judge/fl1182>.

³⁸ R91-801766, «New Introduction Hizbullah The Story from Within» Naim Qassem (Deputy Secretary General of Hezbollah), p. 60217343-60217344. In addition to a letter: R91-801143 (undisclosed details).

³⁹ PRH577, PRH273, PRH243, PRH244, PRH089, PRH359, PRH531, PRH264, PRH423, PRH556, PRH470, PRH306, PRH523.

physical characteristics and personal habits between Badreddine and Sami Issa and concludes that they are one person. He also alleges that Badreddine is also Elias Fouad Saab who was condemned for his involvement in terror attacks perpetrated in Kuwait in the 1980s. The Prosecutor relies on similarities in the description of Elias Fouad Saab with Badreddine in the Kuwait court documents.

The attribution of the aliases to Badreddine is a corner stone in the prosecutor's indictment because there is only one witness (PRH329) who alleges that Badreddine is a supporter of Hezbollah, whereas all other allegations in this regard are attributed to his alleged aliases.

Oneissi

The Prosecutor based his allegation that Oneissi is a supporter of Hezbollah on a speech by the party's Secretary General stating that the accused are "brothers who have an honourable history in resisting the Israeli occupation"⁴⁰.

However, such statement was announced in a press conference after the indictment was published and it does not prove the Prosecutor's allegation beyond reasonable doubt.

Sabra

The Prosecutor based his allegations on the affiliation of Sabra to Hezbollah on three witnesses (PRH024, PRH079 & PRH106); however, PRH024 also stated that he did not have a close relation to Sabra, and PRH106 said that Sabra is linked to Hezbollah but he could not specify the nature and type of the link. As for PRH079, he stated that Sabra is pro-Hezbollah; however he said that he is not in a position to obtain details about members of Hezbollah.

Merhi

In the indictment filed on June 5, 2013, the Prosecutor claims that Hassan Merhi is "a supporter of Hezbollah, which is a political and military organization in Lebanon". How the Prosecutor knows this remains confidential at this time.

⁴⁰ Hussein Dakroub, "Nasrallah Refuses to Hand Over Accused"; The DailyStar (July 4, 2011) <http://www.dailystar.com.lb/News/Lebanon-News/2011/Jul-04/142781-nasrallah-refuses-to-hand-over-accused.ashx#axzz2pQkWkv00>

Collective accusation?

It is perhaps relevant to note here that although the STL Mandate is confined to individual criminal responsibility, article 3 of the STL Mandate states that it has jurisdiction over persons who “contributed (...) to the commission of the crime (...) by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime”⁴¹.

On July 22nd, 2013, The European Union agreed to put the armed wing of Hezbollah on its terrorism blacklist⁴². Commenting on this, US Secretary of State John Kerry said that “a growing number of governments are recognizing Hezbollah as the dangerous and destabilizing terrorist organization that it is”⁴³. It is not yet clear if this European decision, taken just a few months before trial starts, had a substantial impact on the respect for the principle of presumption of innocence, considering that many STL personnel are Europeans and its seat is in the Netherlands, the only European country that designates the entire organization and its adherents as terrorists, by law. It is also not clear whether the fact that the STL President, Prosecutor, and Registrar and several others who currently hold key posts at the STL, are citizens of the few states⁴⁴ (respectively, New Zealand, Canada and the United States) that have legally designated the entire Hezbollah organization as terrorist, has an impact on the STL proceedings.

Paragraph 2 of Article 3 of the STL Mandate states that “With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes (...) committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates”. It may therefore be anticipated that the STL Prosecutor will extend the allegations to Hezbollah’s leadership in the expected upcoming indictments.

(2) Alleged telephone networks and attribution of SIM cards to the accused

The STL Prosecutor states that there were four closed telephone networks and one group of phones, and that the indicted persons were using one or several phones that are part of

⁴¹ Article 3 Paragraph 1(b) of the STL Statute, SC Resolution 1757, May 30, 2007.

⁴² EU agrees to put Hezbollah military wing on terror list; Haaretz (July 22, 2013); <http://www.haaretz.com/news/diplomacy-defense/1.537204>

⁴³ Reuters, July 22, 2013. EU adds Hezbollah's military wing to terrorism list, by Justyna Pawlak and Adrian Croft. <http://www.reuters.com/article/2013/07/22/us-cu-hezbollah-idUSBRE96K0DA20130722>

⁴⁴ Consulate General for Israel in New York (July 23, 2013) <http://embassies.gov.il/new-york/NewsAndEvents/Pages/European-Union-Hezbollah-Designation-.aspx>

these networks or the group, and that this establishes their involvement in the perpetration of the February 14, 2005 attack.

The Prosecutor claims that the investigators discovered the existence of these networks and group of phones by examining similarities in phone-line activation dates, usage locations and dates, and modes of communication. He further claims that the alleged networks and group of phones were used for specific activities related to the crime and that most of the calls were made to other phones that are also part of the same network or group.

In addition to the network phones the prosecutor explored the usage of alleged Personal Mobile Phones (PMPs) and Sequential Mobile Phones (SMPs: phones used successively with different phone lines, which allegedly means that each phone was used over several weeks or months, and then replaced by another one⁴⁵). He claims that some of the persons using network phones also had PMPs and SMPs and that this contributed to their identification.

The prosecution relies on a vast volume of complex technical reports to back up its claims about telephone use of the accused⁴⁶ and it presented complicated analysis of the usage of phone lines and mobile phone devices.

Each of the four alleged networks and group of phones was given a color by STL the Prosecutor.

The following table is included in the Prosecutor’s Pre-Trial Brief⁴⁷:

	Red Network	Green Network	Blue Network	Yellow Network	Purple Phones	PMPs/SMPs
Badreddine		3140023 Green 023				3966663 (PMP 663) 3833354 (PMP 354) 3476683 (SMP 683) 3293944 (SMP 944) 3103195

⁴⁵ Pre-Trial Judge’s Report, December 11, 2013; <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/pre-trial-judge/f1182>; Page 21, paragraph 56.

⁴⁶ Two reports by Expert witness PRH147, entitled «Network Analysis Report: Red, Green, Blue and Yellow Phones» and «Communications Evidence Concerning the Assassination of Rafik Hariri: Chronology Report» (covering the period from October 13, 2004 to February 16, 2005); Analysis of “Call Sequence Tables” (CST) composed of detailed information about calls made during the designated period, i.e. the number of the called, the number of the receiver, the date and time and length of the call and the antennas used for the call. Report entitled «Examination of Red and Green Network Handset Usage Introduction» and witness statements (PRH064 & PRH377); Report entitled «Evidence of Telephone Attribution - Salim Jamil Ayyash»; Report entitled «Evidence of Telephone Attribution - Mustafa Amine Badreddine» (by expert witness PRH230); Report entitled «Evidence of Telephone Attribution - Hussein Hassan Oneissi »; Report entitled «Evidence of Telephone Attribution - Assad Hassan Sabra »; «Indictment Report Attribution of Phone Numbers to Hassan Habib Merhi» (by expert witness PRH230); Analysis of expert witness PRH435; Report entitled «Demonstration of Single Person Use of Multiple Mobile Phones Using Cell Site Analysis Suspect 1»; Report entitled «Demonstration of Single Person Use of Multiple Mobile Phones Using Cell Site Analysis Suspect 2 »; and Report entitled «Single Person Use of 2 Mobiles-Suspect 3»

⁴⁷ Redacted Version of the Prosecution’s Updated Pre-Trial Brief, dated 23 August 2013, Page 13; <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/other-filings/office-of-the-prosecutor/f1077>

						(SMP 195) 3121486 (SMP 486) 3442593 (SMP 593)
Ayyash	3123741 Red 741	3159300 Green 300	3071233 Blue 233	3205294 Yellow 294		3767165 (PMP 165) 3523935 (PMP 935) 3831170 (PMP 170) 3020091 (PMP 091)
Oneissi					3598095 Purple 095	
Sabra					3419018 Purple 018	
Merhi		3150071 Green 071			3575231 Purple 231	
S5	3125636 Red 636		3043585 Blue 585			
S6	3129678 Red 946		3197610 Blue 610	3345457 Yellow 457		
S7	3127946 Red 946		3067324 Blue 324			
S8	3129893 Red 893		3197817 Blue 817	3971933 Yellow 933		
S9	3129652 Red 652		3198864 Blue 864			
S10	3478662 Red 662					
S11	3292572 Red 572					
S12			3071235 Blue 235			
S13			3079501 Blue 501			
S14			3067322 Blue 322			
S18			3193428 Blue 428			
S19			3196742 Blue 742			
S23			3020967 Blue 967			
n/a			3198940 Blue 940			
n/a			3846965 Blue 965			
n/a			3196813 Blue 813			

S5-S14, S18-19, and S23 were not identified by the Prosecutor and, for unknown reasons, the last three alleged Blue network users were not given any label or number.

*The red network*⁴⁸

This alleged network was composed of eight mobile phone lines used for the preparation of the attack and for its execution. The prosecutor claims that Salim Ayyash used one of this network's phone lines during the preparation and execution of the February 14, 2005 attack.

*The green network*⁴⁹

This alleged network was composed of three mobile phone lines used from October 13, 2004 until February 14, 2005, one hour before the attack.

The Prosecutor claims that Badreddine, Ayyash and Merhi used this network to communicate between them for the preparation of the attack.

*The blue network*⁵⁰

This alleged network was composed of 18 mobile phone lines. The Prosecutor claims that 15 of the 18 phone lines of this network were used in the preparation of the attack, namely in the surveillance of Hariri from October 18, 2004 until February 14, 2005. None of the users of this alleged network, except Ayyash, were identified by the prosecution.

*The yellow network*⁵¹

This alleged network was composed of 18 mobile phone lines activated between 1999 and 2003 and deactivated on January 7, 2005. The Prosecutor claims that Ayyash along with three others who are allegedly part of the group responsible for the execution of the attack used four yellow network phone lines for the preparation of the attack.

*The purple phones*⁵²

⁴⁸ No SMS were sent or received by these phones and they were all activated on January 4, 2005, used for the first time on January 14, 2005 and deactivated on February 14, 2005 two minutes before the explosion. The Prosecutor claims that the alleged red network phones: were activated on January 4, 2005 in Tripoli (North Lebanon) and, based on Expert witness PRH528's report «Acquisition of SIM Cards Report» these phone lines were purchased by using false identification documents; were recharged with additional credits on February 2, 2005 in Tripoli; and phone swaps were made between the users of this network.

⁴⁹ The green network was allegedly part of a larger network including 18 phone lines that were deactivated in August 2005

⁵⁰ The users of this alleged network communicated from October 18, 2004 until October 1st, 2005 exclusively between them and did not receive or send any SMSs. There were phone swaps between users of this network and the users of the yellow network.

⁵¹ The users of this alleged network communicated exclusively between themselves and did not receive or send any SMSs; 13 of the 18 phone lines were active between September 1, 2004 and January 7, 2005; The users of the phone lines in the yellow network swapped phones among themselves and with users of phone lines in the blue network and two PMPs allegedly belonging to Ayyash; and one of the phone numbers of the yellow network later became one of Ayyash's alleged PMPs.

⁵² This alleged open network was composed of three PMPs used between January 2003 and February 16, 2005.

The Prosecutor claims that Oneissi, Sabra and Merhi used these phone lines to communicate during the false claim of responsibility for the February 14, 2005 attack.

PMPs and SMPs

The Prosecutor claims that Badreddine used nine PMP⁵³ and that Ayyash used four PMPs and that these PMPs were also used to communicate between Badreddine, Ayyash and Merhi in the preparation of the attack and the claim of false responsibility for the assassination of Hariri.

Attribution of phone lines to the accused

The Prosecutor uses the following methodology to attribute phone lines from the red, green, blue and yellow networks and the purple group of phones to the accused:

Based on “Call Sequence Tables” (CST) composed of detailed information about calls made during the designated period — i.e. the number of the called, the number of the receiver, the date and time and length of the call and the antennas used for the call — a number of witnesses are used and relevant documents are presented to confirm the identity of the phone line users. The prosecutor also presents detailed and complex analysis of the timing, location and frequency of calls made and received and he employed a co-location technique tracking the usage of phone devices to identify the users. This technique was used to claim that the accused used more than one phone and that they also had PMPs. However, it should be noted that the co-location of two phone lines may not necessarily mean that these phones were used by the same person but by two persons in the same location.

The Prosecutor attributes to Ayyash four PMPs and four other phone lines: one in the alleged red network, a second in the alleged green network, a third in the alleged blue network and a fourth in the alleged yellow network.

The Prosecutor attributes to Badreddine and his alleged aliases Sami Issa and Safi Badr: two PMPs, nine SMPs and one in the green network

The Prosecutor attributes one phone line in the alleged violet group of phones to Oneissi; and another phone line in the alleged violet group to Sabra.

The Prosecutor attributes two phone lines to Merhi, one in the alleged green network and the other in the alleged violet group of phones.

The position of Defense counsels

⁵³ From January 2003 until August 2006

Counsels for the Defense challenge the Prosecutor's allegations on telecommunication. The Ayyash defense rejects the allegation that he has used any phone lines that were part of the above listed alleged networks.

The Oneissi Defense's position is that none of the telecom information and analysis can be considered beyond reasonable doubt and it further adds that the purple phones do not form a network of phones and there is no credible evidence proving that any one of these phones was used by Oneissi, especially not on the dates and at the locations specified by the Prosecutor. The Sabra Defense counsel presents similar challenges the Prosecutor's claims and adds that there may be alternative conclusions to the Prosecutor's telecom analysis. The Badreddine Defense rejects the entire telecom allegations whereas the Merhi defense counsel, appointed on December 23, 2013, just three weeks before the start of trial, did not have the time yet to read the vast amount of documents presented by the Prosecutor as supporting elements to the indictment.

(3) Alleged activities preceding the February 14, 2005 attack

These activities are according to the indictment: (a) surveillance; (b) preparations for the false claim of responsibility; and (c) purchase of the vehicle used in the attack of February 14, 2005.

The prosecutor's investigation records chart the movements of former PM Hariri's convoy months before his assassination, and determines, based on a "co-location" technique, the location of the phones in question, and thereafter the identity of the users of these phones.

The Prosecutor claims that Badreddine was in control and that, in coordination with Ayyash, he overviewed the surveillance of Hariri's movements and the purchase of the Mitsubishi truck that was later filled with explosives. Oneissi and Sabra are alleged to have recruited Ahmad Abu Adass who falsely claimed responsibility for the assassination of Hariri on video. The Prosecutor further claims that Badreddine and Merhi coordinated the false claim of responsibility.

(a) Surveillance

According to the Prosecutor, from October 20, 2004 until February 14, 2005, Ayyash and several unidentified persons meticulously observed strategic locations in preparation of the attack including Hariri's residence, the Parliament and the St. George area where the attack

later took place. They initially used the alleged blue network, and, as of January 15, 2005 they used the alleged red network.

The Prosecutor claims that the surveillance lasted 50 days from Hariri's resignation as Prime Minister on October 20, 2004. The surveillance, according to the Prosecutor, allowed Badreddine and Ayyash to determine the location and method for Hariri's assassination. Based on this, the Prosecutor determined the premeditated homicide intent of Badreddine and Ayyash. To support this claim the Prosecutor states that between January 1st and February 14, 2005 Badreddine used a phone line in the alleged green network to be in contact with Ayyash who used another phone in the same alleged network, on 59 occasions. He adds that during this period Ayyash used one of his PMPs to be in contact with Merhi who used a phone from the alleged violet group of phones.

(b) Preparations for the false claim of responsibility

The Prosecutor claims that in parallel with surveillance activities, Sabra and Oneissi, in coordination with Merhi, recruited Ahmad Abu Adass who was allegedly used to claim false responsibility for Hariri's assassination. To support this allegation, the Prosecutor presents an analysis of the frequency of calls made among the phones in the alleged purple group of phones. He states that Oneissi and Sabra contacted each other using the purple phones 84 times from January 12, 2003 until February 16, 2005 and that Sabra was in contact with Merhi 231 times between December 26, 2002 and February 14, 2005, and that Oneissi was also in contact with Merhi 194 times from June 25, 2003 until February 6, 2005. He adds that Merhi was in contact 39 times with Ayyash's PMPs from January 23, 2005 and February 6, 2005.

Abu Adass had disappeared on January 16, 2005 according to the Prosecutor after he left his apartment to meet Oneissi. He used to pray at the mosque of the Beirut Arab University where he was approached by a man called Mohammad, an alleged alias of Oneissi according to the testimony of one witness (PRH056).

The Prosecutor further claims that on the day Abu Adass disappeared, Badreddine and Merhi were in contact with each other by phone five times. However there seems to be an anomaly that may raise doubts about the Prosecutor's claims, because, on that day, none of the alleged violet group of phones were used. Yet the prosecutor may allege that Merhi, Oneissi and Sabra were together on this day and did not need to call each other.

(c) the purchase of the vehicle

The Prosecutor claims that Ayyash travelled to Tripoli on January 11, 2005 where a Mitsubishi Canter truck was on display for sale. He further claims that Ayyash called Badreddine, using the alleged green network, twice on that day. On this same day one of the users of the alleged blue network was in Tripoli and called another unidentified person using the same alleged network in Beirut. The latter then called Ayyash. The Prosecutor claims that an unidentified person using the alleged blue network purchased the Mitsubishi with a false identity and that fragments of this vehicle were later found at the crime scene.

However, the analytical reports and evidence presented by the Prosecutor⁵⁴ do not prove that the Mitsubishi truck was purchased on January 25, 2005 but rather between January 17 and January 26, 2005.

(4) Allegations about the February 14, 2005 attack

Based on telecommunications analysis the Prosecutor claims that Ayyash and the other unidentified members of the execution group were positioned in locations that allowed them to observe the Hariri convoy near his residence in Koraytem, near the Parliament and in the St. George area where he was assassinated. In support of this claim the prosecutor states that the blue network phones started the surveillance operation at 4:55 AM on February 14, 2005. He claims that they moved from the southern suburb of Beirut to the Parliament area. And at 11:48 AM they allegedly stopped using the blue network phones and started using the red network phones that were also in their possession.

The Prosecutor claims that when the Mitsubishi truck loaded with explosives neared the crime scene at 11:57 Ayyash, who was in the area, received a phone call from one of the users of the red network phones. 11 calls were allegedly made by the red network phones from 12:00 until 12:16. AT 12:25 when Hariri left the Café de l'Etoile near the Parliament a phone call was made between two red network phones and the Prosecutor claims that all the holders of red network phones were aware of the departure of Hariri from the Parliament area towards the St George road. Ayyash allegedly called Badreddine at 11:58 and this was the last call among the green network phones.

The Prosecutor claims that an unidentified suicide bomber detonated the explosives and that no traces of the body of Abu Adass were found in the crime scene.

The Defense counsel for Badreddine challenges the allegation that the explosives were placed in a Mitsubishi Canter truck.

⁵⁴ Report "Information concerning the Mitsubishi Canter van" R91 -200002 (ERN 600005 10-600005 11_D_EN) & R91-200289 (ERN 60000486-60000676_D_EN)

(5) The alleged activities following the February 14, 2005 attack

The Prosecutor claims that Oneissi and Sabra are responsible for delivering the video tape in which Ahmad Abu Adass states that he is part of a religious extremist group called “Al-Nusra Wal Jihad Fi Bilad Al Shaam” and that he killed Hariri. To support these claims the Prosecutor refers to a telephone card (number 616569) which was allegedly used on February 14, 2005 by Sabra and Oneissi to make four phone calls from four different phone booths to Al-Jazeera (3 times) and to Reuters (once). However the Prosecutor could not determine if it was Sabra or Oneissi who made the calls.

Defense counsels for Oneissi and Sabra consider this lack of precision violates the rights of the accused, namely the right to be informed, precisely, of the charges against them.

The Prosecutor identified Sabra and Oneissi by showing that the purple phones attributed to them were in the proximity of the telephone booths. However, the purple phones were not operating (making or receiving calls and messages) at the time the calls from the phone booths were made. This makes the allegations of the Prosecutor questionable.

(6) Alleged pattern of criminal behavior

The Prosecutor evokes a pattern of criminal behavior of Badreddine pointing to attacks perpetrated in Kuwait on December 12, 1983, following which, one of Badreddine’s aliases, Elias Fouad Saab, was convicted on March 27, 1984 and incarcerated until he escaped from prison in 1990. The Prosecutor refers to a suicide attack in Kuwait committed against the US Embassy in which Saab had purchased the vehicle and, as an explosives expert, prepared the explosive charge and planned the entire operation.

The Badreddine defense counsel challenges these allegations based on the following:

- Badreddine and Saab are not the same person.
- Saab’s fundamental rights may have been violated in the Kuwait court.
- The alleged pattern of criminal behavior is not clear.

III. The Defense

On February 2nd, 2012, one day after the decision of the Trial Chamber to proceed with trial in absentia, the Head of the STL Defense Office, Francois Roux appointed four counsels, Antoine Korkmaz, Vincent Courcelle Labrousse, Eugene O’Sullivan, and David Young to defend the rights and interests of the four indicted persons. Roux also appointed four co-counsels, John Jones, Yasser Hassan, Emile Aoun, and Guenael Mettraux.

On December 20, 2013, the same day the Trial Chamber decided to hold trial in absentia for Hassan Merhi, Roux appointed Counsel Mohamad Aouini to defend his rights and interests. And on December 31, 2013, Roux appointed one additional co-counsel to each of the accused's defense teams: Ian Edwards, Philippe Larochelle, Thomas Hannis, and Geoffrey Roberts.

Main Challenges to Defense counsels

The principle of equality of arms falls within the fair trial guarantee of the STL Statute and is viewed as having a direct correlation to the right of adequate time and facilities. This principle obliges any judicial body to ensure that neither party is put at a disadvantage when presenting its case. Defense counsels must be placed on an equal footing with the Prosecution at all stages of the proceedings, in order to protect the right of the accused to a fair trial. This does not seem to be the case here because of three main challenges: the lack of cooperation with Defense counsels' requests for assistance, insufficient resources to cross examine the vast volume of documentation presented by the Prosecutor, non-disclosure, and the various challenges of in absentia defense.

(1) Excessive redactions and non disclosure

Fact-Finding Mission materials

The Defense requested the lifting of redactions applied to three documents disclosed by the Prosecution. Each of these documents is material to the preparation of the Defense and full un-redacted versions of these documents are required in order to prepare adequately and effectively for trial. In addition, the Defense requested the disclosure of any remaining undisclosed documents from the Fact-Finding Mission (FFM 2005) which the Prosecution asserts are not subject to disclosure.

The Prosecution takes the extreme position, in its responses to the requests for the Three Documents and the FFM materials, that it is not obliged to provide any information to the Defense when documents are either not disclosed at all, as with the FFM materials, or are disclosed in redacted form, as with the Three Documents. This position does not accord with the law as cited by the Prosecution or a common-sense reading of the provisions on which the Prosecution seeks to rely, and it gravely prejudices the ability of the Defense to prepare to meet the case against the accused.

The STL Rules of Procedure and Evidence do not support the Prosecution's position. Rule 111 provides that internal products of Prosecution work are not "subject to disclosure or notification under the Rules". As such, the Prosecution is not obliged to inform the Defense every time it locates a document or part of a document that falls under this category. However, where the Defense specifically identifies and requests a document or specific information that it considers to be relevant for its preparation the Prosecution should be obliged to inform the Defense of the specific legal justification for this refusal to disclose. Without such an indication, the Defense would be unable to challenge the Prosecution's assertion and the Chamber would have no means to rule on the merit of the Prosecution's refusal to disclose.

To hold otherwise, namely, that the Prosecution may simply hide the existence of these documents or any justification for their non-disclosure, would be inconsistent with the Prosecution's duty and responsibility pursuant to Rule 55(C) to assist the Tribunal in establishing the truth. It would also waste Defense time and resources by requiring it to guess the legal and factual justification for partial redactions to a document where it is disclosed in redacted version and it would leave the Defense entirely blind and unaware of documents that the Prosecution has refused to disclose in their entirety. As noted above, it would also deny the Chamber the ability to police the Prosecution's compliance with its disclosure obligations. Leaving the Defense's preparation for trial at the mercy of the Prosecution's unverified interpretations of its disclosure obligations would be unfair and prejudicial. It would also constitute a violation of the Rules.

Witness identity

On December 21, 2011, the Prosecution filed an application seeking the interim nondisclosure of the identity of some witnesses in accordance with Rules 115 and 116 of the Rules of Procedure and Evidence and for protective measures to be granted.

On March 15, 2012, the Prosecution filed another application seeking that the Pre-Trial Judge issue an order for the interim non-disclosure of the identity of some expert witnesses and international investigators until 30 days before the presentation of the evidence for the Prosecution. The Victims and Witnesses Unite (VWU) stated that, in order to determine the levels of risk in question, it reviewed the risk assessment for the expert witnesses in a general manner, without verifying the information on which the Prosecution relied.

The Prosecution is of the opinion that the Pre-Trial Judge has sufficient evidence establishing that the 16 international experts concerned are in danger or at risk. The

Prosecution notes in addition that reference to the experts or to official representatives of a State could likewise have an impact on other officials from that State. Lastly, the Prosecution submits that the redactions sought do not relate to the substance of the reports, but to the identity of their authors and are therefore consistent with the rights of the Accused.

On 11 April 11, 2012, Counsels for the Defense of the accused determined that there was no basis for the Prosecutor's applications. The Defense for Mr Ayyash, Mr Badreddine and Mr Oneissi argue that the nondisclosure of the identity of the experts does not allow them to verify their qualifications which "considerably compromises their right to examine the evidence"⁵⁵. The time limit of 30 days proposed by the Prosecution is not sufficient to allow the Defense to prepare effectively.

Defense counsels draw a clear distinction between *inter partes* disclosure and disclosure to the public. They are of the opinion that although it might be understandable that, for security reasons, the experts do not wish their identities to be disclosed to the public, the Prosecution failed to demonstrate that the confidential disclosure of that information to the Defense might constitute a danger, especially when the proceedings in question are taking place *in absentia*.

On November 13, 2012, the Prosecution filed an application for non-disclosure of witness statements, investigators' notes and audio-recordings. The Prosecution maintained that disclosing witness protection statements, which include specific risks identified by the witnesses in question, "may generally increase the risk to the security of these witnesses."⁵⁶ The Prosecution sought authorization for redaction to three more witness statements on October 18, 2013. The Prosecution held that non-disclosure is necessary for information that would allegedly threaten the security of witnesses such as "reference to telephone numbers, how they commute to and from work and the security of their residences"⁵⁷. More specifically, the Prosecution submitted that the redactions in the three witness statements pertain to information related to the witnesses' personal safety and "witnesses' personal opinion about his/her own security"⁵⁸. The Chamber granted the Prosecution's request on November 8, 2013.

⁵⁵ Badreddine Response of 11 April 2012, para. 35.

⁵⁶ Non-Disclosure Application, paragraph 12

⁵⁷ Decision on Prosecution's Application to Authorize Necessary Redactions Pursuant to Rule 116 Dated 18 October 2013. November 8, 2013. Paragraph 3, page 1.

⁵⁸ Ibid. Paragraph 4, page 2.

Questionable Rules

STL rules of Procedures and Evidence, set by the STL judges, raise questions about the transparency and adequacy necessary for the attainment of justice. Paragraph F, under rule 118, states that “if the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, neither the Pre-Trial Judge nor the Trial Chamber may compel that witness to answer any question relating to the information or its origin if the witness declines to answer on grounds of confidentiality”⁵⁹. This represents a clear breach of the basic guarantees for the attainment of justice because Judges should have the authority to question the source of “evidence” collected by the prosecutor and presented in court. Rule 117 allows non-disclosure of information to protect “security interests of states and other international entities”. This rule states that where the disclosure of information “may affect the security interests of a State or international entity, the Prosecutor may apply ex parte to the Pre-Trial Judge sitting in camera for an order to be relieved of his obligation to disclose in whole or in part”. Rule 118 also expands on this by noting that “where the Prosecutor is in possession of information which was provided on a confidential basis and which affects the security interests of a State or international entity or an agent thereof, he shall not disclose that information or its origin without the consent of the person or entity providing the information”. The rules also grant the prosecution the opportunity to select the presentation format of witness statements: “the Prosecutor shall take reasonable steps to obtain the consent of the provider to (i) disclose that information or the fact of its existence to the accused or (ii) provide an alternative form of disclosure such as: identification of new similar information; provision of the information in summarized or redacted form; or stipulation of the relevant facts. If the Prosecutor obtains such consent, the Prosecutor shall make the disclosure that has been consented to without delay”. Hence, once the consent of the witness is secured the prosecution is granted an opportunity to rephrase his or her statements and present it in a way that may limit the defense’s prospect for efficient cross-examination⁶⁰.

Badreddine counsel Antoine Korkmaz said in a Pre-Trial conference held on October 17, 2013 that the defense “received large numbers of disclosure in July, in August, in September 2013 without even discussing that evidence which is contested and which has been brought to the attention of the Pre-Trial Judge”. He added that “on the 22nd of October, the Prosecutor disclosed exculpatory evidence to us in relation to a particular matter (...). Of

⁵⁹ STL Rules of Procedures and Evidence are available on the STL website, available from www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/RPE_EN_November%202010.pdf

⁶⁰ Nashabe, O. (February 2011). *The Special International Tribunal for Lebanon: Politics and the Law*. Socialist Lawyer, No. 57. London: Haldane Society. Pp.24-27.

course the Defense also has a right to run its own investigation and to hear its own witnesses, but unfortunately there we are unable to act because each time that we make a request, the request remains without response; therefore, we have been unable to interview our own witnesses.”⁶¹

On December 18, 2013, on the eve of the start of the trial, the Prosecutor submitted a request to add a number of witnesses and exhibits. The Prosecution seeks to add "three recently received expert reports related to communications evidence"⁶² without providing any explanation as to why these reports have only recently been commissioned. Such a late submission of new apparently incriminating evidence, especially evidence relating to telecommunications, inevitably has a substantial impact on the Defense's preparations for trial, in particular on the planning of the work of its telecommunications expert. The instructions of the Defense counsels to their telecommunication expert, including deadlines by which work is to be completed, are based on the evidence that has already been served, with a particular emphasis on the Prosecutor's experts' reports.

Further to the above, the Prosecutor's updated phone attribution expert report of Badreddine was disclosed to the counsel appointed to defend him on December 23, 2013.

However the STL Trial Chamber itself had previously held, that it may, "in the interests of justice, allow a party to amend its exhibit list. In doing so, the Chamber must balance the Prosecution's interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for trial"⁶³.

The question is relevant to the Defense, whether less than one month is considered "adequate time" to examine the updated telecommunication alleged evidence presented by the prosecution.

(2) Lack of cooperation

On 27 September 2013, the Defense submitted its "Motion Seeking the Cooperation of Lebanon" concerning nine outstanding requests sent to the relevant Lebanese authorities between March 2012 and August 2012⁶⁴. The requests sought information regarding the known whereabouts of the accused and telecommunications information.

Further requests relating to telecommunications information were sent to the Lebanese judicial authorities between September 2012 and November 2012, concerning information

⁶¹ Counsel Antoine Korkmaz on October 29, 2013 at the Pre-Trial Conference. Official Transcript page 20.

⁶² December 18, 2013 Submission paragraph 24

⁶³ Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, November 19, 2013, para.4.

⁶⁴ Public Redacted Version of Sabra Defense Motion for Stay of Proceedings Due to Lebanon's Failure to Cooperate With the Defense", filed on October 11, 2013. Page 2, paragraph 5.

on: (i) de-activation and SMS records; (ii) cell-towers, handsets, theoretical and physical cell coverage, relevant SIM cards, relevant Tele-cards and Call Data Records; (iii) jammers and interference in the Lebanese mobile phone system; and (iv) theoretical cell coverage models.

The lack of response by the Lebanese authorities to these requests was the subject of "Second Motion Seeking the Cooperation of Lebanon-Telecommunications Information" filed by the Defense before the Pre-Trial Judge on 4 February 2013.

In relation to the First Motion, the Pre-Trial Judge rendered his "Decision on the Defense Request Seeking to Obtain the Cooperation of Lebanon" on 11 February 2013 and invited the Lebanese authorities to "reply effectively and specifically to the various remaining requests of the Defense; and to do so within 30 calendar days from the notification of this decision at the latest".

On April 4, 2013, the Sabra Defense filed its "Third Motion Seeking the Cooperation of Lebanon" concerning two requests sent to the Lebanese authorities on 27 September 2012 and 2 November 2012 respectively. The requests sought a variety of information regarding terrorist groups operating in Lebanon and further, potential perpetrators of the 14 February 2005 attack. On the same date (April 4, 2013), the Defense also submitted its "Fourth Motion Seeking the Cooperation of Lebanon" concerning a request sent to the Lebanese authorities on 20 November 2012 and subsequently followed up on 9 January 2013, seeking information on the residences and workplaces of the accused; their friends; family and other associates.

On 28 August 2013, the Defense seized the Pre-Trial Judge of its "Fifth Motion Seeking the Cooperation of Lebanon". No response had been received to the Defense's request.

On the same date, the Defense also filed its "Sixth Motion Seeking Cooperation of Lebanon" concerning a request sent to the Lebanese Ministry of Justice on 6 May 2013. This sought information regarding Army personnel.

The Prosecution's case is founded almost exclusively upon the attribution of phone lines to the accused and the use of these numbers to facilitate and orchestrate the crimes set out in the indictment at particular locations on particular dates and times. The First, Second, Fourth, Fifth and Sixth Motions all directly concern this attribution and the strength of the Prosecution's evidence in allegedly locating the users of these phones on particular days. The Defense must independently investigate to ascertain the credibility of the Prosecution's case in this regard. As recognised by the Pre-Trial Judge, steps to verify and to ensure the reliability of telecommunications data must therefore be taken.

The Defense initially sought information in the First and Second Motions from the Lebanese authorities on a wide variety of telecommunications related information used by Lebanese phone companies to estimate where a caller using a mobile phone was located at the time they initiated the call. This includes how Call Data Records are generated, kept, manipulated and used and how the software used to locate such users is created, used and verified. Even accepting, for the sake of argument, that specific phone lines may be attributed exclusively to the accused, it is not clear that the wide range of telecommunications related evidence, relied upon extensively by the Prosecution, is sufficiently reliable to locate effectively the accused on the relevant dates at the relevant locations described in the indictment.

The Lebanese authorities have not disputed the fact that they are in possession of all requested material. Instead they have routinely: (i) ignored the requests either outright or in part; (ii) delayed the process by requiring the Defense to redirect the request or denying competence to deal with the request; (iii) indicated that they would respond, but then failed to do so; or (iv) issued a blanket response that the information was transferred by the Lebanese judicial authorities to the Tribunal on 7 April 2009.

The nature of the investigations conducted so far and of current proceedings before the Tribunal renders the cooperation of Lebanon crucial. The Hariri explosion occurred over eight years ago and was initially investigated by the Lebanese authorities. No other State therefore has access to the information sought by the Defense. Nor does the Defense have the ability to take instructions from the accused or conduct its own follow-up ground investigations in a safe and secure environment.

If Lebanon is able to refuse, ignore or fail to respond diligently to requests for cooperation by blanket responses or procrastination, then it would defeat the very purpose of the STL Agreement and no fair trial could reasonably be said to be possible.

The systematic failure of the Lebanese authorities to cooperate with the Defense is now at a stage whereby the rights of an accused can no longer be guaranteed. These rights are not exhaustive, are non-negotiable and must be strictly respected.

Double standards

The Prosecution has not been prejudiced by non-cooperation from Lebanon or has not filed any submissions asserting otherwise. In each of the IIIC Reports, Lebanon is specifically thanked for its support and cooperation with IIIC as the Commission details the "close interaction" it enjoyed with the Lebanese authorities "on all matters relevant to [its]

mandate", highlighting its "close and collegial working relationship with the Internal Security Forces and the Lebanese Army"⁶⁵. By July 2007, the Commission detailed that since January 2006 it had submitted 88 requests for assistance seeking to obtain relevant documents.

The Prosecution has publicly acknowledged its own working relationship with the Lebanese authorities⁶⁶. It has also enjoyed access and control over the investigative materials compiled by both the Lebanese authorities and the IIC, after which it chose to bring the case against the accused. Non-cooperation by the Lebanese authorities is therefore selective and exclusively affects the Defense.

Premature request to stay the proceedings?

Counsel for the Accused, Mr. Assad Hassan Sabra, sought a stay of the proceedings based on Lebanon's failure to cooperate with the Defense by not providing information they had requested. Counsel for Ayyash, Badreddine, and Oneissi joined the application.

Originally seeking a stay of the transfer of the case file to the Trial Chamber and a conditional stay of the case to prevent it proceeding to trial, counsels decided to seek a conditional stay now and to suspend trial proceedings immediately following the conclusion of the first stage of the Prosecution's case at trial. However, the chamber decided on December 17, 2013 that defense counsels "have neither shown that the essential preconditions for a fair trial are missing nor that there is insufficient indication that the issue will be resolved during the trial process".

The Trial Chamber stated on December 17, 2013, that the motion to stay the proceedings is "premature and is accordingly dismissed"⁶⁷ despite the fact that:

- In 2012 and 2013 counsels sent 119 requests for assistance to Lebanon seeking specific information that they state is relevant to their preparations for trial.
- Between February 2nd, 2013 and August 28, 2013, they filed five motions before the Pretrial Judge seeking orders directed to Lebanon to cooperate with the Special Tribunal in respect of these requests for assistance to 'search, identify and provide

⁶⁵ First UNIIC Report, page 1, and paragraphs 9-11, Second UNIIC Report, paragraphs 5, 21, and 92; Third UNIIC Report, paragraph 113; Fourth UNIIC Report, paragraph 133; Fifth UNIIC Report, paragraphs 70-74; Sixth UNIIC Report, paragraph 1, and paragraphs 93-96; Seventh UNIIC Report, paragraph 1, and paragraphs 91-94 and 113; Eighth UNIIC Report, page 2, and paragraphs 88-91; Ninth UNIIC Report, page 1, paragraphs 11, 80-83, and 109; Tenth UNIIC Report, paragraphs 13, 44-48; and Eleventh UNIIC Report, paragraphs 43-48.

⁶⁶ "Statement by Daniel A. Bellemare, Prosecutor of the STL, to the People of Lebanon", 20 February 2012, www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/the-office-of-the-prosecutor/statement-by-daniel-bellemare-prosecutor-of-the-stl-to-the-people-of-lebanon . See also www.dailystar.com.lb/News/LebanonNews/2013/Sep-28/232891-tribunal-says-lebanon-cooperating-with-requests.ashx#axzz2gM2Vospx

⁶⁷ Decision on Defense Motion to Stay the Proceedings, December 17, 2013. Para. 27 page 10

material' that is 'materially relevant' to their preparations for trial.' The orders were sought⁶⁸ but the five motions remain unresolved.

- The Prosecution opposed the motion, arguing that the Trial Chamber should address several factors, including whether the material sought is properly identified, actually exists, is exculpatory and the Defense has been unable to obtain it, by for example, asking the Prosecution if it has it. The Prosecutor held that at this “early stage of the proceedings, it was premature to conclude that a fair trial is not possible and that there is no prospect that any alleged unfairness cannot be addressed later in the proceedings”⁶⁹.

(3) Insufficient resources

During a Pre-Trial conference held on October 29, 2013, Counsel for Oneissi, Vincent Courcelle-Labrousse said to the judges “we've received some 1 million pages of documents. You have received not a million pages, because the Prosecutor hasn't sent you everything. The Chamber can certainly understand how difficult the situation is for us. I'd like to be very clear as regards the first chapter of the trial. The first chapter deals with the explosion, the victims, first of all, and then the technical aspects regarding the explosion itself. What I can say at this point to the Chamber is that it's extremely difficult to calculate exactly how many experts are going to be working for the Prosecution. We, on the Defense side, can afford one single expert. So yes, indeed, we've had to make choices. And for the time being, unless the financial situation of the Tribunal improves, in particular as regards the Defense, we, the Defense, simply do not have an expert in explosives. So yes, as regards the first chapter, we will be there, my team will be there to listen, to hear the experts produced by the Prosecution, the numerous experts who've been financed by the Office of the Prosecutor, which we were not able to do” (pp 25-26).

During the same Pre-Trial conference, Counsel Korkmaz said “we are not yet in possession of all of the evidence which we have called for. We have not been able to analyze it or have a counter-analysis produced. Our expert's contractual situation remains unresolved”⁷⁰.

On the other hand, the Prosecution was in possession of the Fact-Finding Mission, the UNIIC and the Lebanese judicial investigation files since March 2009 and the first STL prosecutor had served as commissioner of the UNIIC and had the time and resources to

⁶⁸ under Rule 20(A) of the Rules of Procedure and Evidence, headed 'Non-compliance by Lebanon with a Tribunal Request or Order'

⁶⁹ Prosecution Response to Sabra motion for stay of proceedings, October 28, 2013.

⁷⁰ Counsel Antoine Korkmaz on October 29, 2013 at the Pre-Trial Conference. Official Transcript page 23.

conduct further investigations and employ various experts in forensics, explosives and telecommunications.

The Prosecutor and his team also enjoy the support of the Lebanese government and a large local and international political coalition aimed, it may be inferred, at criminalizing Hezbollah and affirming its involvement in terrorism. The Defense, on the other hand, suffers from lack of resources, limited time for preparation and reticent Lebanese government cooperation.

Concluding notes

STL Defense counsels have been mainly confronted with the following difficulties:

- difficulties in obtaining co-operation from the Lebanese authorities;
- the massive volume of information and the large number of pieces of evidence and the disclosure that has taken place;
- inability to interview their own witnesses because their requests “remain without response”⁷¹.

The fact that the accused will be tried in absentia, and therefore will not have any contact with their counsels, exacerbates these difficulties.

If the primary objective of this tribunal is to reach a verdict before its mandate expires in 2015, then the arguments presented in this seminar may be dismissed. However, if the main objective is to attain justice, based on evidence beyond reasonable doubt, then these arguments merit attention because they are concerned with the fundamental principles of presumption of innocence, equality of arms between the prosecution and the defense, and the basic right of the victims and the accused to a fair trial.

The start of trial was initially set for March 25, 2013, however, Pre-trial Judge Daniel Fransen found that the Prosecution had not disclosed the entirety of the material to the Defense, and that the Defense has not been able to access certain material disclosed by the Prosecution “due to technical issues”⁷². Hence, he decided to set January 13, 2014 for the start of trial and then postponed it again for a few days. Counsel Korkmaz held that “On the 13th I would say the conditions are not at all satisfactory, they're not optimal, and they do not allow the Defense to fulfill its mandate in an effective way”. His colleague, Counsel Courcelle-Labrousse told the judges on October 29, 2013 that “Oneissi's Defense shall say to

⁷¹ Ibid. page 20.

⁷² “Pre-Trial Judge postpones trial date”, STL Press Release on February 22, 2013; <http://www.stl-tsl.org/en/media/press-releases/pre-trial-judge-postpones-trial-date>

you that, yes, we will be present on the 13th, since from what I've understood the trial is to start regardless"⁷³.

In conclusion, charges have been brought against five men, alleged to be members of an organisation declared terrorist by a number of important countries, and the trial is under way. The alleged evidence adduced by the Prosecutor is detailed and technical, if largely circumstantial. It is not that defense counsels are not disposed or qualified to challenge the indictment and its supporting elements, despite the fact that the conditions for the defense, in the first trial in absentia since the Nuremberg trials, are far from ideal. At the same time, however, one of the most voiced objectives of this tribunal is to end impunity for perpetrators of what are declared terrorist acts. I leave open the question whether such an aim should not require more rigorous compliance with the "highest international standards of criminal justice" (UN SC Resolution 1757/2007).

⁷³ Official STL Transcript of the Pre-Trial Conference held on October 29,2013, page 24.