

Special Tribunal for Lebanon Sentencing Judgment in the Ayyash Case

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By: Dr Joseph Rikhof

After his conviction for five separate crimes on August 20, 2020 as part of the killing in a bomb attack of Mr. Rafik Hariri, the former prime minister of Lebanon in 2005 (see here), Salim Jamil Ayyash was sentenced by the Trial Chamber of the Special Tribunal for Lebanon to five terms of life imprisonment to be served concurrently (see here, paragraph 307).

Introduction

Unlike the finding with respect to the substantive crimes in the conviction judgment, which relied for the most part on Lebanese law (see here, under “The general legal framework”), in the sentencing judgment, the Trial Chamber was of the view that the sentencing principles should primarily be based on the practice of other international courts and tribunals while using Lebanese practice as an secondary aid (paragraphs 77-79; this was based on the sequence set out in article 24(1) of the Statute of the Special Court (see here), which states:

The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.

The Trial Chamber was also of the view that other domestic sentencing practices, such as those of France and the United Kingdom, were inappropriate (paragraph 80). Last, by way of preliminary discussion, the Trial Chamber indicated that, unlike the laws governing the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC) and the Lebanese Criminal Code, the Statute of the Special Tribunal does not allow for penalties other than imprisonment, so that fines, freezing of assets or ordering compensation or reparations to the victims cannot be imposed. (paragraphs 106-112)

Sentencing principles – purpose of sentencing

The Trial Chamber, relying on the Security Council Resolution establishing the Special Court (resolution 1757, see here) and the jurisprudence of the ICTY, ICTR and ICC and at times of the Lebanese courts, was of the view that its sentencing purposes should be based on the concepts of retribution and deterrence, which in turn meant that a sentence must be proportional to the gravity of the criminal conduct. (paragraphs 121-122). While rehabilitation is a factor in Lebanese sentencing practice, it has not had a predominant role in international sentencing and should therefore be given minimal weight. (paragraphs 129-130)

In discussing the principle of deterrence, the Trial Chamber distinguished between individual deterrence (aimed at discouraging the convicted person from reoffending) and general deterrence (to ensure that other potential perpetrators are dissuaded from committing the same or similar crimes in the future) (paragraph 123) and expressed the opinion that in the circumstances of the case in question, “individual deterrence combined with a limited form of general deterrence is probably more realistic than general deterrence in its widest sense.” (paragraph 124). It came to this conclusion that:

"given the highly probable role of a state actor in this terrorist attack, the aim of wider general deterrence in sentencing here, insofar as it extends to the instigators of state sponsored crimes, is less likely to have the intended effect. In other words, this wider form of general deterrence may have less significance in crimes involving state actors where the risk of apprehension for the instigators is slight. Individual and a more limited form of general deterrence for people such as Mr Ayyash may be

more pertinent: a severe sentence may act as a warning to potential perpetrators who are engaged by state actors to commit acts of terrorism." (paragraph 126)

With respect to retribution, the Trial Chamber set out the following principles:
-retribution should not fulfil a desire for revenge;
-it should be expression of the outrage of the international community at the crimes committed;
-retribution requires the imposition of a just and appropriate punishment and nothing more;
-a proportionate sentence acknowledges the harm caused to the victims. (paragraphs 127-128)

The second factor, the expression of outrage of the international community was especially appropriate “in an attack against a political figure that achieved its intended destabilising effect in spreading terror in Lebanon for political reasons.” (paragraph 127)

Sentencing principles – sentencing factors

Article 24(2) of the Statute for the Special Tribunal says this about sentencing factors: “In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person” (see here) while Rule 172(B) of the Rules of Procedure and Evidence mentions the following factors:
“(i) any aggravating circumstances;
(ii) any mitigating circumstances, including substantial cooperation with the Prosecutor by the convicted person before or after conviction;
(iii) the general practice regarding prison sentences in Lebanon;
(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.” (see here)

Gravity is the primary factor in sentencing the crimes for which the Special Tribunal has jurisdiction. As well, “the assessment of gravity includes the inherent gravity of the crime and the Accused's criminal conduct -in its form and the degree of participation- and the impact of the crimes on the victims. The gravity of the crime must be considered in light of the specific circumstances of the case.” (paragraphs 168-169) With respect to the gravity of the crime, terrorism is considered one the most serious crimes (paragraph 170) while other factors to be considered for gravity are the consequences of the crimes for the victims who were directly injured, the effects on their immediate families (paragraph 173) and the accused’s degree of participation in the crimes (paragraph 175).

The Trial Chamber came to the conclusion that the gravity requirement was met because

"apart from the effects on the immediate victims, direct and indirect, the Lebanese population was collectively harmed by this reprehensible attack on their system of government. Lebanon is a parliamentary democracy in which its politicians and leaders should be removed by the ballot box rather than by the bullet or bombs in terrorist explosions. Mr Hariri in 2005 was a prominent opposition member of parliament and the leader of a parliamentary bloc. The attack was aimed at eliminating a leading political figure, a former prime minister who was to be a candidate in the 2005 parliamentary

elections. It undermined the foundations of the Lebanese state." (paragraphs 176-178)

In addition to the *aggravating factors* set out in the Lebanese Criminal Code, including the death of one or more people and the partial destruction of buildings having one or more people inside in relation to terrorism and premeditation and the use of explosives in relation to the crimes of intentional homicide and attempted intentional homicide (paragraph 185), the Trial Chamber also noted international sentencing practice recognition of a wide range of aggravating factors in sentencing, such as:
-premeditation;
-motive;
-long term impact on the victims;
-abuse of power or official capacity;
-prior convictions;
-circumstances where a victim is particularly defenceless or which involved particular cruelty;
-multiple victims. (paragraphs 180-182).

Applying primarily the factors from the Lebanese Criminal Code to the situation at hand, the Trial Chamber found that the use of explosives could not be applied as it was not proven that Ayyash knew the type or quantity of the explosives to be used in the attack (paragraph 196) nor could the intention to spread terror be used as that had already been part of the findings in the conviction judgment that the attack was terrorist in nature. (paragraph 199) However, there had been numerous victims who had died, were injured or who suffered long-term and continuing effects, which could be considered as an aggravating factor. (paragraph 198)

Mitigating circumstances, which are potentially applicable under international criminal law include voluntary surrender; the expression of remorse or compassion towards victims; and good character with no previous convictions. Mitigating factors will not lead to an automatic reduction of a sentence, and a life sentence may be imposed if the gravity of the offence warrants it. (paragraph 200) The Trial Chamber was of the view that there were no mitigating circumstances in this case. (paragraph 201)

There was very little relevant evidence in regards to Ayyash's *individual circumstances*. The only possible issue was the fact that he had had one conviction in the past, which had been expunged as a result of which it was disregarded for the purposes of sentencing. (paragraphs 202-205)

The question of separate sentences or a single sentence

Rule 171(D) of the Rules of Procedure and Evidence states: "The Trial Chamber shall impose a sentence in respect of each count in the indictment upon which the accused has been convicted and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused." (see here)

The Trial Chamber assessed both Lebanese and international sentencing practice with respect to this question. (paragraph 221). After canvassing both the Lebanese law (paragraphs 222-225) and Lebanese jurisprudence (paragraphs 226-231) it came to the conclusion that Lebanese courts have generally imposed a single sentence for multiple convictions for intentional homicide or attempted intentional homicide of multiple people; this was usually done in the form of first imposing separate sentences for each crime but then deciding that these sentences should be served concurrently with the heaviest possible sentence to be actually carried out. International practice varies in that the ICTR and ICTY generally imposed single sentences at both the trial and appeal level since the crimes mentioned in the indictments tended to blend into one large fact situation which were difficult to separate for sentencing purposes, as long as the reasoning for imposing a single sentence is sound and not arbitrary. (paragraphs 232-236) On the other hand, the Special Court for Sierra Leone preferred to impose concurrent sentences. (paragraph 237)

The Trial Chamber eventually decided to impose separate sentences for each of the five counts, for which Ayyash had been convicted for a number of reasons, namely:
-to reflect culpability in a precise manner;
-each of the crimes were serious enough to justify the maximum penalty;
-imposing a separate sentence for each crime allowed the public to understand that each crime is by itself grave;
-imposing separate sentences also had the advantage, in the event of an appeal, of allowing the Appeals Chamber to address the penalty imposed for each crime without having to engage in an appellate resentencing by attempting to separate the criminal conduct reflected in individual counts. (paragraphs 238-241)

The appropriate sentence

The Trial Chamber was of the view that the only appropriate sentence for Ayyash was the maximum available for each count, namely life imprisonment, for a number of reasons: not only was he a co-perpetrator of serious terrorist attack against the Lebanese people causing mass murder, but there were also the aggravating circumstances of killing a large number of people, wounding even more, destroying property and using explosive materials, all with premeditation; while at the same time, there were no mitigating circumstances. (paragraphs 249-258)

Compensation for the victims of the attack

The Trial Chamber noted that The Special Tribunal, unlike the ICC, had no statutory compensatory or reparations mechanism. However:

"While the Statute does not authorise the Trial Chamber to make financial orders against a convicted accused person, such as to pay compensation or reparations to a victim of crimes within its jurisdiction, it does not expressly prohibit the Special Tribunal from establishing or administering any such scheme that does not involve making orders against a convicted person. Further, in addition to

imposing sentence, the Trial Chamber may make relevant recommendations on matters of concern that it has encountered in the proceedings." (paragraph 275)

As a result of this desire and based on general principles of international law, specifically the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (see here), the Trial Chamber recommended that Lebanon should establish statutory mechanism to compensate victims of crimes (paragraphs 281-284) or, in the words of the Trial Chamber:

"In these circumstances, and having heard the evidence of some participating victims and Professor Letschert, the Trial Chamber is firmly of the view that it has a moral and legal duty to the victims of crimes found to fall within the Special Tribunal's jurisdiction to do anything it can to help them obtain redress. However, it has no power to make formal orders against Mr Ayyash or the Government of the Lebanese Republic. All it can do, in an attempt to ensure the consistent application in Lebanon of the UN Basic Principles, and thus fairness to the victims, is to make recommendations." (paragraphs 294 and 308)

In addition to setting up such a mechanism, the Trial Chamber also recommended that the Special Tribunal establish a special trust fund to compensate the victims of the crimes; such a fund should be administered by the Special Tribunal's Registrar and international trustees, who should decide a form of just compensation for any recognised victim of such an attack. International donors should fund the trust fund. (paragraphs 299-302 and 308)

Surrender of Ayyash

Last, the Trial Chamber implored that “those who are shielding Mr Ayyash from justice should surrender him to the Special Tribunal”. (paragraph 306)

Conclusion

The imposition of a life imprisonment for Ayyash for the heinous attack in April 2005 was carried out in accordance with the principles of fair sentencing as established in international criminal law as observed and applied by the Trial Chamber in this case. It is interesting to see that Ayyash joins a relatively small group of perpetrators who have received such a heavy sentence, namely 18% of all persons convicted by international criminal institutions since the Second World War (see Einarsen and Rikhof, table 10 on page 188). What is even more interesting is that this type of sentencing has more often been imposed by those institutions on persons who wielded a great deal of power in situations of ongoing serious international crimes and less so for persons at a lower level in a hierarchy or who acted in a more direct manner (see Einarsen and Rikhof, table 10 on page 188 as well as pages 191-192) and in single attacks, like Ayyash.

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About the author

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