

Special Tribunal for Lebanon Appeals Chamber enters convictions for two accused acquitted at trial

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By: James Hendry

The Appeals Chamber for the Special Tribunal for Lebanon reversed the acquittals of two accused, Hassan Habib Merhi and Hussein Hassan Oneissi, in the Prosecutor's appeal from the Trial Chamber (paragraph references are to the decision here, unless otherwise noted). They were convicted of the

following crimes for their roles in the murder of the former Prime Minister of Lebanon, Rafik Harari, his entourage and harm to 226 others on February 14, 2005: being co-perpetrators in a conspiracy aimed at committing a terrorist act; being accomplices to the felony of committing a terrorist act; being accomplices to the felony of intentional homicide; and being accomplices to the felony of attempted intentional homicide (para. 654).

Earlier, the Trial Chamber had convicted Salim Jamil Ayyash as the main actor in the attack on charges of participating in a conspiracy aimed at committing a terrorist act; committing a terrorist act by means of an explosive device; the intentional homicide of the former Lebanese prime minister with premeditation by using explosive materials; the intentional homicide of an additional 21 people with premeditation by using explosive materials; and the attempted intentional homicide of 226 people with premeditation by using explosive materials (Trial Chamber decision here, authoritative summary here and sentencing decision here, Appeals Chamber decision that an appeal filed by *defence counsel* for Ayyash tried *in absentia* was inadmissible here). This Journal published accounts of these proceedings (the decision and applicable law here, the telecommunications evidence here, and the sentence here).

Trial in absentia

The trials took place in absence of the accused as allowed by Article 22 of its Statute (here) and Rules 105bis-109 of the Rules of Procedure and Evidence with full procedural protections as if they were present (here). This novel provision among the statutes of international criminal tribunals provides that the absent accused are entitled to request a retrial should they appear in person (Article 109). The Appeals Chamber said that allowing for a trial without the accused being present ensured justice for victims, social peace and prevented obstructing justice (paras. 8 and 25).

While an accused tried *in absentia* has the right to a retrial in person or appeal, the Appeals Chamber held that defence counsel have no right to file an appeal without an appearance by the accused, but the Prosecutor has the right to appeal the judgment (here, paras. 51-4).

The appeal

The Prosecutor appealed the acquittals of Merhi and Oneissi, largely for their part in the conspiracy by creating a false attribution of responsibility for the attack deflecting attention from the real conspirators to a fictitious fundamentalist group called “Victory and Jihad in Greater Syria” by way of a videotape of a Palestinian man, Abu Adass who disappeared shortly after the attack, and by calls to Reuters and Al-Jazeera.

The Appeals Chamber noted that its job was to decide whether the Trial Chamber committed errors of law invalidating the decision or errors of fact occasioning a miscarriage of justice (para. 14, Statute Article 26). It concluded the Trial Chamber had interpreted the rules of circumstantial evidence correctly, but that it erred in fact on critical points concerning Mehri and Oneissi’s involvement in the attack and had erred in law and fact on elements of conspirator and accomplice liability.

The telecommunications evidence was circumstantial

To recapitulate the earlier article in this Journal on the telecommunication evidence (here), experts sifted though billions of cellphone calls records to find patterns in the activation of cellphone towers that co-located with the routes that Harari took around Beirut and cellphones that followed them. These patterns revealed that there were a series of “covert networks” of cellphones, where the patterns showed that they were surveilling Harari’s movements, while other patterns frantically concentrated on the location of the attack and, in the case of Mehri and Oneissi, the patterns concentrated on the location from which the false attribution of liability was created and later made known to the news organizations. The Prosecutor argued the attack was prepared and carried out by covert networks of individuals using cell phones formed a hierarchy and were colour-coded for the purposes of presenting evidence, for example, the “Green network” was the directing mind at the top and the “Purple network” was engaged with the false claim. The networks were themselves identified by evidence showing similarities such as the provenance of the SIM cards, the intensity and timing of recharge payments for the service and most importantly, the timing of communication between members and the simultaneity of their terminating after the attack. The network cellphones were co-located with the accused by means of activations of cell towers at the same time and place as personal cellphones along with some evidence of the identity of movements of the accused. Many of the network cellphones could not be co-located with individuals who then remained anonymous.

The law of circumstantial evidence

The Prosecutor alleged several errors in the Trial Chamber’s treatment of circumstantial evidence which formed almost the entire case against the accused. The Appeals Chamber responded with a primer on the subject.

The Appeals Chamber dismissed the Prosecutor’s argument that the Trial Chamber did not give circumstantial evidence the same weight as direct evidence (para. 57). It noted that the criminal burden of proof beyond a reasonable doubt had to be met by both kinds of evidence, and that standard is met by circumstantial evidence by asking whether it leads to only one reasonable inference (para. 95). It held that such inferences must be narrowly construed and, that where they were based on intermediate inferences, these too must be the only reasonable ones from the circumstantial evidence, all as required by the *in dubio pro reo principle* of criminal law (in doubt, for the accused) (para. 108). It held that the Trial Chamber had erred on some abstract points, such as noting corroboration was more desirable for circumstantial evidence, but that it had not erred in generally giving it less weight. In fact, Ayyash had been convicted on it. The Appeal Chamber also held that the Trial Chamber erred in applying the reasonable doubt standard to the assessment of whether items of evidence corroborated each other, though this did not invalidate the decision (paras. 116-7). It noted that assessing the need for mutual corroboration was simply part of the discretionary process of weighing the evidence. It also held that the Trial Chamber had erred when applying the criminal standard to facts that it had recognized did not need to be proved beyond a reasonable doubt, that is, facts not material to the elements of the crimes, the mode of liability, and ultimately, the

accused's guilt and sentence, though this error had not invalidated its decision (paras. 116, 120). The Appeal Chamber noted that there is a presumption that the trier of fact evaluated all the evidence before it; that it need not refer to each item of evidence if there is no indication that it disregarded a piece of evidence; and, that it must assess the evidence holistically and proper context (paras. 155, 157).

These issues were raised in the context of evidence tendered by the Prosecutor as inferences that must be drawn from the inactivity of the Purple phones on January 16, the meaning of increased Green network frequency of calls from January 12-16, calls between Mehri, Oneissi and the other Purple 018 (alleged, but not proved at trial to be used by another accused, Assad Hassan Sabra) on the day of the attack, calls between Mehri and Ayyash on their personal phones a few days before the attack, calls made near the payphones to news services and their *modus operandi*, the place where the video of the false claim of liability was left to be picked up and the almost simultaneous deactivation of the Purple cellphones two days after the attack.

Witness statements

The Appeal Chamber ruled on an issue common to international tribunals when it held that Rule 158, providing that reliable evidence in written statements or transcripts of witnesses who have died is admissible, must be corroborated by tested evidence if it is to establish a conviction (para. 202). However, the Appeals Chamber held the Trial Chamber had erred by refusing to admit it based only on a challenge by the defence and further, that it erred in refusing to admit Rule 158 evidence if it was corroborated by other Rule 158 evidence alone, though neither error invalidated the Judgment (paras. 205-6).

Mehri was part of the Green network of cellphones

The Appeal Chamber overruled the Trial Chamber and found that Mehri was the user of Green 071 which the Prosecutor had argued was (and later found by the Appeal Chamber to be) the directing network of the attack, and the false claim (para. 305). The Prosecutor initially failed to persuade the Appeal Chamber that the Trial Chamber had set a specific number of SIM card co-locations of personal cellphone calls to Mehri and Green 071 in order to attribute it to him (para. 220). However, the Prosecutor did persuade the Appeals Chamber that the Trial Chamber had erred in fact causing a miscarriage of justice by mistaking the night and daytime windows for counting cellphone calls, changing the number of times Green 071 activated a cell tower near the place where Mehri worked and where that cellphone activated a cell tower near where he stayed at night, increasing the strength of the inference that he was the user of that Green network cellphone (paras. 279-80). Finally, the Appeals Chamber not only found there was evidence of co-location between Mehri's Purple 231 and a "Grey" cellphone used by Mehri and Green 071, not only in quantity of paired calls and common movement between two cell towers activated where he was during the day window and in the south of Beirut where Mehri was during the night window, but that the evidence, taken in its totality, made it the only reasonable inference from the circumstantial along with the geographic evidence. Thus, the Trial

Chamber had acted unreasonably in not finding that Mehri was the user of Green 071 (para. 304).

However, the Appeal Chamber next rejected a number of intermediate grounds of appeal raised by the Prosecutor who was attempting to establish the Green network of cellphones coordinated both the attack and the false claim of responsibility. The Trial Chamber had found that Ayyash used Green 300 and Badraddine (an accused who died in 2016) used Green 023. As noted, the Appeal Chamber found Mehri the user of Green 071 and was in contact with Oneissi in making the false claim of responsibility.

Connecting the attack with Hezbollah

The Prosecutor then went on to convince the Appeal Chamber, largely on evidence from newspaper and television reports, that the Trial Chamber reached an unreasonable conclusion in not finding Badraddine was a Hezbollah military commander in 2004-5 (para. 401). This was important because the Appeal Chamber then found that the Trial Chamber unreasonably erred in failing to find that the Green network was a Hezbollah network, based on the totality of evidence from statements that corroborated each other on the point that Ayyash and Badraddine's Green cellphones connected with another Hezbollah cellphone network under investigation by Lebanese Internal Security Forces (paras. 429-431). Harari was a known opponent of Hezbollah in Syria.

Strengthening the cellphone network evidence

In the next step to overturn the Mehri and Oneissi acquittals, the Prosecutor convinced the Appeals Chamber that the Trial Chamber had erred in fact causing a miscarriage of justice in finding that the coverage of cell towers was much broader than the evidence showed it to be (para. 476). This meant that the location of cellphones activating the cell towers was more accurate than the Trial Chamber found it to be throughout its Judgment (para. 471). The same error applied to its location of the Purple cellphones at the site of the payphones and the videotape used to make the false attribution of liability after the attack were located (para. 473). The Appeals Chamber then held that the cell tower activation evidence was sufficiently reliable to determine the general location of Oneissi and the unknown Purple 018 at that time (para. 474).

The Prosecutor then convinced the Appeals Chamber that the Trial Chamber erred causing a miscarriage of justice in finding that the cell network congestion following the attack affected the reliability of cell site analysis to prove general location and movements of cellphones (paras. 502-506).

These findings strengthened the evidence of the location of the various cellphones involved in the conspiracy.

The Appeals Chamber then concluded that the Trial Chamber erred by making a finding that no reasonable trier of fact could have made by failing to find that Merhi and Oneissi participated in the false claim of responsibility which was determinative in their acquittals (paras. 545-7). It found that the

cellphone call patterns proved Oneissi and the user of Purple 018 made the false claim under the direct supervision of Mehri (para. 533). The activations of the cell towers near the payphones and videotape location by Oneissi and Purple 018 was not a coincidence and there was no reasonable explanation for the intense exchange of calls between Mehri, Oneissi and Purple 018 after the attack other than their participation in the false claim (para. 523). This conclusion was also the only reasonable inference from the exceptional activities of the Purple phones during a period in late 2003 and early 2004 when they activated a series of cellphone towers designated by a “COLA” prefix near a mosque where Abu Adass who appeared in the false claim video was selected (see Trial Judgment, paras. 5170-1 and following) demonstrating that Oneissi and Purple 018 were preparing the false claim (paras. 523-5, 528-9, 538) and evidence of the simultaneous deactivation of the Purple cellphones after the attack.

However, the Appeals Chamber did not find that cellphone contacts between Mehri and Ayyash connected Mehri to the conspiracy other than to the false claim (para. 541-2). However, in summarizing its decision, the Appeals Chamber noted that the Trial Chamber had found that the Red, Yellow, Green, and Blue Networks were connected and further that some of their users had a common mission in assassinating Hariri. Then, the Appeals Chamber said that its finding that the Green network was a covert Hezbollah network, which included Badreddine, Ayyash (who was convicted of participating in the surveillance of Hariri and coordinating those who physically carried out the attack because he belonged to the Red, Blue, and Yellow networks) led to the conclusion that the Green network was used to coordinate the other networks in preparing for and executing the attack; that its members were Badreddine, Ayyash, and Merhi; and, that the Green network was a covert Hezbollah network acting as the mission command of the attack (para. 627). The Appeals Chamber held that this meant Mehri was guilty of the crimes alleged (para. 544). (Interestingly, the Appeals Chamber had earlier held that its conclusion that the Green network was a Hezbollah network had left open the issue of whether it coordinated the overall conspiracy (paras. 433-4)). The intervening discussions about the accuracy of the telecommunications evidence focused on the false claim, the focus of the charges against Mehri and Oneissi, and not the role of the Green network.

Errors of law in the elements of the crimes charged

The Appeals Chamber also found errors of law in the elements of the crimes and modes of liability in the Trial Judgment. As noted above, the applicable law was set out in an earlier article in this Journal (here).

With respect to the conspiracy charges to commit a terrorist act against Mehri and Oneissi, the Appeals Chamber dealt with the Prosecutor’s appeal on the first element of the crime of conspiracy to commit a terrorist act, that is the agreement on the means to be used to commit the crime (para. 531).

The Appeals Chamber held that the Trial Chamber erred in holding that the conspirators must have known the identity of the target’s identity in addition to the means liable to create a public danger because the identity requirement unduly added to the elements of the crime (paras. 571-2, 578). The

Appeals Chamber also found that the Trial Chamber erred in holding that all conspirators must have known the means liable to create a public danger would be used to create a state of terror (paras. 576, 578). However, it did not err in requiring proof of material facts specified in the Indictment that the conspirators had agreed that a large explosive device would be used and would kill and injure people. Such “means” were encompassed by the elements of the crimes such that the use of such a device in a public place in this case would constitute “a means liable to create a public danger”. Additionally, the Trial Chamber’s failure to find Oneissi had delivered the false claim, directly or indirectly, under the direction of Mehri meant that its error of law on the element of conspiracy invalidated the Judgment (para. 579).

The Appeals Chamber also held that the Trial Chamber erred in the law governing accomplice liability for a terrorist act and intentional homicide by requiring that it had to be proved that Mehri and Oneissi must have known that Harari was the target of the act (paras. 610, 615). For the charges related to terrorism, it was sufficient to demonstrate the accomplice knew the perpetrator would use means liable to create a public danger with the intent to cause terror (para. 607). However, as with the charges of conspiracy, the proof of the material facts in the Indictment that the explosive device would be large and would kill or injure people did not result in an error of law because they were proof of elements of terrorism and accomplice liability for it in the Indictment (para. 611). Similarly, the Trial Chamber erred in law in holding, in addition to the fact that the accomplices knew they were assisting in killing someone, that they knew the identity of that person (paras. 613-5). The Appeal Chamber held then that the fact that the Trial Chamber erred in failing to find Oneissi delivered the false claim under the direction of Mehri, the error of law on the elements of accomplice liability invalidated the judgement (para. 619).

The Appeal Chamber finally reviewed the charges against Mehri and Oneissi: conspiracy aimed at committing a terrorist act, being an accomplice to the felony of committing a terrorist act by means of an explosive device, being an accomplice to the felony of intentional homicide of Hariri and 21 other persons with premeditation by using explosive materials and being an accomplice to the felony of attempted intentional homicide of 226 persons with premeditation by using explosive materials. Mehri directed Oneissi in creating and disseminating the false claim of responsibility to shield the perpetrators of the attack from justice. The Appeals Chambers agreed with the Trial Chambers that a terrorist act, intentional homicide and attempted intentional homicide had been committed. The shielding of the perpetrators by the false claim established the objective element of being an accomplice to terrorism and intentional homicide. The objective element of attempted intentional homicide against the 226 persons was established because the victims died in circumstances beyond Mehri and Oneissi’s control and that they did not voluntarily withdraw from the commission of the crime. Mehri’s leading role in directing the false claim and the speed with which Oneissi acted on those directions prove that both knowingly and willingly entered into an agreement to participate in a terrorist act of assassinating Harari. Thus, both the objective and subjective elements of the crime of conspiracy to commit a terrorist attack and the subjective element of being an accomplice to a terrorist act and the intentional homicide of Harari were proved. The knowledge that Mehri and Oneissi had of

the attack because of their roles in the conspiracy provided foreseeability of other deaths that might be the result of the terrorist act and therefore proof of the subjective element of the intentional homicide of the 21 others who immediately died in the attack and the 226 of those injured in the attempted intentional homicide (paras. 640-50).

Conclusion

Since the establishing of the Special Tribunal for Lebanon by Security Council Resolution 1757 of 2007 (here) by agreement between the UN and the government of Lebanon to seek the truth and hold those responsible for the terrorist attack killing Prime Minister Harari and many others, the Appeals Chamber's ruling brings the total of those found guilty of the crimes to three. Has this outcome been worth the hundreds of millions spent in investigating and litigating the case? The answer should be yes. It is very important as violence is used to press ideological agendas, that those who kill, main and destroy should not be immune from personal, criminal liability for what they have done. Justice is done for all the world to see.

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About the author

James HendryJames Hendry is a lawyer who was in private practice until becoming counsel to the Canadian Human Rights Commission in 1984. He joined the Department of Justice in 1989 where he was General Counsel until retirement in 2011 working in civil Charter social policy review, specializing in equality rights, and human rights legislation and human rights act design. He was Research Director with the Canadian Human Rights Act Review Panel and a Visiting Scholar at Harvard Law School on a Canada-U.S. Fulbright Scholarship studying equality rights. He has published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong. He has taught Constitutional Law and Charter at the University of Ottawa, Faculty of Law and currently co-teaches a course on "Writing for Social Justice." He has lectured on the Charter, International Human Rights and Aboriginal Rights at Carleton University. He was an Editor and the Editor in Chief of Federated Press' Charter and Human Rights Litigation journal from 1993 to 2016.

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