

mastermind of a terrorist incident in which thousands of people perished could never face justice. Anyone who allegedly conspired to commit genocide with a deceased, or even an absent long on the run accused, could never be tried, whatever the strength of the evidence against the alleged genocidaire.

10. There is nothing legally special about Mr Badreddine and his pleaded role in the crimes charged. He is no more than an unindicted former co-accused, whatever may have been his position in Hezbollah, and at any time.

11. Conspiracy requires an agreement between at least two people. If a court legally cannot find its existence merely because only one conspirator is before the court, this novel way of viewing accessorial liability, if it gained acceptance, would mean that the charge would always fail. Had Mr Ayyash been the only other person alleged on the Prosecutor's indictment to have conspired with Mr Badreddine, on the position advocated in the dissent, the charges would fail on that basis alone. He could never have been brought before a court anywhere.

12. Thus, on that view, termination of the charges against the one who was no longer before the court would automatically terminate the proceedings against the other. To put it another way, when Mr Badreddine's name leaves the indictment, he takes Mr Ayyash's with him. This illustrates quite simply the logical but inevitable consequence of following the approach of the dissent. Respectfully, I disagree with its legal foundations and the unintended legal and social consequences that would flow from applying it. These must be contrary to public policy in bringing suspected perpetrators of crimes to justice.

C. The 'four generals' and the UN and UNIHC's public silence—the case of Jamil El-Sayyed

13. Between August and October 2005, eight Lebanese nationals were arrested, ostensibly in connection with the attack on Mr Rafik Hariri. They were detained for a lengthy period without charge or the notification of a trial date. Four of these were senior Lebanese officials, who came to be known as the 'four generals'. These were General Jamil El-Sayyed, General Raymond Azar, General Ali El-Haj and General Mustapha Hamdan.² They were released only in the month

² There are variations in the spellings of these names in their transliteration from Arabic into English.

following the Special Tribunal for Lebanon's establishment, pursuant to an order of its Pre-Trial Judge, issued on 29 April 2009.

14. Mr El-Sayyed was the director of the Lebanese *Sûreté Générale* between 1998 and 25 April 2005, and was imprisoned and held without charge by first the UNIIC and then the Lebanese authorities between 30 August 2005 and his release on 29 April 2009, a period of three years and eight months.³ His initial arrest and subsequent detention, however, was according to either a 'warrant' or a 'recommendation' of the first UNIIC Commissioner, Mr Detlev Mehlis.

15. Mr Mehlis was appointed by the UN Secretary-General as the first UNIIC Commissioner in May 2005 and remained in the position for less than a year, until January 2006. He produced two reports for the Security Council, in October and December 2005.

16. Mr Serge Brammertz, who was the UNIIC Commissioner from 11 January 2006 until 1 January 2008, succeeded him. The third UNIIC Commissioner was Mr Daniel Bellemare, who remained in that post until the UNIIC ceased operation on 28 February 2009. The following day he became the Prosecutor of the newly established Special Tribunal for Lebanon.

17. Mr Mehlis's first report to the Security Council, issued on 19 October 2005, accused the four generals of being among the main organizers of Mr Hariri's assassination, stating:

On 30 August 2005, the Lebanese authorities arrested and detained four high-level officials of the Lebanese security and intelligence apparatus, pursuant to arrest warrants issued by the Lebanese Prosecutor General based on recommendations from the Commission that there was probable cause to arrest and detain them for conspiracy to commit murder in connection with the assassination of Rafik Hariri.⁴

18. The lengthy detention without charge of the four generals and four others was the subject of a referral to the UN Human Rights Council's Working Group on Arbitrary Detention (WGAD)

³ Jamil El-Sayyed, T. 5 June 2018, pp 2-3, 67, 86. Mr El-Sayyed testified from 5 to 7 June 2018. *See also* Order regarding the detention of four Generals.

⁴ S/2005/662, Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005), Detlev Mehlis, Commissioner, Beirut, 19 October 2005, para. 174. The Trial Chamber, on the application of the Defence of Mr Assad Hassan Sabra that had requested that it admit each in its entirety into evidence, examined all the UNIIC reports in deciding the application; *for example*, F2722, Decision on Agreements as to Evidence Between Prosecution and Sabra Defence on United Nations Fact-Finding Mission and UNIIC Reports, 16 September 2016.

in 2007. The Working Group investigated the circumstances surrounding their arrest and detention, and communicated with the UNIIC—which was another UN agency—and the Lebanese government about what had and was occurring. It reported in its Opinion 37/2007 that:⁵

The deprivation of liberty of Jamil El Sayed, Mustapha Hamdan, Raymond Azar and Ali El Haj, Ayman Tarabay, Mustapha Talal Mesto, Ahmad Abdel Aal and Mahmud Abdel Aal is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights, to which Lebanon is a party, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.⁶

19. Relevant to Mr El-Sayyed's case, the Working Group in its report outlined the following background facts:

- On 30 August 2005, at 5:30 a.m., patrols came to Mr El-Sayyed's home with an order signed by Mr Mehlis, describing Mr El-Sayyed as a 'suspect'. He was taken to the UNIIC headquarters and interrogated in the absence of a lawyer. He was then placed in detention at the ISF (Lebanese Internal Security Forces) headquarters;⁷
- On 1 September 2005, he was taken to the UNIIC headquarters and confronted with a witness, in the presence of his lawyer and UNIIC investigators. The interview was recorded and filmed. 'The witness had his head covered by a bag, apart from his eyes. The witness affirmed that General El Sayed had visited Damascus seven times between November 2004 and February 2005 for meetings with the Chief of the Syrian Presidential Guard and the head of the Syrian intelligence services to plan the assassination of President Hariri and that on the last occasion he had been accompanied by General Mustapha Hamdan, at that time Chief of the Lebanese Presidential Guard';⁸

⁵A/HRC/10/21/Add.1 Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Opinions adopted by the Working Group on Arbitrary Detention 4 February 2009, Opinion 37/2007, para. 101, stating that:

'General Al-Sayyed, according to the witness, cooperated closely with General Mustapha Hamdan and General Raymond Azar in the preparation of the assassination of Mr. Hariri. He also coordinated with General Ghazali (and, among others, people from Ahmad Jibreel in Lebanon). General Hamdan and General Azar provided logistical support, including money, telephones, cars, walkie-talkies, pagers, weapons, identification cards, etc'. The communication of the opinion was 'addressed to the Government on 27 April 2007'.

⁶ WGAD report, para. 47.

⁷ WGAD report, para. 10.

⁸ WGAD report, para. 12.

- Mr El-Sayyed denied these meetings and requested more details on their dates. He invited the investigators to check every date in his diaries. The masked witness was unable to specify any of the dates of the seven alleged meetings. Mr El-Sayyed remained in detention at UNIIC's disposal on the basis of a verbal order notified to him by one of the investigators on the night of 30 August;⁹
- On 3 September 2005, he was brought before the Lebanese examining magistrate, who subjected him to a purely formal interrogation which did not last more than one hour. Following this investigation, the magistrate issued a warrant for his detention;¹⁰
- From 3 September to 19 October 2005, five interrogation sessions took place with UNIIC investigators. Each time that the investigator alluded to an individual, Mr El-Sayyed 'asked to be confronted with this individual, and the question was immediately shelved';¹¹
- The accusations against Mr El-Sayyed were based primarily on the declarations of two individuals (identified as 'witnesses'). 'The first, Mr. Hussam Hussam, is probably the masked individual with whom Mr El-Sayyed was confronted on 1 September 2005.' On 27 November 2005, the witness withdrew his declaration at a press conference;¹²
- On 19 January 2006, Mr El-Sayyed was taken to the UNIIC headquarters for interrogation;¹³
- On 15 March 2006, the third UNIIC report, Mr Brammertz's first, was published. It did not mention Mr El-Sayyed. Neither did the fourth and fifth UNIIC reports of 6 June and 25 September 2006;¹⁴
- On 7 and 8 April 2006, and at his request, UNIIC had a 'discussion' with Mr El-Sayyed '(the investigator refuses to describe the session as an interrogation)'. This discussion is to date his only discussion with the present UNIIC officials;¹⁵

⁹ WGAD report, para. 12.

¹⁰ WGAD report, para. 13.

¹¹ WGAD report, para. 14.

¹² WGAD report, para. 15.

¹³ WGAD report, para. 16.

¹⁴ WGAD report, para. 17.

¹⁵ WGAD report, para. 18.

- On the basis of this discussion, Mr El-Sayyed presented a statement on 23 May 2006, requesting UNIIC to revoke its recommendation to keep him detained. On 6 June 2006, UNIIC replied, ‘indicating that all the questions raised in the statement fell within the exclusive competence of the Lebanese judicial authorities’;¹⁶
- On 20 June 2006, Mr El-Sayyed’s lawyers requested the examining magistrate to withdraw the warrant for his detention. The request went unanswered, so on 12 October 2006, Mr El-Sayyed lodged a further application with UNIIC to revoke its detention recommendation. On 24 October 2006, Mr Brammertz stated that the Lebanese authorities had exclusive competence to deal with any questions of detention;¹⁷
- Mr El-Sayyed presented an application for release on 25 March 2007;¹⁸

The Working Group also found:

- ‘The Lebanese examining magistrate responsible for the case acknowledges that he has no evidence against General El Sayed or against the other detainees but has to date not taken any decision pending completion by the International Investigation Commission of its investigations and its transmission to him of details concerning the detainee. Mr. Brammertz’s report dated 12 December 2006 indicates that the International Investigation Commission has transmitted to the Lebanese courts information on the individuals who are in detention, being aware that this can help the Lebanese authorities take the steps which they deem appropriate or necessary concerning their detention, and reaffirms the exclusive responsibility of the Lebanese courts for decisions relating to the detention of these persons’;¹⁹
- ‘In its response, the Government states that it cannot be held liable for any violations that may have occurred in regard to the investigations conducted by the International Investigation Commission, in particular those concerning the interrogation of Jamil El-Sayed carried out by the international investigator in the absence of his lawyer and without

¹⁶ WGAD report, para. 19.

¹⁷ WGAD report, para. 20.

¹⁸ WGAD report, para. 21.

¹⁹ WGAD report, para. 26.

his having been informed of this right. The Government contends that the Lebanese authorities and courts have no connection with investigative acts of the International Investigation Commission’;²⁰ and

- ‘A real grey area exists regarding which authority considers itself competent to rule on the judicial situation of these detainees. According to the information obtained by the source, the Investigation Commission states that it is the Lebanese courts that are competent to decide on questions of detention. This position was reaffirmed in Commissioner Brammertz’s last report dated 12 December 2006’.²¹

1. Mr El-Sayyed’s testimony in the trial

20. Mr El-Sayyed testified during the trial for the defence of Mr Hussein Hassan Oneissi and described the circumstances of his arrest and detention without charge.

21. In preparation for Mr El-Sayyed’s testimony, I viewed a video recording of the UNIIC investigator’s interview with him of 2 September 2005. It had been disclosed to the Trial Chamber in advance of Mr El-Sayyed’s evidence for its possible use during his testimony, but ultimately was not used in court nor admitted into evidence.²² It was a strange sight, especially when it became evident that Mr El-Sayyed recognised the voice coming from under the paper bag.

22. When Mr El-Sayyed testified, as Presiding Judge, I made the following introductory comments to him, which put on the record some disturbing aspects of his treatment by UNIIC officials when he was in its custody:

I’d also note from a transcript of a recording of a suspect statement on the 2nd of September 2005, where you were interviewed by the United Nations International Independent Investigations Commission, that you participated in what in international terms is a fairly bizarre procedure, in which a witness was brought in to confront you with a bag over his head and holes cut for his eyes, and an investigator then spoke to you in English in a lengthy

²⁰ WGAD report, para. 27.

²¹ WGAD report, para. 7.

²² R128-4-0046, disclosure 3521, transcript of recording suspect statement, 2 September 2009, ERN 10009238C-10009238C_TS_D_EN_AR.

conversation afterwards and treated you, I would assess, as very badly and in a very unprofessional manner.

It was quite extraordinary that an investigator would speak to you in that manner, especially when you're in custody at the time as a prisoner, and he basically accused you of lying.

Just to give some context to it, I put this on the record to give some context to your evidence here. After you were arrested, I think, on the 30th of August 2005, the transcript shows -- I viewed the video, too, and I've heard the tone used by the investigator.

23. To provide context to these remarks, I then read onto the trial record part of the transcript of the interview, saying:

Just for a background context here, the situation you were in at that point, at that time you were in custody as a suspect. The investigator, you and him were in the room, and transcript goes, you:

El-Sayyed: "Don't hit on the table."

Investigator: "I hit the table when I want. Is it clear?"

El-Sayyed: "No, no, you can hit me if you want."

Investigator: "No, I don't hit you."

El-Sayyed: "You are strong enough."

Investigator: "Yes, but I'm a German police officer working for the United Nations."

El-Sayyed: "I won't be provoked."

Investigator: "And I ask the questions."

El-Sayyed: "Please be calm with me."

Investigator: "We stay with the rules. You stayed calm with the witness? No, you were shouting all the time."

El-Sayyed: "We were discussing."

Investigator: “And you were bullshitting.”

El-Sayyed: “No, no, no.”

Investigator: “You were bullshitting about talking the thing off the head, whatever.”

El-Sayyed: “I was bullshitting. What do you have to tell me? I’m hearing you.”

Investigator: “So you deny that you know the people he was asking you, yes, Marhi Assad?”

El-Sayyed: “No, no, no, please.”

Investigator: “Did you not meet him?”

El-Sayyed: “Please, please.”

Investigator: “You did not meet Marhi Assad?”

El-Sayyed: “Please.”

Investigator: “Yes or no?”

El-Sayyed: “No.”

Et cetera. That was at page 59 to 60 of the transcript. Then at 68, the investigator says:

“So he is a liar.”

And you say: “Surely he is not to be a liar.”

Investigator: “He is known to be a liar, yes, and you are telling only the the truth.”

23

24. As the Presiding Judge, I then said to Mr El-Sayyed:

I’m just putting on the record how badly you were treated in custody. You’re not going to be treated like that here. My assessment is what happened in that interview was disgraceful.

²³ T. 5 June 2018, pp 7-10. The video and transcript of the interview were on the Oneissi Defence’s second updated exhibit list, F3650, Annex F.

It does not withstand scrutiny and it is far below accepted international standards. So we thank you very much for coming here. You'll be treated with dignity and courtesy here'.²⁴

2. Background to Mr El-Sayyed's arrest

25. Mr El-Sayyed, in his testimony during the trial, provided some background information to his arrest. He testified that on 31 May, 2 June, 15 August and 21 August 2005, he was approached by a UNIIC investigator and told that he had to, 'Find a victim or it could be you'.²⁵

26. The approach included, he said, one from western intelligence officials proposing that he go to visit President Bashar Al-Assad in Syria and ask him to constitute a Syrian judicial investigation commission and to:

choose a heavy -- heavy weighted victim like Rustom Ghazaleh and more, one of those who served in Lebanon.

This sort of victim -- this victim would confess having assassinated Hariri based on a personal or a financial disagreement, and this victim would give this written confession, and then this victim would be found later killed in a car accident or in a suicide action. Then the Syrian authorities would convene us as an investigation committee, and then we will have an agreement with Assad similar to the agreement we had with Gadaffi for the Lockerbie case. For the Lockerbie case.²⁶

27. Mr El-Sayyed also testified about his interrogation by the UNIIC Commissioner, Mr Mehlis and the same investigator, on 30 August very late in the evening, after 23:00. These corresponded in substance with details in the Working Group's report extracted above. Referring first to a conversation with a British UNIIC investigator earlier that evening, Mr El-Sayyed stated:

He said Detlev Mehlis and Gerhard Lemon will come. So they did come. They sat next to each other, and they said: "I propose that you produce a victim now you are in our hands. It's still not a wasted opportunity. You can go back home. Just give us a victim."

I looked at Detlev Mehlis. I told him you are the judge and he is the policeman. "I am addressing myself to you as a judge: Would this be acceptable?" He looked down and he

²⁴ T. 5 June 2018, pp 10-11.

²⁵ T. 5 June 2018, pp 117-122.

²⁶ T. 5 June 2018, pp 117-118.

didn't answer. So I asked: "As a judge, would you find this acceptable?" I told him: "I will not cooperate with you." "He said: "Now, you will go to prison. And believe me, you will stay in prison for a long time and we will take you to the international tribunal. There will be an international tribunal. You have two days to think before I refer you to the Lebanese judge." I said, "No need for me to think. I will not think".²⁷

3. Continued detention after the key witness retracted his statement against Mr El-Sayyed

28. The detention of the four generals continued, notwithstanding that the key witness publicly retracted his statement in November 2005. Their names were not mentioned in any UNIIC report subsequent to the first report of October 2005.

29. Commissioner Brammertz in the sixth UNIIC report, dated 12 December 2006, stated that:

The Commission regularly shares with the appropriate Lebanese authorities the substance of all relevant information that it obtains in a manner that does not compromise the interest of the source of this information, be it an individual, an organization or a State. This includes an analytical report on the credibility of a witness, recently transmitted to the Prosecutor General and the investigative judge assigned to the Hariri case. This process is of particular importance where the information is relevant to individuals who are detained, as it may assist the Lebanese authorities in taking any steps they deem appropriate or necessary in relation to detention.²⁸

30. This appears to have been an oblique reference to the circumstances of the four generals and the credibility of the witness upon whom the UNIIC relied to recommend their arrests. However, it neither names them nor categorically states that the evidence against them was not credible.

31. This broad hint, however, was not taken and the four remained in detention until the Special Tribunal became seized of their case in 2009.

²⁷ T. 5 June 2018, pp 123-124.

²⁸ S/2006/962, Sixth report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005), 12 December 2006, para. 96.

32. On the conditions of their detention, the Working Group reported that ‘all are being held in isolation in cells without light and ventilation, 2 metres long and 1.3 metres wide. Three of the detainees are said to be suffering from serious physical and mental health problems.’²⁹

33. During his detention, Mr El-Sayyed, through his lawyers, sent a number of memoranda to the UNIIC Commissioners and the UN Secretary-General asking them to facilitate his release from custody.

34. The final UNIIC interview with Mr El-Sayyed appears to have occurred on 14 February 2009, when UNIIC’s Chief of Investigations and an investigator interviewed him about ‘matters that you are willing to tackle and things that you think could be useful to the Commission’. The Chief of Investigations, Mr Najib Kaldas, commenced the interview by stating:

We understand everything that happened before today. What I can say and I’ll just say it on the record here; is that the Commissioner at the moment Mr. Bellemare and I’m the chief of investigations are very committed to treat people fairly and to investigate this murder and other matters that we’re investigating fairly, but we are very, very committed to resolving the crime; we have a mostly new team of investigators; so, there is perhaps a new approach to the investigation. You have had some concerns about what’s happened in the past and I will convey those concerns to Mr. Bellemare at your request. I’m happy to that. The main purpose of today that we would like to, and thank you for signing the document, just the document the fact that we are here at your request.³⁰

4. Special Tribunal’s Pre-Trial Judge’s order to release the four generals

35. In the month following Mr El-Sayyed’s final interview with the UNIIC, on 27 March 2009, the Pre-Trial Judge ordered the Lebanese judicial authorities to defer to the Special Tribunal’s competence, and to provide a list of all persons detained in connection with the investigation of the ‘Hariri case’. On 8 April 2009, the Lebanese judicial authorities provided the

²⁹ WGAD report, para. 9.

³⁰ R128-4-0046, disclosure 3521, D0361908_U_EN, ‘UNIIC audio recorded interview of AL-SAYYED Jamil 14 Feb 09 (60111009A). The Oneissi Defence disclosed this interview to the Trial Chamber before Mr El-Sayyed testified.

list, which contained only the names of the four generals, and on 10 April 2009, the results of the investigation and a copy of the relevant court records.³¹

36. On 27 April 2009, the new Prosecutor, Mr Bellemare, filed a submission before the Pre-Trial Judge, stating that the four should be released with immediate effect.

37. He stated that he had reviewed all the records and ‘taken account, in light of a review of all this information, of inconsistencies in the statements of key witnesses and of a lack of corroborative evidence to support these statements’ and ‘taken account of the fact that some witnesses had modified their statements and one key witness had expressly retracted his original statement incriminating the persons’.³² On 29 April 2009, the Pre-Trial Judge ordered the release of the four, ‘unless they are held on another basis’.³³ They were immediately released.

38. With due respect to Mr Bellemare—who was the UNIIC Commissioner from 1 January 2008—and his submission to the Pre-Trial Judge arguing that the four should be released, none of this could have been new to him. The relevant key witness retraction had occurred three years and five months before, in November 2005. As the third UNIIC Commissioner he had to have known all of this, and, additionally, that his predecessor, Mr Serge Brammertz had formed the view that there was no credible evidence against any of the detained four.

39. At the time when the Pre-Trial Judge ordered Lebanon to defer the *Hariri* case to the Special Tribunal, namely in March 2009, Mr Bellemare—as is evident from the indictment confirmed in June 2011—was investigating those whose mobile telephones might be connected with the attack. There has never been any suggestion, so far as I am aware, that Mr El-Sayyed’s mobiles had any connection with the attack or the five Accused.

5. Proceedings before the Special Tribunal

40. Well over ten years ago, on 17 March 2010, Mr El-Sayyed filed an application before the Special Tribunal’s President requesting the ‘release of evidentiary material related to the crimes of libellous denunciations and arbitrary detention’. The President assigned the matter to the Pre-

³¹ Order regarding the detention of four Generals, paras 3-4.

³² Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence, 27 April 2009, para. 30.

³³ Order regarding the detention of four Generals, disposition.

Trial Judge, who, on 17 September 2010, ruled that he had jurisdiction to determine the substance of the application.³⁴

41. The Prosecutor, Mr Bellemare, had opposed Mr El-Sayyed's application, and appealed the decision. The Appeals Chamber dismissed the appeal on 10 November 2010, and remanded the matter to the Pre-Trial Judge to consider the merits of Mr El-Sayyed's application, namely his request for access to documents that may be contained in his criminal file.

42. Mr El-Sayyed filed his application before the then President four and a half years after the commencement of his detention without trial. Another ten years has elapsed, meaning that almost fifteen years have now passed since he was detained on the recommendation/request of the UNIIC Commissioner, Mr Mehlis. According to the UN Working Group report, as is noted above, one of the two 'false witnesses' against him 'withdrew his declaration publicly at a press conference held on 27 November 2005'.³⁵

43. The litigation regarding Mr El-Sayyed's access to the material sought continues at the Special Tribunal, with the Prosecutor filing regular updates every six months to the Pre-Trial Judge on his disclosure of material to Mr El-Sayyed. The Prosecutor's last filing was on 11 June 2020, referring to an order made almost eight years earlier by the Pre-Trial Judge.³⁶

6. Who bears responsibility?

44. At the conclusion of Mr El-Sayyed's testimony, I said the following to him:

We thank you for coming and providing evidence, which we will of course assess in the same way as we will assess the evidence of all the other witnesses who have given evidence on points. Look, we do understand that there are some emotions here because of your incarceration for I think it was three years and eight months. I think between the 30th of August, 2005 and the 29th of April, 2009.

³⁴ CH/PTJ/2010/005, F0019, Order relating to the jurisdiction of the Tribunal to rule on the application by Mr El Sayed dated 17 March 2010 and whether Mr El Sayed has standing before the Tribunal, 17 September 2010.

³⁵ WGAD report, para. 15.

³⁶ STL-El Sayed/PTJ, F0182, Prosecution's Submission in Compliance with the "Decision Setting a Deadline for the Prosecutor to Disclose to Mr. El Sayed the Documents Mentioned in the Pre-Trial Judge's Order of 12 May 2011" of 8 October 2012, 11 June 2020.

And we understand it's difficult for you to be detached and objective about the Tribunal itself, as you're associating the continuation of the Tribunal with what happened at the UNIIC. But you appreciate the Prosecutor came in 2012, and Mr. Povoas some years later. They have nothing to do with what occurred to you and the others who were detained, and they are doing their job professionally. And the investigation has proceeded after the establishment of the Tribunal, and you know one of the first -- the first judicial acts was to release you.

Now, the media reported the other day that I'd said that I was offering an apology on behalf of the Tribunal to you. I didn't and I can't. It's not my role. But I can certainly recognize, as an independent Judge, that your detention was unlawful and it was contrary to international human rights. It was reported by the Human Rights Council, and even after that it continued.

And whatever the motivations in arresting you in the first place, and I make no judgement about that. You were arrested under the -- in accordance with Lebanese law. The detention clearly wasn't and just -- it wasn't in accordance with international human rights standards. Lebanon is a signatory to the International Convention on Civil and Political Rights. And this is my view as a Judge, an independent Judge, that once a commissioner working for the United Nations, an independent commissioner forms a view that there is no evidence against someone who is in detention, even if they're detained by other authorities but at the behest of the commission, the commissioners have a moral and legal duty to do something about it. They have no legal power to do anything but they do have what's called the moral -- that they do -- that they can take steps such as included in communications or reports, and the reports of the UNIIC from the 3rd through to the 11th report, nine reports were silent on the detention. In my view, that was something which should not have occurred.

Once those who were in higher position had formed the view that there is no credible evidence against detainees, it's incumbent upon them to take the appropriate action to ensure that someone in your position is released. You can't be detained for three years and eight months without charge or trial. It's a clear breach of your rights.

So it's not an apology on behalf of the Tribunal. It wasn't the Tribunal that did it. It's just a recognition that it should never occur again.³⁷

³⁷ T. 7 June 2018, pp 35-37.

45. So, how should this shameful episode be resolved? Nothing on the trial record gives any confidence that Mr El-Sayyed will receive compensation, an *ex-gratia* payment or an apology from the Lebanese government. The Trial Chamber received much evidence at trial concerning aspects of dysfunctionality in Lebanese state institutions.

46. The essential matter of causation, which does not seem to be in dispute, is that Mr El-Sayyed was detained on Mr Mehlis's 'recommendation' or request, for interrogation by UNIIC officials. Mr El-Sayyed was detained by the UNIIC for three or four days before being taken before a Lebanese judge. That judge continued the detention on the basis that the UNIIC was investigating his possible role in Mr Hariri's assassination.

47. However, the main witness against Mr El-Sayyed, Mr Hussam, publicly recanted in a televised press conference on 27 November 2005, thus raising real questions about his credibility in any investigation or court proceedings. This is irrespective of his reasons for withdrawing his allegations.

48. Mr Mehlis's first report to the Security Council, of 19 October 2005, had relied upon Mr Hussam's account as the basis for the continuing detention of the four generals. His second report, of December 2005, however, stated that Mr Hussam's televised appearance was 'coerced' at 'the behest of the Syrian Judicial Commissions charged with investigating the Hariri assassination'.³⁸ Of the four generals, the second report referred to a new, unnamed witness who had provided a report that 'strengthens the evidence confirmed to date against the Lebanese officers in custody, as well as high-ranked Syrian officers'.³⁹

49. In March 2006, the third UNIIC report—the first produced by Mr Brammertz—stated that '10 individuals are still held in custody in connection with the Hariri investigation', and all were suspected of committing crimes under the Lebanese Criminal Code, including 'persons suspected of instigating and participating in the planning and execution of the crime'.⁴⁰ It did not mention that they then had remained in custody for six and a half months, without any formal charges.

³⁸ S/2005/775, Second report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005) and 1636 (2005), 10 December 2005, para. 30.

³⁹ Second UNIIC report, para. 34.

⁴⁰ S/2006/161, Third report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005), 14 March 2006, paras 48-49.

50. It is unclear from when the UNIIC Commissioner(s) realised that there was no admissible evidence against Mr El-Sayyed, and presumably his fellow detainees, who are the subject of the Working Group's report. But from whenever that moment was, they should have insisted on his immediate release from unlawful detention. In other words, when the UNIIC stopped investigating Mr El-Sayyed as a suspect and turned its attention elsewhere—unless the Lebanese authorities had a lawful reason to keep him in detention—he should have been released, or charged with committing a crime.

51. The Working Group found that it had no mandate to rule on human rights violations caused by the UN's actions. Concerning the UN's responsibility (in 2007) for the continuing unlawful detentions in Lebanon, it concluded that:

The Working Group considers that it is thus not competent to rule on the arbitrariness of detentions resulting from violations imputed to investigators acting within the framework of an international investigation commission set up by the Security Council.⁴¹

52. This is what could be termed a 'legal loophole', rather than the 'grey area' referred to above. The Working Group also reported that:

The Lebanese examining magistrate responsible for the case acknowledges that he has no evidence against General El Sayed or against the other detainees but has to date not taken any decision pending completion by the International Investigation Commission of its investigations and its transmission to him of details concerning the detainee. Mr. Brammertz's report dated 12 December 2006 indicates that the International Investigation Commission has transmitted to the Lebanese courts information on the individuals who are in detention, being aware that this can help the Lebanese authorities take the steps which they deem appropriate or necessary concerning their detention, and reaffirms the exclusive responsibility of the Lebanese courts for decisions relating to the detention of these persons.⁴²

53. It concluded as follows:

⁴¹ WGAD report, para. 36.

⁴² WGAD report, para. 26.

The Working Group concludes that, if from the examination of the communication it is concluded that the detention is of an arbitrary character, the Lebanese Government bears full responsibility for it.⁴³

7. What the UN and UNIIC should have done

54. Senior UN officials must act courageously and according to international human rights instruments, many of which emanate from the UN itself, including the International Covenant on Civil and Political Rights (ICCPR). The Working Group found that Lebanon was breaching this human rights instrument by its continued arbitrary detention of Mr El-Sayyed and the others.

55. Putting to one side Mr Mehlis, who clearly was not going to take action, in my view, his two successors as UNIIC Commissioner should have taken *active public* steps for the immediate release of anyone detained at the UNIIC's behest against whom there was no admissible evidence. Once it was apparent that the reasons for their arrest, at the UNIIC's request were flawed, and that there was no reliable evidence against them—such as a formerly star witness recanting his testimony—they should have sent a loud and clear *public* message to the Lebanese authorities that the continued detentions breached international human rights law.

56. The Commissioners could have done this in their regular annual reports to the Secretary-General or addresses to the Security Council. Or they could have issued a separate public report on the topic. They did neither. The situation was that on one hand, one UN agency—the Human Rights Council—was investigating and determining that the detention was arbitrary and breaching the ICCPR, while, on the other, the agency responsible for the breach, the UNIIC, remained publicly silent about it.⁴⁴

57. To summarise: Mr El-Sayyed was arrested and detained at the UNIIC's behest; held incommunicado in the initial phases without access to a lawyer; accused of committing a terrorist

⁴³ WGAD report, para. 39.

⁴⁴ Alamuddin and Bonini, 'The UN Investigation of the Hariri Assassination', at p. 60, fn. 57, refers to an interview with Mr Brammertz. However, as of 4 August 2020, the link on the UN website was broken. 'Informal Comments to the Media by the Commissioner of the UN International Independent Investigation Commission into the Assassination of Former Lebanese Prime Minister Rafiq Hariri, Mr Serge Brammertz, on the Situation in the Middle East', UN Webcast Archives(19 July 2007)6m15–6m30) accessed 2 December 2013). In his addresses to the Security Council in 2006 and 2007, Mr Brammertz made no mention of the plight of the detainees. S/PV.5597, provisional, Monday 18 December 2006; and S/PV.5790, provisional, 5790th meeting, Wednesday, 5 December 2007. Neither did Mr Bellemare in his address, S/PV.6047, provisional, 6047th meeting, Wednesday 17 December 2008.

act and lying about it; bullied and threatened by an investigator while in custody; and, on his sworn testimony before the Special Tribunal, told to go find a suitable victim or it would be him. He was then detained without charge or trial until 28 April 2009, but without mention in the UNIIIC's regular reports to the Security Council that it had no reliable evidence justifying his continued detention.

58. Lebanon ignored the Working Group's opinion, addressed to its government on 27 April 2007. The opinion forcefully stated that the responsible Lebanese investigating magistrate acknowledged having no evidence against Mr El-Sayyed, although the government had disputed that the magistrate had said this, as the investigation was secret.⁴⁵ Yet he remained in detention for another two years.

59. The detainees should have been released. There was no legal 'grey area'. They were detained long after the original reasons for their arrests had gone. There is no indication that Mr El-Sayyed was under investigation for involvement in the attack on Mr Hariri, at least from the time of Commissioner Brammertz's report in December 2006, which appears to suggest although not explicitly, that he was not.

8. Resolution of the matter

60. The cost to the international community, and Lebanon, through its annual contributions to the Special Tribunal's budget, of dealing with the El-Sayyed litigation—specifically, the cost of the time spent by Prosecution and Registry officials, and the judges and staff of the Pre-Trial and Appeals Chamber—must surely by now greatly exceed the cost of any reasonable compensation payable by the Lebanese Republic to Mr El-Sayyed. And this unending litigation before the Special Tribunal continues.

61. This matter cries out for national and international resolution. The UN and Lebanon, in my view, jointly share responsibility for what occurred to the 'four generals'. The UNIIIC, a UN agency, was responsible for their arrest and detention. The Lebanese investigating and judicial authorities then detained them without charge for three years and eight months, but on a number

⁴⁵ WGAD report, paras 26, 29.

of occasions during what was obviously an unlawful detention, UNIIC officials were given access to interview them.

62. The UN, through its agency the UNIIC, clearly bears some culpability here, irrespective of the legal niceties about the detainees being the responsibility of the Lebanese investigating authorities who were conducting their own investigations into the attack on Mr Hariri. In my view, the legal and moral responsibility is shared between the UN and Lebanon.

63. Lebanon and the UN, in my view, should therefore jointly compensate Mr El-Sayyed and the others who were unlawfully detained, and offer a public apology. And lessons should be learned from this unfortunate episode in UN investigatory and fact-finding missions.

64. Of course I am not privy to any discussions between the UN and Mr El-Sayyed's lawyers, but if the UN has not already reached a settlement with Mr El-Sayyed, it should; it has a legal and moral duty to compensate him for the consequences of its actions, and inactions, from 30 August 2005 onwards.

9. Why it is unlikely that Lebanon will compensate Mr El-Sayyed for his unlawful detention

65. Confidence that Lebanon will assume any responsibility for these injustices, however, is slight. During the trial, the Trial Chamber received evidence of dysfunctionality in the Lebanese state related to its government and governance, including its judicial and law enforcement authorities. Collectively, this provides little reason for optimism that Lebanon will right the wrongs here. It is worth highlighting how I have reached this view.

66. One aspect was of the mismanagement of the investigation into the attack on Mr Hariri. The judgment details some of the basic issues, such as how the crime scene was not secured, was contaminated and evidence was lost, and a senior Lebanese official correctly described the scene as 'chaotic'. There was no clear line of responsibility for the investigation. The FitzGerald fact-finding report reached the same conclusions.⁴⁶

⁴⁶ 'The review of the investigation indicates that there was a distinct lack of commitment on the part of the Lebanese authorities to investigating the crime effectively, and that this investigation was not carried out in accordance with acceptable international standards. The Mission is also of the view that the Lebanese investigation lacks the confidence

67. The ISF forensic team that retrieved vehicle parts from the crime scene took them to their office without photographing them *in situ*. The investigating judge then ordered them to take the parts back to the crater and to photograph them where they found them. The team then tried to do this. The forensic officials also did not use protective equipment such as forensic suits, nor even gloves.

68. On the night of the attack, the military investigating judge ordered the burnt-out vehicles at the crime scene to be removed, apparently because the authorities wanted the road reopened the next day. Bulldozers and tow trucks then drove onto the crime scene area to remove the vehicles in Mr Hariri's convoy. They were then taken to a police holding yard where they were left in the open and exposed to the elements for another six months.

69. The body of one victim, Mr Zahi Abou-Rjeileh, was found a day after the attack, and the medical examiner reported he had been alive for twelve hours after the explosion. The body of another, Mr Abdul Hamid Ghalayini, was found seventeen days later, and by his family rather than by investigating authorities.

70. Another matter of concern explored in the judgment is the arbitrary way in which some victims of the attack on Mr Rafik Hariri received compensation, while others received nothing. Participating victims complained about this in their evidence at trial. The payment of compensation to victims of the attack was indiscriminate, and according to the evidence, often based upon connections rather than an objective assessment of injury or need.

71. Evidence was also given of Syrian military intelligence officials attempting to obtain information about the investigation.

72. The envelope and VHS cassette containing the video of the false claim of responsibility disappeared after Al-Jazeera's Beirut bureau chief, Mr Ghassan Ben-Jeddo, gave them to Mr El-Sayyed, the day after the attack. Mr El-Sayyed says that he gave them to the military investigating judge. What happened to these crucial pieces of evidence is a mystery.

of the population necessary for its results to be accepted.' S/2005/203, Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, 24 March 2005, executive summary.

73. Innocent people were rounded up, interrogated, held without charge and eventually released.⁴⁷

74. The long detention of the ‘four generals’ was the subject, as noted above, of this UN Human Rights Council’s report. The Lebanese government and judiciary refused to take steps to release the four men long after it was apparent that no legal basis existed to continue what had become an unlawful detention. The Working Group on Arbitrary Detention strongly makes this point.

75. There was an attack on Mr Marwan Hamade’s life on 1 October 2004. Despite his position as a prominent public figure, his case was never properly investigated. Mr Hamade testified in the trial that he had given a statement before an investigating judge. About ten days after the attack the Minister for the Interior visited him in hospital and told him that ‘the Syrian intelligence came, took over the file, and took all the evidence and files and reports to the Syrian intelligence headquarters in Anjar’.⁴⁸ Despite the Syrians leaving Lebanon in April 2005, the attack on Mr Hamade appears not to have been investigated between then and its transfer to Special Tribunal as a connected case under the Statute of the Special Tribunal for Lebanon, in 2009.

76. Mr Wissam Al-Hassan, on loan from the ISF to Mr Hariri as his chief of security at the time of the attack, returned to the ISF to take up a senior position in the investigation into Mr Hariri’s death. He also liaised extensively with the UNIIC and the Office of the Prosecutor. This was despite the conflict of roles and his obvious lack of neutrality in the investigation.

77. While he was the prime minister of Lebanon, Mr Hariri also had extensive media, property and construction interests that overlapped with his governmental duties.

78. For at least eleven years before his death, Mr Hariri was giving monthly cash payments to the chief of Syrian military intelligence in Lebanon, Mr Rustom Ghazaleh. The evidence was of Mr Hariri paying the late Mr Ghazaleh, who died soon after the evidence was adduced, millions

⁴⁷ Mr Mehlis’s first report to the Security Council stated that ‘As a result of the Commission’s investigation to date, a number of people have been arrested and charged with conspiracy to commit murder and related crimes in connection with the assassination of Mr. Hariri and 22 others. The Commission is of course of the view that all people, including those charged with serious crimes, should be considered innocent until proven guilty following a fair trial’. First UNIIC report, para. 223. Not one of this ‘number of people’ who were ‘charged with conspiracy to murder’ faced trial before the Special Tribunal, nor so far as I am aware, a Lebanese court. The ‘four generals’ were never charged with committing crimes connected with Mr Hariri’s murder, and self-evidently had not been so charged when the report was written in October 2005.

⁴⁸ Marwan Hamade, T. 8 December 2014, pp 31-36.

of US dollars over the period. The payments started at USD 40,000 per month and increased to USD 67,000 per month, with Mr Ghazaleh demanding an extra month's payment two days before Mr Hariri's murder.

79. The Lebanese government also repeatedly failed to cooperate with the Special Tribunal by responding to legitimate requests for assistance from Defence counsel through the Defence Office. The Trial Chamber had to issue two orders to Lebanon to comply.⁴⁹ Thereafter, it had to engage in a time-wasting exercise of what basically was a lengthy period of negotiation in an effort to convince Lebanon to comply with its international legal obligations pursuant to Security Council resolution 1757.

80. The Trial Chamber expended a great deal of effort into dividing the documents sought into easily understood categories, including specifying the government agency that should have been expected to hold the documents, if they existed. Despite this, Lebanese government officials responded effectively stating that they did not understand the nature of the requests. The Trial Chamber then rewrote what had been perfectly clear orders. It took over four years to resolve an issue that should have resolved itself within weeks, if not a few months at the most, had the Lebanese government been inclined to cooperate with the Defence requests for assistance.

81. These random examples, and it is emphasized that these come from the trial record, suggest that little hope exists that the Lebanese authorities will right the wrong against those who were arbitrarily detained. It is of course appreciated that some of these incidents date back to 2005. But against this, the fact that Mr El-Sayyed's litigation continues before the Special Tribunal indicates that he has not yet attained justice in Lebanon for what occurred.

82. In these circumstances, the United Nations should, if it has not already, move to compensate those who were wrongly detained for years on the basis of the recommendations of its officials. It should formally apologise for what occurred.

⁴⁹ This is detailed in the procedural history, annex A, to the judgment.