

**THE PRE-TRIAL JUDGE**

Case No.: **STL-11-01/PT/PTJ**  
The Pre-Trial Judge: **Mr Daniel Fransen**  
The Registrar: **Mr Herman von Hebel**  
Date: **7 February 2013**  
Original language: **French**  
Classification: **Public**

**THE PROSECUTOR**  
**v.**  
**SALIM JAMIL AYYASH,**  
**MUSTAFA AMINE BADREDDINE,**  
**HUSSEIN HASSAN ONEISSI &**  
**ASSAD HASSAN SABRA**

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**DECISION ON THE MOTION OF THE DEFENCE FOR MR BADREDDINE  
SEEKING AN ORDER TO STRIKE OUT CERTAIN SECTIONS OF THE  
PROSECUTOR'S PRE-TRIAL BRIEF**

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**Office of the Prosecutor:**  
Mr Norman Farrell

**Counsel for Mr Salim Jamil Ayyash:**  
Mr Eugene O'Sullivan

**Legal Representative of Victims:**  
Mr Peter Haynes

**Counsel for Mr Mustafa Amine Badreddine:**  
Mr Antoine Korkmaz

**Counsel for Mr Hussein Hassan Oneissi:**  
Mr Vincent Courcelle-Labrousse

**Counsel for Mr Assad Hassan Sabra:**  
Mr David Young



## **I. The subject of the decision**

1. By way of this decision, the Pre-Trial Judges rules on the motion of Counsel for the defence for Mr Badreddine (the “Defence” and the “Accused”) of 9 January 2013 seeking an order from the Pre-Trial Judge inviting the Prosecution to strike out certain sections of the Prosecutor’s Pre-Trial Brief filed on 15 November 2012 (the “Motion”).<sup>1</sup>

## **II. Procedural background**

2. On 15 November 2012, the Prosecution filed a Pre-Trial Brief<sup>2</sup> in compliance with the Pre-Trial Judge’s Order of 28 August 2012<sup>3</sup> (the “Pre-Trial Brief”).

3. On 9 January 2013, the Defence filed the Motion confidentially.

4. On 15 January 2013, Counsel for the defence for Mr Sabra and Counsel for the defence for Mr Oneissi joined the Motion.<sup>4</sup>

5. On 24 January 2013, the Prosecution filed a response to the Motion (the “Response”).<sup>5</sup>

6. On 4 February 2013, the Defence requested leave to file a reply to the Response in accordance with Rule 8 of the Rules of Procedure and Evidence (the “Rules”) or to be heard in the courtroom (“Request to Reply”).<sup>6</sup> On 5 February 2013, Counsel for the defence for Mr Ayyash joined that request.<sup>7</sup>

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<sup>1</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Motion of the Defence for Mr. Badreddine Seeking an Order to Strike out Sections of the Prosecutor’s Pre-Trial Brief, confidential, 9 January 2013.

<sup>2</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution’s Submission Pursuant to Rule 91, confidential, 15 November 2012 with a redacted public version dated the same day.

<sup>3</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Order Setting a Date for Filing the Prosecution’s Pre-Trial Brief, 28 August 2012.

<sup>4</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Sabra Joinder to Badreddine Motion to Strike out Sections of the Prosecution Pre-Trial Brief, confidential, 15 January 2013; *Jonction de la Défense de M Hussein Hassan Oneissi à la requête de la Défense de M Badreddine aux fins d’obtenir l’exclusion de sections du Mémoire d’avant procès du Procureur*, confidential, 15 January 2013.

<sup>5</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Response to ‘Motion of the Defence for Mr. Badreddine Seeking an Order to Strike out Sections of the Prosecutor’s Pre-Trial Brief’, confidential, 24 January 2013.

<sup>6</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Defence Request for Leave to Reply to the Prosecution Response to the Motion to Strike out Sections of the Prosecutor’s Pre-Trial Brief, confidential, 4 February 2013.

<sup>7</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Ayyash Joinder to “Defence Request for Leave to Reply to the Prosecution Response to the Motion to Strike out Sections of the Prosecutor’s Pre-Trial Brief”, confidential, 5 February 2013.

### III. The arguments of the Parties

#### A. The Motion

7. The Defence seeks that, pursuant to Article 16 of the Statute and Rules 69, 77 (A), 89 (B) and 91 (G) of the Rules, sections of the Pre-Trial Brief relating to other attacks be struck out (the “Other Attacks”).<sup>8</sup> The Defence is of the opinion that the inclusion of that additional evidence intended to demonstrate “a consistent pattern of conduct” on the part of the Accused infringes his rights since he has not been formally charged with those crimes and it is contrary to the spirit of the law.<sup>9</sup> The Defence also states that the filing of the Motion is without prejudice to its right to challenge the admissibility of that evidence before the Trial Chamber.<sup>10</sup>

8. According to the Defence, the case law cited by the Prosecutor in support of the admissibility of the evidence relating to a consistent pattern of conduct on the part of the Accused concerns facts which did not fall within the *ratione materiae* or territorial jurisdiction of the tribunals seized, which is not the case with the Other Attacks.<sup>11</sup>

9. The Defence submits that, if the investigation is such as to enable the Prosecutor to establish that there is sufficient evidence demonstrating that a suspect committed a crime that may fall within the jurisdiction of the Tribunal, the Prosecutor must submit an indictment for confirmation by the Pre-Trial Judge. However, if the Prosecutor considers that he does not have sufficient evidence in his possession to request an indictment, he should not be allowed to use that evidence in support of allegations made against the Accused.<sup>12</sup>

10. Lastly, the Defence is of the opinion that were the Trial Chamber to rely on that evidence within the context of the Hariri case, it would be irreparably vitiated and would not be able to sit on a trial in the Other Attacks, were a separate indictment to be issued regarding the Other Attacks in the future.<sup>13</sup>

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<sup>8</sup> Motion, paras 1 and 4.

<sup>9</sup> Motion, para. 2.

<sup>10</sup> Motion, para. 1.

<sup>11</sup> Motion, para. 10.

<sup>12</sup> Motion, para. 11.

<sup>13</sup> Motion, para. 16.

## B. The Response

11. The Prosecution seeks the dismissal of the Motion, in particular for the following reasons:

- a) the Motion has no legal basis;<sup>14</sup>
- b) even if the Pre-Trial Judge were to grant the Motion, this would not necessarily preclude the Trial Chamber from using that evidence during the proceedings upon request from the Prosecution;<sup>15</sup>
- c) the issue of the admissibility of the evidence must be determined by the Trial Chamber in accordance with Rule 149 (C) of the Rules, and not by the Pre-Trial Judge;<sup>16</sup>
- d) the Defence has not demonstrated why those paragraphs of the Pre-Trial Brief should be struck out bearing in mind the existence of case law which admits the use of any admissible evidence, including that which relates to a consistent pattern of conduct on the part of the Accused;<sup>17</sup>
- e) the Prosecution does not seek to hold the Accused criminally responsible for the Other Attacks and, as such, is not required to include that evidence in the indictment linked to the attack against Mr Hariri.<sup>18</sup>

## IV. Statement of reasons

12. As a preliminary matter, the Pre-Trial Judge recalls that, according to case law, a reply is generally justified when the response raises new issues.<sup>19</sup> He notes that, in this case, the Defence wishes to challenge the case law cited by the Prosecution in its Response. The Pre-Trial Judge considers that, in the case at hand, citing case law does not constitute new points that would justify a reply. He considers that the requests for leave to reply or for a hearing are not therefore justified and that he is sufficiently informed of the positions of the

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<sup>14</sup> Response, para. 2.

<sup>15</sup> Response, para. 2.

<sup>16</sup> Response, para. 3.

<sup>17</sup> Response, para. 4.

<sup>18</sup> Response, para. 6.

<sup>19</sup> STL, *The Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/AC/AR90.1, Scheduling Order on Interlocutory Appeals, 27 August 2012, para. 2; STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/R176bis, Order by the Judge Rapporteur on Filing of Reply, 4 July 2012, para. 2.

Parties so as to rule on the Motion. As a consequence, the Pre-Trial Judge dismisses the Request to Reply.

13. The Pre-Trial Judge considers that he does not have jurisdiction to rule on whether sections of the Prosecution Pre-Trial Brief concerning the Other Attacks should be struck out. As part of his duties, the Pre-Trial Judge must, in particular, ensure that the Pre-Trial Brief includes “for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused” together with “any admissions by the Parties, as well as a statement of matters that are not in dispute.”<sup>20</sup> More specifically, in order to prepare the case for trial so that it may be determined diligently and efficiently by the Trial Chamber, the role of the Pre-Trial Judge is, in accordance with Rule 95 of the Rules, in particular to examine the documents filed during the pre-trial phase in order to provide the trial judges with useful guidance for preparing for trial. However, it is not for the Pre-Trial Judge to rule on the admissibility of evidence disclosed to him during the pre-trial phase. Indeed, that particular right is the exclusive responsibility of the trial judges, in accordance with Rule 149 of the Rules. Were he therefore to rule on whether sections of the Pre-Trial Brief concerning the Other Attacks should be struck out, the Pre-Trial Judge would have to examine the evidence submitted in support of those cases, thus exceeding his jurisdiction.

14. Furthermore, the Pre-Trial Judge recalls that under the terms of Article 21 (1) of the Statute, there must be no unreasonable delay to the proceedings and all necessary measures must be taken to prepare the case for a fair and expeditious trial.

15. In this respect, as the Defence observed, the issues raised in the Motion might have an effect on the preparation of the trial, in particular with regard to the amount of time that should be given to the Defence for this purpose. It is therefore right that the Defence should know as soon as possible whether or not it has to prepare with regard to the evidence on the Other Attacks. It should also be noted that the date for the start of trial was set according to an indictment that does not contain allegations relating to Other Attacks by taking into consideration, in particular, Article 16 (4) (b) of the Statute which provides that the accused must “have adequate time and facilities for the preparation of his or her defence [...]”. In this

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<sup>20</sup> Rule 91 (G) (i) of the Rules.

regard, the Pre-Trial Judge recalls that he was seized, on 23 January 2013, of a request to vacate the trial date by all the Defence teams<sup>21</sup> and on which he has yet to rule.

16. The response given to the Motion can likewise have an effect on the list of witnesses and on the exhibits the Prosecution has filed in accordance with Rule 91 (G) (ii) and (iii) of the Rules.

17. Consequently, insofar as he does not have jurisdiction to rule on the issues raised in the Motion, the Pre-Trial Judge considers that, in the context of the good administration of justice, it is appropriate, pursuant to Rule 89 (E) of the Rules, to inform the Trial Chamber and submit those issues to it so that it may examine them.

## **V. Disposition**

**FOR THESE REASONS,**

Pursuant to Rules 77 and 89 (E) of the Rules,

**THE PRE-TRIAL JUDGE,**

**DECLARES** the Request to Reply unfounded;

**DECLARES** that he does not have jurisdiction to rule on the Motion; and

**INFORMS** the Trial Chamber of the Motion and submits the Motion to said Chamber.

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<sup>21</sup> STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Joint Defence Motion to Vacate Tentative Date for Start of Trial, confidential, 23 January 2013 with a redacted public version filed on 24 January 2013.

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

Leidschendam, 7 February 2013

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[signature]

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Daniel Fransen  
Pre-Trial Judge

