SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

BEFORE THE TRIAL CHAMBER

Case No:	**STL-11-01/PT/TC**
	Judge Robert Roth, Presiding **Judge Micheline Braidy** **Judge David Re** **Judge Janet Nosworthy, Alternate Judge** **Judge Walid Akoum, Alternate Judge**
Registrar:	**Mr. Herman von Hebel**
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THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI &
ASSAD HASSAN SABRA

DECISION ON DEFENCE MOTION TO STRIKE OUT PART OF THE PROSECUTOR'S PRE-TRIAL BRIEF

Office of the Prosecutor:
Mr. Norman Farrell

Defence Office:
Mr. François Roux

Victims' Legal Representative:
Mr. Peter Haynes

Counsel for Mr. Salim Jamil Ayyash:
Mr. Eugene O'Sullivan
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Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz
Mr. John Jones

Counsel for Mr. Hussein Hassan Oneissi:
Mr. Vincent Courcelle-Labrousse
Mr. Yasser Hassan

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young
Mr. Guénaël Mettraux

PROCEDURAL BACKGROUND

1. Article 1 of the Statute of the Tribunal in combination with Rule 11 of Tribunal's Rules of Procedure and Evidence gives the Tribunal jurisdiction and primacy in respect of the attack of 14 February 2005 resulting in the death of Rafiq Hariri and the death and injury of other persons. It also has jurisdiction in respect of other attacks occurring in Lebanon between 1 October 2004 and 12 December 2005. These other cases are referred to in Rule 68 of the Rules as 'connected cases', and the Tribunal is now seised with several.

2. On 15 November 2012 the Prosecutor filed a pre-trial brief in the present case in which, in section X, he foreshadowed (confidentially) his intention to lead evidence against Accused persons to establish that they were involved in attacks in certain connected cases on various dates in 2004 and 2005. The Prosecutor described it as evidence of a consistent pattern of conduct.

3. On 9 January 2013 the defence of the Accused Mr. Mustafa Amine Badreddine filed a motion before the Pre-Trial Judge requesting him to 'order the striking out of the paragraphs of the Prosecutor's pre-trial brief that refer to the attacks' in connected cases. The defence of Mr. Salim Jamil Ayyash, Mr. Hussein Hassan Oneissi, and Mr. Assad Hassan Sabra joined the motion.[1] The Prosecutor opposes the motion.[2] These submissions were filed confidentially. The Pre-Trial Judge subsequently decided that he did not have jurisdiction to decide the issue and referred the matter to the Trial Chamber pursuant to Rule 89 (E). In doing so he also denied a Defence request to file a reply to the Prosecutor's response.[3]

[1] STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, 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, 9 January 2013, Ayyash Joinder to 'Motion of the Defence for Mr. Badreddine Seeking an Order to Strike out Sections of the Prosecutor's Pre-Trial Brief', 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, 15 janvier 2013, *Sabra* Joinder to Badreddine Motion to Strike Sections of the Prosecution Pre-Trial Brief, 15 January 2013.

[2] *Prosecutor v Ayyash, Badreddine, Oneissi and Sabra*, 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', 24 January 2013.

[3] *Prosecutor v Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/PT/PTJ, Décision relative à la requête de la défense de M. Badreddine aux fins de la suppression de certaines sections du mémoire d'avant-procès du Procureur, 7 février 2013.

ARGUMENTS OF THE PARTIES

4. The Defence motion objects to the Prosecutor averring in his pre-trial brief, and leading at trial, the evidence relating to the attacks in connected cases. It argues that doing so would violate the purpose and spirit of the Rules and circumvent crucial procedural safeguards, thereby breaching the accused's rights to a fair trial. It is unlawful and, as it violates the presumption of innocence certain paragraphs of section X should be struck out.

5. The motion also contends that the Prosecutor has a duty to indict, pursuant to Rule 68, if satisfied that there is sufficient evidence that a suspect has committed a crime. It is therefore inappropriate to make factual criminal allegations against accused in one case (this one) in circumstances where the evidence is insufficient to indict them in another case for committing these crimes. Moreover, the factual allegations are tantamount to pleading material facts that should be pleaded in an indictment, not a pre-trial brief. The motion also alleges that the Defence would be substantially prejudiced as they would have insufficient time to prepare their case as another year's preparatory work would be required.

6. The Prosecution resisted the application, stating that in principle the evidence was admissible to demonstrate a consistent pattern of conduct, its admission was 'consistent with the Prosecutor's mandate', that the Defence submission ignored the fundamental distinction between charging crimes and the evidence used to prove charges, and that no prejudice had been demonstrated in relation to preparation time. The Prosecution also objected to the Pre-Trial Judge determining the matter, correctly arguing that this was a matter for the Trial Chamber. This issue is now moot following the Pre-Trial Judge's referral under Rule 89 (E).

ANALYSIS

7. The issues raised in the Defence motion and the Prosecution's response can be divided into the procedural and the substantive. The main procedural issue is of the appropriateness of granting the relief specifically sought in the motion, namely striking paragraphs from the pre-trial brief.

8. The Defence motion seeks to deal with the substantive issue – the ultimate admissibility at trial of the evidence of the connected cases – by having portions of the pre-trial brief deleted

or stricken from the record. For the reasons that follow this remedy will not be granted, but it is equally premature to attempt to decide the substantive issue now.

9. This substantive matter has two sides to it. One relates to the Prosecutor's foreshadowed intention to lead evidence of the connected cases, by terming it 'consistent pattern of conduct' evidence, but without indicting those accused of committing the crime(s) – and whether this would abuse the process of the court. Is this a backdoor method of charging (without indicting) that would violate the presumption of innocence, and consequently amount to an abuse of process?

10. The other strictly concerns the admissibility of the evidence at trial if its categorisation – as pattern of conduct evidence – is accepted. If it is truly pattern of conduct evidence, the issues for determination will be (a) whether the evidence is admissible in this case and (b) if so, whether in all of the circumstances it ought to be excluded in the exercise of judicial discretion.

11. However categorised, the two issues are closely linked as they concern the ultimate admissibility of the evidence described in the pre-trial brief and foreshadowed for admission at trial. They should therefore be determined in a single decision. But before deciding these substantive issues the Trial Chamber must be in possession of full argument by the Parties, in a properly framed motion for exclusion (or admission). Additionally, the Trial Chamber needs to know whether the Prosecutor is intending to indict anyone for the connected attacks.

The function of a pre-trial brief in international criminal law proceedings and whether a pre-trial brief or portions can be stricken

12. Moving to the procedural issue of the relief sought in the Defence motion, the answer to the question of whether a pre-trial brief or portions of it can be stricken depends on the true function of a pre-trial brief.

13. The pre-trial brief is a significant document in international criminal law proceedings. It is not an accusatory instrument – only the indictment has that function. Its most basic function is to inform the opposing party of the case they face. The International Criminal Tribunal for Rwanda for example has held that the 'function of a pre-trial brief is to develop the strategy

of the Prosecutor and to elaborate on the charges and material facts outlined in the indictment'.[4] In the context of allowing the Prosecutor to amend an indictment over a defence objection its Appeals Chamber has held that 'particularized notice in advance of the Prosecution's theory of the case does not render proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet that case'.[5]

14. In deciding whether to convict or acquit, a trial or appellate chamber may use a pre-trial brief to assist in determining whether accused persons have received proper notice of the case against them, and hence received a fair trial. This could relate to notice of charges, material facts or modes of liability. The pre-trial brief may, in some circumstances, supplement the indictment by providing an accused with proper notice, and thus even 'cure' certain pleading defects. The Appeals Chambers of the International Criminal Tribunal for the Former Yugoslavia, the ICTR and the Special Court for Sierra Leone have determined that certain defects in the formal pleading of an indictment (such as vagueness) may, in some circumstances, be 'cured' by providing an accused person with notice in the pre-trial brief.[6] Conversely, accused persons have been acquitted on appeal because of defects in the pleading of indictments that have not been 'cured' by pleadings in pre-trial briefs, in combination with other forms of notice such as in witness statements, opening statements, and other appropriate documents providing notice.[7]

15. Rule 93 of the Rule Procedure and Evidence of the ICTY, ICTR and SCSL expressly allows the admission of consistent pattern of conduct evidence, but provides that the Prosecution must inform the defence (in a specified manner) of its intention to lead such evidence. Although the STL Rules contain no similar express provision, the STL Prosecutor could not

[4] *Prosecutor v Nizeyimana*, ICTR-2000-555C-PT, Decision on Defence Motion to strike out or have declared irrelevant parts of the pre-trial brief, 13 December 2010, para. 6.
[5] *Prosecutor v. Karemara*, ICTR-1998-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 8 December 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 27.
[6] *Muvunyi v Prosecutor*, ICTR-2000-55A-A, Judgement, 29 August 2008, para. 28: '[T]he Appeals Chamber has previously held that a pre-trial brief can, in certain circumstances, cure a defect in an indictment . . .'
A defective indictment may sometimes be cured if the Prosecution has provided an accused with timely, clear and consistent information detailing the factual basis underpinning the charges, e.g. ICTY, *Prosecutor v Kupreškić*, IT-96-16-A, Appeal Judgement, para. 114, *Prosecutor v. Ntagerura*, ICTR-99-46-A, Judgement, 7 July 2006, para. 114, *Prosecutor v. Sesay, Kallon & Gbao*, SCSL-04-15-A, Appeal Judgment, 26 October 2009, paras. 120 - 127.
[7] For example, *Prosecutor v Kupreškić*, IT-95-16-A, Judgement, 23 October 2001, para. 124, p. 168, ICTY, *Prosecutor v Simić*, IT-95-9-T, Judgement, 28 November 2006, para. 74, *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Judgement, 29 August 2008, paras 31-32.

attempt to lead consistent pattern of conduct evidence – whatever the issue – without giving the Defence the requisite and timely notice of its intention to do so. Such notice should normally be in the pre-trial brief (unless leave is later given to do so).

16. Striking from a pre-trial brief a pleading that merely evinces an intention to call evidence at trial is equivalent to striking from the court transcript a similar reference in an opening statement (prosecution or defence) to which objection is taken by an opposing party. As confirmed by the case-law and practice of other international criminal courts and tribunals, this makes little sense.

The power to strike documents from the court record

17. In principle, utilising their inherent powers to control their proceedings, courts may strike from the record or redact documents for abusing the court process. In practice, international decisions relating to striking documents or portions of them fall into two categories – those breaching formal pleading requirements, and those breaching practice directions or filing requirements. The usual remedy in those rare circumstances where an order for striking is sought, and some portion or a document in some way is found to offend, is to order the refiling of the document, but without the offending portion.

18. Parties in international criminal proceedings have sought to strike various documents (or parts of them) from the court record. Numerous international decisions have denied, dismissed or rejected requests[8] to strike out (i) paragraphs/counts from an indictment,[9] (ii) paragraphs in a pre-trial brief,[10] (iii) paragraphs (or corrigenda) in a final trial brief,[11] (iv)

[8] At least 48 have been identified – examples are listed in the footnotes below.

[9] ICTY, *Prosecutor v Kordić & Čerkez*, IT-95-14/2-PT, Decision on Joint Defense Motion to Strike All Counts Arising Under Article 2 or Article 3 for Failure to Allege a Nexus Between the Conduct and an International Armed Conflict, 1 March 1999, *Prosecutor v. Karemera*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Strike 1993 Incitement Allegation from the Indictment and Mathieu Ngirumpatse's "Requete Visant au Retrait des Allegations d'Incitation au Genocide Anterieures a 1994 de l'Acte d'Accusation, 16 July 2008, and, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Strike JCE III Allegations as to Specific Intent Crimes, 8 April 2011.

[10] *Prosecutor v Zigiranyirazo*, ICTR-2001-73-T, Decision on the Defence Motion on Prosecution Witness ATN and the Relevant Paragraphs of the Pre-Trial Brief, 19 October 2005, ICTY, *Prosecutor v Gotovina*, IT-06-90-PT, Decision on Ante Gotovina's Motion Pursuant to Rule 73 Requesting Pre-Trial Chamber to Strike Parts of Prosecution Pre-Trial Brief Constituting Effective Amendment of the Joinder Indictment, and on Prosecution's Motion to Amend the Indictment, 14 February 2008, and *Prosecutor v Nizeyimana*, ICTR-2000-55C-PT, Decision on Defence Motion to Strike or Have Declared Irrelevant Parts of the Pre-Trial Brief, 13 December 2010.

[11] ICTY, *Prosecutor v Stakić*, IT-97-24-T, Decision on Defence Motion to Strike the Prosecution's *Corrigendum* to the Final Brief and Decision on Defence Reply, 28 May 2003, *Prosecutor v Bagosora*, ICTR-98-41-T, Decision on Defence

paragraphs or arguments in notices of appeal and appellate, respondent, and reply briefs,[12] (including entire appeal briefs),[13] (v) witness testimony or evidence,[14] and (vi) other miscellaneous matters including appendices and *amicus* briefs.[15] Overall, these include annexes to briefs contravening practice directions by containing substantive argument, documents contravening word and page limits, and late filed documents.

19. Most motions seeking such relief have been refused. Ten international decisions (located so far) have however granted such a motion and ordered a party to re-file the offending document.[16] All related to breaches of formal pleading rules – in the case of indictments – or practice directions. Four concerned an indictment, or at the International Criminal Court 'the document containing the charges', five were appellate submissions, and the other related to a response to a motion at trial. A specific example of such a decision is one ordering a party to re-file documents to comply with word limits.[17]

Motions to Strike Excluded Evidence from the Prosecution Closing Brief, 29 March 2007, and *Prosecutor v Galete*, ICTR-2000-61-T, Decision on Defence Motion to Strike Portions of the Prosecution Closing Brief, 30 September 2010.

[12] *Prosecutor v. Simić*, IT-95-9-A, Decision on Prosecution's Motion to Strike Parts of the Brief in Reply, 27 September 2004, ICTY, *Prosecutor v Boškoski & Tarčulovski*, IT-04-82-A, Decision on Boškoski Defence Motion to Strike Out Paragraphs from Prosecution Appeal Brief, 19 May 2009, *Prosecutor v Zigiranyirazo*, ICTR-01-73-A, Decision on Prosecutor's Motion to Strike Portions of Protais Zigiranyirazo's Respondent's Brief, 14 May 2009, and *Prosecutor v Gotovina*, IT-06-90-A, Decision on Prosecution's Motion to Strike Ante Gotovina's Reply Brief, 18 October 2011.

[13] ICTY, *Prosecutor v Galić*, IT-98-29-A, Decision on "Urgent Prosecution Motion For an Order Requiring the Appellant to Re-File his Appeal Brief and Request for Leave to Exceed Word-Limit for Motion", 2 September 2004.

[14] *Prosecutor v. Ntakirutimana*, ICTR-96-10-T & ICTR-96-17-T, Decision on the Motion of the Defence to Strike the Testimony of Witness YY, 5 November 2001, *Prosecutor v Muvunyi*, ICTR-2000-55A-T, Decision on Accused Tharcisse Muvunyi's Motion to Exclude Testimony of Witnesses AFV, TM, QCS, QY, and QBP and Motion to Strike QY's Testimony, 20 June 2005, and, *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, Decision on Motion to Strike the Evidence of Dr. Binaifer Nowrojee, 15 February 2011.

[15] *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Kingdom of Belgium's Application to File an *Amicus Curiae* Brief and on the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response by the Defence, 9 February 2001, *Prosecutor v Gotovina*, IT-06-90-PT, Decision on Defendant Ante Gotovina's Motion for Provisional Release and on Defendant Ante Gotovina's Motion to Strike Appendices 11, 12, 13, 14, 15, 16, 17, 18 from the Prosecution's Response Opposing Gotovina's Motion for Provisional Release, 28 November 2007, and, ICTY, *Prosecutor v. Prlić*, IT-04-74-T, Decision of the President on Prosecution Motions to Strike, 28 October 2010.

[16] For example, ICTY, *Prosecutor v Perišić*, IT-04-81-PT, Decision on Preliminary Motions, 29 August 2005, ICTY, *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Decision on Further Motions to Strike, 17 December 2009, *Prosecutor v. Nizeyimana*, ICTR-2001-55C-PT, Decision on Nizeyimana's Motion to Order the Prosecutor to Conform with a Trial Chamber Decision and Strike Parts of the June 18 Amended Indictment, 12 July 2010, and *Prosecutor v Mbarushimana*, ICC-01/04-01/10, Decision on the "Defence request to exclude the Prosecution's amended document containing the charges and amended list of evidence", 22 July 2011.

[17] *Prosecutor v. Gotovina*, IT-06-90-AR73.5, Decision on Ante Gotovina's Motion to Strike the Prosecution's Response Due to Violation of the Practice Direction on Length of Briefs and Motions, 13 May 2010.

20. In at least seven other decisions the offending document (or portions thereof) was ordered to be stricken (or 'excluded' or 'expunged').[18] Of these, six concerned appellate submissions including where new appeal arguments had been raised in a response, while the other related to a trial exhibit (although excluding an exhibit from the trial record after its admission effectively amounts to disregarding it in considering a verdict). The ICTY and ICTR Appeals Chambers have ordered that appendices to appeal briefs that breached practice directions by containing legal and factual arguments be 'expunged' from the record.[19]

21. Striking as a remedy is also distinguishable from a court declining to accept for filing documents that appear to breach filing rules,[20] or requiring that documents falling into specified categories be accepted onto the court record only after receiving leave for filing.[21] (This practice avoids litigation over the admissibility of documents after their filing.)

22. It is apparent that the remedy of striking is used very sparingly and is normally accompanied by an order for refiling. Motions seeking to strike something from the record have found only limited success and mostly only for breaching formal filing or pleading rules, for example, by including arguments in an appellate brief which did not appear in a notice of appeal. The decisions reveal that international criminal courts and tribunals are reluctant to strike filed or already received documents from their record or case file.

23. The Trial Chamber has not found any case in international criminal law proceedings where a court or tribunal has ordered the striking of a portion of a pre-trial brief, and certainly none striking the mere foreshadowing of an intention to lead a category of evidence at trial. Several

[18] For example, ICTY, *Prosecutor v. Kvočka*, IT-98-30/1-A, Decision on Prosecution's Motion to Strike Portion of Reply, 30 September 2002, *Prosecutor v Galić*, IT-98-29-A, Decision on Prosecution's Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 28 January 2005, and *Prosecutor v Muvunyi*, ICTR-2000-55A-T, Decision on Motion to Strike or Exclude Portions of Prosecutor's Exhibit No. 34, Alternatively Defence Objections to Prosecutor's Exhibit No. 34, 30 May 2006.

[19] *Prosecutor v Nahimana*, ICTR-99-52-A, Order Expunging from the Record Annexures "A" Through "G" of Appendix "A" to the Consolidated Respondent's Brief Filed on 22 November 2005, 30 November 2005, *Prosecutor v Halilović*, IT-01-48-A, Decision on Prosecution's Motion to Strike Annexes to the Respondent's Brief, 6 September 2006.

[20] Such as for exceeding word limits, incorrect formatting, or late filing. Or, alternatively, to seek guidance from a chamber before accepting documents, see e.g. ICTY Practice Direction on the Procedure for the Review of Written Submissions which Contain Obscene or Otherwise Offensive Language, 14 November 2005, see e.g. *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Order on Submission No. 58, 10 December 2004.

[21] Articles 6 (2) and (3) Practice Direction on *Amicus Curiae* Submissions before the Special Tribunal for Lebanon. An application to file *amicus* submissions 'is entered in the case file it if fulfils the conditions' (specified) and 'an application for leave to file unsolicited submissions is not automatically entered in the case file'.

unsuccessful attempts have been made by accused persons at the ICTY and ICTR to have portions of prosecution pre-trial briefs struck out but the closest to 'success' appears to have been where the ICTR Trial Chamber in *Ngirabatware* ordered the Prosecutor to 'delete from the footnotes any references to witnesses who are not expected to testify in this case'. That order, however, was aimed at clarifying the names of witnesses to be called at trial, rather than striking pleading averments, as the Defence motion here seeks. Moreover, that decision (taken by the Trial Chamber during the pre-trial phase) also stated that Defence submissions challenging the relevance of proposed testimonies were premature and should have been left to the trial stage.[22]

24. Consistent with the case-law and practice of the international courts and tribunals the Trial Chamber will not grant the relief sought of striking paragraphs of section X of the pre-trial brief. The Defence motion has not demonstrated any breach of any formal pleading requirements and, moreover, the Accused retain their right and ability to contest the admissibility of the evidence. The motion will be dismissed on that basis alone.

Timely determination of the substantive issues

25. Notwithstanding this, the Defence has flagged its intention of challenging the admissibility of the evidence referred to in section X of the pre-trial brief (there termed consistent pattern of conduct evidence) that the Prosecutor proposes to lead at trial. The substantive issue of the admissibility of the evidence associated with the connected cases – which includes determining whether accepting this evidence would be tantamount to adding new charges against the Accused – should be decided before trial to allow the Parties, and especially the Defence, the opportunity to properly prepare their case if it is ultimately decided that the foreshadowed evidence is admissible.

26. This latter point appears to be novel in international criminal law proceedings, so determining it should await (a) the filing of full submissions and (b) the Prosecutor advising of his intention in respect of indicting anyone for committing these three connected attacks.

[22] *Prosecutor v Ngirabatware* ICTR-99-54-PT, Decision on Defence Motions Objecting to the Prosecution's pre-trial brief, 2 June 2009, para. 73 and p. 18.

27. This matter will be therefore decided as soon as practicable in a timely fashion. For this reason the Defence is invited to file any substantive challenge to the admission of the foreshadowed evidence by Tuesday 9 April 2013.

Confidentiality of the motion and responses

28. The motions and response have been filed confidentially and will remain so for the moment, pending further order. The Trial Chamber does however expect that any submissions made pursuant to this decision will be filed publicly. The issues for consideration are essentially legal and no sound policy reason exists for this litigation to remain confidential.

FOR THESE REASONS, the Trial Chamber:

(1) DISMISSES the motion, and

(2) INVITES the Defence to file any substantive submissions relating to the admissibility of the evidence referred to in section X of the pre-trial brief by Tuesday 9 April 2013.

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

8 March 2013
Leidschendam
The Netherlands

Judge Robert Roth, Presiding

Judge Micheline Braidy

Judge David Re