

**THE TRIAL CHAMBER**

Case No.: STL-11-01/PT/TC

Before: Judge Robert Roth, Presiding
Judge Micheline Braidy
Judge David Re
Judge Janet Nosworthy, Alternate Judge
Judge Walid Akoum, Alternate Judge

Registrar: Mr. Daryl Mundis, Acting Registrar

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THE PROSECUTOR

v.

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

**DECISION ON ALLEGED DEFECTS IN THE
FORM OF THE AMENDED INDICTMENT**

Office of the Prosecutor:
Mr. Norman Farrell

Counsel for Mr. Salim Jamil Ayyash:
Mr. Eugene O'Sullivan
Mr. Emile Aoun

Victims' Legal Representative:
Mr. Peter Haynes

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. Guénaél Mettraux



INTRODUCTION

1. Defence counsel for three of the Accused, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra challenged the Prosecutor's amended indictment, filed on 6 February 2013, alleging defects in its form. The Prosecution opposed the challenges.
2. The Trial Chamber has decided that the challenges are without merit and has dismissed the three Defence motions. The Trial Chamber has found that the amended indictment provides counsel for the Accused with enough detail to inform them clearly of the nature and cause of the charges, and to allow them to prepare a defence of the case at trial.

PROCEDURAL HISTORY

3. On 10 June 2011, the Prosecution filed an indictment against Mr. Salim Jamil Ayyash, Mr. Badreddine, Mr. Oneissi and Mr. Sabra charging them with crimes related to the death of Rafik Hariri and others in Beirut on 14 February 2005.¹ The indictment was confirmed by the Pre-Trial Judge on 28 June 2011.²
4. On 25 June 2012, Defence counsel for Mr. Badreddine, Mr. Oneissi and Mr. Sabra filed preliminary motions under Rule 90 (A) of the Tribunal's Rules of Procedure and Evidence alleging defects in the form of that indictment.³
5. On 17 August 2012, the Prosecution, however, sought the Pre-Trial Judge's leave to amend the indictment.⁴ Recognising that an amendment to the indictment could affect the existing Defence challenge to the form of the indictment, the Trial Chamber, on 12 September 2012, deferred considering the Defence motions pending the Pre-Trial Judge's decision on amending the indictment.⁵

¹ STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, Case No. STL-11-01/I/PTJ, Indictment, confidential, 10 June 2011. A public redacted version dated the same day was filed on 16 August 2011.

² STL-11-01/I/PTJ, Decision relating to the Examination of the Indictment of 10 June 2011 issued against Mr. Salim Jamil Ayyash, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi & Mr. Assad Hassan Sabra, confidential, 28 June 2011. A public redacted version was filed on 16 August 2011.

³ STL-11-01/PT/TC, Sabra's Preliminary Motion Challenging the Form of the Indictment, confidential, 25 June 2012, with a public redacted version dated the same day; Preliminary Motion Submitted by the Defence for Mr. Mustafa Amine Badreddine on the Basis of Rule 90 (A) (ii) of the Rules of Procedure and Evidence, 25 June 2012; The Defence for Hussein Hassan Oneissi Preliminary Motion on Defects in the Form of the Indictment, 25 June 2012. The Prosecution responded in Prosecution Consolidated Response to the Defence Motions Alleging Defects in the Form of the Indictment, confidential, 25 July 2012.

⁴ Rule 71 (A) (ii), STL-11-01/PT/PTJ, Prosecution Request for Leave to Amend the Indictment Pursuant to Rule 71(A) (ii), confidential, 17 August 2012, with a public redacted version filed on 18 September 2012.

⁵ STL-11-01/PT/TC, Interim Decision on Alleged Defects in the Form of the Indictment, confidential, 12 September 2012.

6. On 25 October 2012, the Pre-Trial Judge granted the Prosecution's request to amend the indictment,⁶ and on 8 November 2012 the Prosecution filed an amended indictment. However, it also sought the Pre-Trial Judge's authorisation to make two further clarifications to the indictment.⁷ Defence counsel for Mr. Sabra then filed a motion alleging defects in the form of the amended indictment.⁸
7. On 5 December 2012, noting that the Pre-Trial Judge had not yet decided the Prosecution's request to 'clarify' the amended indictment, the Trial Chamber deferred deciding that motion.⁹ Defence counsel for Mr. Sabra also filed a motion before the Pre-Trial Judge seeking additional 'particulars' in regard to the amended indictment.¹⁰ Noting the similarities between that motion and the preliminary motions alleging defects in the form of the indictment pending before the Trial Chamber, the Pre-Trial Judge declared that he lacked jurisdiction to rule on the motion for particulars.¹¹
8. On 6 February 2013, the Prosecution again requested leave of the Pre-Trial Judge to amend the indictment – but this time in respect of the amended indictment filed on 8 November 2012.¹² On 12 April 2013, the Pre-Trial Judge granted leave for the Prosecution to amend the amended indictment, declaring the indictment of 6 February 2013 to be the operative indictment.¹³ The Prosecution subsequently (on 17 April 2013) filed a signed copy of this amended indictment.¹⁴
9. The following day the Trial Chamber declared the previous Defence motions alleging defects in the form of the indictment to be moot, and requested Defence counsel to file any fresh motions by 3 May 2013.¹⁵ Counsel for Mr. Badreddine, Mr. Oneissi and Mr. Sabra, on 2 and 3 May 2013,

⁶ STL-11-01/PT/PTJ, Decision on the Prosecution Request of 17 August 2012 for Leave to File an Amended Indictment, 25 October 2012.

⁷ STL-11-01/PT/PTJ, Filing of the Amended Indictment in Compliance with the Decision of 25 October 2012 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention, confidential, 8 November 2012.

⁸ STL-11-01/PT/TC, Sabra's Second Preliminary Motion Challenging the Form of the Indictment, 26 November 2012.

⁹ STL-11-01/PT/TC, Decision on Sabra's Second Preliminary Motion Challenging the Form of the Indictment, 5 December 2012.

¹⁰ STL-11-01/PT/PTJ, Motion for Particulars, 30 November 2012.

¹¹ STL-11-01/PT/PTJ, Decision Relating to the Sabra Defence Motion for Further Particulars, 22 January 2013.

¹² STL-11-01/PT/PTJ, Prosecution Request for Leave to Include Further Amendments to its Proposed Amended Indictment, 6 February 2013.

¹³ STL-11-01/PT/PTJ, Decision Relating to the Prosecution Requests of 8 November 2012 and 6 February 2013 for the Filing of an Amended Indictment, 12 April 2013.

¹⁴ STL-11-01/PT/PTJ, Prosecution's Filing of the Signed Version of the Amended Indictment in Compliance with the Pre-Trial Judge's Decision of 12 April 2013 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention, 17 April 2013.

¹⁵ STL-11-01/PT/TC, Order Authorising the Defence to File Preliminary Motions Challenging Defects in the Form of the Amended Indictment of 6 February 2013, 18 April 2013.

filed preliminary motions under Rule 90 (A) of the Rules alleging defects in the form of the amended indictment.¹⁶ The Prosecution filed a consolidated response on 24 May 2013.¹⁷

APPLICABLE LAW

10. Article 16 of the Tribunal's Statute 'Rights of the Accused' outlines the rights of the Accused to a fair trial including that to 'a fair and public hearing'. International human rights instruments mandate that accused persons have the right to be informed of the charges against them,¹⁸ and Article 16 (4) (a) mirrors these rights by providing:

In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

11. Rule 68 (D) further elaborates on this right by stating that an indictment must contain 'the name and particulars of the suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged'.

12. Rule 3 (A) provides that the Rules shall be interpreted in accordance with the spirit of the Statute, and, relevantly, according to international standards on human rights, and the general principles of international criminal law.¹⁹ The rights of an accused person to be informed of the charges against them under international human rights law are set out in the Statute and Rules. Additionally, numerous decisions of other international criminal courts and tribunals have interpreted and expanded upon these rights.

¹⁶ STL-11-01/PT/TC, Consolidated Motion on Form of the Indictment, 2 May 2013; Exception préjudicielle formée contre l'Acte d'accusation du 6 février 2013 par la Défense de M. Onetssi en vertu de l'article 90(A)(ii), confidentiel, 3 mai 2013; Double exception préjudicielle présentée par la Défense de M. Badreddine à l'encontre de la « Décision relative aux requêtes du Procureur du 8 novembre 2012 et du 6 février 2013 aux fins de déposer un acte d'accusation modifié » et de « l'Acte d'accusation modifié », 3 mai 2013.

¹⁷ STL-11-01/PT/TC, Prosecution Consolidated Response to Preliminary Defence Motions Alleging Defects in the Amended Indictment, 24 May 2013.

¹⁸ See e.g. Article 6 (3) (a) of the European Convention on Human Rights, and Article 14 (3) (a), International Covenant on Civil and Political Rights the right 'to be informed promptly, and in detail in a language which he understands of the nature and cause of the accusation against him'; see also Article 8 (2) (b) American Convention on Human Rights, the right to 'prior notification in detail to the accused of the charges against him'. The case-law of the ECtHR holds that a fair trial requires that indictments include the charges and form of liability alleged; see e.g. *Penev v. Bulgaria*, Appl. 20494/04, 7 January 2012, para. 44; *Varela Gels v. Spain*, Appl. 61005709, 5 March 2013, para. 42.

¹⁹ It is not necessary here to examine the Lebanese Code of Criminal Procedure, see Rule 3 (A) (iv).

13. Articles 21 (4) and 20 (4) and 17 (4) (a) (respectively) of the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL) are identical to Article 16 (4) (a) of the Special Tribunal's Statute. Rule 47 (C) of the Rules of Procedure and Evidence of both *ad hoc* tribunals is also identical to the Special Tribunal's Rule 68 (D).²⁰ The Trial and Appeals Chambers of both *ad hoc* tribunals, and of the Special Court for Sierra Leone, have extensively interpreted their equivalents of the Special Tribunal's Article 16 (4) (a) and Rule 68 (D).

14. In examining this international case law, the following general principles of international criminal law emerge;

- the Prosecution must plead the material facts underpinning the charges with enough detail to inform an accused person clearly of the nature and cause of the charges to allow them to prepare a defence,²¹
- there is a clear difference between the material facts (which must be pleaded) and the evidence proffered to prove them;²²
- the Prosecution is not required to plead the evidence proving the pleaded material facts,²³
- it would be unworkable for an indictment to contain all the evidence the Prosecutor proposes to introduce at the trial,²⁴
- an indictment must be considered as a whole, and select paragraphs should be read in context with the entire document,²⁵
- the materiality of a particular fact cannot be decided in the abstract and depends on the nature of the Prosecution's case,²⁶

²⁰ Although its wording differs slightly, the SCSL's Rule 47 (C) is in substance the same, providing 'The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case'.

²¹ ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000 ('*Furundžija* Judgement'), paras 61, 147; *Prosecutor v. Kupreškić*, IT-95-16-A, Judgement, 23 October 2001 ('*Kupreškić* Judgement'), para. 88; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 ('*Blaškić* Judgement'), para. 209; *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, (*Stakić* Judgement), para. 116; *Prosecutor v. Simić*, IT-95-9-A, Judgement, 28 November 2006, ('*Simić* Judgement') para. 20; *see also, Ntabakuze v. The Prosecutor*, ICTR-98-41A-A, Judgement, 8 May 2012, para. 30 and the line of authority at the ICTR cited there.

²² *Blaškić* Judgement, para. 210; *Stakić* Judgement, para. 116.

²³ *Furundžija* Judgement, paras 61, 147, 153; ICTR, *The Prosecutor v. Ntagerura*, ICTR-99-46-A, Judgement, 7 July 2006, ('*Ntagerura* Judgement'), para. 21; *Simić* Judgement, para. 20; *The Prosecutor v. Uwinkindi*, ICTR-01-75-AR72 (c), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, ('*Uwinkindi* Decision'), para. 4.

²⁴ *Furundžija* Judgement, para. 153.

²⁵ *Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para. 304; *Gacumbitsi v. The Prosecutor*, ICTR-2001-64-A, Judgement, 7 July 2006, para. 123; *The Prosecutor v. Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008, para. 27.

- the alleged criminal conduct is decisive in determining the degree of specificity required in the indictment,²⁷
- regarding the identity of perpetrators for whose acts an accused is charged, but without being charged with personally committing the crimes, it is sufficient to identify such perpetrators by category or group in relation to a particular crime site,²⁸
- a date may be considered to be a material fact if it is necessary in order to inform a defendant clearly of the charges so that he may prepare his defence,²⁹
- a reasonable range of dates may be pleaded where precise dates cannot be specified as to when the alleged criminal conduct occurred,³⁰
- a broad range of dates does not of itself invalidate a paragraph in an indictment,³¹
- the precision with which dates have to be charged varies from case to case,³²
- the Prosecution must offer its best understanding of the case in the indictment,³³ or the 'best information available'.³⁴
- the identities of co-conspirators are required to be pleaded when they are known,³⁵ and
- a chamber must distinguish between a disagreement with the alleged facts (which is to be determined at trial) and a defect in the form of the indictment,³⁶ and the material facts and the evidence proving those material facts.³⁷

²⁶ *Kupreškić* Judgement, para. 89; *Blaškić* Judgement, para. 210; *see also*, *Uwinkindi* Decision at para. 4 and the line of authorities cited there.

²⁷ *Kupreškić* Judgement, para. 89; *Blaškić* Judgement, para. 210.

²⁸ *Prosecutor v. Krnojelac*, IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46; *Blaškić* Judgement, para. 218; *Simba v. The Prosecutor*, ICTR-01-76-A, Judgement, 27 November 2007, paras 71-72; *Muvunyi v. The Prosecutor*, ICTR-2000-55-A-A, Judgement, 29 August 2008, ('*Muvunyi* Judgement') para. 55; *Renzaho v. The Prosecutor*, ICTR-97-31-A, Judgement, 1 April 2011, para. 64.

²⁹ *Ndindabahizi v. The Prosecutor*, ICTR-01-71-A, Judgement, 16 January 2007, ('*Ndindabahizi* Judgement') para. 19.

³⁰ *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Objection by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 22; *Ndindabahizi* Judgement, paras. 19-20; *Muvunyi* Judgement, para. 58.

³¹ *Muvunyi* Judgement, para. 58; *Rukundo v. The Prosecutor*, ICTR-2001-70-A, Judgement, 20 October 2010, para. 163; *Bagosora and Nsengiyumva v. The Prosecutor*, ICTR-98-41-A, Judgement, 14 December 2011, para. 150.

³² *Ndindabahizi* Judgement, para. 20.

³³ *Kupreškić* Judgement, paras 92, 95; *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, 28 February 2005, para. 30.

³⁴ SCSL, *Prosecutor v. Sesay*, SCSL-04-15-T, Judgement, 2 March 2009, para. 398.

³⁵ *The Prosecutor vs Nahimana*, ICTR-96-11-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 5 November 1999, para. 19; *The Prosecutor vs. Barayagwiza*, ICTR-97-19-1, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000, p. 3; *The Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Nyiramasuhuko's Preliminary Motion based on Defects in the Form and the Substance of the Indictment, 1 November 2000, paras. 58, 60; *The Prosecutor v. Bikindi*, ICTR-2001-72-1, Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment, 22 September 2003, para. 38 (i).

³⁶ *Prosecutor v. Kvočka*, IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 40.

³⁷ *Furundžija* Judgement, para. 153.

15. The Trial Chamber endorses and adopts these decided general principles of international criminal law and will apply them in determining the Defence challenges to the form of the indictment.

DISCUSSION

16. The main issue for determination is whether the amended indictment provides a concise statement of the case against the four Accused by setting out the material facts in sufficient detail to allow their counsel to prepare a defence at trial.

17. Requests for relief in the three motions seeking either an annulment of the amended indictment (or the initial indictment), or an order directing the Prosecutor to provide better particulars to the Defence, are not properly part of a motion under Rule 90 (A) (ii). This decision disposes first of these issues, and then deals with the specific challenges to the form of the indictment, either individually or, where convenient, thematically.

Dismissal of relief seeking an 'annulment' of the amended indictment

18. Two Defence motions ask the Trial Chamber to 'annul' the amended indictment. The Trial Chamber, however, cannot do this.

19. Counsel for Mr. Badreddine requests the Trial Chamber to:

- (a) annul the indictment of 10 June 2011 as an abuse of process, and
- (b) to determine and state that the amended indictment is consequently defective, and
- (c) to declare it without legal effect and non-binding.

In the alternative, the Trial Chamber is asked to:

- (i) state that the submissions of the motion of 25 June 2012³⁸ are admissible and well-founded,
- (ii) determine that the amended indictment lacks precision is defective and therefore null and void or, failing that,
- (iii) suspend the charges pending the issuance of a valid indictment.

20. The request in (a) is dismissed for two reasons. First, the indictment of 10 June 2011 is no longer operative and cannot be 'annulled'. Moreover, even if this were possible, the Trial Chamber

³⁸ Preliminary Motion Submitted by the Defence for Mr. Mustafa Amine Badreddine on the Basis of Rule 90 (A) (ii) of the Rules of Procedure and Evidence, 25 June 2012.

lacks the jurisdiction to 'annul' such an indictment. It could order the Prosecutor to amend an indictment – or, in an appropriate case, stay the proceedings on an indictment – but it could not annul one that had been confirmed by the Pre-Trial Judge. The relief sought in (b) and (c) is similarly dismissed for the same reason.

21. In relation to the alternative forms of relief sought; the Trial Chamber does not understand the submission supporting the relief sought in (i) regarding the motion of 25 June 2012. That motion, pertaining to a no longer operative indictment, is now moot. Pursuant to the Trial Chamber's order of 18 April 2013, the motion of 3 May 2013 replaced the earlier Defence motion. The request is thus dismissed. Regarding (ii) and (iii), in paragraphs 23-64 below the Trial Chamber has determined that the indictment does not lack specificity. However, even if it were to find that it did it would order the Prosecutor to amend it to cure any pleading defects, rather than declaring it null and void.
22. Counsel for Mr. Oneissi similarly asks the Trial Chamber to declare the amended indictment void. This request is dismissed for the same reason, namely that the Trial Chamber lacks the power to make this order. The two alternative orders sought, namely, of ordering the Prosecutor to file an amended indictment, and within fifteen days, are dismissed by the reasoning in paragraphs 23-64 on the basis that the amended indictment contains no pleading defects.

Counsel for Mr. Sabra's request for particulars

23. At paragraphs 13-43 of their 43 paragraph motion, counsel for Mr. Sabra seek 'further and better particularisation of the Prosecution case' in respect of both the amended indictment and the Prosecution's pre-trial brief. This section of the Defence motion poses as questions a number of sentences commencing with '*who*', '*when*', and '*In what circumstances did/ is it alleged*' and '*on what proposed evidential material*' etc.³⁹
24. The Prosecution responded by arguing that these requests for particulars should be assessed by reference to the amended indictment alone, using only those principles applicable to determining a challenge to the form of an indictment.
25. The Sabra Defence motion is substantially presented as a request for a judicial decision ordering the Prosecutor to provide particulars to the Defence. This, however, is not a proper challenge alleging defects in the form of an indictment, and goes beyond the scope of Rule 90 (A) (ii). As

³⁹ E.g. Sabra motion, paras. 16, 27.

the Prosecutor submits, the Trial Chamber should confine itself to the principles applicable to determining a challenge to the form of the indictment, namely whether the indictment provides the information necessary to mount a defence. The Trial Chamber will judicially determine any motion relating to a request for particulars only after the Parties have exhausted all reasonable efforts *inter partes* to resolve the issues.

26. The Prosecution also submitted that it would 'not make sense' for the Trial Chamber to consider, at this stage of the proceedings, whether its pre-trial brief provided sufficient notice of its case, but rather that this should be better considered at the close of the case.⁴⁰ The Trial Chamber, however, disagrees; although the sufficiency of notice can certainly be considered at the end of a case, considering the issue at a much earlier stage could promote the interests of a fair and expeditious trial. (The issue though is not relevant to this particular motion).

Specific defects

27. The Defence motions allege specific defects in the form of the pleading of the amended indictment. These are dealt with thematically in turn:

Pleading of the alleged conspiracy

28. The amended indictment, at paragraph 3, alleges that the four Accused 'participated in a conspiracy with others aimed at committing a terrorist act to assassinate' Rafik Hariri. It then outlines in broad terms the role of each in the conspiracy alleged.
29. Paragraph 42 avers that the four 'together with others as yet unidentified, including the assassination team, and S15... agreed to commit a terrorist act by means of an explosive device in order to assassinate HARIRI'. (The alleged co-conspirator, S15, is not named). It then further charts the alleged role of each Accused in the conspiracy alleged.
30. The dates of the alleged conspiracy are specified in the particulars of count one, in paragraph 48. There, it is alleged that participation in the conspiracy occurred – in the case of Mr. Badreddine and Mr. Ayyash between 11 November 2004 and 14 February 2005, and for Mr. Oneissi and Mr. Sabra between 22 December 2004 and 14 February 2005.⁴¹

⁴⁰ Prosecution's response, para. 19.

⁴¹ And in relation to Mr. Oneissi and Mr. Sabra in counts 6, 7, 8 and 9 between 22 December 2004 and 14 February 2005.

31. Counsel for each of the three Accused also challenged the pleading of the alleged conspiracy in the amended indictment. The complaints essentially concern the dates of the alleged conspiracy and that S15 is not named in the amended indictment. (Further complaints are made concerning a lack of particulars of the alleged conspiracy).

Dates of alleged conspiracy

32. Counsel for Mr. Badreddine submitted that the time pleaded for the conspiracy was 'unreasonably long' and lacks material facts supporting its alleged commencement date and Mr. Badreddine's alleged participation in it. They also submit that pleading this date range is 'incompatible with the statement that Mr. Badreddine was allegedly among the early members of the conspiracy' asking how this could be correct if he could have joined it as late as 14 February 2005?⁴²

33. The Defence of Mr. Oneissi submitted that the amended indictment fails to provide sufficient details of the charges. The amended indictment, it is argued, lacks the material facts necessary to allow the Defence to identify the other members of the conspiracy, and the date when Mr. Oneissi joined it, and does not explain why those dates were chosen. They will assume (unless the Prosecution provides further details) that the other three Accused are the only other members of the alleged conspiracy. They then ask the Trial Chamber to order the Prosecution to give details of the material facts alleged in the relevant paragraphs of the amended indictment.⁴³

34. Counsel for Mr. Sabra argue that the amended indictment lacks sufficient detail supporting the material facts in the crimes charged. Such defects generally relate to the alleged conspiracy and Mr. Sabra's complicity and undermine their ability to prepare for trial and may ultimately result in unfairness to the Accused.⁴⁴

35. The Prosecution responded by referring to international criminal law jurisprudence which holds that the range of dates pleaded in an indictment must not be overly broad. The dates pleaded in the amended indictment, it is argued, provide the Defence with sufficient notice of the relevance of the time frame to the conspiracy pleaded.

⁴² Badreddine motion, paras. 27-31.

⁴³ Oneissi motion, paras. 39-42.

⁴⁴ Sabra motion, paras. 1, 16 (ii).

36. The Trial Chamber agrees. It is permissible (and indeed normal) to plead in an indictment the occurrence of an act within a range of dates if its precise date is unknown. The ICTR Appeals Chamber, in summarising the relevant international jurisprudence, has recently held that:⁴⁵

'a broad date range, in and of itself, does not invalidate a paragraph of an indictment. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct with which the accused is charged. Obviously, there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'.

37. Counsel for Mr. Badreddine's submission that pleading such a range of dates is 'incompatible' with an allegation that one Accused was an early participant in a conspiracy is misconceived. Here, the Prosecution has alleged the existence of a conspiracy and the participation of each of the Accused in that conspiracy but between specified dates. There is nothing impermissible in this form of pleading, and indeed, the Special Tribunal's Appeals Chamber has held – in relation to the duration of a conspiracy – that 'no explicit time-line is required for the validity. The agreement stands, even though it is a long-term one or has no predefined or foreseen term'.⁴⁶

38. An indictment must be viewed in its totality, and pleading that an act relating to a conspiracy occurred within a three month period – in the totality of the circumstances alleged here – is not disproportionate or overly broad. The circumstances in which the two Accused are alleged to have come to participate in the alleged conspiracy are a matter for evidence at trial and need not be pleaded as material facts in an indictment (but should be notified to the Defence in a timely manner before trial).

The identity of the alleged co-conspirators, and in particular, S15

39. Counsel for Mr. Sabra claim that the amended indictment is defective in not explicitly naming S15, stating that this implies that the Prosecution does not know who he is.⁴⁷ Counsel for Mr. Oneissi similarly argue that the Prosecution's failure to identify the user of Purple (mobile telephone) 231 (S15) is a defect in the amended indictment.⁴⁸ The Prosecution responded by arguing that it had no obligation either to name an individual in an indictment if it was still

⁴⁵ *Bagosara* Judgement, para. 150.

⁴⁶ STL-11-01/I, Interlocutory Decision on the Applicable Law; Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging ('Applicable Law Decision'), 16 February 2011, para. 196.

⁴⁷ Sabra motion, paras. 12 (xi) and 40.

⁴⁸ Oneissi motion, para. 34.

investigating the person at the time of indicting, or to indict an individual 'where evidence in the possession of the Prosecution may simply tend to demonstrate an identity'.⁴⁹

40. As a general principle of pleading indictments in international criminal law, a Prosecutor is required to plead the identity of known co-conspirators,⁵⁰ but is not required to plead the names of those whose identity is unknown. Moreover, 'there is no requirement concerning the identification of all individuals'.⁵¹

41. Here, the Prosecutor has pleaded the identity and the role of a known alleged co-conspirator, S15, but by referring to him in the amended indictment by pseudonym rather than by name. The Prosecutor has informed Defence counsel of S15's identity (as the alleged user of mobile telephone 231).⁵² The Trial Chamber is thus satisfied that the amended indictment pleads sufficient material facts, relating to the role and identity of S15, to allow Defence Counsel to prepare their case for trial.

The False Claim of Responsibility

42. The amended indictment, at paragraphs 3 (d), 20, 24, 25 and 38, alleges that Mr. Oneissi and Mr. Sabra participated in finding and then using a person, Abu Adass, to make a video-taped false claim of responsibility for the Hariri assassination, which was ultimately broadcast on Al-Jazeera on 14 February 2005.

43. The amended indictment pleads the following material facts, by alleging that Mr. Oneissi and Mr. Sabra participated together in:

- identifying and finding a suitable individual (Abu Adass) for making the false claim,
- after the attack, disseminating statements falsely attributing responsibility for the attack,

⁴⁹ Prosecution's response, para. 76.

⁵⁰ For example, *The Prosecutor vs. Nahimana*, ICTR-96-11-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 5 November 1999, para. 19; *The Prosecutor vs. Barayagwiza*, ICTR-97-19-1, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000, p. 4; *The Prosecutor v. Bikindi*, ICTR-2001-72-1, Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment, 22 September 2003, para. 38 (i).

⁵¹ Applicable Law Decision, para. 195.

⁵² Prosecution's response, para. 77.

- ensuring the delivery to Al-Jazeera of a video, with a letter attached containing the false claim, by telephoning Al-Jazeera on 14 February 2005, and
- then demanding, with menace, that the video be broadcast (i.e. ensuring that it would be broadcast).

More specifically it alleges that Mr. Oneissi (using the pseudonym Mohammed) allegedly met Abu Adass on 16 January 2005, and, on 14 February 2005 observed Al-Jazeera employees locating the video-cassette which had been placed in a tree near its offices in Beirut. Mr. Sabra is alleged in the amended indictment to have telephoned Al-Jazeera shortly before this to inform the broadcaster of the video's location.

44. Counsel for Mr. Oneissi submits that these pleadings do not specify clearly enough the respective roles of Mr. Oneissi and Mr. Sabra in making the false claim. Counsel for Mr. Oneissi and Mr. Sabra state they need further details of the alleged involvement of their clients in recruiting Abu Adass. They also complain of an absence of material facts outlining the respective roles of these two Accused in the alleged disappearance of Abu Adass. Both submit that the description of the observation and delivery of the video-cassette, including telephone calls to Al-Jazeera falsely claiming responsibility,⁵³ are impermissibly vague and fail to establish the Accused's participation.
45. The Prosecution's response is that the amended indictment pleads all the necessary material facts in relation to these alleged events, rather than the evidence which will establish the material facts pleaded at trial.
46. The Trial Chamber agrees with the Prosecution's submissions. The Prosecution has pleaded the material facts necessary for such an averment in an indictment. Further, although no material facts connecting Mr. Oneissi and Mr. Sabra with the disappearance of Abu Adass in January 2005 are pleaded, the amended indictment does not allege that they were actually involved with or responsible for the disappearance.
47. The pleading provides sufficient information to Defence counsel to inform them clearly of the nature and cause of the charges against their clients such as to allow them to prepare a defence

⁵³ In this context, the Sabra motion argues that the word 'or' in the phrase 'ONEISSI or SABRA made a total of 4 calls' is insufficiently clear, and the allegation should be stricken if the Prosecution is unable to specify who made each call, para. 12 (xix).

for trial. The issues raised in the Defence submissions generally relate to the evidence to be led at trial (and particulars between the Parties) rather than what must be pleaded in an indictment.

The alleged criminal conduct of Mustafa Amine Badreddine, contrary to Articles 2 and 3 of the Statute of the Tribunal

48. The amended indictment in its preamble at paragraph 1 accuses Mr. Badreddine of committing five counts contrary to 'Article 2 and 3 of the Statute of the Tribunal (and thereby under the Lebanese Criminal Code and the Lebanese Law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith strength')'. These are; conspiracy aimed at committing a terrorist act, of committing a terrorist act by means of an explosive device, the intentional homicide of Rafik Hariri, the intentional homicide of 21 others, and the attempted intentional homicide of 226 others.

49. The amended indictment specifically accuses Mr. Badreddine of committing these five counts contrary to various provisions of the Lebanese Criminal Code (including article 212),⁵⁴ and Articles 6 and 7 of the Lebanese Law of 11 January 1958, and Article 3 (1) (a) of the Statute of the Tribunal, which provides:

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

(a) Committed, participated as accomplice, organized or directed others to commit the crimes set forth in article 2 of this Statute, or,'

50. Article 212 of the Lebanese Criminal Code provides:

The perpetrator of an offence is anyone who brings into being the constituent elements of an offence or who participates directly in its commission.

In its Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging,⁵⁵ the Appeals Chamber – in interpreting article 212 – divided the role of a

⁵⁴ Articles 188, 189, 200, 201, 212, 213, 270, 314, 547, 549 (1), and 549 (7) Lebanese Criminal Code. He is generally charged as a 'perpetrator of the conspiracy against state security'. He is specifically charged, with Mr Ayyash, with 'each bearing individual criminal responsibility as co-perpetrators with shared intent'(count one), 'each bearing individual criminal responsibility as co-perpetrators with shared intent'(two and three) and 'each bearing individual responsibility as co-perpetrators' (four and five).

⁵⁵ Applicable Law Decision, paras. 215-217.

co-perpetrator into two; first a 'core perpetrator' who executes the same action as the perpetrator and, second, one who commits some but not all of the elements of the crimes.⁵⁶

51. Under the heading 'Imprecision in the form of participation'⁵⁷ counsel for Mr. Baddredine submit that the pleaded legal basis of Mr. Badreddine's alleged responsibility is ambiguous in two respects; first the amended indictment does not state the applicable source of law – either Lebanese law or international criminal law; and second it does not clearly designate his form of criminal participation, and most specifically by not referring to Article 3 (1) (b).⁵⁸ It is thus unclear whether the Prosecutor is relying on the first or the second form of co-perpetration identified in the Appeals Chamber's Decision on the Applicable Law.⁵⁹ Complaint is also made that the Pre-Trial Judge failed to determine whether there was any conflict between Lebanese law and international law.
52. The Prosecution responded that the Appeals Chamber had decided that Lebanese law applies where there is no conflict between the two sources of law,⁶⁰ and that the Appeals Chamber had clearly stated the applicable law with regard to the two forms of co-perpetration under Lebanese law. The amended indictment, according to the Prosecution, pleads the first form of perpetration under the Lebanese article 212 for count one, and the second in respect of counts two, three, four and five. The Defence cannot challenge the confirmation decision of the Pre-Trial Judge, and, moreover, has not demonstrated that he failed to consider whether there was any such conflict.⁶¹
53. The Trial Chamber – at this stage of the proceedings – must verify that the amended indictment properly informs Mr. Badreddine as to how he is alleged to have committed the crimes charged. The Trial Chamber must also evaluate, if required, whether there is any conflict – in the charging of the crimes in the amended indictment – between Lebanese law and international criminal law and in the event of conflict apply the law most favourable to the Accused.⁶² The Trial Chamber, although not directly asked to rule on this, sees no conflict between Lebanese and international law here. An Accused who is alleged to have directly participated in the crime may be indicted under Article 3 (1) (a) of the Statute as a co-perpetrator under the second form of liability

⁵⁶ Applicable Law Decision, paras. 213-214.

⁵⁷ Badreddine motion, paras. 39-42.

⁵⁸ Which provides '(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime'.

⁵⁹ Applicable Law Decision, paras. 215-217.

⁶⁰ Applicable Law Decision, para. 261.

⁶¹ Prosecution's response, paras. 83-84.

⁶² Applicable Law Decision, paras. 211, 263, 264.

specified in article 212 of the Lebanese Code (as identified in the Appeals Chamber's Applicable Law decision).

54. That is the case here; Mr. Badreddine is alleged to have directly participated as co-perpetrator in all of the crimes charged against him. The Prosecution's submission that both forms of co-perpetration under article 212 of the Lebanese Code law may be subsumed under Article 3 (1) (a) is consistent with the Appeals Chamber's decision. The Prosecution's information in its Response that it relies on the first form of co-perpetration liability (under article 212 of the Lebanese Code) for counts one and the second form for the remaining counts also informs the Parties and the Trial Chamber of its interpretation of the ambit of Article 3 (1).⁶³
55. The Trial Chamber is thus satisfied that the amended indictment provides Mr. Badreddine with sufficient notice of the form of criminal liability alleged against him to allow his counsel to prepare his defence at trial.

Defects in pleading *mens rea* (intention)

56. The amended indictment pleads, generally, in paragraphs 46 to 64, section IV 'The Counts' the *mens rea* (that is, the intention to commit a criminal act) of the four Accused for the nine counts alleged. It does so by alleging that the four Accused intended to commit the crimes alleged.
57. Counsel for Mr. Oneissi and Mr. Sabra have challenged these pleadings as being insufficient to mount a proper defence. The Oneissi Defence complains that the 'Prosecution does not specify the circumstances in which Mr. Oneissi allegedly learnt of' the intentions of his co-perpetrators.⁶⁴ Counsel for Mr. Sabra – as part of their request for particulars – complain that the Prosecution has provided inadequate particulars of Mr. Sabra's knowledge of the alleged conspiracy and how he had foreknowledge of using Abu Adass to create the pleaded claim of false responsibility for the attack.⁶⁵
58. An indictment may plead the intention of an accused person to commit a criminal act in two ways '(i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence,

⁶³ It also differs slightly from the Prosecution's notice at para. 14 of its Prosecution Consolidated Response to the Defence Motions Alleging Defects in the Form of the Indictment, 25 July 2012, (in respect of the same pleading in the indictment confirmed 10 June 2011) where it stated 'To clarify, the Prosecution intends to rely on the second category of co-perpetration for the four accused, as enumerated in the Appeals Chamber Decision of 16 February, 2011'.

⁶⁴ Oneissi motion, para. 50.

⁶⁵ Sabra motion, paras. 38-39.

and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred'.⁶⁶

59. The Trial Chamber is satisfied that the amended indictment pleads either the intention of Mr. Oneissi and Mr. Sabra to commit the crimes charged, or the material facts from which their state of mind should be inferred. For example, the amended indictment – in addition to generally pleading their *mens rea* for all the crimes charges – also pleads material facts from which their *mens rea* can be inferred in relation to the alleged false claim of responsibility. These include pleadings of communications between the two Accused and S15 before and after the alleged recruitment of Abu Adass, the method of the alleged recruitment, and the content of telephone calls to Al-Jazeera on 14 February 2005. The Trial Chamber is satisfied that the amended indictment pleads the *mens rea* of the two Accused with sufficient particularity to allow their counsel to mount a proper defence at trial.

Alleged defects relating to Hezbollah

60. The amended indictment, at paragraph 43, pleads that 'All four Accused are supporters of Hezbollah, which is a political and military organisation in Lebanon'. Counsel for Mr. Oneissi ask the Trial Chamber to order the Prosecutor to clarify this pleading including specifying how 'being a member of Hezbollah might be considered incriminating evidence'.⁶⁷

61. As part of their claim for better particulars, Counsel for Mr. Sabra also refer to this pleading, arguing that the amended indictment is defective because the Pre-Trial Judge 'did not confirm this part of the Prosecution case' in the original indictment and the Prosecution then removed this reference from the amended indictment. (This submission appears to be factually mistaken). They then ask the Trial Chamber to 'confirm that the charges do not contain an allegation that "Hezbollah" or any relationship with that group is material to the charges and that no such allegation has been confirmed for the purposes of these proceedings',⁶⁸ and seek a ruling ordering the Prosecution to provide further particulars in relation to the pleading.

62. This submission, however, is inaccurate. The Pre-Trial Judge first confirmed an indictment, and then later confirmed an amended indictment containing the precise averment that the Sabra

⁶⁶ *Blaškić* Judgement, para. 219; *The Prosecutor v. Nahimana and others*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 347; *The Prosecutor v. Kanyarukiga*, ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010, para 9.

⁶⁷ Oneissi motion, paras. 31-32.

⁶⁸ Sabra motion, paras. 42-43.

Defence states was never 'confirmed'. The Trial Chamber is not prepared to order the Prosecutor to provide particulars to the Defence in relation to this particular matter now; this should be properly explored between the Parties before the Trial Chamber's involvement is sought. Counsel for Mr. Sabra also complained that the pre-trial brief and some disclosed materials make materially unclear references to the Hezbollah leader. The amended indictment, however, contains no reference to the leadership of Hezbollah, so any claim for such relief in this particular motion is meaningless.

Allegations of vagueness in pleading

63. Counsel for Mr. Sabra argued that the amended indictment is vague in 24 distinct aspects. These include using the words 'each and together with', 'participated together with', 'ensuring the delivery of the video', 'to co-ordinate the false claim', 'phones ... were used from at least 1 January 2005', 'a number of days prior to the attack', 'surveillance occurred on at least fifteen days', 'activity... is illustrated *inter alia*', 'in the vicinity of the mosque', 'locating', 'chose', 'seek a suitable individual', 'together with others as yet unidentified', 'sometime between at least 11 November 2004 and 16 January 2005', and 'identifying and then using'.⁶⁹ Counsel for Mr. Badreddine attacked the use of words such as 'often' and 'monitor' as being imprecise.⁷⁰ Counsel for Mr. Oneissi complains that the Prosecution does not clarify what is meant by 'a group of phones'.⁷¹
64. The Trial Chamber disagrees with these submissions. The amended indictment pleads the material facts necessary for a valid indictment; each of the circumstances complained of by Defence counsel relates to the evidence to be presented at trial. The totality of the case against the three Accused is contained in the amended indictment, the Prosecution's pre-trial brief, the evidence disclosed to his counsel, and the evidence to be presented at trial. These documents must be viewed as a package providing an Accused with the material necessary to mount a proper defence, but the indictment itself is only required to plead material facts. It has done so.

⁶⁹ Sabra motion, para. 12.

⁷⁰ Badreddine motion, paras. 33-34.

⁷¹ Oneissi motion, para. 33.

CONCLUSION

65. The amended indictment therefore provides counsel for the Accused with enough detail to inform them clearly of the nature and cause of the charges to allow them to prepare a defence of the case at trial. The amended indictment is not defective in its form.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

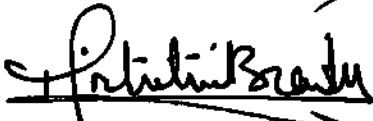
Dismisses the motions alleging defects in the form of the amended indictment filed by the Defence of Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra.

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

12 June 2013



Judge Robert Roth, Presiding



Judge Micheline Braidy



Judge David Re

