



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRE-TRIAL JUDGE

Case No.: **STL-11-01/PT/PTJ**

The Pre-Trial Judge: **Judge Daniel Fransén**

The Registrar: **Mr. Daryl Mundis, Acting Registrar**

Date: **5 July 2013**

Original language: **English**

Classification: **Public**

THE PROSECUTOR

v.

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

DECISION ON "PROSECUTION MOTION REGARDING THE DEFENCE PRE-TRIAL BRIEFS"

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. INTRODUCTION

1. By way of this decision, the Pre-Trial Judge rules on the Prosecution motion that the pre-trial briefs filed by the respective Counsel for the four Accused in these proceedings (respectively, the “Defence” and the “Accused”) are defective (the “Motion”).¹

II. PROCEDURAL BACKGROUND

2. On 15 November 2012, the Prosecution filed pursuant to Rule 91(G) of the Rules of Procedure and Evidence (the “Rules”) its pre-trial brief (“Prosecution PTB”) along with its list of witnesses and exhibits.²

3. On 8 January 2013, Counsel for Mr. Assad Hassan Sabra (the “Sabra Defence”) filed its pre-trial brief (“Sabra PTB”) pursuant to Rule 91(I).³

4. On 9 January 2013, Counsel for Messrs Mustafa Amine Badreddine (the “Badreddine Defence”) and Salim Jamil Ayyash (the “Ayyash Defence”) filed their individual pre-trial briefs (respectively, “Badreddine PTB” and “Ayyash PTB”) pursuant to Rule 91(I).⁴

5. On 18 January 2013, Counsel for Mr. Hussein Hassan Oneissi (the “Oneissi Defence”) filed a corrected version (“Oneissi PTB”)⁵ of the pre-trial brief it had filed on 9 January 2013,⁶ along with a corrigendum indicating the changes that were made.⁷

6. On 23 January 2013, the Prosecution filed the Motion, asking the Pre-Trial Judge to order that the Defence each file “a pre-trial brief which fully complies with the requirements of Rule 91(I)”.⁸

¹ STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Prosecution Motion Regarding the Defective Defence Pre-Trial Briefs, Confidential, 23 January 2013, with a Public Redacted Version of the same day. All further references to filings and decisions relate to this case number unless otherwise stated.

² Prosecution’s Submission Pursuant to Rule 91, Confidential, 15 November 2012, with a Public Redacted Version of the same day.

³ *Sabra* Pre-Trial Brief, Confidential, 8 January 2013, with a Public Redacted Version filed on 9 January 2013.

⁴ Pre-Trial Brief Submitted by the Defence for Mr Mustafa Amine Badreddine Pursuant to Rule 91(I), 9 January 2013; Ayyash Defence Pre-Trial Brief, Confidential, 9 January 2013, with a Public Redacted Version filed on 17 January 2013.

⁵ *Version corrigée du Mémoire d’Avant Procès pour la Défense de M. Hussein Hassan Oneissi déposé le 9 janvier 2013*, Confidential, 18 January 2013, with a Public Redacted Version filed on 20 February 2013.

⁶ *Mémoire d’Avant Procès pour la Défense de M. Hussein Hassan Oneissi*, Confidential, 9 January 2013.

⁷ *Rectificatif au Mémoire d’Avant Procès pour la Défense de M. Hussein Hassan Oneissi déposé le 9 janvier 2013*, Confidential, 18 January 2013.

⁸ Motion, para. 21.

7. Between 29 January and 12 February 2013, the Defence filed individual responses, each requesting that the Pre-Trial Judge reject the Motion.⁹

III. SUBMISSIONS

A. The Motion

8. The Prosecution submits that the four Defence pre-trial briefs do not comply with Rule 91(I) and they therefore fail to provide sufficient notice “of the nature of each Defence team’s defence, each of the matters which the respective Defence team disputes in the Prosecution’s pre-trial brief and the reasons for the disputes.”¹⁰

9. The Prosecution refers to jurisprudence from the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in arguing that the purpose of Rule 91(I) is to “enable the Trial Chamber, in the interests of justice and to facilitate expeditiousness of the trial, to better control the proceedings and focus the trial on disputed issues.”¹¹ According to the Prosecution, the Defence pre-trial briefs “neither assist the Tribunal nor provide sufficient notice of the nature and approach of the challenges that will be raised during” the proceedings.¹²

10. The Prosecution considers that, to the extent that the Defence was unable to meet its obligations under Rule 91(I) “at least at this time”,¹³ it should have requested an extension of time.¹⁴

B. The Defence Response

11. The Defence opposes the Motion, denying that their respective pre-trial briefs are defective.¹⁵

⁹ Response from the Defence for Mr Badreddine to “Prosecution Motion Regarding the Defective Defence Pre-Trial Briefs”, 29 January 2013 (the “Badreddine Response”); Sabra’s Response to the Prosecution Motion Regarding the Defence Pre-Trial Brief, Confidential, 8 February 2013, (the “Sabra Response”); Response from the Defence of Salim Ayyash to the Prosecution Motion Regarding the Defective Defence Pre-Trial Briefs, Confidential, 11 February 2013 (the “Ayyash Response”); *Réponse de la Défense de M Hussein Hassan Oneissi à la “Prosecution Motion Regarding the Defective Defence Pre-Trial Briefs”*, Confidential, 12 February 2013 (the “Oneissi Response”).

¹⁰ Motion, paras 1-2.

¹¹ *Id.*, para. 6 (footnote omitted).

¹² *Id.*, para. 7.

¹³ *Id.*, para. 18.

¹⁴ *Ibid.*

12. Essentially, the Defence submits that, in the circumstances of *in absentia* proceedings, it has “extremely limited”¹⁶ authority to decide that certain facts will not be disputed at trial, especially since doing so may “irreparably compromise the fundamental interests or rights of the client”.¹⁷ The Defence further argues that the *in absentia* nature of the proceedings renders the ICTY jurisprudence cited by the Prosecution inapplicable to the current case.¹⁸ The Accused are not present to assert their rights against self-incrimination and to remain silent,¹⁹ or to provide full instructions to their Counsel.²⁰ The Accused should not be conflated with the Defence²¹ and the requirements of Rule 91(I) must be read in accordance with the Accused’s statutory right to remain silent.²²

13. The Defence emphasises that, according to the ICTY jurisprudence, defence pre-trial briefs “need not be lengthy or detailed”,²³ especially when the “defence is based upon the argument that the Prosecution cannot prove the allegations made against” the Accused.²⁴

14. The Ayyash Defence and Oneissi Defence submit that their pre-trial briefs are in full compliance with Rule 91(I) and that their complaints against the Prosecution PTB are clear and specific.²⁵ Additionally, the Oneissi Defence distinguishes Rule 91(I) from Rules 112 and 128, which require filing a more detailed document but only after the close of the Prosecutor’s case.²⁶

15. The Badreddine Defence argues that it cannot provide the minimum information required for a pre-trial brief on account of Mr. Badreddine’s absence,²⁷ and it has therefore complied with Rule 91(I) to the extent that it can.²⁸ It submits that Rule 91(I) refers to the Accused’s defence, of which the Defence is unaware.²⁹

¹⁵ Badreddine Response, para. 1; Sabra Response, paras 1, 18; Ayyash Response, paras 2-3; Oneissi Response, para. 1.

¹⁶ Badreddine Response, para. 5.

¹⁷ *Id.*, para. 7.

¹⁸ Badreddine Response, para. 9; Ayyash Response, para. 7; Oneissi Response, para. 14(a).

¹⁹ Badreddine Response, para. 12.

²⁰ Badreddine Response, para. 14; Ayyash Response, para. 7.

²¹ Badreddine Response, paras 15, 18.

²² Sabra Response, para. 3.

²³ *Id.*, para. 4 (footnote omitted).

²⁴ Sabra Response, para. 9 (footnote omitted); Oneissi Response, paras 10-11.

²⁵ Ayyash Response, para. 4; Oneissi Response, paras 10, 14(b).

²⁶ Oneissi Response, para. 13.

²⁷ Badreddine Response, paras 16, 21.

²⁸ *Id.*, para. 20.

²⁹ *Id.*, para. 17.

16. The Sabra Defence distinguishes between setting out the “nature” of its case, and providing “notice” of the contents of its case. While the latter need not be included in its pre-trial brief, the former “may be limited to arguing [...] that the prosecution cannot prove beyond reasonable doubt the allegations contained in the Indictment”.³⁰ The Sabra Defence states that the “fact that it disputes the whole of the Prosecution case [...] simply underlines the weakness of the Prosecution case in all respects”.³¹ It adds that unless the Prosecution provides more specificity in relation to its own case,³² the Defence is unable to be clearer or more specific as to the nature of the Accused’s defence.³³

IV. APPLICABLE LAW

17. At this stage of proceedings, the Defence pre-trial briefs are governed by Rule 91(I), which provides:

After the submission by the Prosecutor of the items mentioned in paragraph (G), the Pre-Trial Judge shall order the Defence, within a set time-limit and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing factual and legal issues, and including:

- (i) in general terms, the nature of the accused’s defence;
- (ii) the matters which the accused disputes in the Prosecutor’s pre-trial brief; and
- (iii) in the case of each matter set out pursuant to paragraph (ii), the reason why the accused disputes it.

18. At the close of the Prosecution’s case and prior to the Defence presenting its case, the latter will be required to file a more detailed document, including information as to the evidence it intends to use.³⁴

V. DISCUSSION

A. The Defence pre-trial briefs and the Rule 91 requirements

19. Pursuant to Rule 91, more extensive obligations are imposed on the Prosecution than on the Defence in relation to their respective pre-trial filings.³⁵ While the Prosecution is

³⁰ Sabra Response, para. 4.

³¹ *Id.*, para. 9.

³² *Id.*, para. 17.

³³ Sabra Response, paras 9, 17; Oneissi Response, para. 9.

³⁴ Rules 112 and 128 STL RPE. *See also* ICTY, *Prosecutor v. Brđanin & Talić*, Decision on Prosecution Response to “Defendant Brđanin’s Pre-Trial Brief”, 14 January 2002 (“Brđanin Decision”), para. 4; ICTY, *Prosecutor v. Mrkšić et al.*, Decision on Prosecution’s Motion for Relief Pursuant to Rule 65ter(F), 10 October 2005 (“Mrkšić Decision”), para. 3.

³⁵ Compare Rule 91(G) and 91(I). *See also* Brđanin Decision, para. 2; Mrkšić Decision, para. 3.

required to file a detailed pre-trial brief in addition to providing information about its witnesses and exhibits to be used at trial, the Defence pre-trial brief “is primarily intended to be a response to the prosecution’s pre-trial brief”.³⁶

20. In this respect, the Pre-Trial Judge agrees with the Defence that its pre-trial briefs “need not be lengthy or detailed”.³⁷ However, they nevertheless must “be sufficient to provide the parties and the Trial Chamber with a general framework for understanding the disputed legal issues”.³⁸ In order to meet the requirements of Rule 91(I), the Defence must, at a minimum, (a) provide in general terms the nature of the Accused’s defence, (b) identify the factual and legal matters it disputes from the Prosecution PTB, and (c) provide the reasons why it disputes them.³⁹

21. The Pre-Trial Judge further emphasises that, in the interests of justice, the Parties’ pre-trial briefs ought to enable the Trial Chamber “to better control the proceedings and focus the trial on disputed issues.”⁴⁰ Accordingly, the Defence pre-trial briefs are intended “as a tool to set some general boundaries for the trial prior to its commencement and to identify potential areas of agreement between the parties.”⁴¹

22. For the purposes of Rule 91(I)(i), the Pre-Trial Judge considers that the pre-trial briefs of the Ayyash Defence, the Oneissi Defence and the Badreddine Defence do set out, in general terms, the nature of the Accused’s defence.⁴² Indeed, it suffices that the Defence state that the Prosecution cannot prove the allegations contained in the Indictment beyond reasonable doubt.⁴³

23. However, with respect to Rule 91(I)(ii) and (iii), the Pre-Trial Judge finds that these pre-trial briefs are inadequate as they neglect to identify the factual and legal issues disputed.⁴⁴ Instead, the three defence teams merely enumerate factors which they claim rendered them incapable of addressing the matters raised in the Prosecution PTB with any

³⁶ Brđanin Decision, para. 4.

³⁷ *Id.*, para. 12.

³⁸ *Ibid*

³⁹ ICTY, *Prosecutor v. Milan Lukić & Sredoje Lukić*, Decision on Prosecution’s Response and Motion for Clarification of Defence Pre-Trial Briefs, 15 May 2008 (“Lukić Decision”), para. 5.

⁴⁰ ICTY, *Prosecutor v. Stanišić & Župljanin*, Decision to Deny the Joint Defence Motion for Certification to Appeal the Order to Supplement the Pre-Trial Briefs, 23 July 2009, para. 10.

⁴¹ Mrkšić Decision, para. 3.

⁴² Ayyash PTB, para. 1; Badreddine PTB, paras 5-6; Oneissi PTB, para. 78.

⁴³ Brđanin Decision, para. 7.

⁴⁴ Ayyash PTB, para. 1; Badreddine PTB, para. 8; Oneissi PTB, paras 78-79.

specificity.⁴⁵ The Pre-Trial Judge recalls that the requirements of a Defence pre-trial brief are clearly established under Rule 91(I) and this filing is not intended as an opportunity for the Defence to list its complaints against the Prosecution. These three pre-trial briefs are therefore “deficient in a manner that is not conducive to the conduct of a fair and expeditious trial”.⁴⁶ Therefore, the Pre-Trial Judge finds that the Ayyash Defence, the Badreddine Defence and the Oneissi Defence should each file a pre-trial brief that fulfils the requirements of Rule 91(I).

24. While the Sabra PTB also unnecessarily enumerates what it considers failings on the part of the Prosecution,⁴⁷ Lebanese authorities,⁴⁸ and others,⁴⁹ it nonetheless contains sufficient detail as to the nature of the Sabra Defence’s case,⁵⁰ the factual allegations which it disputes regarding the Prosecution PTB,⁵¹ and the reasons why.⁵² The Pre-Trial Judge disagrees with the Prosecution’s claim that the Sabra Defence “makes sweeping denials”.⁵³ On the contrary, the Pre-Trial Judge considers it adequate that the latter’s “defence is based upon the argument that the prosecution cannot prove the allegations made against [Mr. Sabra]”.⁵⁴

25. At the time of its filing, the Sabra PTB was therefore sufficient to meet the requirements of Rule 91(I) in terms of addressing factual issues. However, in relation to the legal issues, the Sabra Defence merely states that it “takes issue with every legal [...] assertion contained in the Indictment unless otherwise specified” in the Sabra PTB.⁵⁵ The Sabra Defence makes no attempt either to specify which parts of the Prosecution’s analysis of the law it disagrees with, or to set out alternative legal interpretations. Hence, the Pre-Trial Judge finds the Sabra PTB inadequate in terms of addressing legal issues.

⁴⁵ These factors include: what the Defence perceived as a lack of cooperation from the Lebanese authorities (Ayyash PTB, para. 18; Badreddine PTB, para. 7; Oneissi PTB, para. 50); failings on the part of the Prosecution in terms of incomplete disclosure and insufficient Rule 91(G) submissions (Ayyash PTB, paras 3-17, Badreddine PTB, para. 7; Oneissi PTB, paras 9-48, 57-78); amongst other (Ayyash PTB, para. 2; Badreddine PTB, paras 4-6; Oneissi PTB, paras 51-54).

⁴⁶ ICTY, *Prosecutor v. Stanišić & Župljanin*, Order to the Defence to Supplement the Pre-Trial Briefs Pursuant to Rule 65ter(F), 9 July 2009 (“Stanišić & Župljanin Order”), page 3.

⁴⁷ Sabra PTB, para. 4(ii)-(iv).

⁴⁸ *Id.*, para. 4(v)-(vi).

⁴⁹ *Id.*, para. 4(vii).

⁵⁰ *Id.*, para. 1.

⁵¹ *E.g.* Sabra PTB, paras 7, 12, 15, 21, 30.

⁵² *Ibid.*

⁵³ Motion, para. 12.

⁵⁴ Brđanin Decision, para. 8.

⁵⁵ Sabra PTB, para. 1.

26. Furthermore, as noted in the Sabra PTB, the submissions were based on “the evidence presently in its possession, which the Defence has thus far been able to review.”⁵⁶ In fact, on numerous occasions throughout the Sabra PTB, the Defence specifies that its position is limited by the current filings and state of disclosure.⁵⁷ In this respect, the Pre-Trial Judge notes that the Prosecution confirmed that it has now “duly discharged its disclosure obligations pursuant to Rule 113.”⁵⁸ Furthermore, the Prosecution has completed the disclosure of all the *Curricula Vitae* (CVs) and related material of expert witnesses,⁵⁹ as well as updated its Rule 91 exhibit and witness lists.⁶⁰ Particularly, on the 17 April 2013, the Prosecution filed an Amended Indictment dated 6 February 2013 (the “6 February 2013 Indictment”),⁶¹ which the Pre-Trial Judge shall address in the last section.

27. In the interests of the proper administration of justice, all four defence teams shall take into consideration the material that has been disclosed since the initial filings in their updated pre-trial briefs. As specified by Rule 95, the Pre-Trial Judge must submit a complete file to the Trial Chamber “[a]fter receiving the filings from the Prosecutor and the Defence pursuant to Rules 90 and 91”. Clearly then, the pre-trial briefs must be current, relevant, and drafted in a manner that is useful to the Pre-Trial Judge in putting together a complete file, which includes a report setting out the arguments of the Parties and the issues in contention.⁶²

B. The Defence *in absentia* arguments

28. The Pre-Trial Judge finds that the *in absentia* argument repeatedly raised by the Defence⁶³ in justifying its incapacity to comply with Rule 91(I) overstates the impact that the absence of the Accused has on the Defence’s capacity to make the necessary submissions in its pre-trial briefs.

⁵⁶ Sabra PTB, para. 2.

⁵⁷ *E.g.* Sabra PTB, paras 4, 12, 14.

⁵⁸ Prosecution’s Notice Pursuant to the Working Plan Regarding Disclosure Under Rule 113, 21 June 2013, para. 2.

⁵⁹ Final Update and Further Corrigendum to “Prosecution Updated Notice Pursuant to Rule 161(A)”, with Confidential Annex I, 15 May 2013, para. 1(i).

⁶⁰ Prosecution Submission of Consolidated and Updated Rule 91 Exhibit and Witness List, Confidential with Confidential Annexes A-I, 31 May 2013.

⁶¹ 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, with Confidential Annexes A and B, 17 April 2013.

⁶² Rule 95(A)(vii) STL RPE.

⁶³ Badreddine PTB, paras 4-5; Badreddine Response, paras 16, 21.

29. Notably, in addressing legal issues arising from the Prosecution PTB, the Pre-Trial Judge considers that the absence of the Accused theoretically has no effect on the Defence's capacity to agree with or dispute legal analyses and interpretations. In addition, even if the Accused were present to provide instructions and guide the Defence's submissions, the latter would still have to compare and contrast the Accused's claims to the witness statements and documentary evidence provided by the Prosecution. The exercise of evaluating the credibility and reliability of the Prosecution's evidence can be conducted despite the *in absentia* nature of the proceedings.

30. As stated by the ICTY Trial Chamber, the "indictment, the supporting material, the Prosecution's pre-trial brief and disclosed materials provide the necessary information to allow the Defence to form an opinion concerning the nature of the Accused's defence."⁶⁴ Therefore, although the Accused's presence would be beneficial, it is not necessary in order for the Defence to comply with the minimal standards of the Rule 91(I) requirements.

C. The Prosecution pre-trial brief

31. The Pre-Trial Judge recalls the importance of timely and comprehensive pre-trial briefs in facilitating the expeditiousness of the trial⁶⁵ and he therefore considers it appropriate for the Prosecution to file, prior to the submission of updated pre-trial briefs by the Defence, an updated pre-trial brief according to the 6 February 2013 Indictment. Pursuant to Rule 91(G)(ii) and (iii), the Prosecution shall also file its updated lists of witnesses and exhibits. Thereafter, all four Defence teams shall file updated pre-trial briefs which take into account the material that has been disclosed since their initial filings, the Prosecution's updated pre-trial brief and the 6 February 2013 Indictment.

32. The Pre-Trial Judge takes note that on 26 June 2013, he was seized of a Prosecution request to amend the 6 February 2013 Indictment, and said request is still pending.⁶⁶ Nevertheless, he considers it appropriate to continue proceedings in relation to the pre-trial briefs on the basis of the confirmed 6 February 2013 Indictment. Indeed, at this stage, the Pre-Trial Judge can neither assume that the pending amended Indictment will be authorised nor that it will be the final version. It would therefore be contrary to the efficient and speedy

⁶⁴ Lukić Decision, para. 9.

⁶⁵ Stanišić & Župljanin Order, page 3.

⁶⁶ Prosecution Further Request for Leave to Amend the Indictment, Confidential, 21 June 2013, with a Public Redacted Version dated 1 July 2013.

preparation of the current case⁶⁷ to postpone all the proceedings pending the filing of the final version of the Indictment. If necessary, the Parties will be given the opportunity to complete or further update their Rule 91 filings according to whether the requested amendments are authorised.

D. The Legal Representative of Victims

33. Pursuant to Rule 91(H), the Pre-Trial Judge invites the Legal Representative of Victims to file, should he deem it necessary, updated versions of the lists of witnesses and exhibits he would like the Trial Chamber to use at trial.

⁶⁷ Rule 88(C) STL RPE.

VI. DISPOSITION**FOR THESE REASONS,****THE PRE-TRIAL JUDGE,****PURSUANT TO Rules 77(A) and 91,****GRANTS the Motion;****ORDERS** the Prosecution to file an updated pre-trial brief, as well as updated witness and exhibit lists, in compliance with Rule 91(G) by 15 July 2013 at the latest;**INVITES** the Legal Representative of Victims to file updated witness and exhibit lists by 19 July 2013; and,**ORDERS** the Ayyash Defence, the Badreddine Defence, the Onessi Defence and the Sabra Defence each to file a pre-trial brief in compliance with Rule 91(I) by 15 August 2013 at the latest.

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

Leidschendam, 5 July 2013

Daniel Fransen
Pre-Trial Judge