



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 Fransen**

The Registrar: **Mr. Daryl Mundis**

Date: **24 October 2013**

Original language: **English**

Classification: **Public**

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

**DECISION ON THE PROSECUTION'S MOTION REGARDING THE DEFENCE
UPDATED PRE-TRIAL BRIEFS**

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I. INTRODUCTION

1. By way of this decision, the Pre-Trial Judge denies the Prosecution motion which claimed that the Pre-Trial Briefs (the “Defence PTBs”) filed by the Defence teams for the four Accused in these proceedings (the “Accused”) do not conform to the requirements of Rule 91 of the Rules of Procedure and Evidence (the “Rules”) and should be re-filed, and that two of the pre-trial briefs include improper arguments (the “Motion”).¹

II. PROCEDURAL BACKGROUND

2. On 8 January 2013, Counsel for Mr. Assad Hassan Sabra (the “Sabra Defence”) filed its pre-trial brief pursuant to Rule 91(I).²

3. 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 pursuant to Rule 91(I).³

4. On 18 January 2013, Counsel for Mr. Hussein Hassan Oneissi (the “Oneissi Defence”) filed a corrected version⁴ of the pre-trial brief it had filed on 9 January 2013,⁵ along with a Corrigendum indicating the changes that were made.⁶

5. On 23 January 2013, the Prosecution filed a 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)”.⁷

6. On 5 July 2013, the Pre-Trial Judge issued a Decision on the first Defence PTBs, finding them defective and ordering the four defence teams to re-file them in accordance with the decision and Rule 91(I).⁸

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Prosecution Motion Regarding the Defence Updated Pre-Trial Briefs, Confidential, 20 September 2013 (“Motion”). All further references to filings and decisions relate to this case number unless otherwise stated. Pre-Trial Brief will be referred to as “PTB” in this decision.

² *Sabra* Pre-Trial Brief, Confidential, 8 January 2013, with a Public Redacted Version filed on 9 January 2013.

³ 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.

⁴ *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.

⁵ *Mémoire d’Avant Procès pour la Défense de M. Hussein Hassan Oneissi*, Confidential, 9 January 2013.

⁶ *Rectificatif au Mémoire d’Avant Procès pour la Défense de M. Hussein Hassan Oneissi déposé le 9 janvier 2013*, Confidential, 18 January 2013.

⁷ Prosecution Motion regarding the Defective Defence Pre-Trial Briefs, Confidential, 23 January 2013, with a Public Redacted Version of the same day, para. 21.

7. On 5 September 2013, the Sabra Defence filed its updated pre-trial brief (the “Sabra PTB”).⁹
8. On 6 September 2013, the Ayyash Defence, the Badreddine Defence, and the Oneissi Defence filed their updated pre-trial briefs pursuant to Rule 91(I), (respectively, the “Ayyash PTB”,¹⁰ the “Badreddine PTB”,¹¹ and the “Oneissi PTB”¹²).
9. On 20 September 2013, the Prosecution filed the Motion.¹³
10. On 30 September 2013, the Sabra Defence filed a response to the Motion (the “Sabra Response”).¹⁴
11. The Badreddine Defence and the Oneissi Defence filed their individual responses to the Motion on 7 October 2013 (respectively, the “Badreddine Response”¹⁵ and the “Oneissi Response”¹⁶).
12. The Defence for Mr. Ayyash did not file a response.

III. SUBMISSIONS

A. The Motion

1. Alleged defects of the Sabra PTB

13. The Prosecution alleges that the Sabra PTB seeks relief on matters already adjudicated by the Pre-Trial Judge or the Trial Chamber, namely, a request to “strike out” certain paragraphs of the Indictment and the Prosecution’s PTB.¹⁷ The Prosecution submits

⁸ Decision on “Prosecution Motion Regarding the Defence Pre-Trial Briefs”, 5 July 2013 (the “5 July 2013 Decision”).

⁹ Updated *Sabra* Pre-Trial Brief, Confidential, 5 September 2013.

¹⁰ Updated Defence Pre-Trial Brief on Behalf of Mr. Ayyash, Confidential with Confidential Annex A, 6 September 2013.

¹¹ Updated Pre-Trial Brief Submitted by the Defence for Mr Mustafa Badreddine Pursuant to Rule 91(I), With Confidential Annex, 6 September 2013.

¹² Second Pre-Trial Brief on behalf of the Defence for Mr Hussein Hassan Oneissi, Confidential, 6 September 2013.

¹³ Prosecution Motion Regarding the Defence Updated Pre-Trial Briefs, Confidential, 20 September 2013.

¹⁴ Sabra Defence Response to the Prosecution Motion Regarding the Defence Updated Pre-Trial Briefs, Confidential, 30 September 2013.

¹⁵ Badreddine Defence Response to “Prosecution Motion Regarding the Defence Updated Pre-Trial Briefs”, Confidential, 7 October 2013.

¹⁶ *Réponse de la Défense de M. Hussein Hassan Oneissi à la “Prosecution Motion Regarding the Defence Updated Pre-Trial Briefs”*, le 7 octobre 2013.

¹⁷ Motion, para. 4.

that, not only is a party's PTB an improper forum for such grievances, but the matter has already been adjudicated, and the Sabra PTB is attempting to re-litigate challenges to the confirmation of the Indictment.¹⁸ The Sabra PTB also includes arguments as to whether consistent pattern of conduct evidence should be pleaded in the Indictment. However, the Prosecution argues that, as the Trial Chamber already ruled on this challenge, these paragraphs of the Sabra PTB are improper and should be removed.¹⁹

2. Alleged defects of the Oneissi PTB

14. The Prosecution argues that the Rules do not allow the submissions in the Oneissi PTB challenging the Pre-Trial Judge's Order to transfer part of the case file to the Trial Chamber.²⁰ The Prosecution avers that challenges to interlocutory decisions are not related to the nature of the accused's defence or a matter under dispute in the Prosecution's PTB, and thus are not a part of the Rule 91(I) requirements.²¹ Therefore, the Prosecution requests the Pre-Trial Judge to order the Oneissi Defence to re-file its Pre-Trial Brief without the paragraphs that challenge the Order.²²

3. Alleged defects of all four Defence PTBs

15. Finally, the Prosecution submits that the four Defence PTBs do not comply with the requirements of Rule 91(I). The Prosecution specifically refers to Rule 91(I)(iii), arguing that the Defence PTBs do not provide enough reasons as to why they dispute the legal matters contained in the Prosecution's Pre-Trial Brief.²³ Specific to the Badreddine Defence, the Prosecution alleges that it has not provided any explanation for its disagreement with the Prosecution's reliance on the Appeals Chamber's Interlocutory Decision on applicable law.²⁴ The Prosecution further submits that the reservations contained in the Sabra PTB, Badreddine PTB and Oneissi PTB to "reserve their right to amend their positions submitted in their pre-

¹⁸ *Id.* at paras 4-8.

¹⁹ *Id.* at paras 9-10, 12.

²⁰ *Id.* at paras 13-16.

²¹ *Id.* at paras 13-16.

²² *Id.* at para. 16.

²³ *Id.* at paras 17-19.

²⁴ *Id.* at para. 18; *see generally* STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2013 ("Interlocutory Decision").

trial briefs” are unacceptable as the Prosecution, the Pre-Trial Judge and the Trial Chamber cannot rely on them to determine which matters will be disputed at trial.²⁵

B. The Defence Responses

1. The Sabra Response

16. The Sabra Defence responds that the Prosecution does not have a right under the Rules to file a response to the Defence PTBs, and that therefore the claims in the motion should be “dismissed *in limine*”.²⁶ Secondly, the Sabra Defence alleges that the Pre-Trial Judge has previously decided that he does not have jurisdiction to decide on the issue of removing sections of the Prosecution’s Pre-Trial Brief, therefore he does not have jurisdiction over this similar issue regarding the Defence PTBs.²⁷ In this regard, the Sabra Defence asserts that, even if the Motion was transferred to the Trial Chamber, the Trial Chamber has already held that it will not strike out formal pleadings save for a breach in formal pleading requirements.²⁸ Finally, the Sabra Defence avers that it has fully complied with the requirements of Rule 91(I), and that an expansive reading of the requirements does not render its Pre-Trial Brief defective.²⁹

2. The Badreddine Response

17. The Badreddine Defence responds that it has clearly put its objections regarding the Interlocutory Decision on record.³⁰ The Badreddine Defence notes that the Prosecution has only referred to “abstract definitions” from the Interlocutory Decision, thus it could only reserve the right to make future submissions on the issue once the Prosecution has “fully articulated its case with regard to legal matters”.³¹ In response to the Prosecution’s complaint about the Defence teams reserving their rights to amend their positions, the Badreddine Defence submits that it has a right not to be bound by representations made currently, in the

²⁵ Motion, para. 20.

²⁶ Sabra Response, para. 2.

²⁷ *Id.* at para. 3.

²⁸ *Id.* at para. 4.

²⁹ *Id.* at para. 5.

³⁰ Badreddine Response, para. 3.

³¹ *Ibid.*

event that new information emerges in the future.³² It further avers that it has acted in good faith in order to comply, as best as possible, with the requirements of Rule 91(I).³³

3. The Oneissi Response

18. The Oneissi Defence submits that the Prosecution cannot dictate what arguments or observations are made in its Pre-Trial Brief.³⁴ Further, it submits that its arguments do conform to Rule 91(I) because they concern defects in the Prosecution’s Pre-Trial Brief.³⁵

IV. DISCUSSION

19. As a preliminary observation, the Pre-Trial Judge notes the Sabra Defence argument that the Rules do not entitle the Prosecution to respond to the Defence PTBs.³⁶ However, the Pre-Trial Judge considers that the Prosecution’s Motion is not a response to the Defence PTB; rather it is an independent motion requesting relief regarding the preparation of the proceedings.³⁷ He notes further that he has already ruled on such motions regarding pre-trial briefs with respect to both the Prosecution and the Defence.³⁸ As such, the Pre-Trial Judge declines to dismiss the Motion *in limine*.

20. As previously established by the Pre-Trial Judge, Defence PTBs are governed by Rule 91(I) at this stage of the proceedings, but 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”.³⁹ In order to meet the requirements of Rule 91(I), the Pre-Trial Judge has held that PTBs 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

³² *Id.* at para. 4.

³³ *Ibid.*

³⁴ Oneissi Response, para. 10.

³⁵ *Id.* at para. 9.

³⁶ Sabra Response, para. 2.

³⁷ Rule 77(A) STL RPE.

³⁸ *E.g.*, 5 July 2013 Decision; Decision on the Motion of the Defence for Mr Badreddine Seeking an Order to Strike out Certain Sections of the Prosecutor’s Pre-Trial Brief, 7 February 2013 (the “7 February 2013 Decision”).

³⁹ 5 July 2013 Decision, para. 18, *citing* Rules 112 and 128 STL RPE; ICTY, *Prosecutor v. Brđanin & Talić*, IT-99-36-PT, Decision on Prosecution Response to “Defendant Brđanin’s Pre-Trial Brief”, 14 January 2002 (“Brđanin Decision”), para. 4; ICTY, *Prosecutor v. Mrkšić et al.*, IT-95-13/1-PT, Decision on Prosecution’s Motion for Relief Pursuant to Rule 65ter(F), 10 October 2005, para. 3.

disputes them”.⁴⁰ The Pre-Trial Judge also recalls that the PTBs “need not be lengthy or detailed”,⁴¹ yet it must provide the Parties and the Trial Chamber with a general framework for understanding the disputed legal issues,⁴² and be of assistance to the Pre-Trial Judge in preparing the Rule 95 report.⁴³

21. Turning to the question of whether the four Defence PTBs comply with Rule 91(I), the Pre-Trial Judge considers that the Defence PTBs set out, in general terms, the nature of the Accused’s defence and the matters which they dispute in the Prosecutor’s Pre-Trial Brief,⁴⁴ as well as the reasons why they are in dispute.⁴⁵

22. Furthermore, the Pre-Trial Judge has previously specified that, in order to discharge his duty to submit a complete file to the Trial Chamber under Rule 95, “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”.⁴⁶ The Pre-Trial Judge considers that the four Defence PTBs were at parts only of minimal assistance, yet he has relied on the relevant, valid parts of them in preparing the Rule 95 Report.

23. While more detail would be appreciated in order to help the Prosecution and the Trial Chamber to understand the issues under dispute, and the Pre-Trial Judge to prepare the Rule 95 Report, the four Defence PTBs nevertheless provide sufficient notice of their disputes as to the legal qualifications.⁴⁷ Consequently, the Pre-Trial Judge considers that the Defence PTBs, in the current stage of proceedings, are not deficient under the Rules. If necessary it is for the Trial Chamber to decide at a later stage, where appropriate, if it requires supplemental submissions from the Defence teams.

⁴⁰ 5 July 2013 Decision, para. 20, *citing* ICTY, *Prosecutor v. Milan Lukić & Sredoje Lukić*, IT-98-32/1-PT, Decision on Prosecution’s Response and Motion for Clarification of Defence Pre-Trial Briefs, 15 May 2008, para. 5.

⁴¹ 5 July 2013 Decision, para. 20, *citing* Brđanin Decision, para. 12.

⁴² *Ibid.*

⁴³ 5 July 2013 Decision, para. 27; *citing* Rule 95(A)(vii) STL RPE.

⁴⁴ *E.g.*, Ayyash PTB, paras 3 -5, 10-25; Badreddine PTB, paras 11, 13-15, 17; Oneissi PTB, paras 21-44; Sabra PTB, paras 1-2, 5-27, 30-33.

⁴⁵ Ayyash PTB, paras 6-7, 10-27; Badreddine PTB, paras 16, 18-22, Annex A to Updated Pre-Trial Brief Submitted by the Defence for Mr Mustafa Badreddine Pursuant to Rule 91(I); Oneissi PTB, paras 13-44; Sabra PTB, paras 5-31.

⁴⁶ 5 July 2013 Decision, para. 27; *citing* Rule 95(A)(vii) STL RPE.

⁴⁷ Ayyash PTB, paras 6-9; Badreddine PTB, paras 18-22, Annex A to Updated Pre-Trial Brief Submitted by the Defence for Mr Mustafa Badreddine Pursuant to Rule 91(I); Oneissi PTB, para. 44; Sabra PTB, paras 30-31. *See generally* 5 July 2013 Decision, para. 25.

24. Regarding the removal of sections of the Sabra and Oneissi PTBs, the Pre-Trial Judge disagrees with the Sabra Defence assessment that the 7 February 2013 Decision to transfer the issue regarding striking out of portions of the Prosecution’s Pre-Trial Brief to the Trial Chamber for determination precludes the Pre-Trial Judge from deciding on the issue at hand.⁴⁸ In the 7 February 2013 Decision, the Pre-Trial Judge determined that he did not have the jurisdiction to rule on the admissibility of evidence disclosed to him during the pre-trial phase, therefore he could not rule on the substance of that motion.⁴⁹ The current request is distinguishable on that basis. In the Motion, the Pre-Trial Judge is being asked to order the removal of sections of the Defence PTBs putatively disputing previously adjudicated facts or orders.⁵⁰

25. The Trial Chamber has previously found that the remedy of striking documents from the court record is used sparingly in international criminal law, and even then “mostly only for breaching formal filing or pleading rules”.⁵¹ Indeed, after a thorough review of jurisprudence, the Trial Chamber did not find “any case in international criminal law proceedings where a court or tribunal has ordered the striking of a portion of a pre-trial brief”.⁵² This is significant for the purposes of the Motion. Although the Prosecution does not explicitly use the word “to strike”, it nevertheless applies the same notion by requesting an order to remove. The Pre-Trial Judge considers that, while the Sabra and Oneissi PTBs add unnecessary elements regarding what they consider to be improper decisions,⁵³ the relevant inquiry is whether or not they conform to the requirements set out in Rule 91(I).⁵⁴ Therefore, to the extent that the Defence PTBs raise matters outside of the Rules, the Pre-Trial Judge has not considered them in the context of Rule 91(I). Furthermore, and considering the jurisprudence of international criminal law,⁵⁵ he does not consider it appropriate to strike or order the removal of those portions of the Pre-Trial Briefs from the record.

⁴⁸ Sabra Response, para. 3.

⁴⁹ 7 February 2013 Decision, paras 13, 17.

⁵⁰ *E.g.*, Motion, para. 22.

⁵¹ STL-11-01-PT/TC, Decision on Defence Motion to Strike out Part of the Prosecutor’s Pre-Trial Brief, 8 March 2013, para. 22.

⁵² *Id.* at para. 23.

⁵³ *E.g.*, Sabra PTB, paras. 28- 29, 34; Oneissi PTB, paras 4-12.

⁵⁴ *See supra*, footnotes 44-45.

⁵⁵ *See supra*, footnotes 51-52.

V. DISPOSITION

FOR THESE REASONS,

THE PRE-TRIAL JUDGE,

PURSUANT TO Rules 77(A) and 91,

DENIES the Motion.

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

Leidschendam, 24 October 2013.



Daniel Fransen
Pre-Trial Judge

