



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

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

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 28 March 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

DECISION ON ALLEGED DEFECTS IN THE FORM OF THE INDICTMENT AGAINST HASSAN HABIB MERHI

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Victims' Legal Representatives:

Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Salim Jamil Ayyash:

Mr Eugene O'Sullivan, Mr Emile Aoun
& Mr Thomas Hannis

Counsel for Mr Mustafa Amine Badreddine:

Mr Antoine Korkmaz, Mr John Jones
& Mr Iain Edwards

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothee Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Larochelle

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux
& Mr Geoffrey Roberts



INTRODUCTION

1. Counsel for the Accused, Mr Hassan Habib Merhi, challenged the Prosecutor's indictment, signed 5 June 2013, alleging defects in its form. The Prosecution opposed the challenges.
2. The motion is substantially similar in form and substance, although shorter, to six Defence motions alleging defects in its form of the amended indictments collectively filed in the case of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra* by counsel for Mr Badreddine, Mr Oneissi and Mr Sabra in May and August 2013. The Trial Chamber dismissed those challenges and also denied a request to certify the decision for interlocutory appeal.
3. The challenge to the form of the indictment filed by counsel for Mr Merhi, like the challenges to the form of the indictment in the *Ayyash* case, is without merit. The Trial Chamber has found that the indictment provides counsel for Mr Merhi—consistent with its findings on the earlier challenges—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, and has dismissed the motion.

PROCEDURAL HISTORY

4. On 12 June and 13 September 2013, the Trial Chamber dismissed as without merit the motions of counsel for three of the Accused, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra, alleging defects in the form of the two amended indictments in the *Ayyash* case, dated 10 June 2011 and 25 June 2012.¹ On 9 October 2013, the Trial Chamber also dismissed the Defence motions to certify for interlocutory appeal its decision of 13 September 2013.²
5. On 24 June 2013, the Prosecutor filed an indictment, signed 5 June 2013, against Mr Merhi.³ The Pre-Trial Judge confirmed that indictment on 31 July 2013,⁴ and made it public on 10 October 2013.⁵ On 20 December 2013, after being seised of the issue on 25 November 2013, the Trial

¹ *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013; Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013.

² STL-11-01/PT/TC, Decision on Defence Motions for Certification for Appeal of the Trial Chamber's 13 September 2013 'Decision on Alleged Defects in the Form of the Indictment', 9 October 2013.

³ *Prosecutor v. Hassan Habib Merhi*, STL-13-04/I/PTJ, Prosecution's Submission of an Indictment for Confirmation and Order to Keep this Filing and its Annexes Confidential and *Ex Parte*; and Motion for an Arrest Warrant, Order for Transfer and Detention; and Order for Non-Disclosure (confidential and *ex parte*), 5 June 2013.

⁴ Decision Relating to the Examination of the Merhi Indictment, paras 10-11.

⁵ Order on Partially Lifting the Confidentiality of the Indictment against Mr. Hassan Habib Merhi, 10 October 2013.

Chamber decided that the trial against Mr Merhi should proceed *in absentia*.⁶ On 8 January 2014, the Prosecution filed the pre-trial brief.⁷

6. The Pre-Trial Judge, on 31 January 2014, ordered counsel for Mr Merhi to file any challenges to the indictment by 14 February 2014.⁸ On 11 February 2014, the Trial Chamber joined the *Merhi* case to the *Ayyash* case,⁹ with reasons provided in a written decision issued on 25 February 2014.¹⁰

7. The Trial Chamber, on 12 February 2014, ordered the Prosecution to file a consolidated indictment in the two cases.¹¹ On 14 February 2014, counsel for Mr Merhi filed their motion alleging defects in the form of the indictment under Rule 90 (A) (ii) of the Special Tribunal's Rules of Procedure and Evidence.¹² The Prosecution opposed the challenges.¹³ On 7 March 2014, the Prosecution filed its consolidated indictment;¹⁴ the Trial Chamber is yet to formally confirm the consolidated indictment.

APPLICABLE LAW

8. In its two previous decisions on challenges to the form of the indictment, the Trial Chamber held that Article 16 of the Special 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'.¹⁵ International human rights instruments mandate that accused persons have the right to be informed of the charges against them,¹⁶ 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:

⁶ STL-13-04/I/TC, Decision to Hold Trial *In Absentia*, 20 December 2013.

⁷ STL-13-04/I/PTJ, Prosecution's Pre-Trial Brief (confidential) annexed to Prosecution's Submission Pursuant to the Pre-Trial Judge's Order of 24 December 2013, 8 January 2014. The French version of the Brief was filed on 3 February 2014.

⁸ STL-13-04, Official transcript of 31 January 2014, pp. 35, 48.

⁹ STL-11-01/T/TC and STL-13-04/PT/TC, Joint Hearing, transcript of 11 February 2014, pp. 91-96.

¹⁰ STL-11-01/T/TC, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014.

¹¹ STL-11-01, Official transcript of 12 February 2014, pp. 27, 47-49, 120.

¹² STL-11-01/PT/TC, Preliminary Motion on Defects in the Form of the Indictment, 14 February 2014.

¹³ Prosecution Response to the Merhi Defence's Preliminary Motion on Defects in the Form of the Indictment, 7 March 2014.

¹⁴ STL-11-01/T/TC, Prosecution Submission of Consolidated Indictment, Witness and Exhibit Lists, 7 March 2014.

¹⁵ Decision of 12 June 2013, paras 10-15; Decision of 13 September 2013, paras 13-18.

¹⁶ See e.g., Article 6 (3) (a) of the European Convention on Human Rights and Article 14 (3) (a) of the International Covenant on Civil and Political Rights which provide 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 Geis v. Spain*, Appl. 61005709, 5 March 2013, para. 42.

(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.

9. 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’. 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. The rights of an accused person under international human rights law to be informed of the charges against him are set out in the Statute and Rules.¹⁷ Numerous decisions of other international criminal courts and tribunals have interpreted and expanded upon these rights.

10. 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 the same as the Special Tribunal’s Rule 68 (D).¹⁸ The Trial and Appeals Chambers of the *ad hoc* tribunals and the SCSL have extensively interpreted their equivalents of the Special Tribunal’s Article 16 (4) (a) and Rule 68 (D).

11. The Trial Chamber has now twice surveyed the international case-law and has found the following principles to be applicable to the situation in this Defence motion, namely, the rights of an accused person to be informed of the charges against him and the contents of an indictment.¹⁹ These are:

- 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,²⁰

¹⁷ Decision of 12 June 2013, paras 10-15; Decision of 13 September 2013, paras 13-18.

¹⁸ 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’.

¹⁹ Decision of 12 June 2013, para. 14; Decision of 13 September 2013, para. 17.

²⁰ ICTY, *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement, 21 July 2000 (‘*Furundzija* 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

- there is a clear difference between the material facts (which must be pleaded) and the evidence proffered to prove them,²¹
- the Prosecution is not required to plead the evidence intended to prove the pleaded material facts,²²
- it would be unworkable for an indictment to contain all the evidence the Prosecutor proposes to introduce at the trial,²³
- an indictment must be considered as a whole, and select paragraphs should be read in context with the entire document,²⁴
- the materiality of a particular fact cannot be decided in the abstract and depends on the nature of the Prosecution's case,²⁵
- the alleged criminal conduct is decisive in determining the degree of specificity required in the indictment,²⁶
- 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,²⁷
- 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,²⁸
- a reasonable range of dates may be pleaded where precise dates cannot be specified as to when the alleged criminal conduct occurred,²⁹
- a broad range of dates does not of itself invalidate a paragraph in an indictment,³⁰

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.

²¹ *Blaškić* Judgement, para. 210; *Stakić* Judgement, para. 116.

²² *Furundzija* Judgement, paras 61, 147, 153; *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.

²³ *Furundzija* Judgement, para. 153.

²⁴ *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.

²⁵ *Kupreškić* Judgement, para. 89; *Blaškić* Judgement, para. 210; *see also*, *Uwinkindi* Decision at para. 4 and the line of authorities cited there.

²⁶ *Kupreškić* Judgement, para. 89; *Blaškić* Judgement, para. 210.

²⁷ ICTY, *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.

²⁸ *Ndindabahizi v. The Prosecutor*, ICTR-01-71-A, Judgement, 16 January 2007 ('*Ndindabahizi* Judgement'), para. 19.

²⁹ ICTY, *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.

- the precision with which dates have to be charged varies from case to case,³¹
- the Prosecution must offer its best understanding of the case in the indictment,³² or the ‘best information available’,³³
- the identities of co-conspirators are required to be pleaded when they are known,³⁴ 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,³⁵ and the material facts and the evidence proving those material facts.³⁶

12. The Trial Chamber has endorsed and adopted these general principles of international criminal law³⁷ and has reapplied them in determining this seventh challenge to the form of the indictment. This latest motion—this time filed by counsel for Mr Merhi—is very similar in form to the six earlier challenges collectively submitted by counsel for Mr Badreddine, Mr Oneissi and Mr Sabra in May 2013,³⁸ and in August 2013.³⁹

DISCUSSION

13. As in the Trial Chamber’s two previous decisions on the form of the indictment, the main issue for determination is whether the indictment provides a concise statement of the case against the Accused by setting out the material facts in sufficient detail to allow his counsel to prepare a defence

³⁰ *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.

³¹ *Ndindabahizi* Judgement, para. 20.

³² *Kupreškić* Judgement, paras 92, 95; ICTY, *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, 28 February 2005, para. 30.

³³ *Prosecutor v. Sesay*, SCSL-04-15-T, Judgement, 2 March 2009, para. 398.

³⁴ *The Prosecutor v. 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 v. Barayagwiza*, ICTR-97-19-I, 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-I, 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).

³⁵ ICTY, *Prosecutor v. Kvočka*, IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 40.

³⁶ *Furundzija* Judgement, para. 153.

³⁷ Decision of 12 June 2013, para. 14; Decision of 13 September 2013, para. 17.

³⁸ 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. Oneissi en vertu de l’article 90 (A) (ii), confidentiel, 3 May 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 May 2013.

³⁹ STL-11-01/PT/TC, The Defence for Hussein Hassan Oneissi Preliminary Motion on the Defects in the Form of the Amended Indictment of 21 June 2013, Confidential, 19 August 2013, with a public redacted version filed on 20 August 2013; Preliminary Motion on the Form of the Indictment, Confidential, 19 August 2013, with a public redacted version filed on 23 August 2013; Nouvelle exception préjudicielle présentée par la Défense de M. Badreddine à l’encontre de l’Acte d’accusation modifié du 21 Juin 2013, 19 August 2013.

at trial. The Merhi Defence motion is briefer but substantially similar in form to the six other challenges to the indictment filed in 2013, as is the Prosecution response.⁴⁰ Having already examined and ruled on comparable and identical issues, this decision is thus similar to the Trial Chamber's previous two decisions in 2013 dismissing the previous six challenges.

14. For example, counsel for Mr Merhi have re-argued the same already-decided legal point that the indictment requires greater specificity because the case is tried *in absentia* and is based mainly on circumstantial evidence. The Trial Chamber has previously ruled on this issue, so this latest decision disposes of this issue first, and then deals with the six specific challenges in this seventh Defence motion challenging the form of the indictment.

An indictment in a case based on circumstantial evidence and tried *in absentia* requires greater specificity

15. Counsel for Mr Merhi argue that greater specificity is required in the indictment because the proceedings are being held *in absentia*, and the Prosecution is relying essentially on circumstantial evidence. They submit that the Prosecution 'arbitrarily places a number of the alleged telephone contacts under one or another of the alleged preparatory acts, without giving Mr Merhi the opportunity to fully understand the charges against him'.⁴¹

16. The Prosecution responded by arguing that, as the Trial Chamber has already determined this issue,⁴² neither the fact that the proceedings are *in absentia* nor the circumstantial nature of the evidence requires greater specificity in the indictment. It also submits that the Defence has provided no legal authority to support this argument, and that Article 22 of the Statute and Rule 107 do not require greater specificity in an indictment where the decision is taken to proceed to trial in the absence of the accused.⁴³

17. Defence counsel here have provided no reason for the Trial Chamber to depart from the findings in its earlier decision. There, it held that in the absence of any legal authority supporting the Defence argument, *in absentia* proceedings and circumstantial evidence, either alone or in combination, do not impose on the Prosecution a more onerous pleading burden in filing an indictment. When filing an indictment a Prosecutor is not required to attempt to predict whether proceedings will later be held

⁴⁰ STL-11-01/PT/TC, Prosecution Consolidated Response to Preliminary Defence Motions Alleging Defects in the Amended Indictment, 24 May 2013; Prosecution Consolidated Response to Preliminary Motions on the Form of the Indictment, Confidential, 30 August 2013, with a public redacted version filed on 13 September 2013.

⁴¹ Merhi Defence motion, paras 10-12.

⁴² Prosecution response, para. 4, referring to the Decision of 13 September 2013, para. 26.

⁴³ Prosecution response, paras 4-5.

in absentia. The quality and sufficiency of the material pleaded in an indictment, rather than the category of case or type of evidence of itself, is determinative in deciding whether an indictment is defective in form.⁴⁴

18. In the same decision, the Trial Chamber held that the totality of the case against these Accused is contained in the combination of the indictment, the Prosecution's pre-trial brief and the evidence intended to be used at trial, which had been all disclosed to Defence counsel. It is this combination of information, rather than that found in the indictment alone, that provides Defence counsel with the notice of the nature of the case necessary to allow them to properly defend their clients. Thus, even if the Prosecution is required to provide better particulars to counsel defending accused in proceedings held *in absentia*, and where the evidence is circumstantial, Defence counsel are informed by the totality of that information, rather than only that specified in an indictment.⁴⁵ This challenge is thus dismissed.

A. The list of material facts underpinning each count

19. Defence counsel allege defects and seek further details in relation to the material facts underpinning each count in both the amended indictment and the Prosecution's pre-trial brief. As an example, they argue that the indictment is defective in form because it does not list 'the numbers of paragraphs in which the material facts that specifically support each count are pleaded';⁴⁶ stating that 'this specificity is necessary for their understanding of the charges and so that a useful and relevant defence may be prepared'.⁴⁷ In support of this, they cite some ICTY and ICTR case-law analysing the structure and content of an indictment.⁴⁸ They request the Trial Chamber to order the Prosecution to clarify the indictment by incorporating into it, for each count, a specific and exhaustive list of the paragraphs setting out the supporting material facts.⁴⁹

20. The Prosecution responded by arguing that the indictment provides a concise statement of facts and thoroughly lists the material facts related to the counts; the counts themselves reinforce this by referencing the specific alleged acts of the Accused that meet each count. Further, the ICTY and

⁴⁴ Decision of 13 September 2013, para. 26.

⁴⁵ Decision of 13 September 2013, para. 27.

⁴⁶ Merhi Defence motion, para.13.

⁴⁷ Merhi Defence motion, paras 13-16.

⁴⁸ Merhi Defence motion, para. 15, referring to, ICTY, *Prosecutor v. Delalić*, IT-96-21-T, Decision on Motion by the Accused Hazim Delić Based on Defects in the Form of the Indictment, 15 November 1996, para. 14; *The Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 43; *The Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order for Prosecution to Review Indictment and to File Public Version, 8 April 2011, para. 2.

⁴⁹ Merhi Defence motion, para. 17.

ICTR case-law cited does not support that the absence of a list of paragraph references constitutes a defect in the form of the indictment, and that this is not a requirement and has not been a universal practice. The mere fact that the Prosecution has not chosen to organise its indictment in the fashion preferred by Defence counsel cannot constitute a defect in the form of the indictment for the purposes of Rule 90 (A) (ii).⁵⁰

21. This part of the motion is no more than a request for a judicial decision ordering the Prosecution to provide better particulars to the Defence. It is not a proper challenge alleging defects in the form of an indictment, and goes beyond the scope of Rule 90 (A) (ii). The Trial Chamber confines itself to the principles applicable to deciding a challenge to the form of the indictment, that is, 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; this is not the appropriate time.

22. Further, Defence counsel seem to have misinterpreted the legal requirements for the structure and contents of an indictment as the ICTY and ICTR case-law they cite does not support their arguments. In fact, the current ICTY practice is the opposite; eight of the nine cases on trial or on appeal at the ICTY do not contain lists of counts being linked to specific paragraphs in the indictment.⁵¹ The absence of a list of paragraph references corresponding to each count is not a legal requirement for an indictment and cannot suggest a defect in the form of the indictment. This part of the motion is accordingly dismissed.

B. Date of participation in the alleged conspiracy

23. The Prosecution alleges, at paragraph 3 of the indictment, that Mr Merhi ‘participated in a conspiracy’ with the other four Accused ‘aimed at committing a terrorist act to assassinate Rafik Baha’eddine AL-HARIRI (HARIRI).’ The indictment then outlines in broad terms the role of each Accused person, including Mr Merhi, in the alleged conspiracy. It avers, at paragraph 48, that the five Accused ‘together with others as yet unidentified, including the assassination team, agreed to commit a terrorist act by means of an explosive device in order to assassinate HARIRI’. The indictment then describes the alleged role of each Accused, including Mr Merhi, in the alleged conspiracy. In the particulars of count one, at paragraph 54, the indictment specifies the dates of the

⁵⁰ Prosecution response, paras 11-12.

⁵¹ *Prosecutor v. Hadžić*, IT-04-75; *Prosecutor v. Karadžić*, IT-95-5/18-I; *Prosecutor v. Mladić*, IT-09-92; *Prosecutor v. Šešelj*, IT-03-67; *Prosecutor v. Popović*, IT-05-88, *Prosecutor v. Stanišić and Simatović*, IT-03-69; *Prosecutor v. Stanišić and Župljanin*, IT-08-91, and *Prosecutor v. Tolimir*, IT-05-88/2.

alleged conspiracy. Mr Merhi's participation in the conspiracy is said to have occurred between 11 November 2004 and 14 February 2005.

24. Counsel for Mr Merhi challenged the pleading of the alleged conspiracy in the indictment. They submitted that as the requirement of specificity is necessary to prepare a 'useful and relevant' defence, 'the Prosecution should not be spared from providing more specific indications of the occurrence of an act in a given date range every time it is in a position to do so.'⁵² They request the Trial Chamber to order the Prosecution to specify in the indictment details regarding the date on which Mr Merhi participated in the alleged conspiracy.⁵³

25. The Prosecution responded by referring to international criminal law case-law—including that of this Trial Chamber and the Special Tribunal's Appeals Chamber—which holds that the range of dates pleaded in an indictment must not be overly broad. The dates pleaded in the indictment provide the Defence with sufficient notice of the relevance of the time frame of the conspiracy pleaded.⁵⁴

26. The Trial Chamber has twice previously found that 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.⁵⁵ The Trial Chamber reiterates a pertinent finding of the ICTR Appeals Chamber, in summarising the relevant international jurisprudence, in holding:

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.⁵⁶

27. Defence counsel also argue that a date range as 'vague and broad' as three months is not 'conceivable and proportionate' in the context of an agreement to commit a terrorist act which, by its very nature, occurs at a specific time and requires 'specialised' preparation'.⁵⁷ The Trial Chamber however considers that this submission is misconceived. Here, the Prosecution has alleged the existence of a conspiracy and the participation of each of the Accused, including Mr Merhi, in that conspiracy but between specified dates. This form of pleading is permissible and the Special Tribunal's Appeals Chamber has held—in relation to the duration of a conspiracy—that 'no explicit

⁵² Merhi Defence motion, paras 18-21.

⁵³ Merhi Defence motion, para. 22.

⁵⁴ Prosecution response, paras 13-18.

⁵⁵ Decision of 12 June 2013, para. 36; Decision of 13 September 2013, para. 38.

⁵⁶ *Bagosora* Judgement, para. 150.

⁵⁷ Merhi Defence motion, paras 18-22.

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'.⁵⁸

28. The Trial Chamber holds, *now for the third time*, that an indictment must be viewed in its totality, and pleading that an act relating to a conspiracy occurred within a three month period—in all of the circumstances alleged here—is not disproportionate or overly broad. The circumstances in which the five Accused are said 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.⁵⁹ This part of the motion is likewise dismissed.

C. The alleged role of Mr Merhi in the preparations other than the false claim of responsibility

29. Counsel for Mr Merhi submit that the indictment is impermissibly vague as to the alleged role of Mr Merhi in the preparatory acts in the conspiracy alleged, other than the false claim of responsibility, including notably the surveillance of the former Prime Minister of Lebanon, Mr Rafik Hariri, and the purchase of the Mitsubishi Canter van allegedly used in the explosion.⁶⁰

30. Defence counsel request the Trial Chamber to order the Prosecution to clearly specify in the indictment whether or not it intends to draw criminal inferences from the telephone contacts between Mr Merhi, Mr Ayyash and Mr Badreddine referred to in the Prosecution's pre-trial brief. They also seek clarification from the Prosecution as to whether Mr Merhi is indicted for any participation in the preparatory acts other than the false claim of responsibility—and, if so, that the Prosecution provides further relevant details.⁶¹

31. The Prosecution acknowledges that it has not pleaded in the indictment a specific role for Mr Merhi with respect to other preparatory acts such as the surveillance of Mr Hariri and the purchase of the Mitsubishi Canter van.⁶² It submits that the telephone contacts referenced by counsel are referred to in the pre-trial brief, not as a way of attributing a specific role to Mr Merhi with respect to other preparatory acts or introducing any additional charges, but rather to provide further information about the evidence supporting the existing charges, which includes the history of contact between the alleged co-conspirators at key moments.

⁵⁸ STL-11-01/I, Interlocutory Decision on the Applicable Law; Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 196.

⁵⁹ Decision of 12 June 2013, para. 38; Decision of 13 September 2013, para. 40.

⁶⁰ Merhi Defence response, paras 23-24.

⁶¹ Merhi Defence response, para. 25.

⁶² Prosecution response, para. 19.

32. The Prosecution explains that its consolidated indictment includes explicit information that Mr Merhi was in contact with Mr Ayyash in relation to preparations for the attack. It also provides better information with respect to the nature of the telephone network used by Mr Merhi to communicate with other alleged co-conspirators, and the nature of the communications between Mr Merhi and Mr Badreddine.⁶³

33. Just as the Trial Chamber has previously found in its decisions relating to the two earlier amended indictments against the other four Accused,⁶⁴ the pleading in the indictment against Mr Merhi provides sufficient information to Defence counsel to inform them clearly of the nature and cause of the charges against Mr Merhi such as to allow them to prepare a defence for trial. The issues raised in the Defence submissions generally relate to the evidence to be led at trial, and to particulars between the Parties, rather than what must be pleaded in an indictment. This challenge to the form of the indictment is also dismissed.

D. The alleged role of Mr Merhi in the disappearance of Mr Abu Adass

34. Defence counsel argue that the indictment does not specify clearly enough the role of Mr Merhi in the disappearance of Mr Abu Adass.⁶⁵ They request the Trial Chamber to order the Prosecution to clearly specify whether or not it intends to draw criminal inferences from the disappearance of Mr Abu Adass and whether or not Mr Merhi is being prosecuted for having coordinated the disappearance of Mr Abu Adass, or for having otherwise participated in it.⁶⁶

35. The Prosecution submits that the indictment does not seek to hold Mr Merhi criminally responsible for the disappearance of Mr Abu Adass although the indictment pleads that Mr Merhi was involved in the circumstances surrounding the identification and subsequent disappearance of Mr Abu Adass.⁶⁷ In the proposed consolidated indictment, the Prosecution has more explicitly pleaded Mr Merhi's alleged role in the false claim of responsibility.⁶⁸

⁶³ See, e.g., 'The Green Network was a coordination network used exclusively by three conspirators—BADREDDINE, AYYASH, and MERHI—to exchange information regarding all aspects of the conspiracy and coordinate the acts done in furtherance of the conspiracy' (STL-11-01/T/TC, Consolidated Indictment, 7 March 2014, para. 19).

⁶⁴ Decision of 12 June 2013, para. 46; Decision of 13 September 2013, para. 48.

⁶⁵ Merhi Defence motion, paras 26-28.

⁶⁶ Merhi Defence motion, para. 29.

⁶⁷ Prosecution response, paras 21-23.

⁶⁸ See, e.g., 'ONEISSI, prior to the attack and under the coordination of MERHI, participated in the disappearance of ABU ADASS for the purpose of creating a false claim of responsibility' (Consolidated Indictment, para. 3 (c)).

36. Here again, as the Trial Chamber has already twice determined in relation to the indictments in the *Ayyash* case,⁶⁹ it is satisfied that the Prosecution has pleaded the necessary material facts in the *Merhi* indictment to provide sufficient information to Defence counsel to inform them clearly of the nature and cause of the charges against Mr Merhi to allow them to prepare a defence for trial. The issues raised by counsel relate to the evidence to be led at trial (and particulars between the Parties) rather than to what must be pleaded in an indictment. Further, as Mr Merhi has not been charged with the disappearance of Mr Abu Adass, no legal consequences could flow to him from the pleading in the indictment relating to the disappearance. This challenge is also dismissed.

E. The timeframe of the charges relating to the alleged preparatory acts

37. Defence counsel argue that some material facts, specifically, telephone calls allegedly made by Mr Merhi before 22 December 2004, supporting the charges relating to Mr Merhi's involvement in the 'preparatory acts' contained in the pre-trial brief exceed the timeframe for the same acts in the indictment, and thus constitute a new charge. They allege vagueness in relation to pleading Mr Merhi's alleged role in the surveillance of Mr Rafik Hariri in the period before his death, and the purchase of the Mitsubishi Canter van allegedly used in the explosion in Beirut on 14 February 2005.⁷⁰

38. The Trial Chamber is asked to order the Prosecution to clarify whether or not it intends to draw inferences from the telephone calls made before 22 December 2004 and whether or not it intends to prosecute Mr Merhi for particular acts prior to 22 December 2004, and if so, it should comply with the procedure under Rule 71 to amend the indictment.⁷¹

39. The Prosecution responded by arguing that the relevant timeframes are clearly set out in the counts of the indictment.⁷² It also argues that this is not a valid challenge to the form of the indictment since, under Rule 90 (A) (ii), the indictment—as opposed to the Prosecution's pre-trial brief—is the accusatory instrument against the Accused. Referring to an earlier decision of the Trial Chamber,⁷³ the Prosecution further states that the pre-trial brief is not an accusatory instrument, and its purpose is not to clarify the indictment but rather, pursuant to Rule 91 (G) (i), to set out a

⁶⁹ Decision of 12 June 2013, paras 46-47; Decision of 13 September 2013, para. 48.

⁷⁰ Merhi Defence motion, paras 30-31.

⁷¹ Merhi Defence motion, para. 32.

⁷² Prosecution response, paras 24, 26.

⁷³ Decision on Defence Motion to Strike Out Part of the Prosecutor's Pre-Trial Brief, 8 March 2013, para. 13.

‘summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused’.⁷⁴

40. The Trial Chamber again, *now for the fourth time*, confirms the basic legal principle that it is the indictment, as the accusatory instrument, that provides notice of the nature and cause of the charges.⁷⁵ Further, and contrary to the contention of Defence counsel, information in the pre-trial brief cannot constitute a new charge since the indictment is the only document that charges the Accused.⁷⁶

41. An accused cannot be convicted or acquitted of an allegation contained in the pre-trial brief. No legal consequences to an accused person arise from an allegation in the pre-trial brief. This challenge misunderstands the basic difference between a charging document—the indictment—and an explanatory document such as the pre-trial brief. It is accordingly dismissed.

F. Added or discarded material facts in the pre-trial brief

42. Under this sixth heading, counsel for Mr Merhi submit that the Prosecution must ‘set right’ a number of inconsistencies between the indictment and the pre-trial brief. They state that the Prosecution has added two new material facts—in relation to a number of telephone contacts between Mr Merhi and two other Accused—in the pre-trial brief and deleted one material fact from the pre-trial brief that was in the indictment.⁷⁷

43. Defence counsel request the Trial Chamber to order the Prosecution to specify whether or not it intends to support the allegations contained in paragraphs 98 and 111 of the pre-trial brief, in which case it should comply with the procedure under Rule 71; and to state whether it intends to discard the allegation in paragraph 38 of the indictment.⁷⁸ The Prosecution responded by arguing that any inconsistency between the indictment and the pre-trial brief, even if one did exist, would not establish a defect in the indictment, as the two documents serve different purposes.⁷⁹

44. The Trial Chamber agrees with this contention. As the Trial Chamber has twice determined, the indictment is the accusatory instrument providing notice of the nature and cause of the charges against the accused, while the pre-trial brief is a summary of the evidence supporting the charges in

⁷⁴ Prosecution response, para. 25; See also para. 7 of the Prosecution response, referring to paras 24, 30, 33 of the Merhi Defence motion.

⁷⁵ Decision of 8 March 2013, para. 13; Decision of 12 June 2013, para. 64; Decision of 13 September 2013, para. 27.

⁷⁶ Decision on Defence motion to strike out part of the Prosecution’s pre-trial brief, 8 March 2013, para. 13.

⁷⁷ Merhi Defence motion, paras 33-35.

⁷⁸ Merhi Defence motion, para. 36.

⁷⁹ Prosecution response, paras 27-33.

the indictment. Consequently, contrary to Defence counsel's contention, divergent dates in the two documents do not suggest a defect in the indictment. Telephone contacts not specifically mentioned in the indictment may be referenced in the pre-trial brief to inform Defence counsel and the Trial Chamber of the contours of the Prosecution case. Moreover, Rule 90 (A) (ii) regulates challenges to the form of the indictment, not to the pre-trial brief.

45. Further, the Trial Chamber has previously held,⁸⁰ consistent with the principles in the case-law of international criminal law, that the totality of the case against these Accused is contained in the combination of the amended indictment, the Prosecution's pre-trial brief and the evidence intended to be used at trial. These have all been disclosed to Defence counsel. It is this combination of information, rather than that found in the indictment alone, that provides Defence counsel with the notice of the nature of the case and the particulars necessary to allow them to properly defend the Accused at trial. Defence counsel is therefore informed by the totality of that information, rather than only that specified in an indictment. To assert otherwise fundamentally misunderstands the nature of a pre-trial brief in international criminal law proceedings. This challenge is thus dismissed.

CONCLUSION

46. The indictment provides counsel for Mr Hassan Habib Merhi 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. In these circumstances the indictment is not defective in its form and the motion is therefore dismissed.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the motion alleging defects in the form of the indictment filed by counsel for Mr Hassan Habib Merhi.

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

Leidschendam,
The Netherlands

28 March 2014

⁸⁰ Decision of 12 June 2013, para. 64; Decision of 13 September 2013, para. 27.

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

