



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: 17 April 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

REASONS FOR ORDER ON DATE FOR FILING MERHI PRE-TRIAL BRIEF

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INTRODUCTION

1. The Trial Chamber, during a status conference on 10 April 2014, ordered the Defence of Hassan Habib Merhi to file a defence pre-trial brief by Monday 26 May 2014.¹ A pre-trial conference was scheduled for 16 June 2014. This decision provides the written reasons for the oral order.

APPLICABLE LAW

2. To enhance the rights of an accused person to adequate notice of the Prosecution case in proceedings before the Special Tribunal for Lebanon, the Prosecution is required to file a pre-trial brief. Its main purpose is to inform the Defence and the Trial Chamber of the particulars of the Prosecution's case at trial. The Trial Chamber elaborated on this in its 'Decision on Trial management and reason for decision on joinder'.² The Special Tribunal's Rules of Procedure and Evidence, modelled on those of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone, provide for the Defence to file a pre-trial brief. Although the International Criminal Court (ICC) does not have an equivalent Rule, its Trial Chambers have ordered its Prosecutor to file pre-trial briefs.³

3. Rule 91 (I) of the Special Tribunal's Rules, 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.

The requirements of Rule 91 (G) are the filing of the Prosecutor's pre-trial brief, witness and exhibit lists.

¹ STL, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, STL-11-01/T/TC, 10 April 2014, transcript of hearing, p. 46.

² STL-11-01/T/TC, Decision on Trial Management and Reasons for Decision on Joinder', 25 February 2014, para. 82, and footnote 144, 'The "most basic function" of a Pre-Trial Brief "is to inform the opposing party of the case they face": see STL-11-01/PT/TC, Decision on Defence motion to strike out part of the Prosecution's pre-trial brief, 8 March 2013, paras 13-14 and the international case-law cited therein.'

³ For example, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-440, Decision on the schedule leading up to trial, 9 July 2012, para. 15.

4. The Pre-Trial Judge ordered Defence counsel to file pre-trial briefs by 9 January 2013.⁴ In a decision on a Prosecution challenge to Defence pre-trial briefs filed in January 2013, citing international criminal law case law, the Pre-Trial Judge held,⁵

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

In this respect, the Pre-Trial Judge agrees with the Defence that its pre-trial briefs ‘need not be lengthy or detailed’. However, they nevertheless must “be sufficient to provide the parties and the Trial Chamber with a general framework for understanding the disputed legal issues’. 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.

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.’ 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 up between the parties’.

5. The Trial Chamber generally agrees with the Pre-Trial Judge on these points; they accord with international criminal law case law.⁶

DISCUSSION

6. In a status conference on 10 April 2014, counsel for Mr. Merhi stated that they would be in a position to file their pre-trial brief within four to five months, submitting that counsel for the other four Accused had had eleven months from their assignment as counsel to file their pre-trial briefs.⁷ A

⁴ *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, STL-11-01/PT/PTJ, Order on a Working Plan and on the Joint Defence Motion regarding Trial preparation, 25 October 2012, para. 21.

⁵ STL-11-01/PT/PTJ, Decision on ‘Prosecution motion regarding the Defence pre-trial briefs’, 5 July 2013 paras 19-21 (footnotes omitted). See also STL-11-01/PT/PTJ, Decision on the Prosecution’s motion regarding the Defence updated pre-trial briefs, 24 October 2013, paras 20-22.

⁶ For example, *Prosecutor v. Stanisić and Župljanin*, IT-08-91-PT, Decision to deny the joint Defence motion for certification to appeal the order to supplement the pre-trial briefs, 23 July 2009, paras 7, 10; *Prosecutor v. Šešelj*, IT-03-67-PT, Reasons for decision on the Accused’s request to file a pre-trial brief, 22 November 2006, para. 8; *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Prosecution response to ‘Defendant Brđanin’s pre-trial brief’, 14 January 2002, para. 4.

⁷ STL-11-01/T/TC, 10 April 2014, transcript of hearing, p. 34.

chronological background to the filing of Defence pre-trial briefs in the two joined cases provides some context to the analysis rejecting this submission that follows.

Pre-trial briefs and disclosure in the Ayyash case

7. In the *Ayyash* case, Defence counsel were assigned in February 2012, and the Prosecution filed its first pre-trial brief in November 2012.⁸ Two months later, in January 2013, counsel for Mr. Ayyash, Mr. Badreddine, Mr. Oneissi, and Mr. Sabra filed their Defence pre-trial briefs.⁹ The Prosecution objected to their format and moved the Pre-Trial Judge to order them to file ‘a pre-trial brief which fully complies with the requirements of Rule 91(I)’.¹⁰ However, an amended indictment was confirmed in February 2013 and, in July 2013, the Pre-Trial Judge ordered the Prosecution and the Defence to file updated pre-trial briefs, in July and August 2013 respectively.¹¹ In August 2013, after confirming a further amendment to the amended indictment,¹² the Pre-Trial Judge varied this order to dates in August and September 2013,¹³ when the Prosecution’s and Defences’ updated pre-trial briefs were filed.¹⁴ In August 2013, the Pre-Trial Judge, in setting a tentative trial commencement date of 13 January 2014, specified that any outstanding pre-trial issues of disclosure

⁸ STL-11-01/PT/PTJ, Prosecution Submission pursuant to Rule 91, 15 November 2012.

⁹ STL-11-01/PT/PTJ, Ayyash Defence Pre-Trial brief, 9 January 2013; Pre-Trial Brief submitted by the Defence for Mr. Mustafa Amine Badreddine pursuant to Rule 91 (I), 9 January 2013; Version publique expurgée de la Version Corrigée du Mémoire d’Avant Procès pour la Défense de M. Hussein Hassan Oneissi déposé le 9 janvier 2013, 20 February 2013; Sabra Pre-Trial Brief, 8 January 2013.

¹⁰ STL-11-01/PT/PTJ, Redacted Version of the Prosecution Motion regarding the Defective Defence Pre-Trial Briefs, 23 January 2013.

¹¹ STL-11-01/PT/PTJ, Décision on “Prosecution Motion Regarding the Defence Pre-Trial Briefs” 5 July 2013; the Prosecution also filed a similar challenge to the Defence pre-trial briefs filed in September 2013, STL-11-01/PT/PTJ, Prosecution Motion Regarding the Defence Updated Pre-Trial Briefs, Confidential, 20 September 2013, that was similarly dismissed by the Pre-Trial Judge, STL-11-01/PT/PTJ, Decision on the Prosecution’s motion regarding the Defence updated pre-trial briefs, 24 October 2013.

¹² STL-11-01/PT/PTJ, Décision portant sur la requête du 21 juin 2013 du Procureur en modification de l’acte d’accusation du 6 février 2013, 31 July 2013.

¹³ STL-11-01/PT/PTJ, Order on the Defence Request for a variance of the deadline for re-filing the Defence Pre-Trial Briefs, 7 August 2013.

¹⁴ STL-11-01/PT/PTJ, Prosecution’s Submission of Updated Pre-Trial Brief pursuant to Rule 91 (G) (i) and the Pre-Trial Judge’s Order of 7 August 2013 and Decision of 16 August 2013; Updated Defence Pre-Trial Brief on Behalf of Mr. Ayyash (Ayyash Brief), 6 September 2013; Updated Pre-Trial Brief Submitted by the Defence on Behalf of Mr. Mustafa Badreddine pursuant to Rule 91(I), 6 September 2013 (Badreddine Brief); Version publique expurgée du Second Mémoire d’Avant Procès pour la Défense de M. Hussein Hassan Oneissi déposé le 6 septembre 2013, 25 October 2013 (Oneissi Brief); Updated Sabra Pre-Trial Brief, 5 September 2013 (Sabra Brief).

had been ‘in principle’ resolved.¹⁵ This was eighteen months after the assignment of Defence counsel to represent the original four Accused.¹⁶

8. In the *Ayyash* case, before the joinder of the two cases, counsel for the four Accused filed pre-trial briefs in which they generally contested the allegations in the Prosecution’s pre-trial brief. As a general reason for this they stated that they could not obtain instructions from the four Accused.¹⁷ Although the defence of the five Accused have now agreed on nine uncontested facts,¹⁸ the original four Accused have otherwise contested virtually every legal and factual allegation in the Prosecution’s pre-trial brief. This impacts on the content of the Merhi Defence pre-trial brief.

Merhi case

9. In the *Merhi* case, by contrast, disclosure was completed within about six weeks of the assignment of Defence counsel. On 20 December 2013, the Head of the Defence Office assigned lead counsel to act for Mr. Merhi, and, ten days later, on 30 December 2013, assigned two co-counsel.¹⁹ As of 14 January 2014, according to lead counsel, his team was constituted,²⁰ and, in mid-February 2014, he had engaged another lawyer experienced in international criminal law proceedings to assist in the trial preparations.²¹

10. Another contrast with the *Ayyash* case—where eleven months passed between assigning counsel and the filing of the Prosecution’s pre-trial brief, and eighteen months between the assignment and the resolution of disclosure issues—is that the Prosecution in the then separate *Merhi* case filed its pre-trial brief and its witness and exhibit lists on 8 January 2014, less than three weeks

¹⁵ STL-11-01/PT/PTJ, Order setting a new tentative date for the start of trial proceedings, 2 August 2013, para. 46, ‘The Pre-Trial Judge notes that, since 21 February 2013, the preparation of the case for trial has been actively pursued and most of the pending issues that might affect the setting of the date for the start of trial proceedings have been, or are being, resolved. As such, the disclosure of materials under Rules 91 (G) (iii) and 110 (A) (ii) of the Rules has, in principle, been finalised. The disclosure of materials under Rule 113 of the Rules was completed on 17 June 2013.’

¹⁶ The Prosecution also filed a challenge to the Defence pre-trial briefs filed in September 2013, STL-11-01/PT/PTJ, Prosecution Motion Regarding the Defence Updated Pre-Trial Briefs, Confidential, 20 September 2013, dismissed by the Pre-Trial Judge, STL-11-01/PT/PTJ, Decision on the Prosecution’s motion regarding the Defence updated pre-trial briefs, 24 October 2013.

¹⁷ Ayyash brief, paras 2, 12; Badreddine brief, para. 12; Oneissi brief, para. 3; and Sabra brief, para. 4.

¹⁸ STL-11-01/T/TC, Second decision on agreed facts under Rule 122, 11 April 2014.

¹⁹ STL-13-04/I/PTJ, Assignment of a Counsel for the *In Absentia* Proceedings Held Pursuant to Rule 106 of the Rules, 20 December 2013; Commission d’Office de Co-Conseils, 30 December 2013.

²⁰ STL-13-04/PT/TC, 14 January 2014, transcript of hearing, p. 9.

²¹ STL-11-01/TC, Minutes of Proceedings pursuant to Rule 53 of the Rules of Evidence and Procedure, 21 February 2014 p. 3.

after counsel's assignment.²² In this respect the Prosecution has submitted, in relation to Mr. Merhi, that it completed its disclosure obligations to counsel for Mr. Merhi as of the following dates;²³

- 24 December 2013 for Rule 110 (A) (i) (the material supporting the indictment),
- 31 January 2014 for Rule 91 (witness and exhibit list and witness summaries),
- 7 February 2014 for Rule 110 (A) (ii), (witness statements and material to be used at trial), and
- 7 February 2014 for Rule 113 (exculpatory material relating to Mr. Merhi).

11. All Prosecution pre-trial disclosure was complete as of 7 February 2014—with the exception of the ongoing obligation of disclosure of materials under Rule 113 and any new evidence. A stark contrast is evident between the timetables for disclosure and the filing of pre-trial briefs in the two cases. In the *Ayyash* case Defence counsel filed their pre-trial briefs two months after the Prosecution's first pre-trial brief—some eleven months after their assignment as counsel—and filed their updated briefs two weeks after the Prosecution's update was filed. By contrast, counsel for Mr. Merhi received the Prosecution's pre-trial brief, witness and exhibit lists, and the evidence in the case, and all disclosure, within six weeks of their assignment.

Time required to file a Defence pre-trial brief

12. After joining the cases of *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra* and *Prosecutor v. Hassan Habib Merhi* on 11 February 2014, the Trial Chamber adjourned the trial to allow counsel for Mr. Merhi additional time to prepare the Defence case for trial.²⁴ At a status conference on 10 April 2014, the Trial Chamber discussed with counsel for Mr. Merhi—two months after the decision on joinder and three months after they received the Prosecution's pre-trial brief and its evidence at trial—when they could file their defence pre-trial brief. As noted above, lead counsel for Mr. Merhi informed the Trial Chamber that he needed another four to five months for this, meaning filing it in August or September 2014.²⁵ Explaining why, he said that at the beginning of April 2014 he had just employed a telecommunications expert whose report he hoped to obtain within six months (namely, by October

²² STL-13-04/PT/PTJ, Prosecution's Submission Pursuant to the Pre-Trial Judge's Order of 24 December 2013, 8 January 2014.

²³ STL-11-01/T/TC and STL-13-04/PT/TC, 11 February 2014, transcript of hearing, pp. 40-42; STL-11-01/T/TC, 12 February 2014, transcript of hearing, p. 79; STL-11-01/T/TC, 4 March 2014, transcript of hearing, p. 39.

²⁴ STL-11-01/T/TC & STL-13-04/PT/TC, 11 February 2014, transcript of hearing, pp. 91-96.

²⁵ STL-11-01/T/TC, 10 April 2014, transcript of hearing, pp. 26-28.

2014) but that that this could take another two months,²⁶ (meaning December 2014). This was despite lead Defence counsel, in a meeting on 21 February 2014, informing the Trial Chamber that he was going to meet telecommunications experts and would choose the most experienced among them.²⁷

13. The Merhi Defence, he explained, had also just contracted an explosives expert who expected to finish his work in early July 2014. Counsel could therefore file his pre-trial brief before the recommencement of the trial but would only be ready to resume trial at the end of September or early October 2014.²⁸ Counsel also submitted that a pre-requisite to filing a pre-trial brief was having ‘a panoramic view and a deep-seated understanding’ of the Prosecution’s case—this would also assist the Trial Chamber and, ‘at a given point of time...we need to stop rushing in’.²⁹ Moreover, the content of the other four defence pre-trial briefs was irrelevant because the Pre-Trial Judge had ordered them to refile their briefs on the basis that they were ‘unlawful’ (*‘déclarés irréguliers’*). Less haste was therefore necessary in ordering a pre-trial brief; a premature order could only lead to a decision by the Trial Chamber declaring the Merhi defence brief ‘unlawful’.³⁰

14. Prosecution counsel responded, submitting that in circumstances where counsel for the other four Accused had contested virtually all allegations contained in the consolidated indictment and its pre-trial brief, only a perfunctory defence pre-trial brief was now required from the Merhi Defence.³¹

15. As counsel for the original four Accused are contesting virtually the entirety of the Prosecution case, the Prosecution is consequently required to run its case in full. But *the five Accused* are all alleged to be part of the same conspiracy, albeit with differently defined roles. The logical result of this is that even if the Defence of Mr. Merhi contests fewer facts or allegations than any of the other four Accused, the Prosecution is still obliged to run its entire case against the other four. In these circumstances the utility of counsel for Mr. Merhi filing a lengthy and detailed Defence pre-trial brief is unclear. Furthermore, the Defence pre-trial brief, as its title suggests, sets out the Defence position prior to trial; the Defence cannot be expected to know the entirety of the Prosecution case until the close of the Prosecution case, and hence how to conduct any defence in the

²⁶ STL-11-01/T/TC, 10 April 2014, transcript of hearing, pp. 26, 28-29.

²⁷ STL-11-01/TC, Minutes of Proceedings pursuant to Rule 53 of the Rules of Evidence and Procedure, 21 February 2014 p. 3.

²⁸ STL-11-01/T/TC, 10 April 2014, transcript of hearing, pp. 26, 29.

²⁹ STL-11-01/T/TC, 10 April 2014, transcript of hearing, pp. 34-35.

³⁰ STL-11-01/T/TC, 10 April 2014, transcript of hearing, pp. 34, 35, 37.

³¹ STL-11-01/T/TC, 10 April 2014, transcript of hearing, pp. 41-42.

Defence case itself. For this reason, Rule 129 does not require a pre-Defence conference (in which the Trial Chamber may make orders in relation to Defence witnesses) before the trial commences.

16. As the Pre-Trial Judge held, the purpose of a Defence pre-trial brief is to inform the Trial Chamber and the Prosecution of the nature of any Defence dispute with the Prosecution's case and the nature of their case. It is not to inform Defence counsel themselves of their own case or the Prosecution case, or even to assist *their* own case preparation—although it may do so. Its primary purpose is to provide information to the Prosecution and Trial Chamber. However, the Prosecution has informed the Trial Chamber that now, in April 2014—unlike in January 2013 when the original Defence pre-trial briefs were filed—no more than a perfunctory pre-trial brief is required from the fifth Accused. And, furthermore, the Trial Chamber accepts that the Prosecution is required to run a full case against all five Accused.

17. In circumstances where the Prosecution must run a full case against all five Accused, a lengthy and detailed pre-trial brief from the Merhi Defence will not assist the Trial Chamber's judicial case management of the trial. Moreover, there is no obvious connection between when a Defence pre-trial brief must be filed and when a trial can commence, or when Defence counsel will be trial-ready. The Pre-Trial Judge's observations on whether a strict connection exists between Defence Counsel filing their pre-trial brief and their preparations to commence trial are quite pertinent. In one decision, he held that 'the *sui generis* nature of the Tribunal means that this case is in a constant state of evolution'.³² By this, it is implicit that Defence counsel are not expected to provide their final position at this point. In another, he noted that 'the investigations conducted by Counsel for the Defence have generally not ended at the time of submitting their Briefs. Furthermore, those counsel are not required to disclose their overall strategy at that preliminary stage of the proceedings.'³³

18. A defence pre-trial brief is not a necessary pre-condition to commencing trial, and although filing one is specified in Rule 91, a trial could conceivably start without one being filed. As an example, the ICTR, despite having a Rule similar to the Special Tribunal's, has allowed Defence

³² STL-11-01/PT/PTJ, Decision on Sabra Defence Defence Request for Suspending the Transfer of the Case File to the Trial Chamber, 25 October 2013, para. 39.

³³ STL-11-01/PT/PTJ, The Pre-Trial Judge's report prepared pursuant to Rule 95(A) of the Rules of Procedure and Evidence, 25 October 2013, para. 34.

counsel to file a pre-trial brief during trial, *after* the close of the Prosecution case.³⁴ The ICC Rules of Procedure and Evidence do not require the Defence to file pre-trial briefs.

19. In these circumstances, the Trial Chamber does not agree with the Defence submission that they must await the results of the investigations of their explosives and telecommunications experts before they can file a general defence to the Prosecution's pre-trial brief. Despite this delay in Defence preparation, Defence counsel received the Prosecution's pre-trial brief on 8 January 2014; and most of the evidence that will be used at trial was provided to them on 24 December 2013, supplemented by further disclosures between then and 7 February 2014. In addition, lead counsel was assigned on 20 December 2013 and had available to him from that date the Prosecution's pre-trial brief in the *Ayyash* case—which particularises the conspiracy alleged in the consolidated indictment—and the four Defence pre-trial briefs. In setting the date for filing the pre-trial brief, the Trial Chamber has also considered the factors listed at paragraph 108 of its 'Decision on trial management and joinder', namely, that disclosure is complete, the time elapsed since the assignment of counsel, and that they can benefit from work done by counsel for the other four Accused.

20. By 26 May 2014, counsel for Mr. Merhi will have had most of this material for over four months. This period, in the Trial Chamber's view, is sufficient to file a pre-trial brief setting out a general defence. The Trial Chamber is not expecting to receive—at this stage of the proceedings against the five Accused and especially where virtually all facts are contested—a lengthy or detailed document. Indeed, the Pre-Trial Judge's response to pre-trial briefs filed by counsel for Mr. Ayyash, Mr. Badreddine, Mr. Oneissi, and Mr. Sabra in September 2013 was that they 'were at parts only of minimal assistance' for him—but he nonetheless relied on the 'relevant, valid parts' in preparing his Rule 95 report.³⁵

21. In the Trial Chamber's view this period will provide Defence counsel with adequate time to file their pre-trial brief. And, it is stressed, filing the pre-trial brief then still preserves their right to mount future challenges to the Prosecution case, based on either the evidence at trial or the conclusions of any Defence expert reports.³⁶ Here, an ICTY decision may provide some useful guidance to Defence counsel; a Trial Chamber, rather than ordering an Accused to file a revised pre-

³⁴ See for example, ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-T, Decision on urgent Defence motion for postponement of deadlines for filing of pre-defence brief and the opening of the Defence case, 31 July 2009; and Pre-Defence Brief pursuant to Rule 73 *ter* of the Rules of Procedure and Evidence, 7 August 2009.

³⁵ STL-11-01/PT/PTJ, Decision on the Prosecution's motion regarding the Defence updated pre-trial briefs, 24 October 2013, para. 22.

³⁶ Or putting it the other way around, it will be 'without prejudice' (*sous toutes réserves*) to any future Defence challenges.

trial brief, held ‘it is also noteworthy that the start of the Accused’s trial is imminent and that he must use his resources to the full extent possible to prepare for it’.³⁷ That is also the case here.

DISPOSITION

**THE TRIAL CHAMBER, by majority, with Judge Nosworthy dissenting,
PROVIDES ITS WRITTEN REASONS FOR HAVING
ORDERED** counsel for Hassan Habib Merhi to file their pre-trial brief by 26 May 2014.

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

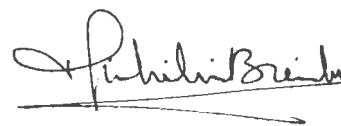
Leidschendam,
The Netherlands
17 April 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy



³⁷ *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision regarding the Accused’s pre-trial brief, 30 July 2009, para. 5.