



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

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

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

Registrar: Mr. Daryl Mundis, Registrar

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THE PROSECUTOR

v.

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

**DECISION ON ALLEGED DEFECTS IN THE
FORM OF THE AMENDED INDICTMENT OF 21 JUNE 2013**

Office of the Prosecutor:
Mr. Norman Farrell

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

Victims' Legal Representative:
Mr. Peter Haynes

Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz
Mr. John Jones

Counsel for Mr. Hussein Hassan Oneissi:
Mr. Vincent Courcelle-Labrousse
Mr. Yasser Hassan

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young
Mr. Guénaél Mettraux



INTRODUCTION

1. Defence counsel for three of the Accused, Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra challenged the Prosecutor's amended indictment dated 21 June 2013 alleging defects in its form. The Prosecution opposed the challenges.
2. The Trial Chamber has decided that the challenges are without merit and has dismissed the three Defence motions. The Trial Chamber has found that the amended indictment provides counsel for the Accused with enough detail to inform them clearly of the nature and cause of the charges and to allow them to prepare a defence of the case at trial.

PROCEDURAL HISTORY

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

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

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

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

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

considering the Defence motions pending the Pre-Trial Judge's decision on amending the indictment.⁵

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

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

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

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

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

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

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

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

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

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

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

by 3 May 2013.¹⁵ Counsel for Mr. Badreddine, Mr. Oneissi and Mr. Sabra, on 2 and 3 May 2013, filed preliminary motions under Rule 90 (A) of the Rules alleging defects in the form of the amended indictment.¹⁶ The Prosecution filed a consolidated response on 24 May 2013.¹⁷

10. The Trial Chamber dismissed these motions on 12 June 2013.¹⁸ On 19 June 2013, counsel for Mr. Oneissi and Mr. Sabra requested certification to appeal the decision, and counsel for Mr. Badreddine requested certification and reconsideration.¹⁹ The Presiding Judge of the Trial Chamber rejected the request for reconsideration,²⁰ and on 5 July 2013 the Trial Chamber certified the three motions for appeal.²¹ Counsel for Mr. Badreddine, Mr. Oneissi and Mr. Sabra then filed separate appeals.²² On 21 June 2013, before the Trial Chamber certified its decision for appeal, the Prosecution filed a further request for leave to amend the Amended Indictment of 6 February 2013.²³ The Pre-Trial Judge allowed this on 17 July 2013,²⁴ and on 2 August 2013 the Prosecution filed the amended indictment.²⁵

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

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

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

¹⁸ STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013.

¹⁹ STL-11-01/PT/TC, Requête de la Défense de M. Oneissi aux fins de la certification de l'appel de la décision de la Chambre de première instance «Decision on Alleged Defects in the Form of the amended Indictment», 19 juin 2013; Sabra Defence Request for Leave to Appeal the Decision on Alleged Defects in the Form of the Amended Indictment, 19 June 2013; Requête de la Défense de M. Badreddine en autorisation aux fins de réexamen et ou en certification aux fins d'appel de la Décision du 12 juin 2013 relative aux exceptions préjudicielles fondées sur un vice de forme de l'acte d'accusation, 19 juin 2013.

²⁰ STL-11-01/PT/TC, Décision refusant à la Défense de M. Badreddine l'autorisation de déposer une requête en réexamen, 2 juillet 2013.

²¹ STL-11-01/PT/TC, Décision sur les requêtes aux fins de certification en vue d'interjeter appel contre la décision de la Chambre de première instance du 12 juin 2013, 5 juillet 2013.

²² STL-11-01/PT/AC/AR90.2, Oneissi Defence Appeal of the Decision on the Alleged Defects in the Form of the Amended Indictment, 22 July 2013; Sabra Defence Appeal of the Decision on Alleged Defects in the Form of the Amended Indictment, 16 July 2013; Mémoire d'appel de la Défense de M. Badreddine à l'encontre de la Décision de la Chambre de première instance du 12 juin 2013 relative aux exceptions préjudicielles fondées sur des vices de forme de l'Acte d'accusation, 17 juillet 2013.

²³ STL-11-01/PT/PTJ, Prosecution Further Request for Leave to Amend the Indictment, 21 June 2013.

²⁴ STL-11-01/PT/PTJ, Order Granting the Prosecution Request for Leave to Reply to the Defence Responses to 'Prosecution Further Request for Leave to Amend the Indictment', 17 July 2013.

²⁵ STL-11-01/PT/PTJ, Prosecution's Filing of the Signed Version of the Amended Indictment in Compliance with the Pre-Trial Judge's Decision of 31 July 2013 & Request for Amended Arrest Warrants and Orders/Requests for Transfer and Detention, 2 August 2013.

11. On 5 August 2013, the Appeals Chamber dismissed the three appeals against the Trial Chamber's Decision as 'moot', and declared that the Defence may file preliminary motions before the Trial Chamber directed at the Amended Indictment of 21 June 2013.²⁶
12. On 13 August 2013, the Trial Chamber issued a scheduling order for the filing of fresh challenges,²⁷ and on 19 August 2013 counsel for Mr. Badreddine, Mr. Oneissi and Mr. Sabra filed revised preliminary motions on the form of the amended indictment.²⁸ The Prosecution filed a consolidated response on 30 August 2013.²⁹ The motions and response are very similar in form, although shorter, to those filed in May 2013. This decision is thus similar to that of 12 June 2013 dismissing those earlier challenges to the form of the previous amended indictment.

APPLICABLE LAW

13. Article 16 of the Tribunal's Statute 'Rights of the Accused' outlines the rights of the Accused to a fair trial including that to 'a fair and public hearing'. International human rights instruments mandate that accused persons have the right to be informed of the charges against them,³⁰ and Article 16 (4) (a) mirrors these rights by providing:

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

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

²⁶ STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals Against Trial Chamber's 'Decision on Alleged Defects in the Form of the Amended Indictment' ('Appeals Chamber's Decision'), 5 August 2013.

²⁷ STL-11-01/PT/TC, Scheduling Order for the Defence to File Preliminary Motions Challenging the Form of the Amended Indictment of 21 June 2013, 13 August 2013.

²⁸ 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 ('Oneissi motion'), 19 August 2013, with a public redacted version filed on 20 August 2013; Preliminary Motion on the Form of the Indictment, Confidential ('Sabra motion'), 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, ('Badreddine motion'), 19 août 2013.

²⁹ STL-11-01/PT/TC, Prosecution Consolidated Response to Preliminary Motions on the Form of the Indictment, Confidential ('Prosecution response'), 30 August 2013, with a public redacted version filed on 13 September 2013.

³⁰ 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.

14. 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’.
15. 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 to be informed of the charges against them under international human rights law are set out in the Statute and Rules. Additionally, numerous decisions of other international criminal courts and tribunals have interpreted and expanded upon these rights.
16. Articles 21 (4) and 20 (4) and 17 (4) (a) (respectively) of the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL) are identical to Article 16 (4) (a) of the Special Tribunal’s Statute. Rule 47 (C) of the Rules of Procedure and Evidence of both *ad hoc* tribunals is also identical to the Special Tribunal’s Rule 68 (D).³¹ The Trial and Appeals Chambers of both *ad hoc* tribunals, and of the SCSL, have extensively interpreted their equivalents of the Special Tribunal’s Article 16 (4) (a) and Rule 68 (D).
17. In examining this international case law, the following general principles of international criminal law emerge:
- the Prosecution must plead the material facts underpinning the charges with enough detail to inform an accused person clearly of the nature and cause of the charges to allow them to prepare a defence,³²
 - there is a clear difference between the material facts (which must be pleaded) and the evidence proffered to prove them,³³

³¹ 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’.

³² ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000 (‘*Furundžija* Judgement’), paras 61, 147; *Prosecutor v. Kupreškić*, IT-95-16-A, Judgement, 23 October 2001 (‘*Kupreškić* Judgement’), para. 88; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 (‘*Blaškić* Judgement’), para. 209; *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, (‘*Stakić* Judgement’), para. 116; *Prosecutor v. Simić*, IT-95-9-A, Judgement, 28 November 2006 (‘*Simić* Judgement’), para. 20; *see also*, *Ntabakuze v. The Prosecutor*, ICTR-98-41A-A, Judgement, 8 May 2012, para. 30 and the line of authority at the ICTR cited there.

³³ *Blaškić* Judgement, para. 210; *Stakić* Judgement, para. 116.

- the Prosecution is not required to plead the evidence intended to prove the pleaded material facts,³⁴
- it would be unworkable for an indictment to contain all the evidence the Prosecutor proposes to introduce at the trial,³⁵
- an indictment must be considered as a whole, and select paragraphs should be read in context with the entire document,³⁶
- the materiality of a particular fact cannot be decided in the abstract and depends on the nature of the Prosecution's case,³⁷
- the alleged criminal conduct is decisive in determining the degree of specificity required in the indictment,³⁸
- 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,³⁹
- 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,⁴⁰
- a reasonable range of dates may be pleaded where precise dates cannot be specified as to when the alleged criminal conduct occurred,⁴¹
- a broad range of dates does not of itself invalidate a paragraph in an indictment,⁴²
- the precision with which dates have to be charged varies from case to case,⁴³

³⁴ *Furundzija* Judgement, paras 61, 147, 153; ICTR, *The Prosecutor v. Ntagerura*, ICTR-99-46-A, Judgement, 7 July 2006, ('*Ntagerura* Judgement'), para. 21; *Simić* Judgement, para. 20; *The Prosecutor v. Uwinkindi*, ICTR-01-75-AR72 (c), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, ('*Uwinkindi* Decision'), para. 4.

³⁵ *Furundzija* Judgement, para. 153.

³⁶ *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.

³⁷ *Kupreškić* Judgement, para. 89; *Blaškić* Judgement, para. 210; *see also*, *Uwinkindi* Decision at para. 4 and the line of authorities cited there.

³⁸ *Kupreškić* Judgement, para. 89; *Blaškić* Judgement, para. 210.

³⁹ 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.

⁴⁰ *Ndindabahizi v. The Prosecutor*, ICTR-01-71-A, Judgement, 16 January 2007 ('*Ndindabahizi* Judgement'), para. 19.

⁴¹ 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.

⁴² *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.

⁴³ *Ndindabahizi* Judgement, para. 20.

- the Prosecution must offer its best understanding of the case in the indictment,⁴⁴ or the ‘best information available’,⁴⁵
- the identities of co-conspirators are required to be pleaded when they are known,⁴⁶ 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,⁴⁷ and the material facts and the evidence proving those material facts.⁴⁸

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

DISCUSSION

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

20. Requesting the Trial Chamber ‘not to annul’ the indictment of 10 June 2011 is not properly part of a motion under Rule 90 (A) (ii). This decision disposes of this issue first, and then deals with the specific challenges to the form of the indictment, either individually or, where convenient, thematically.

Dismissal of relief seeking ‘not to annul’ the indictment of 10 June 2011

21. Counsel for Mr. Badreddine asks the Trial Chamber to:

- (a) declare that the indictment of 10 June 2011 is ‘not annulled’, and ‘to place on record the Defence’s contention that such annulment cannot be relied on against the Accused, and that it cannot prejudice his rights in these or future proceedings’,

⁴⁴ *Kupreškić* Judgement, paras 92, 95; ICTY, *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, 28 February 2005, para. 30.

⁴⁵ *Prosecutor v. Sesay*, SCSL-04-15-T, Judgement, 2 March 2009, para. 398.

⁴⁶ *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).

⁴⁷ ICTY, *Prosecutor v. Kvočka*, IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 40.

⁴⁸ *Furundzija* Judgement, para. 153.

(b) find the amended indictment to be unacceptably vague and therefore defective, and

(c) to suspend the proceedings and prosecution (or, in the alternative, to order the Prosecutor to amend the amended indictment in the manner sought).

22. The Trial Chamber, however, cannot do what is requested in paragraph 21 (a). The indictment of 21 June 2013 is operative; the original indictment of 10 June 2011, having been succeeded by subsequent amended indictments, is no longer operative. As the Trial Chamber does not sit in review of a decision of the Pre-Trial Judge, it lacks the jurisdiction to declare that an inoperative indictment is ‘not annulled’. Moreover, the Appeals Chamber – in respect of the appeal against the form of the amended indictment of 6 February 2013 – declined ‘to entertain the appeals when their underlying premise—namely the existence of the previous indictment—has been fundamentally altered’ (meaning by the confirmation of the newly amended indictment of 21 June 2013).⁴⁹ The Trial Chamber therefore denies the relief sought.

23. In relation to the request to ‘place on record the Defence’s contention that such annulment cannot be relied on against the Accused, and that it cannot prejudice his rights in these or future proceedings’, counsel for Mr. Badreddine have not demonstrated any prejudice or unfairness to their client. The Trial Chamber therefore dismisses the request.

24. In relation to the alternative form of relief sought, the Trial Chamber has determined in paragraphs 25-50 that the indictment does not lack specificity. It thus follows that the Trial Chamber will not ‘suspend’ (or ‘stay’) the proceedings or prosecution.

A circumstantial case tried *in absentia* requires greater specificity in an indictment

25. Counsel for Mr. Badreddine, Mr. Oneissi and Mr. Sabra argued that greater specificity is required in the amended indictment because the proceedings will be held *in absentia*, and the Prosecution is relying heavily on circumstantial evidence.⁵⁰ The Prosecution responded that neither the *in absentia* proceedings nor the circumstantial nature of the evidence require greater specificity in the indictment, and that the Defence has provided no legal authority to support this argument.⁵¹

26. The Trial Chamber is unaware of any legal authority supporting the Defence argument and is unpersuaded by arguments that *in absentia* proceedings and circumstantial evidence, either alone

⁴⁹ Appeals Chamber’s Decision, para. 20.

⁵⁰ Badreddine motion, paras 21-25; Sabra motion, paras 7-8; Oneissi motion, para. 13.

⁵¹ Prosecution response, paras 30-31.

or in combination, impose a more onerous pleading burden on the Prosecutor in filing an indictment. When filing an indictment, a Prosecutor is not required to attempt to predict whether proceedings will later be held *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.

27. Moreover, 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 – and these have been disclosed to their 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. This challenge is thus dismissed.

Using the Lebanese Code of Criminal Procedure

28. Counsel for Mr. Oneissi argued that Rule 68 (D) should be interpreted in a manner more consistent with Article 131 of the Lebanese Code of Criminal Procedure because the Tribunal's Statute and Rules regarding the specificity required in an indictment are too broad. An indictment in a more specific form would assist the Defence in its preparation.⁵² The Prosecution responded that the Special Tribunal should judge the requirements of an indictment 'according to the same well-established principles which govern indictments' at the ICTY and ICTR,⁵³ and that counsel for Mr. Oneissi failed, in the absence of ambiguity, to justify needing to refer to the Lebanese Code.⁵⁴

29. The Trial Chamber considers that Rule 68 (D) clearly specifies the requirements for an indictment, and that the case law from other international courts and tribunals aids its interpretation. Moreover, there is no inconsistency between Article 131 of the Lebanese Code

⁵² Oneissi motion, paras 10, 12.

⁵³ Prosecution response, para. 5. In summarising these 'well-established principles', the Prosecution states that it 'must plead the charges against an accused and the material facts supporting those charges with sufficient precision so as to provide notice of the nature and cause of the charges against the accused. The Prosecution must plead its case according to the best information available to it. It is not required to plead the evidence by which it intends to prove the material facts, or material facts of which it is not aware'.

⁵⁴ Prosecution response, paras 6, 25-29.

and Rule 68 (D), especially when considering that the Special Tribunal's Prosecutor must file a comprehensive pre-trial brief to supplement an indictment, which is not required under the Lebanese Code. And moreover there is no lacuna in the Rules requiring resort to the Lebanese Code.

Specific defects

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

Pleading of the alleged conspiracy

31. The amended indictment, at paragraph 3, alleges that the four Accused participated in a conspiracy with others aimed at committing a terrorist act to assassinate Rafik Hariri. It then outlines in broad terms the role of each in the conspiracy alleged.
32. Paragraph 48 avers that the four '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'. It then further charts the alleged role of each Accused in the conspiracy alleged.
33. The dates of the alleged conspiracy are specified in the particulars of count one, in paragraph 54. There, it is alleged that participation in the conspiracy occurred – in the case of Mr. Badreddine and Mr. Ayyash between 11 November 2004 and 14 February 2005, and for Mr. Oneissi and Mr. Sabra between 22 December 2004 and 14 February 2005.⁵⁵
34. Counsel for each of the three Accused challenged the pleading of the alleged conspiracy in the amended indictment. The complaints essentially concern the dates of the alleged conspiracy. Further complaints are made concerning a lack of particulars of the alleged conspiracy.

Dates of the alleged conspiracy

35. Counsel for Mr. Badreddine submitted that the time period pleaded for the conspiracy was 'increasingly ambiguous', contradictory and inconsistent in relation to its alleged commencement date and Mr. Badreddine's alleged participation in it. They also submit that pleading this date range is 'incompatible with the statement that Mr. Badreddine was allegedly among the early

⁵⁵ And in relation to Mr. Oneissi and Mr. Sabra in counts 6, 7, 8 and 9 between 22 December 2004 and 14 February 2005.

members of the conspiracy’ asking how this could be correct if he could have joined it as late as 14 February 2005?⁵⁶

36. Counsel for Mr. Oneissi argue that the date range provided for the conspiracy is unreasonable as the nature of the case against the Accused cannot be ascertained.⁵⁷ And, more broadly, the amended indictment does not contain any details regarding his alleged involvement in the design and execution of the conspiracy.⁵⁸ Counsel for Mr. Sabra argue that the amended indictment lacks sufficient detail in relation to the date range of the alleged conspiracy and Mr. Sabra’s complicity, thus undermining their ability to prepare for trial.⁵⁹

37. The Prosecution responded by referring to international criminal law jurisprudence which holds that the range of dates pleaded in an indictment must not be overly broad. The dates pleaded in the amended indictment, it is argued, provide the Defence with sufficient notice of the relevance of the time frame of the conspiracy pleaded.⁶⁰

38. The Trial Chamber agrees. It is permissible, and indeed normal, to plead in an indictment the occurrence of an act within a range of dates if its precise date is unknown. The ICTR Appeals Chamber, in summarising the relevant international jurisprudence, has recently held that:⁶¹

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

39. Counsel for Mr. Badreddine’s submission that pleading such a range of dates is ‘incompatible’ with an allegation that one Accused was an early participant in a conspiracy is misconceived. Here, the Prosecution has alleged the existence of a conspiracy and the participation of each of the Accused in that conspiracy but between specified dates. There is nothing impermissible in this form of pleading, and indeed, the Special Tribunal’s Appeals Chamber has held – in relation

⁵⁶ Badreddine motion, paras 34-37.

⁵⁷ Oneissi motion, paras 21-23.

⁵⁸ Oneissi motion, para. 19.

⁵⁹ Sabra motion, paras 10 (u)-(v).

⁶⁰ Prosecution response, paras 45-48.

⁶¹ *Bagosora* Judgement, para. 150.

to the duration of a conspiracy – that ‘no explicit time-line is required for the validity. The agreement stands, even though it is a long-term one or has no predefined or foreseen term’.⁶²

40. 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 Accused are alleged to have come to participate in the alleged conspiracy are a matter for evidence at trial and need not be pleaded as material facts in an indictment, but should be notified to the Defence in a timely manner before trial.

The identity of the alleged co-conspirators

41. Counsel for Mr. Sabra claim that the amended indictment is defective in not explicitly naming the other alleged co-conspirators and in not clarifying certain aspects of their involvement in the alleged conspiracy, while arguing that the conspiracy is related solely to the four Accused.⁶³

42. As a general principle of pleading indictments in international criminal law, a Prosecutor is required to plead the identity of known co-conspirators.⁶⁴ The Prosecution has done so.⁶⁵ Further, a Prosecutor has ‘no requirement concerning the identification of all individuals’,⁶⁶ and is not required to plead the names of those whose identity is unknown.

43. The Trial Chamber is thus satisfied that the amended indictment pleads sufficient material facts to allow Defence counsel to prepare their case for trial.

The False Claim of Responsibility

44. The amended indictment, at paragraphs 3 (c)-(d), 23 and 44, alleges that Mr. Oneissi and Mr. Sabra participated in finding and then using a person, Abu Adass, to make a video-taped false claim of responsibility for the Hariri assassination, which was ultimately broadcast on Al-Jazeera on 14 February 2005.

⁶² STL-11-01/I, Interlocutory Decision on the Applicable Law; Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (‘Applicable Law Decision’), 16 February 2011, para. 196.

⁶³ Sabra motion, paras 10 (b), (t).

⁶⁴ For example, *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. 4; *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).

⁶⁵ Prosecution response, para. 38.

⁶⁶ Applicable Law Decision, para. 195.

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

- identifying and finding a suitable individual (Abu Adass) for making the false claim,
- disseminating, after the attack, statements falsely attributing responsibility for the attack,
- ensuring the delivery to Al-Jazeera of a video, with a letter attached containing the false claim, by telephoning Al-Jazeera on 14 February 2005, and
- demanding, with menace, that the video be broadcast (*i.e.*, ensuring that it would be broadcast).

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

46. Counsel for Mr. Oneissi submits that these pleadings do not specify clearly enough the respective roles of Mr. Oneissi and Mr. Sabra in making the false claim. Counsel for Mr. Oneissi and Mr. Sabra state that they need further details of the alleged involvement of their clients in recruiting Abu Adass. Both submit that the description of the observation and delivery of the video-cassette, including telephone calls to Al-Jazeera falsely claiming responsibility,⁶⁷ are impermissibly vague and fail to establish the Accused's participation.

47. The Prosecution responds that the amended indictment pleads all the necessary material facts in relation to these alleged events, rather than the evidence which will establish the material facts pleaded at trial.⁶⁸

48. The Prosecution's submissions have merit. The Prosecution has pleaded the material facts necessary for such an averment in an indictment. Further and more broadly, the pleading provides sufficient information to Defence counsel to inform them clearly of the nature and cause

⁶⁷ Oneissi motion, paras 26-29, 32-33; Sabra motion, paras 10 (e)-(f), (i), (r), (s). In this context, the Sabra motion argues that the word 'or' on the phrase '**ONEISSI** and **SABRA** made a total of 4 calls' is insufficiently clear, and the allegation should be stricken if the Prosecution is unable to specify who made each call, para. 10 (s).

⁶⁸ Prosecution response, paras 16, 32, 57-64, 72-73.

of the charges against their clients 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 particulars between the Parties) rather than what must be pleaded in an indictment.

Allegations of vagueness in pleading

49. Counsel for Mr. Sabra argued that the amended indictment is vague in 23 discrete aspects. These include using the words ‘each and together with’, ‘participated together with’, ‘ensuring the delivery of the video’, ‘to co-ordinate the false claim’, ‘phones ... were used from at least 1 January 2005’, ‘a number of days prior to the attack’, ‘surveillance occurred on at least fifteen days’, ‘activity ... is illustrated *inter alia*’, ‘in the vicinity of the mosque’, ‘locating’, ‘chose’, ‘seek a suitable individual’, ‘together with others as yet unidentified’, ‘sometime between at least 11 November 2004 and 16 January 2005’, and ‘identifying and then using’.⁶⁹ Counsel for Mr. Badreddine complained that the amended indictment is imprecise in 20 distinct respects, attacking as imprecise the use of words such as ‘monitor’, ‘key times’, ‘coordinate’ and ‘often’.⁷⁰ Moreover, they disagree with the distinction made between material facts and evidence as set out in the Trial Chamber’s decision of 12 June 2013 arguing that the distinction is inevitably arbitrary because the case is circumstantial.⁷¹ Counsel for Mr. Oneissi submit that the deficiencies and lack of clarity (*e.g.*, whether relating to the alleged conspiracy or the false claim of responsibility) result in an unacceptably vague amended indictment which must be cured to ensure adequate preparation for trial.⁷²

50. The Trial Chamber disagrees with these submissions. The amended indictment pleads the material facts necessary for a valid indictment; each of the circumstances complained of by Defence counsel relates to the evidence to be presented at trial. The totality of the case against these Accused is contained in the amended indictment, the Prosecution’s pre-trial brief, the evidence disclosed to their counsel, and the evidence to be presented at trial. These documents must be viewed as a package providing an Accused with the material necessary to mount a proper defence, but the indictment itself is only required to plead material facts. It has done so.

⁶⁹ Sabra motion, para. 10.

⁷⁰ Badreddine motion, paras 29-33, 38-42.

⁷¹ Badreddine motion, para. 23 referring to para. 14 of the decision.

⁷² *E.g.*, Oneissi motion, paras 25, 27, 30, 34.

CONCLUSION

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

CERTIFICATION FOR APPEAL

52. The Trial Chamber requests Defence counsel, if they wish to file a motion seeking certification of this decision for appeal under Rule 126, to clearly set out and concisely list any issues in the decision that they wish to have certified for appeal. This should reference any paragraph in the decision on the issues for which certification is sought. The Prosecution should respond to any requests for certification by Friday 27 September 2013.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

- (1) Dismisses the motions alleging defects in the form of the amended indictment filed by Defence counsel acting for Mr. Mustafa Amine Badreddine, Mr. Hussein Hassan Oneissi and Mr. Assad Hassan Sabra, and
- (2) Orders the Prosecution to respond to Defence requests, if any, to certify this decision for appeal by 27 September 2013.

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

13 September 2013

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

