



**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 October 2014

**Original language:** English

**Classification:** Confidential

**THE PROSECUTOR**

v.

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

**DECISION ON THE BADREDDINE DEFENCE MOTION FOR SPECIFIC  
MEASURES REGARDING WITNESSES PRH291'S AND PRH507'S TESTIMONY**

**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. Dorothée 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 Mett  
& Mr. Geoffrey Roberts



**BACKGROUND**

1. The Prosecution intends to call two witnesses, Witnesses PRH291 and PRH507, to testify about the installation and use of electronic jammers in the convoy of vehicles belonging to the Hariri family in February 2005. On 15 September 2014, in responding to a Prosecution motion for the admission into evidence of the statements of the two witnesses, counsel for Mr Mustafa Amine Badreddine stated that they wished to ask similar questions of both witnesses and requested ‘that these witnesses be called consecutively, and that measures be taken to prevent them from accessing each other’s in-court testimony and from communicating with each other during their testimony.’<sup>1</sup> In a filing of 2 October 2014, counsel for Mr Badreddine referred to these submissions,<sup>2</sup> but suggested that Witness 291’s evidence could be interposed between that of other witnesses to ensure that he commenced his evidence on a given day.<sup>3</sup>

2. The Prosecution, on 18 September 2014, informally provided a schedule to the Trial Chamber and the Parties according to which the two witnesses would testify consecutively.<sup>4</sup> On 7 October 2014, however, the Prosecution advised that, for scheduling reasons, it would probably have to reschedule the testimony of Witness 291 until later in the year.<sup>5</sup> On 10 October 2014, the Prosecution filed a notification revealing that Witness 291 would not testify in the forthcoming two weeks.<sup>6</sup> The witness will probably testify in early December 2014.<sup>7</sup> On 13 October 2014, counsel for Mr Badreddine filed a motion requesting specific measures to address their concerns in relation to the testimony of the two witnesses.<sup>8</sup> On 14 October 2014, the Trial Chamber allowed a Prosecution motion to hear the testimony of Witness 291 via video-conference link.<sup>9</sup>

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<sup>1</sup> F1666, Badreddine Defence Response to ‘Prosecution Motion for Admission of PRH291’s Statement, Declaration of PRH507 as an Expert, and Admission of PRH507’s Expert Statement’, 15 September 2014 (confidential), para. 6.

<sup>2</sup> F1687, Badreddine Defence Response to ‘Prosecution Motion for Testimony by Video-Conference Link for Witness PRH291’, 2 October 2014 (confidential), para. 6.

<sup>3</sup> F1687, Badreddine Defence Response to ‘Prosecution Motion for Testimony by Video-Conference Link for Witness PRH291’, 2 October 2014 (confidential), para. 9.

<sup>4</sup> E-mail from Counsel for Prosecution of 18 September 2014 to Legal Officer of the Trial Chamber, parties, and participants.

<sup>5</sup> E-mail from Counsel for Prosecution of 7 October 2014 to Legal Officer of the Trial Chamber, parties, and participants.

<sup>6</sup> F1691, Prosecution Witness Schedule for the Weeks Commencing 13 & 20 October 2014, 10 October 2014.

<sup>7</sup> F1698, Prosecution Response to Badreddine Defence Motion regarding PRH291 and PRH507, 15 October 2014, para. 2.

<sup>8</sup> F1692, Badreddine Defence Motion for Specific Measures Regarding PRH291’s and PRH507’s Testimony, 13 October 2014 (confidential) (‘Badreddine Motion’).

<sup>9</sup> F1696, Decision on the Prosecution Motion for testimony by Video-Conference Link for Witness PRH291, 14 October 2014.

### SUBMISSIONS

3. Counsel for Mr Badreddine argue that—as the evidence of Witnesses 291 and 507 overlaps significantly—to test their credibility and reliability, they intend to ask some similar questions of both witnesses. The witnesses should therefore be prevented from following each other’s testimony and from communicating with each other during their testimony. Although counsel recognise that both witnesses have had ample opportunity to discuss their evidence, they submit that it is nonetheless important that the second witness to testify should be unaware of the Defence questions to the first witness.<sup>10</sup>

4. Therefore, in applying Rule 150<sup>11</sup> of the Special Tribunal’s Rules of Procedure and Evidence,<sup>12</sup> counsel request the Trial Chamber to order: (i) the Prosecution to amend its witness order to ensure that Witnesses 507 and 291 testify consecutively; (ii) the witness testifying last to remain in a witness room under the supervision of the Victims and Witnesses Unit (VWU) during the cross-examination of the witness testifying first, and that he be expressly prohibited from following, or obtaining details of, the other witness’ testimony until the completion of his testimony; (iii) the VWU accommodate both witnesses separately in The Netherlands; and (iv) the witnesses be prohibited from communicating with each other during their testimony.<sup>13</sup>

5. The Prosecution responded that, due to the practical arrangements already made, rescheduling the testimony of Witness 507 until later in the year would be unfeasible.<sup>14</sup> It adds that the phenomenon of witnesses with overlapping evidence is common and does not of itself warrant

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<sup>10</sup> Badreddine Motion, para. 6.

<sup>11</sup> Rule 150 provides, in the relevant parts, that:

(C) A witness, other than an expert, who has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not, for that reason alone, be disqualified from testifying. [...]

(G) Upon an objection raised by a Party, the Chamber may exercise control over the mode and order of questioning witnesses and presenting evidence so as to:

(i) make the questioning and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time and resources. [...]

(I) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining Party, to the subject-matter of that case.

(J) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining Party, counsel shall put to that witness the nature of the case of the Party for whom that counsel appears which contradicts the evidence given by the witness.

(K) The Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

<sup>12</sup> Badreddine Motion, paras 7 and 11.

<sup>13</sup> Badreddine Motion, para. 14.

<sup>14</sup> F1698, Prosecution Response to Badreddine Defence Motion regarding PRH291 and PRH507, 15 October 2014 (‘Badreddine Response’), paras 2-3.

special treatment here.<sup>15</sup> Further, counsel for Mr Badreddine has not provided any basis to suggest that the witnesses may improperly alter their evidence if they are privy to each other's cross-examination, and any measure imposed in this case would tend to unfairly single-out and impugn their credibility.<sup>16</sup> The Prosecution also disputes the applicability of Rules 150 (C) and (G),<sup>17</sup> and argues that any concern related to the effect, if any, of hearing evidence given by prior witnesses can be raised in cross-examination.<sup>18</sup> The Prosecution rejects any measure that would, directly or implicitly, suggest that the credibility or reliability of the two witnesses is in doubt.<sup>19</sup>

6. Counsel for Mr Badreddine replied contesting that its motion was not filed too late (as argued by the Prosecution) and suggesting that the schedule of witnesses to the end of 2014 allows flexibility.<sup>20</sup> On the substance of the Prosecution response, counsel replied that the motion seeks reasonable measures to ensure that their cross-examination of these 'two key witnesses', the only ones who can give detailed and technical evidence about the jammers employed in Rafiq Hariri's security, 'will be as effective as possible.'<sup>21</sup> The measures sought are the only ones effectively capable of addressing their concerns.<sup>22</sup>

### DISCUSSION

7. The Defence motion aims to ensure that the cross-examination of the second of the two witnesses occurs without his having advance knowledge of the questions that Defence counsel intend to pose in relation to certain parts of the evidence. This is to maintain the element of surprise. The Prosecution counters that rescheduling these witnesses is now unfeasible and that attaching any special condition to the testimony of the second witness will unfairly single him out and suggest that his evidence is less credible or reliable than other witnesses who have testified before the Special Tribunal.

8. The Rules of Procedure and Evidence provide that the Parties call their own witnesses, and file lists of the witnesses they intend to call to testify, or whose statements they seek to tender into

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<sup>15</sup> Prosecution Response, para. 5.

<sup>16</sup> Prosecution Response, paras 6-7.

<sup>17</sup> Prosecution Response, paras 9-10.

<sup>18</sup> Prosecution Response, para. 11.

<sup>19</sup> Prosecution Response, para. 12.

<sup>20</sup> F1702, Badreddine Defence Reply to the Prosecution Response to its Motion for Specific Measures Regarding PRH291's and PRH507's Testimony, 16 October 2014 ('Badreddine Reply'), paras 4-6.

<sup>21</sup> Badreddine Reply, paras 8-10.

<sup>22</sup> Badreddine Reply, para. 10.

evidence.<sup>23</sup> According to the Rules, each Party presents its own case; each therefore has the right to prepare and pursue its own case strategy including presenting evidence according to coherent themes or subject matter, for example, to demonstrate, the evidence of victims, DNA evidence, the evidence of explosives experts or the evidence of the recovery of objects from the crime scene. The Parties are best placed to determine the order of presentation of their evidence. Logistically, the Parties notify the Special Tribunal's VWU of their intended order of witness appearance, and the relevant preparations for travel, including where necessary obtaining visas, are then made. With some witnesses who will testify in a language which is not one of the Special Tribunal's three official languages, additional arrangements need to be made to employ contractor interpreters in that fourth language. The scheduling of witnesses is therefore usually done at least one month in advance of their actual appearance in court. For all of these reasons, the Trial Chamber is normally hesitant to intervene in witness scheduling matters. The Trial Chamber, of course, retains control of the proceedings and is ultimately responsible for the number of witnesses to be called and that it may order a Party to vary its intended order of witness testimony.<sup>24</sup>

9. In international courts and tribunals and hybrid tribunals such as the Special Tribunal, from the first trial in the International Criminal Tribunal for the Former Yugoslavia in 1994, court proceedings have been publicly broadcast live, but with a short delay. This is one crucial difference between international and domestic proceedings; another is that the seat of the court or tribunal may be located in a country that was not where events the subject of the trial occurred. The public policy reasons for broadcasting the trial are both of transparency in the court process, and to allow the public in the country or region concerned to follow the daily court proceedings—and the evidence as a whole. The result is that future and potential witnesses, like any other member of the public, may follow the public broadcast of a trial or read the transcript of proceedings.

10. Witnesses in international criminal trials commonly testify to the same events. The risk is thus always present—as a result of viewing the public broadcast or the public transcript of the testimony of an earlier witness—that a subsequent witness could tailor their evidence. However, this is true regardless of whether or not the testimony is broadcast publicly. The Trial Chamber therefore has to balance the public policy of transparent public proceedings, and the choices made by the parties in scheduling their witnesses, against the possibility that witness A could view the

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<sup>23</sup> Rules 91 (G) (ii) and 145 (B), adopted as a modality for presentation of the parties' cases in (Oral) Order on the Mode of Questioning Witnesses, Hearing of 29 October 2013, p. 5.

<sup>24</sup> Rules 127 (C) (i), 129 (C), and 150 (G).

testimony of witness B and have advance warning of the questions that might be asked of him or her, and thus potentially prejudice an Accused person's right to a fair trial.

11. In appropriate circumstances the Trial Chamber could make orders to make the testimony of a witness confidential for a certain period of time. But to be persuaded that this would be necessary to protect the right of an Accused person to a fair trial, the Trial Chamber would have to be convinced that some objective reason existed to depart from the principle favouring the public nature of the proceedings.

12. Other relevant circumstances here include that the evidentiary material of the two witnesses includes (somewhat strangely) a joint 'interview' taken by the UN International Independent Investigating Commission in August 2005 and that both counsel for Mr Badreddine and the Prosecution accept that the two witnesses have had opportunities to communicate with each other over the past nine years.<sup>25</sup> The main purpose of cross-examination is to test the subject-matter of the evidence in chief and to explore matters affecting the credibility of the witness.<sup>26</sup> However, the Rules provide that, generally, a witness who has heard the testimony of another witness shall not, for that reason alone, be disqualified from testifying.<sup>27</sup>

13. Here, however, counsel for Mr Badreddine—apart from asserting that the two witnesses are particularly important—have not advanced any objective basis as to why an exception should be made to the normal arrangements for witness testimony. The Trial Chamber is satisfied that cross-examination by the Defence and appropriate questioning from the Trial Chamber should be sufficient to counter any concerns of collusion or advance notice of questions. In this context, the Trial Chamber is not persuaded that it should depart from the normal approach and order the Prosecution to modify the sequence of its proposed witnesses. The motion is therefore dismissed. The Trial Chamber, however, emphasises that it would take the same approach on a similar motion filed by the Prosecution in relation to proposed Defence witnesses.

### **CONFIDENTIALITY OF FILINGS**

14. The Trial Chamber reiterates once again the importance of the filings being public. The Prosecution has no objection to making the filings public, subject to very minor redactions in the

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<sup>25</sup> Badreddine Motion, para. 6; Prosecution Response, para. 7.

<sup>26</sup> Rule 150 (I).

<sup>27</sup> Rule 150 (C).

motion.<sup>28</sup> Counsel for Mr Badreddine instead opposes making public the filings, at least until the two witnesses have both testified, and suggests redactions to the Prosecution's response.<sup>29</sup>

15. The Special Tribunal for Lebanon's Statute and its Rules of Procedure and Evidence require the Trial Chamber to ensure a public hearing of the charges.<sup>30</sup> The Rules provide limited exceptions to publicity to ensure the privacy and protection of victims and witnesses,<sup>31</sup> and for public order or morality, security, a State's national security interests, and the interests of justice.<sup>32</sup> The transparency of proceedings is particularly important for an international criminal tribunal removed from the public most concerned with its work. The publicity of these proceedings is to be encouraged, and not curtailed.

16. With this in mind, and despite the sensitivity of the case and the delicate nature of its evidence, the Trial Chamber—because it considers transparency of its proceedings of paramount importance—has so far refrained from ordering closed sessions. The Trial Chamber finds perplexing the suggestion by counsel for Mr Badreddine that 'the Prosecution's assertion that future witnesses are actually allowed to follow the proceedings and hear other witnesses' testimony should be redacted'.<sup>33</sup> That the public can follow the proceedings is well-known, especially in Lebanon, and redacting this portion of the Prosecution filing would not achieve any practical result. Since 1994, many thousands of witnesses have testified in international criminal trials without the need for this kind of redaction from the filing of a Party. The Trial Chamber emphasises that redactions and confidential filings should be minimized. As the filings are already confidential, and they refer to the fact that counsel for Mr Badreddine intends to ask similar questions to both witnesses, the Trial Chamber will however exceptionally accede to the request by counsel for Mr Badreddine to postpone publicizing them.<sup>34</sup>

17. Counsel for Mr Badreddine and the Prosecution are therefore ordered to file publicly redacted versions of their filings in this matter (or to have them reclassified as public) as suggested by the Prosecution, but only after the testimony of both Witnesses 507 and 291. This decision will thus remain confidential until the testimony of both witnesses is complete.

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<sup>28</sup> Prosecution Response, para. 13.

<sup>29</sup> Badreddine Reply, paras 2-3.

<sup>30</sup> Article 20 (4) of the Statute; Rules 96, 130 (B), 136.

<sup>31</sup> Rule 133 (A).

<sup>32</sup> Rule 137.

<sup>33</sup> Badreddine Reply, para. 3.

<sup>34</sup> Badreddine Motion, para. 2; Badreddine Reply, para. 2.

**DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

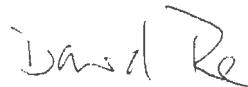
**DENIES** the Motion for Specific Measures Regarding PRH291's and PRH507's Testimony;

**ORDERS** the parties to file publicly redacted versions of their filings (or to have them reclassified as public) after the testimony of Witnesses PRH507 and PRH291 is completed; and

**ORDERS** the Registry to reclassify this decision as 'public' after the testimony of Witnesses PRH507 and PRH291 is completed.

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

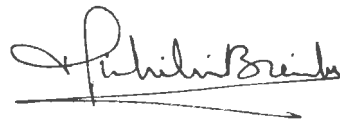
Leidschendam,  
The Netherlands  
17 October 2014



\_\_\_\_\_  
Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

