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: 23 March 2015

Original language: English

Classification: Public

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

Corrected Version of 'DECISION ON SIMULTANEOUS OR CONCURRENT TESTIMONY OF EXPERT WITNESSES' of 17 February 2015

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& Mr Alexander Milne

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Counsel for Mr Assad Hassan Sabra:
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BACKGROUND

1. The Prosecution intends to call two Argentinian professors of civil engineering to provide expert testimony in the trial. Professor Bibiana Luccioni (Witness PRH187) and Professor Daniel Ambrosini (Witness PRH188) jointly co-authored two reports, dated September 2010 and 15 December 2012, about the crater and the damage caused by the explosion in Beirut on 14 February 2005. In a decision issued on 21 August 2014, the Trial Chamber found that both witnesses were qualified as experts within the meaning of Rule 161 of the Special Tribunal's Rules of Procedure and Evidence.[1] The Trial Chamber held the first report to be admissible into evidence under Rule 161 but deferred a final decision on the admissibility of the second until the testimony of one or both experts.[2] It also decided that, as both witnesses have comparable expertise, only Professor Ambrosini was required to appear for cross-examination.[3] Defence counsel, however, could make an application—showing good cause—to cross-examine Professor Luccioni after Professor Ambrosini had completed his testimony.[4]

SUBMISSIONS

2. On 17 December 2014, the Prosecution filed a motion asking the Trial Chamber to allow the two expert witnesses to testify 'simultaneously' in the courtroom.[5] The Prosecution argued that having both witnesses present in the courtroom to answer questions at the same time would be the most efficient method of receiving and testing their reports. Although they had produced two joint reports, each had contributed separate expertise, and either expert could explain his or her own analysis and conclusions for a particular aspect of the report. Professor Ambrosini, the Prosecution explained, specializes in bomb crater analysis, while Professor Luccioni specializes in analysing the damage to buildings caused by explosions.[6] Having the two experts testify simultaneously would ensure that the two could fully answers all questions posed, thereby guaranteeing an efficient use of court time.[7]

3. Defence counsel for three of the Accused opposed the application. Counsel for Mr Salim Jamil Ayyash argued that simultaneous testimony would result in a serious violation of the Defence's right

[1] STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi, and Sabra*, F1646, Decision on twelve expert witnesses, 21 August 2014, paras 62-64. The two reports are entitled, respectively, 'Final forensic report – quantity of explosives' (R91-606433), September 2010 and 'Final report of experts regarding the attack on 14 February 2005 against Rafic Hariri' (R91-100473), 15 December 2012.
[2] Decision of 21 August 2014, paras 65-70.
[3] Decision of 21 August 2014, paras 67 and 70.
[4] Decision of 21 August 2014, para. 67.
[5] F1794, Request to Call Witnesses PRH187 and PRH188 Simultaneously, 17 December 2014.
[6] Prosecution motion, paras 4-5.
[7] Prosecution motion, paras 1 and 6.

to confront the two witnesses, and, further, that hearing witnesses simultaneously is not supported by any international jurisprudence.[8] Simultaneous testimony would 'result in reducing or negating entirely the Defence's ability to probe or expose forgetfulness, confusion, or evasion'.[9]

4. Counsel for Mr Mustafa Amine Badreddine opposed the motion, describing it as a 'novel and, it would appear, unprecedented form of relief' that is not based on anything in the Special Tribunal's Rules. Moreover, the Prosecution had not shown any cogent reasons for departing from ordinary adversarial international criminal procedure where witnesses are called consecutively rather than simultaneously. Further, the proposed measure may undermine the effectiveness of cross-examination.[10]

5. Counsel for Mr Assad Hassan Sabra described the motion as an attempt to 'circumvent' the Trial Chamber's decision of August 2014. They argued that the motion is unsubstantiated and that the proposed measure would decrease the probative value of the evidence. Moreover, the Prosecution has not provided a legal basis or shown good cause as to why the two witnesses could not be heard consecutively. The Prosecution motion also failed to take into account the 'serious risk of witness contamination and the very purpose of calling witnesses to determine the truth'.[11]

6. The Prosecution—at the request of the Trial Chamber, in its attempt to find any supporting international or national legislation, case-law or any other material[12]—filed some case-law, legislation and reference material.[13]

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[8] F1805, Response by the Ayyash Defence to the Prosecution Request to Call Witnesses PRH187 and PRH188 Simultaneously, 31 December 2014, paras 1-2 and 4.
[9] Ayyash Defence Response, para. 3.
[10] F1804, Badreddine Defence Response to Prosecution's "Request to Call Witnesses PRH187 and PRH188 Simultaneously", 31 December 2014, paras 3-9.
[11] F1806, Sabra Response to Prosecution 'Request to Call Witnesses PRH187 and PRH188 Simultaneously', 31 December 2014, paras 2-10.
[12] F1834, Order Requesting Further Clarifications in Relation to the Testimony of Witnesses PRH187 and PRH188, 29 January 2015.
[13] F1839, Prosecution Further Submissions Regarding Simultaneous Testimony, 2 February 2015. The Annex to this submission included portions of judgments and transcripts (ECCC, Case No. 001 (*Kaing Guek Eav alias Duch*), Case No. 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010; ECCC, Case No. 001 (*Kaing Guek Eav alias Duch*), Case No. 001/18-07-2007/ECCC/TC, Transcripts, 31 August 2009 and 1 September 2009; Court of Bosnia and Herzegovina, *Prosecutor's Office of Bosnia and Herzegovina v. Novak Đukić*, Case No. X-KR-07/394, First Instance Verdict, 12 June 2009 (Verdict published 14 September 2009); Court of Bosnia and Herzegovina, *Prosecutor's Office of Bosnia and Herzegovina v. Novak Đukić*, Case No. S1 1 K 015222 14 Krž, Second-Instance Verdict, 11 April 2014; Australia, District Court of New South Wales (Australia), *R. v. Stanyard*, Case No. 2009/62492, Judgment, 25 May 2012; Federal Court of Australia, *Strong Wise Limited v. Esso Australia Resources Pty Ltd*, Case No. VID 1060 of 2008, Judgment, 18 March 2010); examples of domestic legislation, and an article by Justice Steven Rares of the Federal Court of Australia, *Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues*, available at http://www.fedcourt.gov.au/publications/judges-speeches/justice-rares/rares-j-20131012. The article explains that the practice is known colloquially as 'hot-tubbing'.

7. On 4 February 2015, the Trial Chamber heard further oral submissions from the Prosecution, Defence counsel and the Legal Representative of Victims. The Prosecution explained that Rule 130 gave the Trial Chamber a wide discretion to apply any directions it thought fit.[14] That Rule states that the Trial Chamber, 'after hearing the parties, may give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial.' The Prosecution argued that there was some precedent in decisions of the Extraordinary Chambers in the Court of Cambodia (ECCC) and the International Criminal Tribunal for the former Yugoslavia (ICTY) for calling expert witnesses to testify simultaneously, in civil law jurisdictions, including in criminal proceedings in the Court of Bosnia and Herzegovina, and in arbitration.[15] The Prosecution, however, was unable to identify any national or international precedent where the Prosecution had called multiple expert witnesses to testify concurrently in criminal proceedings.[16] Nonetheless, it considered it preferable to call the witnesses simultaneously.[17] That the two experts wrote a joint report suggested that there was little room for the Defence to seek contradiction between the two witnesses.[18] In view of the Defence estimates for cross-examination, however, the Prosecution was now confident that the testimony of the two witnesses could be completed within the five days scheduled in the week of 23 to 27 February 2015.[19]

8. The Legal Representative of Victims urged the Trial Chamber not to be afraid of 'novelty' in the proceedings. He stated that he would support the Prosecution's motion if there was a substantial risk of delay to the proceedings, but if the evidence of both experts could be heard within the allocated week, he would be 'neutral'.[20]

9. Counsel for Mr Badreddine agreed that the overall testimony of the two witnesses could be completed within five days.[21] He described the application as 'an extraordinary motion requesting an extraordinary departure from the normal rules of procedure [...] in international criminal courts generally' that 'demands extraordinary justification for it, and there is none'.[22] No time would be saved, and any overlap in the testimony could be dealt with by calling the witnesses in the normal manner, consecutively. Moreover, it raised practical difficulties.[23] Two witnesses testifying in this

[14] T. 114, 4 February 2015, p. 23.
[15] T. 114, 4 February 2015, p. 28. *See* above, fn. 13, for the relevant cases.
[16] T. 114, 4 February 2015, p. 28.
[17] T. 114, 4 February 2015, p. 32.
[18] T. 114, 4 February 2015, pp 30, 36 and 40.
[19] T. 114, 4 February 2015, pp 32-33.
[20] T. 114, 4 February 2015, pp 42-43.
[21] T. 114, 4 February 2015, p. 46.
[22] T. 114, 4 February 2015, p. 46.
[23] T. 114, 4 February 2015, pp 47-52.

manner would mutually corroborate each other and in an artificial way would significantly minimize the ability of the Defence to properly test the evidence.[24] Counsel was very concerned with the manner in which the witnesses would answer questions posed by the Trial Chamber.[25] Counsel for Mr Sabra supported these arguments.[26]

10. Counsel for Mr Ayyash underlined the fact that simultaneous testimony in the manner foreshadowed; (i) was unprecedented in international criminal law as far as 'guilt or evidence or the *actus reus* of the crime charges' are concerned, but not regarding procedural matters, and (ii) would raise practical problems such as, when questions are asked, who decides which of the two experts is best suited to answer them.[27]

11. Counsel for Mr Hassan Habib Merhi stated that the witnesses should be called to testify separately, and submitted that Articles 253 and 255 of the Lebanese Code of Criminal Procedure do not allow confrontations between experts.[28]

DISCUSSION

12. The first expert report, dated September 2010 and entitled 'Quantity of explosives', used a 'computational study' to provide an opinion on the quantity and location of the explosives used in the explosion in Beirut on 14 February 2005. The second, dated 15 December 2012, analyses the explosion, including the location of the explosion *vis-à-vis* the vehicles in Mr Rafik Hariri's convoy, the type, quantity, positioning and carrier of the explosives, how the triggering mechanism could have been activated, the complexity of the attack and the role of the perpetrators. Because Defence counsel had contested one section (3.5.3) of the second report, the Trial Chamber deferred deciding its admissibility under Rule 161 until the testimony of at least one of the experts.

13. The Prosecution, however, has now clarified that it relies only upon two annexes in the second report,[29] and that both Professor Ambrosini and Professor Luccioni should testify live.[30] Defence counsel for at least two of the Accused want to cross-examine the two witnesses.[31] The Trial

[24] T. 114, 4 February 2015, p. 55.
[25] T. 114, 4 February 2015, pp 56-57.
[26] T. 114, 4 February 2015, p. 58.
[27] T. 114, 4 February 2015, pp 58-66.
[28] T. 114, 4 February 2015, pp 69-72.
[29] T. 114, 4 February 2015, p. 21.
[30] Prosecution motion, para. 9; T. 114, 4 February 2015, pp 16-17.
[31] T. 114, 4 February 2015, pp 16-17, 46, and 67; *see* also F1485, Badreddine Defence Response to "Updated Prosecution Notice of Expert Witnesses and their Statements" dated 4 March 2014, 4 April 2014, confidential Annex, pp 1 and 12; F1563, Merhi Defence Response to the "Prosecution Motion Regarding Upcoming Expert Witnesses", 10 June 2014, para. 16.

Chamber has now re-examined the two reports and accepts the Prosecution's argument that both experts should testify, meaning that they will be cross-examined. The Trial Chamber's decision requiring only Professor Ambrosini to appear for cross-examination was based on the reports not specifying the respective contributions of the two experts.

14. The disagreement here is as to the manner of in-court testimony. The Prosecution submits that the interests of justice would permit concurrent or simultaneous expert testimony, while Defence counsel strongly oppose the motion and submit that the Trial Chamber should follow the normal practice of consecutive testimony.

15. One commentator has summarised the advantages of concurrent expert evidence as; (i) the evidence may proceed directly to the critical points of difference between experts, (ii) counsel and judges are more easily able to understand the issue—assisted by the availability of multiple advisors in the courtroom, (iii) the procedure may expedite proceedings and save costs, and (iv) the intellectual discussion among the experts may remove some of the tension typical of a conventional trial. On the other hand, concurrent testimony raises concerns about the integrity of the whole process, and in particular, that it might delay proceedings, and could allow the more persuasive, confident or assertive expert to win over the judge's mind by overshadowing the others.[32]

16. Against this theoretical background, the starting point for analysis is the Special Tribunal's Rules. These, however, are silent on the issue, neither specifically authorising nor prohibiting concurrent expert witness testimony. For guidance, the Trial Chamber may turn to Rule 3, 'Interpretation of the Rules', which provides:

> the Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights, (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

17. The Trial Chamber believes that attempting to search for evidence of customary international law—as specified in (i)—on this procedural point, would be fruitless.

18. Next, turning to 'international standards on human rights', the Trial Chamber has not found any directly applicable legal authority. However, allowing concurrent expert testimony in the manner

[32] Rares, above, fn. 13, pp 7-12.

requested could not infringe any of the 'Rights of the Accused' enumerated in Article 16 of the Statute, and in particular in paragraph (4) (e) 'to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her'. The two witnesses will be attending the court to testify and will be available for examination by the Defence. Additionally, Rule 150 (C) permits expert witnesses to be present during the testimony of other experts, and no counsel have sought to have either expert excluded from the courtroom during the testimony of the other.

19. The third source of law is the general principles of international criminal law and procedure. The Trial Chamber has found precedent in one international criminal tribunal (ICTY) and in two hybrid domestic courts using international judges and prosecutors (the ECCC, and the Court of Bosnia and Herzegovina).

20. No international court or tribunal using international criminal procedural law has a rule either specifically authorizing or prohibiting concurrent expert testimony. Regulation 44 (5) of the International Criminal Court's (ICC) Regulations of the Court gives a Chamber a wide margin of appreciation in that it 'may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which the evidence is to be presented and the time limits for the preparation and notification of their report.' However, the ICC does not, as of yet, appear to have allowed concurrent expert testimony.

21. Rule 90 (C) of the ICTY's Rules of Procedure and Evidence—replicated in Rule 150 (C) of the Special Tribunal's Rules—provides that a witness 'other than an expert, who has not yet testified, shall not be present when the testimony of another witness is given'.[33] At the ICTY, in *Kovačević*, in conducting a hearing into the fitness of an accused person to enter a plea and to stand trial, a Trial Chamber allowed seven medical experts, psychiatrists and psychologists, to testify simultaneously. They appeared in the courtroom at the same time to answer questions from the parties and the judges.[34] Two were court experts appointed by the ICTY's Registrar upon the Trial Chamber's order,

[33] The rationale for ICTY Rule 90 (C) (previously Rule 90 (D)) was explained in ICTY, *Prosecutor v. Delalić,* IT-96-28-T, Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial during the Testimonies of the Witnesses, 20 March 1997, para. 12: 'The rationale for the Sub-rule seems to be for the protection of witnesses *of fact* from contamination. It is a fundamental consideration of the administration of justice that the purity of its stream should be protected from pollution. This principle is attainable by ensuring that witnesses do not have access to one another before giving their testimony. The provisions of [this Rule] are designed to ensure the purity of testimony admitted in evidence.' (emphasis added).

[34] ICTY, IT-01-42/2-I, *Prosecutor v. Vladimir Kovačević*, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006, paras 19-20; ICTY, IT-01-42/2-I, Hearing of 7 December 2005, transcript p. 367. In the subsequent *Strugar* case, the procedure instead followed the ordinary course. *See* ICTY, IT-01-42-T, *Prosecutor v. Pavle Strugar*, Hearings of 28 and 29 March 2004.

while the others were Defence and Prosecution experts.[35] Each of the three groups had authored joint reports.[36] After the experts had taken a solemn declaration at the beginning of the hearing, they were then questioned, first by the parties, and then by the Trial Chamber.[37] Each expert remained in the courtroom ready to answer any questions.[38] The Presiding Judge explained the procedure to be followed as:

> As far as the order of this afternoon is concerned, I suggest to the parties the following. At the beginning, I'd like to ask all experts that have appeared and that have reported on the mental health of Mr. Kovačević to make a solemn declaration, to confirm that they did write their reports to the best of their abilities, and having given this solemn declaration, I would like to invite the parties to put any additional questions to experts, whether it be experts called by themselves or called by the other party, and to do that in approximately 45 minutes first round. Then we have a break. And on the basis of the answers given by the experts, the Chamber may have some additional questions as well, and the parties will have another possibility responding to what the experts have told us to put more questions to the experts in approximately 25 to 30 minutes. So altogether, that would be 75 minutes for each party.[39]

22. The issue there was not the guilt of the Accused but rather his fitness to stand trial, and no Party opposed the course adopted by the Trial Chamber.

23. At the ECCC, in the lengthy trial of *Kaing Guek Eav* (a.k.a. Duch), the ECCC Trial Chamber allowed a psychologist and a psychiatrist who had jointly drafted a report upon the request of the Co-Investigating Judges, to testify 'together', as to the Accused's character.[40] In giving the experts the floor, the Presiding Judge stated of the procedure:

> [Y]ou can make a joint report or an individual report based on your mutual understanding or one of you representing the two. In relation to responding to questions to be put by the Chamber and the parties to the proceedings after your presentation, if the questions are too general and not for any specific expert, any one of you can respond to that question and another expert can add or supplement the question or remain silent. In relation to the presentation of the report or the

[35] *Kovačević* decision, para. 5.
[36] *Kovačević* decision, para. 19.
[37] *Kovačević* decision, paras 19-20; ICTY, IT-01-42/2-I, Hearing of 7 December 2005, transcript pp 367-374.
[38] ICTY, IT-01-42/2-I, Hearing of 7 December 2005, transcript pp 367-472.
[39] IT-01-42/2-I, Hearing of 7 December 2005, transcript p. 368.
[40] ECCC, 001/18-07-2007/ECCC/TC, Hearing of 31 August 2009, transcript pp 4-11. ECCC Internal Rule 91 *bis* states that 'the President of the Trial Chamber shall determine the order in which the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused, the witnesses, experts and Civil Parties.'

answerings [sic] of the questions, you two are entitled to choose who is going to respond to the questions.[41]

After their joint presentation, the two experts responded to questions by the Trial Chamber and by the parties.[42]

24. The Court of Bosnia and Herzegovina has also authorised the joint in-court examination of opposing experts but, it appears, using a rule that authorises in-court witness confrontation, thus allowing experts to be confronted with the views of opposing experts.[43] In one case, the court explicitly stated that this confrontation was used when 'expert witnesses [...] held diametrically opposing views'.[44]

25. Some national court systems—both civil law and common law—also allow opposing experts to testify concurrently. The apparent rationale is to reduce court time and to facilitate the proper understanding of the evidence by narrowing the issues of contention.[45] However, the national practices the Trial Chamber has surveyed appear generally confined to civil (i.e. non-criminal) proceedings, and to arbitration.[46]

26. Some countries using civil law procedural regimes, for example, France,[47] Belgium[48] and Lebanon may allow expert witnesses to testify simultaneously, although this is not specifically authorized in the relevant codes. Some common law countries, for example, Australia,[49] Canada,[50]

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[41] ECCC, 001/18-07-2007/ECCC/TC, Hearing of 31 August 2009, transcript pp 12-13.

[42] ECCC, 001/18-07-2007/ECCC/TC, Hearing of 31 August 2009, transcript pp 14-119; ECCC, 001/18-07-2007/ECCC/TC, Hearing of 1 September 2009, transcript pp 5-26.

[43] Pursuant to Article 85 (2) of the Criminal Procedure Code of Bosnia and Herzegovina ('At all times during the proceedings, witnesses may be confronted with other witnesses or with the suspect or accused'): Court of Bosnia and Herzegovina, X-KR-07/394, *Prosecutor's Office of Bosnia and Herzegovina v. Novak Đukić*, First Instance Verdict (12 June 2009), in particular paras. 8, 103, 107, 278 and 319; S1 1 K 015222 14 Krž, *Prosecutor's Office of Bosnia and Herzegovina v. Novak Đukić*, Second Instance Verdict (11 April 2014), paras 69 and 109-114.

[44] Court of Bosnia and Herzegovina, X-KR-07/394, *Prosecutor's Office of Bosnia and Herzegovina v. Novak Đukić*, First Instance Verdict (12 June 2009), in particular paras 107, 278 and 319.

[45] *See* Rares, above in fn. 13.

[46] With respect to arbitration proceedings, *see* International Bar Association Rules on the Taking of Evidence in International Arbitration, 29 May 2010, Article 8, Rule 3(f).

[47] According to article 331 of the French Code of Criminal Procedure, witnesses must give evidence separately. However, article 168 does not provide for a similar rule regarding experts (*see* Crim. 19 déc. 1979, *Bull. Crim.*, No 368).

[48] Article 309 of the Belgian *Code d'instruction criminelle* states: '*L'accusé et la partie civile peuvent demander, après que les témoins auront déposé, que ceux qu'ils désigneront se retirent de la salle d'audience, et qu'un ou plusieurs d'entre eux soient introduits et entendus de nouveau, soit séparément, soit en présence les uns des autres. Le procureur général a la même faculté. Le président peut aussi l'ordonner d'office.*'

[49] *See* Rule 23.15 (g) and (i) of the Federal Court Rules (Australia); Regulation 31.35 of the Uniform Civil Procedure Rules 2005 (New South Wales); *see* also Federal Court of Australia, *Wingecarribee Shire Council v. Lehman Bros. Austl. Ltd* (in liq) [2012] FCA 1028 (21 September 2012), para. 13; Australia, Federal Court of Australia, *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200 (5 November 2012), para. 796; *Strong Wise Limited v. Esso Australia Resources Pty Ltd*, Case No. VID 1060 of 2008, Judgment, 18 March 2010, paras 93-97–

the United Kingdom (England and Wales),[51] and the United States[52] permit concurrent expert testimony. The Trial Chamber, however, has found only very limited support for this practice, or examples of its use, in criminal proceedings—and in some common law jurisdictions.[53]

27. The Trial Chamber must always consider that it must 'prevent any action that may cause unreasonable delay', as specified in Article 21 (1) of the Special Tribunal's Statute. In this respect, Rule 130 (A) gives the Trial Chamber a wide discretion in the conduct of the proceedings, allowing it 'to give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial.'

28. Further to Rule 3, Rule 149 (B) under the heading 'General Provisions' of 'Section 3, Rules of Evidence', provides:

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a maritime statute of limitations case in which eight experts; master mariners, naval architects, structural, metallurgical and mechanical engineers, testified concurrently in relevant evidence sessions.

[50] *See* Rule 282.1, 282.2 and para. 52.6 (1) of the Federal Court Rules (Canada). *See*, for instance, *Apotex Inc. v. Astranzeneca Canada Inc.* 2012 FC 559, related to a civil claim arising from pharmaceutical regulations, especially para. 10 ('At the end of the testimony of [two experts in Canadian regulatory practices,] I conducted a "hot tubbing" [as the practice of concurrent testimony is colloquially referred to—*see* Rares, above, fn. 13] examination in which each of them took the stand at the same time, remaining under oath. They answered questions put to them by me and responded to the answers given by each other. At the end of this process, each Counsel was invited to put follow-up questions to these witnesses.' para. 10. But this was 'after each had been examined and cross-examined by Counsel in the usual way', para. 6.).

[51] *See* Practice Direction 35/Experts and assessors (Civil Procedure Rules), England and Wales, para. 11 ('At any stage in the proceedings the court may direct that some or all of the experts from like disciplines shall give their evidence concurrently'); for example, *see* High Court of Justice, *Re Baby X* [2011] EWHC 590 (Fam) (15 March 2011), paras 22-23, in care proceedings where three experts testified concurrently, and Ryder J. remarked, 'The resulting coherence of evidence and attention to the key issues rather than the adversarial point scoring is marked', para. 23.

[52] For example, the United States Tax Court (a U.S. Federal court) allows experts to testify concurrently: *see* U.S. Tax Court, *John Crimi, et al. v. Commissioner of Internal Revenue*, T.C. Memo. 2013-51 (14 February 2013), pp 34, 41, 59-60; United States, U.S. Tax Court, *Rovakat, LLC, A Partnership, Shant S. Hovnanian, Tax Matters Partner v. Commissioner of Internal Revenue,* T.C. Memo. 2011-225 (20 September 2011), pp 29-30. The Trial Chamber has not found criminal cases adopting this approach, and the Federal Rules of Evidence (in particular, Rule 611 on the Mode and Order of Examining Witnesses and Presenting Evidence and Article VII on Opinions and Expert Testimony) are drafted on the assumption that witnesses will testify individually in court.

[53] For example, Australia, Supreme Court of Western Australia, *State of Western Australia v. Rayney (No 3)* [2012] WASC 404, para. 971. In this murder case heard by a single judge (and without a jury) two experts testified concurrently about artefacts and the deceased's boots and clothing, but at the suggestion of both Prosecution and Defence counsel. It is also permitted in Victoria, Australia, *see* County Court of Victoria Practice Note: Expert Evidence in Criminal Trials, PNCR 1-2014, section 11.1 'Where—(a) two or more parties have served expert evidence relating to the same issue or relating to two or more closely related issues; (b) the commissioning parties agree; and (c) the Court so orders, evidence may be given by the experts consecutively (ie one after the other) or concurrently (ie with all of the experts present in court, sworn or affirmed at the same time). 11.2 The procedure to be followed for consecutive or concurrent evidence is to be determined by the Court, with the expectation that the parties will have conferred in advance and attempted to agree on the procedure.' *See* also, District Court of New South Wales, *R v. Stanyard* [2012] NSWDC 78 (25 May 2012), para. 31. In this trial by judge alone case of dangerous driving causing serious injuries, two experts—one called by the Prosecution and one by the accused—had prepared a joint report as the speed of the vehicle setting out where one expert's opinion had changed, where they had reached agreement and where they continued to disagree. The Judge explained that he detected no bias in either witness, and considered that they were both complying with their obligations to assist the court, *see* para. 31.

> In cases not otherwise provided for in these Rules or in the Lebanese Code of Criminal Procedure, a Chamber shall apply rules of evidence which best favour a fair determination of the matter before it and are consonant with the highest standards of international criminal procedure.

The Lebanese Code of Criminal Procedure does not prohibit experts from testifying concurrently, and several decisions of the Lebanese *Cour de Cassation* have held that, acting under Articles 247 and 263, the Presiding Judge has the discretion to hear witnesses separately or simultaneously.[54] This includes expert witnesses.

29. The Trial Chamber has already endorsed the definition in international criminal law of an expert witness, namely, a person who by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute.[55] One of the distinctions between an expert witness and a fact witness is that, due to the qualifications of the expert, he or she can give opinions and draw conclusions, within the confines of his or her expertise.[56] Additionally, they apply their specific expertise to events about which they have no first-hand knowledge, and, before drawing conclusions they consider relevant information. And they may work alone or with others.

30. The only precedent known to the Trial Chamber of concurrent expert testimony in an international criminal court or tribunal is that of the ICTY's *Kovačević* case. However, in that case, the three groups of experts—one called by the Trial Chamber, one by the Prosecution, and one by the Defence—were called to confront *opposing* views, in proceedings relating only to fitness to stand trial, and where the Parties did not oppose the procedure. And the *Kovačević* Trial Chamber did not provide a reasoned decision sourcing any legal authority for its departure from the normal course of consecutive expert testimony.[57]

31. The Special Tribunal and the ICTY have an identical rule permitting experts to remain in the courtroom during the testimony of other witnesses. Presumably, the *Kovačević* Trial Chamber

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[54] Article 263 of the Lebanese Code of Criminal Procedure states that after 'the witness has finished his testimony, the Presiding Judge of the Court may order—of his own motion or in response to an application from the representative of the Public Prosecution Office, the accused, or the civil party—the removal of specific witnesses from the courtroom and the readmission of one or more of those removed to hear their testimony again separately or in the presence of the others or of some of them, to arrange a confrontation between them, to show them impounded items to discuss them with the accused.' *See* also Lebanon, *Cour de cassation*, Judgment n. 82/2006 of 16 March 2006 (republished in Sader on Cassation Proceedings, Law Publications, 2006, part one, p. 760); *Cour de cassation*, Judgment n. 137/2007 of 12 June 2007 (republished in Sader on Cassation Proceedings, Law Publications, 2007, part two, p. 736).

[55] F1610, Decision on Expert Witness PRH120, Professor Fouad Hussein Ayoub, and Expert Witness PRH508, Dr. Issam Mansour, 7 July 2014, para. 6 and references therein.

[56] *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 27. On the application of these principles to Professor Luccioni and Professor Ambrosini, *see* Decision of 21 August 2014, paras 62-70.

[57] In fact, its substantive decision on the merits of the application does not even mention that the expert testimony was concurrent; this is only apparent from reading the (non-redacted portion of the) transcript of proceedings.

implicitly considered its own Rule 90 (C) before adopting its novel procedure. But, significantly, the Trial Chamber has not found any international precedent of concurrent testimony of experts called to testify *by the same Party*, although, on its face, the ICC's Regulation 44 (5) potentially could allow it.

32. Does this combination of international precedent, legal principles and the Special Tribunal's Rules therefore permit the Trial Chamber to allow concurrent courtroom expert evidence, and if so, when? This brief survey of international and national case-law and legislative instruments reveals that concurrent expert testimony in criminal trials may, in certain circumstances, be permissible. In this sense—in the absence of explicit case-law or statutory provision forbidding it—there appears to be no absolute bar to the practice.

33. However, it is evident that concurrent testimony is permitted only when a court is convinced that—without violating the right of the opposing party to fully cross-examine the witnesses—it would significantly facilitate the elucidation of expert evidence and speed up the proceedings. Otherwise, just like any other witness, experts should generally provide their evidence individually.

34. The Trial Chamber is thus satisfied that it may in appropriate circumstances—using the combination of Rules 130 (A) and 150 (C)—allow expert witnesses to testify concurrently or simultaneously. However, to justify a departure from the normal practice of individual testimony in criminal trials using international criminal procedural law, the circumstances must be compelling.

35. The next issue is, therefore, whether the Prosecution has persuaded the Trial Chamber that these are the appropriate compelling circumstances. Here, the Prosecution argues that because each expert has contributed separate expertise to the joint reports, the expertise of one complements the other.[58] The Prosecution conceded, however, that should these experts be heard consecutively, the examination-in-chief would not last more than a day per expert and the testimony of both witnesses would be completed within the week scheduled.[59] The Prosecution also filed an estimate of five days combined testimony for both witnesses.[60] Counsel for Mr Badreddine seemed to agree with this overall assessment.[61] It thus appears that the original imperative for simultaneous testimony, as set out in the Prosecution's motion, has dissipated.

[58] Prosecution motion, paras 5-7.
[59] T. 114, 4 February 2015, p. 32-33.
[60] F1851, Prosecution Witness Schedule for the Week Commencing 23 February 2015, 13 February 2015.
[61] T. 114, 4 February 2015, p. 46.

36. In exercising its discretion, the Trial Chamber should also give weight to the objections, if any, of the opposing party. One such consideration is whether experts testifying concurrently are likely—as Defence counsel asserted—to influence each other's testimony while testifying. Common sense, however, dictates that experts who have worked together and prepared a joint report are already likely to have 'influenced' each other well before their courtroom testimony. The fact that the report is jointly signed normally indicates an agreement as to methodology and conclusions. Moreover, their permissible presence in the courtroom, under Rule 150 (C), during the testimony of a 'co-expert' detracts significantly from the argument that only consecutive expert testimony can prevent one expert from influencing the testimony of another.

37. However, Defence counsel expressed a concern that simultaneous testimony of these witnesses could interfere in their effective cross-examination. Although, for the same preceding reasons, the Trial Chamber does not entirely agree with this argument, it must carefully consider this possibility. That is, in circumstances where; Professor Luccioni and Professor Ambrosini's evidence is highly technical, concerns matters of forensic importance to the case in the analysis of the crater and of the damage to surrounding buildings caused by the explosion of 14 February 2005, and, significantly, that the Prosecution has now specified their differing contributions to the two reports.[62] In these circumstances, the Trial Chamber, in exercising its discretion under Rule 130 (A), is prepared to give this argument some weight.

38. The Trial Chamber also explored with the Parties the possibility of allowing concurrent testimony during examination-in-chief, but followed by the consecutive cross-examination of each witness. The Prosecution and counsel for two of the Accused, however, saw no advantage in this approach.[63] The Trial Chamber therefore sees no need to explore this option.

Conclusion

39. The difficulties the Prosecution originally envisaged in the timing and the organization of consecutive testimonies of experts working and living far from the seat of the Tribunal in different parts of Argentina[64]—and when balanced against the Defence objections—do not appear compelling enough to override the normal practice of consecutive testimony. The Trial Chamber is accordingly not convinced that the Prosecution has demonstrated that hearing the two witnesses concurrently would be more efficient than hearing them individually or that it would significantly shorten the

[62] Prosecution motion, para. 5.
[63] T. 114, 4 February 2015, pp 33-34, 56-57, and 72-73.
[64] T. 114, 4 February 2015, pp 16-17, and 19.

proceedings. For these reasons, the Trial Chamber is not satisfied that compelling reasons exist to justify a departure from the ordinary practice of hearing expert witnesses individually rather than concurrently, and dismisses the motion.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Prosecution's motion.

Leidschendam,
The Netherlands
23 March 2015

Judge David Re, Presiding

Judge Janet Nosworthy

Judge Micheline Braidy