

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

BEFORE THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

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: 7 June 2016

Original language: English

Classification: Public

PROSECUTOR

v.

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

**REASONS FOR INTERIM DECISION ON THE DEATH OF MR MUSTAFA AMINE
BADREDDINE AND POSSIBLE TERMINATION OF PROCEEDINGS**

Office of the Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun & Mr Thomas Hannis

Defence Office:
Mr François Roux

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz, Mr Iain Edwards &
Ms Mylène Dimitri

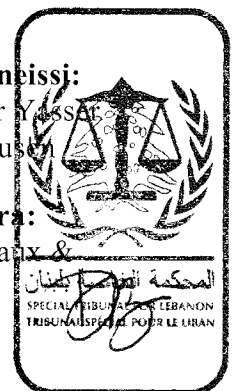
**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothee Le Fraper du
Hellen & Mr Jad Khalil

Government of the Lebanese Republic

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yassaf
Hassan & Ms Natalie von Wistinghaus

Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. On 31 May and 1 June 2016, the Trial Chamber heard evidence and legal submissions regarding the reported death of the Accused, Mr Mustafa Amine Badreddine, in the week of 8 May 2016, and the possible termination of the proceedings against him.

2. The Prosecution and counsel for Mr Badreddine presented evidence to the Trial Chamber relating to his death. The Prosecution submitted this evidence to allow the Trial Chamber to consider whether to make such a finding. Counsel for Mr Badreddine submitted that the Trial Chamber should conclude that he is dead and that the proceedings against him should be immediately terminated. The Legal Representative of Victims submitted that it is premature to make such a decision and that more evidence is required before the Trial Chamber could make a definitive finding that Mr Badreddine is dead and discontinue the proceedings against him.

3. On 1 June 2016, the Trial Chamber delivered an interim decision deciding, by majority, that ‘it did not believe that sufficient evidence has yet been presented to convince it that the death of Mustafa Amine Badreddine had been proved to the requisite standard’.¹ Judge Braidy delivered a short dissenting opinion. These are the written reasons for the Trial Chamber’s decision.

EVIDENCE PRESENTED

A. Evidence presented in support of Mr Badreddine’s death

(i) Prosecution

4. Mr Badreddine is reported to have died near Damascus, the Syrian capital, in the week commencing 8 May 2016, while serving as a senior military commander for Hezbollah. The Prosecution, in the hearing, presented a number of pieces of circumstantial material concerning Mr Badreddine’s death² which can be divided into ten segments:³

- **From 13 May 2016**, (1) initial media reports of the death, primarily from *Al Manar* TV, a Hezbollah-affiliated media outlet, announcing the ‘martyrdom of the jihadist leader, Hajj Mustafa Badreddine ‘El-Sayad Zou Alfiqar’, in three Hezbollah statements. These

¹ Transcript of 1 June 2016, pp 56-57.

² Transcript of 31 May 2016, pp 12-61 and 76-77.

³ Transcript of 31 May 2016, pp 12-13.

included a photograph of Mr Badreddine in military fatigues. The reports stated that Mr Badreddine had been killed at a Hezbollah military facility near Damascus Airport in a rocket attack by Takfiri groups;⁴

- **On 13 May 2016**, (2) media coverage of a condolence ceremony at the Imam Mujtaba Complex in Beirut, attended by male relatives of Mr Badreddine, senior Hezbollah officials and others;⁵ (3) media coverage of funeral speeches delivered over Mr Badreddine's casket, including a speech by Hezbollah's Deputy Secretary-General, Sheikh Naim Qassem;⁶ and (4) video footage of the funeral procession;⁷ and (5) video footage of the casket entering the Rawdat al Shahidayn Mausoleum for interment;⁸
- **On 14 May 2016**, (6) a media statement issued by Hezbollah of its initial investigation into the cause of death,⁹ and (7) media coverage of a visit by an Iranian delegation, including the Iranian Deputy Foreign Minister for Arab and African Affairs and the Iranian Ambassador to Lebanon, to Mr Badreddine's grave;¹⁰
- **On 18 May 2016**, (8) media coverage of a ceremony at the Sayyed Zeinab Mosque in Damascus attended by Hezbollah officials, foreign dignitaries and some family members of Mr Badreddine;¹¹
- **On 20 May 2016**, (9) media coverage of a ceremony in Beirut with speeches by Mr Badreddine's brother and Mr Sayyed Hassan Nasrallah, the Secretary-General of Hezbollah, in which Mr Nasrallah praised the life of Mr Badreddine, and spoke about the Special Tribunal saying that 'what is demanded from it or by it... does not concern us at all and does not deserve any comment from us at all';¹² and
- **On 25 and 26 May 2016**, (10) media coverage of a ceremony in Tehran attended by members of Mr Badreddine's family.¹³

⁴ Exhibits P834MB, P836MB, P836.1MB, P836.2MB.

⁵ Exhibits P841MB, P841.1MB, P846MB, P846.1MB, P848MB, P849MB (photographs of Mr Badreddine's brothers at the ceremony).

⁶ Exhibits P842MB, P842.1MB, P843MB, P843.1MB, P844MB, P844.1MB, P845MB, P845.1MB, P851MB, P851.1MB, P852MB.

⁷ Exhibits P840MB, P850MB, P850.1MB.

⁸ Exhibit P853MB.

⁹ Exhibits P854MB, P854.1MB.

¹⁰ Exhibits P856MB, P856.1MB.

¹¹ Exhibits P858MB, P858.1MB, P860MB, P861MB.

¹² Exhibits P862MB, P862.1MB, P863MB

¹³ Exhibits P864MB, P865MB.

5. The Prosecution also tendered investigators' notes explaining the evidence, the nature of the media outlets, the identification of individuals that appear in the evidence and the provenance of the media reports.¹⁴

Absence of a death certificate

6. The Prosecution confirmed that the only available evidence of Mr Badreddine's death came either from media reports or Hezbollah itself. The Prosecution has sought, through requests for assistance to the Lebanese Prosecutor-General, official confirmation of Mr Badreddine's death in the form of a death certificate. The Prosecution also informed the Trial Chamber of steps it had taken to obtain official documentation from the Lebanese Government. A request for assistance had been sent to the Lebanese Prosecutor-General seeking additional forms of confirmation of Mr Badreddine's death, including a certified copy of any report compiled by or in possession of Hezbollah, or others, on the details of the circumstances of his death. This request also sought a wide range of additional forms of evidence.¹⁵ This request is awaiting a response.

7. Despite the reports of Mr Badreddine's death in Syria, the Lebanese authorities have not yet issued an official death certificate.¹⁶ The Prosecution attributed this primarily to Hezbollah's exercise of exclusive jurisdiction and control over the investigation into Mr Badreddine's death and also to Mr Nasrallah saying that Hezbollah would not cooperate with the Special Tribunal in connection with Mr Badreddine's death.¹⁷ This therefore appears to have precluded Lebanon from investigating the matter. The Prosecution had no information as to when a death certificate might be issued or obtained, or whether, on the basis of additional evidence, it was reasonably expected to be issued.¹⁸

(ii) Counsel for Mr Badreddine

8. Counsel for Mr Badreddine presented several pieces of evidence, namely, an announcement by Mr Badreddine's family of his death, setting out the time and place for the expression of condolences,¹⁹ an official *communiqué* sent to the National News Agency of

¹⁴ Exhibits P835MB, P837MB, P838MB, P839MB, P840MB, P847MB, P855MB, P857MB, P859MB.

¹⁵ Such as clothing, footwear, DNA samples, fingerprints, dental records, post-mortem analyses and any hospital reports from hospital records. See Request for assistance, 2016/ RFA 0113/ LEB/GRC. See transcript of 31 May 2016, pp 3-4; transcript of 1 June 2016, p. 30.

¹⁶ Transcript of 31 May 2016, p. 4.

¹⁷ Transcript of 31 May 2016, pp 4-6, 84-86.

¹⁸ Transcript of 31 May 2016, pp 6-8.

¹⁹ Exhibits 2D248.1MB and 2D248.2MB; see transcript of 31 May 2016, pp 70-71.

Lebanon,²⁰ and a public announcement by the Vice-Chairman of the Higher Islamic Shia Council of Lebanon to the same effect.²¹

LEGAL SUBMISSIONS

A. Prosecution

9. The Prosecution outlined the circumstantial evidence it had obtained—in the form of media reports and statements from Hezbollah—from which, it submitted, the Trial Chamber could conclude that Mr Badreddine had recently died in Syria.

10. The Prosecution submitted that it was merely presenting the evidence in its possession from which the Trial Chamber could consider whether to make a finding that Mr Badreddine was deceased.²² It was not advocating that he was dead. Citing the International Criminal Court (ICC) case of *Jerbo*,²³ the Prosecution argued that a death certificate is not a prerequisite to terminate criminal proceedings before international criminal courts and tribunals. The Trial Chamber may, depending on the circumstances, consider any other evidence.²⁴ The Prosecution also made submissions on the possibly lengthy process for obtaining a death certificate in Lebanon.²⁵

11. Finally, although no definitive evidence had been produced with respect to the exact circumstances of Mr Badreddine's purported death or its precise cause, the Trial Chamber should not give high regard to such details.²⁶ As an alternative, the published media reports with photographs, video records and investigator's notes demonstrated a series of events, statements, ceremonies, and the funeral associated with the death and burial of Mr Badreddine organised and participated in by Hezbollah, that could allow the Trial Chamber to decide whether the evidence presented amounted to 'conclusive' evidence of death.

B. Legal Representative of Victims

12. The Legal Representative of Victims observed that it is premature—on the evidence thus presented—to find that Mr Badreddine is deceased; more evidence is required before the

²⁰ Exhibit 2D249MB; see transcript of 31 May 2016, p. 72.

²¹ Exhibit 2D250MB; see transcript of 31 May 2016, pp 73-74.

²² Transcript of 31 May 2016, pp 82-83.

²³ ICC, Situation in Darfur, Sudan, *Prosecutor v. Abdallah Banda Abakaer Nourain et al.*, ICC-02/05-03/09, Public Redacted Decision Terminating the Proceedings Against Mr Jerbo, 4 October 2013 (*Jerbo Case*).

²⁴ Transcript of 31 May 2016, pp 9-12, 75-76.

²⁵ Transcript of 31 May 2016, pp 61-65.

²⁶ Transcript of 31 May 2016, pp 77-80.

Trial Chamber could make a definitive finding and discontinue the proceedings. A death certificate is a minimum requirement, but the Trial Chamber should also receive evidence that the person who is dead is the accused named in the consolidated indictment. The Trial Chamber should obtain some form of secondary identification such as DNA analysis, identification of the body, or otherwise. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICC had taken this approach in similar cases.²⁷

13. The circumstances in *Jerbo* differ because the ICC concluded that, due to the non-cooperation of the Sudanese authorities, it was not possible to obtain an official death certificate or to safely explore other measures to prove with certainty Mr Jerbo's death. Finally, the videos and photographs presented by the Prosecution that show the funeral and memorial services, attended by members of Mr Badreddine's family, constitute important but insufficient evidence to meet the minimal standard of proof before international criminal courts and tribunals.²⁸

C. Counsel for Mr Badreddine

14. Counsel for Mr Badreddine submit that sufficient factual, legal and religious bases exists for the Trial Chamber to find that Mr Badreddine is dead.

15. Factually, the evidence proving the death consists of the statement issued by Hezbollah and Mr Badreddine's family announcing the death and setting out the time and place for the expression of condolences;²⁹ the official *communiqué* sent to the National News Agency of Lebanon;³⁰ and the public announcement by the Vice-Chairman of the Higher Islamic Shia Council of Lebanon to the same effect.³¹

16. Counsel also referred to Shiite Islamic law and the Lebanese Law of 7 December 1951 concerning the registration of documents related to personal status.³² Article 30 of this Law provides that a *mukhtar* (local mayor) prepares a death notice in the presence of two witnesses, who if possible, should be close relatives or neighbours of the deceased.³³ These

²⁷ Transcript of 31 May 2016, pp 87-90, referring to ICTY, *Prosecutor v. Janko Bobetko*, IT-02-62 (*Bobetko Case*); *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16, Decision on Motion by the Prosecutor for Withdrawal of Indictment Against Stipo Alilović, 23 December 1997 (*Alilović Case*); *Prosecutor v. Momir Talić*, IT-99-36/1; ICC, *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi and Others*, ICC-01/11-01/11 (*Gadaffi Case*).

²⁸ Transcript of 31 May 2016, pp 90-95.

²⁹ Exhibits 2D248.1MB and 2D248.2MB; see transcript of 31 May 2016, pp 70-71.

³⁰ Exhibit 2D249MB; see transcript of 31 May 2016, pp 72-73.

³¹ Exhibit 2D250MB; see transcript of 31 May 2016, p. 73-74.

³² Transcript of 31 May 2016, pp 67-69.

³³ Transcript of 31 May 2016, pp 67-68.

requirements have been fulfilled in practice, because Mr Badreddine's three brothers can be seen participating in the televised funeral proceedings.³⁴

17. Further, religious pronouncements by two of the highest clerics in Lebanon's Shiite community are also confirmative of Mr Badreddine's death. The Jaafari Grand Mufti of Lebanon and the Vice-Chairman of the Higher Islamic Shia Council of Lebanon both made public statements in the wake of the news of Mr Badreddine's alleged death, offering their condolences.³⁵ These statements would not have been made had the officials making them not had any cogent information on the death of Mr Badreddine.³⁶

18. Moreover, the statements of these two religious authorities have legal and judicial force, carry the same weight as those made by a judge, and are equivalent to authentic or notarized statements.³⁷ The highest religious authorities in the Shia community have a moral, religious and civil responsibility and accordingly would not make statements they know to be false.³⁸ Their pronouncements, in addition to the funeral customs and rituals observed by Hezbollah for Mr Badreddine's funeral, create a presumption that can only be rebutted on the basis of evidence.³⁹ When asked, however, by the Trial Chamber whether he knows on what information the Grand Mufti or the Vice-Chairman would have concluded that someone has died, counsel for Mr Badreddine could not provide any details.⁴⁰

D. Submissions on the standard of proof necessary to prove the death of an accused

19. The Trial Chamber, in its decision delivered in court, referred to 'the requisite standard' for proof of death of an accused person before terminating or discontinuing proceedings. For the purposes of this written decision, the Trial Chamber then sought submissions as to its articulation.⁴¹ The Prosecution, counsel for Mr Ayyash, Mr Badreddine, Mr Merhi and Mr Oneissi agreed that the requisite standard of proof whether Mr Badreddine is dead is high, but not as high as the proof 'beyond reasonable doubt' required to prove guilt.

³⁴ Transcript of 31 May 2016, pp 68 and 97.

³⁵ Exhibits 2D250MB, P851MB, P843MB and P843.1MB; *see* transcript of 31 May 2016, pp 73-74, and transcript of 1 June 2016, p. 11.

³⁶ Transcript of 1 June 2016, pp 7-8.

³⁷ Transcript of 1 June 2016, pp 8, 12, 19 and 23-24.

³⁸ Transcript of 1 June 2016, p. 8.

³⁹ Transcript of 1 June 2016, p. 14.

⁴⁰ Transcript of 1 June 2016, pp 13-16.

⁴¹ Provisional transcript of 2 June 2016, p. 34.

20. For the Prosecution, the test is whether the trier of fact is satisfied to the extent, based on all the evidence, that it is considered safe to make a finding of death.⁴² Counsel for Mr Badreddine submitted that ‘the standard should be high but not necessarily as high as beyond reasonable doubt’. ‘Certainness’ puts it too high.⁴³

21. According to co-counsel for Mr Sabra, international criminal law lacks precedents as to the requisite standard to prove the death of an accused. Counsel thus do not argue for a specific standard, but instead contemplate two scenarios: (i) accepting the evidence put forward by the Prosecution that Mr Badreddine is dead or ‘likely’ dead, or (ii) looking into a nation-wide or even international conspiracy of ‘faking’ Mr Badreddine’s death. As there is no evidence supporting the second scenario, according to counsel, the only possibly reasonable conclusion for the Trial Chamber is to accept the first.⁴⁴

22. Counsel for Mr Ayyash argue that ‘clear and convincing evidence’ should be the applicable standard of proof.⁴⁵ Counsel for Mr Merhi submit that the Trial Chamber could satisfy itself with the religious standard that death has indeed occurred.⁴⁶ According to counsel for Mr Oneissi, the Trial Chamber may rely on evidence given by a ‘body of indicia which seem viable’ which allows it to conclude that a person is indeed deceased.⁴⁷

23. The Legal Representative of Victims submits that the Trial Chamber must rely on ‘conclusive evidence, it’s beyond a reasonable doubt, it is clear and compelling evidence’. For example, in the United Kingdom, it was always a death certificate accompanied by identification of the body and nothing less is required.⁴⁸ The Head of Defence Office referred to the Lebanese Constitution, which states that the personal status of citizens should be respected, and argued that, as a result, applying religious standards is in reality a constitutional matter.⁴⁹

⁴² Provisional transcript of 2 June 2016, p. 43.

⁴³ Provisional transcript of 2 June 2016, p. 42.

⁴⁴ Provisional transcript of 2 June 2016, pp 39-41.

⁴⁵ Provisional transcript of 2 June 2016, p. 46.

⁴⁶ Provisional transcript of 2 June 2016, p. 50.

⁴⁷ Provisional transcript of 2 June 2016, p. 53.

⁴⁸ Provisional transcript of 2 June 2016, p. 54.

⁴⁹ Provisional transcript of 2 June 2016, p. 56.

**INTERNATIONAL CRIMINAL LAW CASE-LAW ON THE DEATH OF AN
ACCUSED**

24. Article 1 of the Statute of the Special Tribunal provides for jurisdiction over those responsible for the attack of 14 February 2005, resulting in the death of former Lebanese Prime Minister, Mr Rafiq Hariri, and in the death or injury of other persons (and other connected cases). But neither the Statute nor the Special Tribunal's Rules of Procedure and Evidence provide for what happens after the death of the Accused or for the standard of proof necessary to satisfy a Chamber of the death. The same is true at the International Criminal Court, International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL).⁵⁰

25. International criminal courts and tribunals, after receiving cogent proof of the death of an accused, have terminated proceedings against deceased accused. The Trial Chamber has reviewed the case-law of these courts and tribunals and has extracted the following guiding principles:

- Where a court is satisfied on the available evidence that an accused person is no longer alive, it should terminate the proceedings against that person,⁵¹ regardless of the stage of the proceedings—pre-trial, trial or appeal;⁵²
- The doctrine of individual criminal responsibility provides that criminal jurisdiction may only be exercised over living persons. A court's personal jurisdiction (*ratione*

⁵⁰ In contrast, at the Extraordinary Chambers in the Courts of Cambodia (ECCC), as per Article 7 of the Code of Criminal Procedure of Cambodia, the death of an accused is expressly listed as cause for which criminal actions are extinguished, while Rule 23 *bis* of the ECCC Internal Rules states that civil party proceedings against an accused ends upon their death. Pursuant to Article 12(1) of the agreement between the United Nations and Cambodia on the ECCC's establishment, and Article 20 new and 33 of the ECCC Law, the ECCC is mandated to apply Cambodian criminal procedure. *See also* ECCC, *Co-Prosecutors v. Ieng*, 002/19-09-2007/ECCC-TC/SC(16), E138/1/10/1/5/7, Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, 14 December 2012, para. 38, fn. 98.

⁵¹ ICC, *Gaddafi Case; Prosecutor v. Joseph Kony and Others*, ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya, 11 July 2007 (*Raska Lukwiya Case*).

⁵² ICTY, *Prosecutor v. Vujadin Popović and Others*, IT-05-88-A, Decision Terminating Appellate Proceedings in Relation to Milan Gvero, 7 March 2013, paras 2-3. The Trial Chamber found Mr Gvero guilty of committing persecution and other inhumane acts (forcible transfer) as crimes against humanity, and sentenced him to five years of imprisonment. Mr Gvero had served more than two-thirds of his sentence, demonstrated evidence of rehabilitation, he had complex medical condition, and so he had been granted early release. Following notices of appeal from the Parties, the Appeals Chamber found Mr Gvero fit to participate in appellate proceedings; however he passed away before the appeals were heard. The Appeals Chamber terminated the appellate proceedings with respect to Mr Gvero and considered that the Trial Judgment became final in relation to him.

personae) over an accused person is individualized and personalized.⁵³ It is therefore exclusive to that particular accused and ceases upon his or her death;⁵⁴

- Termination or discontinuance of the proceedings may be either final and absolute or conditional and ‘without prejudice’ to reopening, resuming or continuing the case in appropriate circumstances, should the accused be found to be alive;⁵⁵
- As a general rule, a certificate of death certified or authenticated by the State where death occurred or another interested state, is desirable though not essential, for a court to be satisfied as to the death of an accused. There may be circumstances in which a death certificate in the appropriate form or from an official source is unavailable, difficult to secure or the obtaining of which would result in unreasonable delay. In these circumstances other evidence supporting a finding of death may be accepted,⁵⁶ and
- A death certificate alone may not suffice in all the circumstances and a court may seek additional evidence in the form of, for example, a post-mortem, coroner’s report, other forensic report or document verifying that an accused is dead. DNA analysis, identification of the body may also be required to establish that the body purported to be that of an accused person—in respect of which there has been a funeral service and an interment—is in fact the accused’s.⁵⁷

26. Some specific examples illustrate these principles: ICTY chambers have made different orders concluding proceedings against a deceased accused based on death certificates or coroner’s reports. In some cases, the Judge or the Trial Chamber granted leave

⁵³ *E.g.* SCSL, *Prosecutor v. Norman and Others*, SCSL-04-14-T, Decision on Registrar’s Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, 21 May 2007, paras 13-14 (*Norman Case*); ICC, *Jerbo Case*, para. 17.

⁵⁴ ICTY, *Prosecutor v. Rasim Delić*, IT-04-83-A, Decision on the Outcome of Proceedings, 29 June 2010, paras 7, 14 and 15. The Appeals Chamber considered the *Raska Lukwiya* and *Norman cases*. In *Delić*, Mr. Delić passed away while in provisional release pending resolution of the appeals in his case. The motion requesting continuation of the appellate proceedings submitted on behalf of Mr Delić’s son was dismissed. The Appeals Chamber recalled that the presumption of innocence does not apply to persons convicted by the Trial Chambers pending resolution of their appeals, and held that the Trial Judgment on Mr Delić’s conviction and sentence is final.

⁵⁵ Termination in absolute form: ICTY, *Alilović Case*; ICTY, *Prosecutor v. Mile Mrkšić et al.*, IT-95-13, Order Terminating Proceedings Against Slavko Dokmanović, 15 July 1995 (*Dokmanović Case*); discontinuance in conditional form: ICTY, *Prosecutor v. Goran Borovnica*, IT-95-3-1, Order Granting Leave to Withdraw Indictment without Prejudice, 21 April 2005 (*Borovnica Case*); ICC, *Jerbo Case*.

⁵⁶ ICTY, *Dokmanović Case*. The Trial Chamber terminated the trial proceedings against Slavko Dokmanović based on the coroner’s report as to the death of the accused.

⁵⁷ ICC, *Raska Lukwiya Case*.

for the Prosecutor to withdraw the indictment,⁵⁸ while in others termination of proceedings against the deceased accused was ordered.⁵⁹

27. Similarly, the ICC, ICTR, SCSL and Extraordinary Chambers in the Courts of Cambodia (ECCC) have ordered the termination of the proceedings based on evidence, such as a death certificate, forensic report, DNA testing, recognition of the body and confirmation of the cause of death.⁶⁰

28. Proceedings have been terminated in at least two cases ‘without prejudice’ to their continuation if information becomes available that the accused is alive.⁶¹ In *Borovnica* at the ICTY, and *Jerbo* at the ICC, the Chambers either had no official death certificate, or had contradictory information, or other information from which it could definitively satisfy itself of the death of an accused. In both cases, the Chambers made what could be described as a qualified finding.

⁵⁸ E.g. ICTY, *Alilović Case*, where the Trial Chamber granted leave for the Prosecutor to withdraw the indictment against the accused on the grounds that the Prosecutor received confirmation that the accused was dead and following the submission of his death certificate. See also ICTY, *Prosecutor v. Dragan Zelenović and Others*, IT-96-23, Order Granting Leave to Withdraw Indictment, 30 July 1999, where the Judge granted leave to the Prosecutor to withdraw the indictment against Dragan Gagović following his death on 9 January 1999, before appearing before the Tribunal, based on official municipal records of his death.

⁵⁹ See ICTY, *Bobetko Case*. The Trial Chamber terminated the proceedings against the accused Janko Bobetko based on an official death certificate. See also ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54, Order Terminating Proceedings, 14 March 2006, where the Trial Chamber ordered termination of the proceedings following the submission of a coroner’s report on the death of the accused.

⁶⁰ See ICC, *Raska Lukwiya Case*, where the Pre-Trial Chamber terminated the proceedings based on a forensic report of the Netherlands Forensic Institute of the Dutch Ministry of Justice, prepared at the request of the Ugandan Government and the Prosecutor, and DNA testing coupled with the identification of the body by Lukwiya’s family members, former LRA (Lord’s Resistance Army) members and confirmation from the LRA command that Lukwiya was killed, and an official Ugandan death certificate. See also ICTR, *Prosecutor v. Édouard Karemera and Others*, ICTR-98-44-T, Decision Relating to Registrar’s Submission Notifying the Demise of Accused Joseph Nzirorera, 12 August 2010, where the Trial Chamber terminated the proceedings after receiving a notification of death, supported by a death certificate. See also SCSL, *Norman Case*, where the Trial Chamber terminated the proceedings following the completion of the trial but before the pronouncement of the judgment after receiving a death certificate. ECCC, *Co-Prosecutors v. Nuon et al.*, 002/19-09-2007/ECCC/TC, E270/1, Termination of the Proceedings Against the Accused Ieng Sary, 14 March 2013, where the Trial Chamber terminated the proceedings on the receipt of an official certificate of death.

⁶¹ See ICTY, *Borovnica Case*, where the confirming Judge granted leave to the Prosecutor to withdraw the indictment without prejudice. The Prosecutor had filed a ruling of a municipal court in Prijedor (Bosnia and Herzegovina) dated 4 February 2002, and a death certificate issued by a municipal council stating that the accused, missing since 20 March 1995, had been declared dead, with an official date of death of 22 November 1996. However, some unconfirmed information received by the Prosecutor suggested that he might still be alive. See also ICC, *Jerbo Case*, where the Trial Chamber terminated the proceedings against Saleh Mohammed Jerbo Jamus without prejudice to their resumption if information became available that he was alive. No death certificate issued by an official governing body was available. In that case, the Trial Chamber found the submissions of the parties and the evidence—redacted from the public decision—persuasive and was satisfied that it was not possible to obtain an official death certificate with respect to Mr Jerbo in the near future. Obtaining a certificate from the ‘Popular Committee’ would not assist as it would not come from a State authority and it was unclear how it could guarantee thorough and reliable confirmation.

29. The evidence satisfying the Chamber in *Jerbo* of the Accused's death—in the absence of a death certificate—is redacted from the decision and the Chamber terminated the proceedings without one. Judge Eboe-Osuji, however, preferred the terminology of 'discontinuance without prejudice' over 'termination without prejudice'.⁶² The Chamber held that:

The circumstances of the case at hand are unusual in that it is not possible to obtain an official death certificate or otherwise safely explore other measures to prove, with certainty, Mr Jerbo's death (e.g. exhumation followed by a DNA analysis).⁶³

30. The Trial Chamber was also satisfied that it was not possible to obtain an official death certificate with respect to Mr Jerbo in the near future. In *Gaddafi*, by contrast, another ICC Chamber required a death certificate before terminating the proceedings, notwithstanding the widespread dissemination in the media of footage of the Accused's death and his body.⁶⁴

DISCUSSION

31. Terminating proceedings against an accused person, and especially one being tried *in absentia*, is an extreme step. The Trial Chamber agrees with the Parties and the Legal Representative of Victims that a high standard of proof is required. A Chamber must therefore be satisfied to a high standard—although not to the same standard as proof required for conviction of an accused of beyond reasonable doubt—that an accused person is in fact deceased. It is not necessary to precisely articulate this standard.

32. The death of an accused person may be proved in numerous ways. A death certificate is one form of official proof. A death certificate of itself, however, may be insufficient to prove the death of an accused person, and a chamber may have to resort to other evidence—in combination with such a certificate—to be satisfied of the death. The Trial Chamber therefore agrees with the approach of the ICC in *Jerbo* in recognising that a death certificate may not be necessary to prove the death of an accused person—where none is available—and that it may examine any other evidence to persuade itself that an accused person is deceased. But it may also examine this other evidence in combination with an official death certificate.

33. Having reviewed the material presented by the Prosecution and the Defence of Mr Badreddine, at this stage the Trial Chamber, by majority, is not yet satisfied that it has

⁶² See Separate opinion of Judge Eboe-Osuji, para. 1.

⁶³ ICC, *Jerbo Case*, para. 25.

⁶⁴ ICC, *Gaddafi Case*.

received evidence from which it could safely conclude that the Accused has died. The Trial Chamber is not yet convinced that the circumstantial evidence it has received—in the form of media reports, statements from Hezbollah, and from senior religious figures—satisfies this high standard. Moreover, the media reports on the circumstances of Mr Badreddine’s reported death are ambiguous regarding the location and the cause of death.

34. The Trial Chamber respects and recognizes that for religious purposes the standard of proof of a person’s death may be less strict than in international judicial proceedings. It also respects the emotions and grief displayed by members of Mr Badreddine’s family at the ceremonies held in Beirut.

35. But without diminishing either, the Trial Chamber is not yet satisfied to the high standard required to terminate the proceedings against Mr Badreddine.

36. Not all avenues to obtain official proof from the Lebanese or any other State authorities certifying the death of Mr Badreddine have yet been exhausted. The Prosecution informed the Trial Chamber that, on 19 May 2016, it sent a further request for assistance to the Government of Lebanon, through its Prosecutor-General, seeking: a certified copy of the death certificate; certified copies of all documents, reports, or other documentation submitted to the Lebanese authorities in support of verification of the death and or circumstances of the death; certified copies of any reports compiled by or in the possession of Hezbollah or others regarding Mr Badreddine’s death, including information relevant to the circumstances of his death, location, associated victims and imagery of the scene of death.

37. The Prosecution has requested a number of different forms of proof including a certificate of death. In these circumstances a reasonable period should be allowed for appropriate efforts to be made to secure and provide the information requested. As the Trial Chamber is awaiting official information from the Government of Lebanon confirming that Mr Badreddine is dead, it would not be prudent or in the interests of justice to proceed to make a finding in respect of death at this time. The Trial Chamber encourages the Government of Lebanon to respond with due haste to the Prosecution’s request for assistance.

38. Furthermore, no prejudice would be suffered by counsel for Mr Badreddine or the other four Accused by deferring further consideration and determination of this matter to give the Lebanese Government the time needed to obtain additional material. Consequently, the

Trial Chamber should await the results of the Prosecution's enquiries and any response to this latest request for assistance or further material provided to it for consideration.

39. The Trial Chamber therefore agrees with the Legal Representative for the Victims that, at this stage, it is premature to reach any definitive finding as to whether Mr Badreddine is alive or dead. The Trial Chamber has been presented with circumstantial evidence, which while suggestive of Mr Badreddine's death is not yet, in its view, conclusive of it.

40. The Trial Chamber will review any additional material regarding the issue of Mr Badreddine's death and, if necessary, re-evaluate the material already submitted into evidence. It stresses that this decision is an interim one.

41. For these reasons, the Trial Chamber, by majority, Judge Braidy dissenting, issued its interim decision that 'it did not believe that sufficient evidence has yet been presented to convince it that the death of Mustafa Amine Badreddine had been proved to the requisite standard'.

42. Judge Braidy dissents in the conclusion, and also in the reasoning expressed in paragraphs 33 and 35 to 40. A dissenting opinion will follow.

DISPOSITION

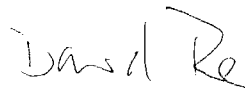
FOR THESE REASONS, the Trial Chamber, by majority, Judge Braidy dissenting as to paragraphs 33 and 35 to 40:

PROVIDES the reasons for its interim decision issued in court on 1 June 2016 in relation to the reported death of the Accused, Mr Mustafa Amine Badreddine; and

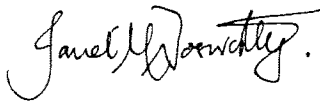
A DISSENTING OPINION will follow.

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

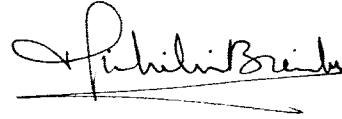
Leidschendam,
The Netherlands
7 June 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

