

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: 8 June 2016

Original language: English

Classification: Public

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

**DISSENTING OPINION OF JUDGE MICHELINE BRAIDY ON THE TRIAL
CHAMBER'S INTERIM DECISION REGARDING THE DEATH OF MR MUSTAFA
AMINE BADREDDINE AND POSSIBLE TERMINATION OF PROCEEDINGS**

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Defence Office
Mr François Roux

Counsel for Mr Mustafa Amine Badreddine:
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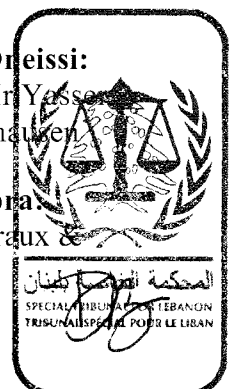
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Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

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



1. I respectfully dissent with the views of my fellow Judges with regard to the decision regarding the death of the Accused Mr Mustafa Amine Badreddine.¹

2. To begin, I agree with the majority with regards to the relevant guiding legal principles elaborated in the case-law of the international criminal courts and tribunals and as summarised in the Trial Chamber's decision.² Among these:

- i. 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, regardless of the stage—pre-trial, trial or appeal;
- ii. The doctrine of individual criminal responsibility provides that criminal jurisdiction may only be exercised over living persons. A court's personal jurisdiction (*ratione personae*) over an accused person is individualised and personalised. It is therefore exclusive to that particular accused and ceases upon his or her death;³
- iii. 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;
- iv. 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 an accused's death. 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; and
- v. A death certificate alone may not suffice in all circumstances and a court may seek additional evidence.

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2612, Reasons for Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings, 7 June 2016; Transcript of 1 June 2016, pp. 56-57.

² Reasons for Interim Decision, para. 25.

³ See also the Lebanese Code of Criminal Procedure, Law No.328 of 7 August 2001, Art 10 (a).

3. Further, I agree with the Trial Chamber's majority decision that a Chamber or a Judge must be satisfied to a high standard and be clearly convinced that an accused person is in fact deceased,⁴ with all the legal consequences that such a finding may entail.

4. My disagreement is not in relation to the guiding principles themselves, but rather with the conclusion reached by the majority after it applied these principles to the facts and evidence presented by the Prosecution and counsel for Mr Badreddine during the hearings of 31 May and 1st of June 2016.

5. Before taking the Trial Chamber through a series of events and an array of pieces of circumstantial evidence, the Prosecution submitted repeatedly that it has no information on 'when a death certificate might be issued; and, second, whether there is any reasonable expectation that such a certificate would be issued on the basis of any additional evidence beyond that which is presently available to [the Trial Chamber], particularly in light of Hezbollah's involvement and their general position.'⁵

6. Although the Prosecution emphasized that it was not advocating one way or another for a factual finding regarding Mr Badreddine's death, it stated that it was open to the Trial Chamber to find that there is overwhelming circumstantial evidence of his death.⁶

7. In the absence of a death certificate, the Prosecution tendered evidence which may be separated into four categories:

- a) Reports published in the Lebanese and international media of the death of Mr Badreddine;
- b) Video recordings and photographs of Mr Badreddine's funeral and burial;
- c) Statements by senior members of the Shiite clergy, relatives of Mr Badreddine and members of Hezbollah;
- d) Investigator notes explaining various aspects of the evidence presented, such as the political affiliation or background of the media outlets broadcasting news

⁴ Reasons for Interim Decision, para. 31.

⁵ Transcript of 31 May 2016, pp. 6-7.

⁶ Transcript of 31 May 2016, p. 76.

of the death and funeral, the identification of persons shown in the video-clips aired in the media, and the location of particular events related to the funeral.⁷

8. The Prosecution also referred to the decision issued by the International Criminal Court in the *Banda and Jerbo* case, pointing out that some of the facts in that case are similar to the circumstances before the Trial Chamber.⁸

9. Counsel for Mr Badreddine, for their part, presented the following three pieces of evidence:

- a) An announcement by Mr Badreddine's family of his death, setting out the time and place for the receipt of condolences;⁹
- b) An official communiqué sent to the National News Agency of Lebanon;¹⁰ and
- c) A public announcement by the Vice-Chairman of the Higher Islamic Shiite Council of Lebanon.¹¹

10. Counsel also referred to Lebanese and Islamic sharia law governing the formal procedures for registering a death.¹²

11. Having carefully reviewed all the evidence put forth by the Prosecution during the hearing of 31 May and by Counsel for Mr Badreddine during that of the 1st of June 2016, as well as their oral submissions, I consider most applicable in this case the approach adopted by the International Criminal Court's Trial Chamber IV in the *Banda and Jerbo* case. In its decision terminating the proceedings against the co-accused Mr Saleh Mohammad Jerbo Jamus, Trial Chamber IV held that:

'[it] is, however, not persuaded that the production of a death certificate is an essential pre-requisite to the termination of criminal proceedings, as suggested by the [Common Legal Representatives]. Instead, it is one of the avenues available to the Chamber to prove the relevant fact, namely that the person is deceased. In

⁷ Transcript 31 May 2016, p. 12.

⁸ Transcript of 31 May 2016, p. 9; 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.

⁹ Exhibits 2D248.1MB and 2D248.2MB; see transcript of 31 May 2016, pp. 70-71.

¹⁰ Exhibit 2D249MB; see transcript of 31 May 2016, p. 72-73.

¹¹ Transcript of 31 May 2016, p. 73.

¹² Transcript of 31 May 2016, pp. 67-69.

seeking to establish this fact, nothing prevents the Chamber from considering evidence other than an official death certificate...'¹³

12. The Chamber also noted that it was highly unlikely that an official death certificate would be issued in relation to Mr Jerbo in the near future. It therefore felt obliged to examine the circumstantial information put before it instead.¹⁴

13. The following evidence, considered as a whole, has persuaded me in reaching my conclusion that Mr Badreddine is deceased:

- a) The video footage of the official statement on the death of Mr Badreddine publicly made by the Jaafarite Grand Mufti of the Shiite community, Mr Ahmad Qabalan, who represents the highest religious authority of the Shiite community, in the presence of Mr Badreddine's family, and broadcasted by *Al-Manar* TV on 13 May 2016;¹⁵
- b) The video footage broadcasted by Al-Manar TV of the official statement on Mr Badreddine's death by Sheikh Abdel Amir Qabalan the Vice-Chairman of the Higher Islamic Shiite Council, which is the highest religious Shiite governing body;¹⁶
- c) Media reports of Mr Badreddine's death nationally and internationally, alongside Hezbollah's announcement on *Al-Manar's* website and *Al-Manar* TV on 13 May 2016,¹⁷ and the investigator notes of Prosecution investigator Mr Toby Smith;¹⁸
- d) The video footage of the condolence ceremony held on 13 May 2016 in the *Imam Mujtaba* Complex,¹⁹ showing a large crowd of people and officials, with a picture identifying Mr Badreddine's son, Ali Badreddine, alongside Mr Badreddine's three brothers (Mohammad, Adnan and Hassan). Additionally, a

¹³ Decision Terminating the Proceedings against Mr Jerbo, para.18

¹⁴ Decision Terminating the Proceedings against Mr Jerbo, para. 19.

¹⁵ Exhibit P843.1MB.

¹⁶ Exhibit 2D250MB.

¹⁷ Exhibit P834MB.

¹⁸ Exhibit P835MB.

¹⁹ Exhibits P846MB and P846.1MB.

photograph showed Mr Adnan Badreddine's visible grief during the ceremony, which was attended by deputies, ministers and thousands of people;²⁰

- e) The video extract from the *Al-Manar* TV broadcast²¹ after the announcement of Mr Badreddine's death; the news presenter announced that the Speaker of the Lebanese Parliament, Mr Nabih Berri, called the Secretary-General of Hezbollah, Sayyed Hassan Nasrallah, offering his deep condolences for the loss of Mr Badreddine;
- f) Funeral speeches delivered on 13 May 2016, reflecting the solemnity of the ceremony;²²
- g) The video of the funeral procession on 13 May 2016, showing the presence of thousands of people and a number of officials, family members, deputies, the Minister of Finance Mr Ali Hassan Khalil, and the delivery of the funeral prayer by the Deputy Secretary-General of Hezbollah, Sheikh Naiim Kassem;²³
- h) The video footage of the casket entering the cemetery of Rawdat al-Shahydain, in order for the body to be buried;²⁴
- i) The statement from Hezbollah stating that the cause of Mr Badreddine's death was 'artillery shelling by Takfiri groups';²⁵
- j) The video of the Iranian delegation, composed of notably the Deputy Foreign Minister of Iran for Arab and African Affairs, and the Iranian Ambassador to Lebanon, paying their respects at Mr Badreddine's grave in Rawdat al-Shahydain. The footage shows the two Iranian officials kneeling at the gravestone and the Deputy Foreign Minister, Mr Hussein Amir-Abdullahian

²⁰ Exhibit P839 MB; Transcript of 31 May 2016, pp 23, 25, 33, 34 and 35.

²¹ Exhibit P836MB.

²² Exhibit P850MB.

²³ Exhibit P862MB.

²⁴ Exhibit P853MB.

²⁵ Exhibit P854.1MB.

making a statement that ‘the Takfiri terrorist extremist groups are the ones behind this heinous crime that led to the martyrdom’ of Mr Badreddine;²⁶

- k) The image of the gravestone;²⁷
- l) Footage of a Hezbollah guard of honour surrounding the casket and a marching band, demonstrating the organisational military recognition of Mr Badreddine’s death;²⁸
- m) The footage of the ceremony held at the Sayyeda Zeinab mosque in Damascus on 18 May 2016 attended by Syrian, Palestinian and Iranian officials, which clearly reflects the seriousness and gravity of the ceremony in recognition of the death of Mr Badreddine;²⁹
- n) The footage of the ceremony held in Beirut on 20 May 2016 attended notably by family members of Mr Badreddine, officials, deputies, the Minister of Finance, the Minister of State for Parliamentary Affairs, the Syrian Ambassador to Lebanon, and Hezbollah members, and at which the Secretary-General of Hezbollah Sayyed Hassan Nasrallah gave a speech;³⁰
- o) News reports of the ceremony held in Tehran on 24 May 2016 which was attended by Mr Badreddine’s brother and son;³¹
- p) News reports of Ayatollah Khamenei, the supreme religious leader of Iran, receiving in particular Mr Badreddine’s son Ali;³² and
- q) The announcement of Mr Badreddine’s death by the family.³³

14. After considering this evidence and hearing the submissions of the Parties and the Legal Representative of Victims, I am satisfied that sufficient evidence has been presented to establish that Mr Badreddine is deceased. Consequently, the proceedings against the Accused

²⁶ Exhibits P856MB and P856.1MB.

²⁷ The still frame was part of the video recording admitted as Exhibit P856MB and P856.1MB; Transcript of 31 May 2016, p. 43.

²⁸ Exhibit P852MB; Transcript of 31 May 2016, p. 39.

²⁹ Exhibits P858MB and P858.1MB; Transcript of 31 May 2016, pp.60-61.

³⁰ Exhibits P862MB, P862.1MB and P863MB.

³¹ Exhibit P865MB.

³² Exhibit P864MB.

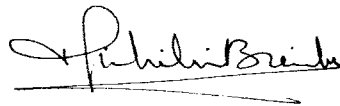
³³ Exhibit 2D428MB.

Mr Mustafa Amine Badreddine must be terminated and the Prosecution required to amend the indictment.

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

Leidschendam,
The Netherlands

8 June 2016



Judge Micheline Braidy

