

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No: STL-11-01/T/AC/AR126.11

Before: Judge Ivana Hrdličková, Presiding
Judge Ralph Riachy
Judge David Baragwanath
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko

Registrar: Mr Daryl Mundis

Date: 23 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

**REASONS FOR DECISION ON BADREDDINE DEFENCE REQUEST FOR SUSPENSIVE
EFFECT OF ITS INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S
DECISION REGARDING MR BADREDDINE'S DEATH**

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux

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

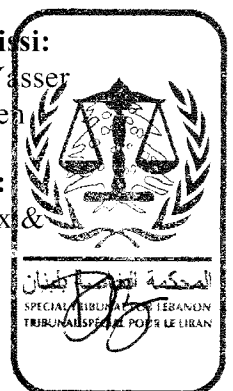
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Counsel for Mr Assad Hassan Sabra:
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Mr Geoffrey Roberts



INTRODUCTION

1. The Appeals Chamber is seized of an interlocutory appeal¹ by Defence counsel for Mr Badreddine (“Badreddine Defence”) against the Trial Chamber’s interim decision regarding whether the death of Mr Mustafa Amine Badreddine had been proven to the requisite standard.² The Badreddine Defence included in its Appeal a request for the suspension of proceedings before the Trial Chamber pending resolution of the Appeal.³ On 21 June 2016, the Appeals Chamber issued a decision granting, by majority, the request for suspensive effect, Judge Baragwanath and Judge Nsereko dissenting.⁴ We hereby give our reasons for the majority’s decision and the two dissenting opinions.

PROCEDURAL BACKGROUND

2. On 1 June 2016, the Trial Chamber delivered its oral interim decision (“Oral Decision”), with Judge Braidy dissenting, stating that it did not believe that sufficient evidence had yet been presented to convince it that the death of Mr Mustafa Amine Badreddine had been proven to the requisite standard, and that trial proceedings will continue pending the receipt of further information from the Government of Lebanon.⁵ The Trial Chamber delivered its written reasons for the Oral Decision on 7 June 2016⁶ and Judge Braidy delivered the written reasons for her Oral Dissent on 8 June 2016.⁷ Following a request for certification from the Badreddine Defence,⁸ which

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0001, Badreddine Interlocutory Appeal of the “Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings”, 15 June 2016 (“Appeal”).

² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2612, Reasons for Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings, 7 June 2016 (“Impugned Decision”); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 1 June 2016, pp. 55-56 (“Oral Decision”). See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2616, 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, 8 June 2016 (“Judge Braidy’s Dissent”); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 1 June 2016, pp. 56-57 (“Oral Dissent”).

³ Appeal, paras 3, 27-31.

⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0010, Decision on Badreddine Defence Request for Suspensive Effect of Its Interlocutory Appeal against the Trial Chamber’s Decision regarding Mr Badreddine’s Death, 21 June 2016.

⁵ Oral Decision, pp. 55-56; Oral Dissent, pp. 56-57.

⁶ Impugned Decision.

⁷ Judge Braidy’s Dissent.

⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2613, Badreddine Defence Perfected Request for Certification to Appeal the Interim Decision of 1 June 2016, 8 June 2016.

was joined by Defence counsel for Messrs Sabra, Oneissi, Merhi and Ayyash,⁹ the Trial Chamber certified for appeal the following issue:

Whether the Trial Chamber erred in determining that it did not believe that sufficient evidence has yet been presented to convince it that the death of Mr Mustafa Amine Badreddine had been proved to the requisite standard.¹⁰

3. The Badreddine Defence filed its Appeal, with the request for suspensive effect, on 15 June 2016. The Legal Representative of Victims (“LRV”) sought leave to respond to the Appeal,¹¹ including the request for suspensive effect, and the Appeals Chamber granted his request on 17 June 2016.¹² Defence counsel for Messrs Oneissi, Merhi and Ayyash joined the Appeal,¹³ the Head of Defence Office (“HDO”) made observations in support of the Appeal,¹⁴ and the Prosecutor responded to the Appeal.¹⁵

4. The Prosecutor responded to the request for suspensive effect on 15 June 2016,¹⁶ and the LRV did the same on 17 June 2015.¹⁷

APPLICABLE LAW

5. Pursuant to Rule 126 (F), “[a]n appeal shall not, of itself, have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules”. Under its terms, the Rule

⁹STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2614, Defence Joinder to “Badreddine Defence Perfected Request for Certification to Appeal the Interlocutory Decision of 1 June 2016”, 8 June 2016.

¹⁰ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2620, Certification for Interlocutory Appeal of ‘Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings’, 9 June 2016.

¹¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0002, Request of the Legal Representative of Victims for Leave to Respond to Badreddine Interlocutory Appeal of the “Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings”, 15 June 2016 (“Leave Request”).

¹² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0005, Decision on the Request of the Legal Representative of Victims Seeking Leave to Respond to the Badreddine Defence Interlocutory Appeal, 17 June 2016.

¹³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0006, Joinder from the Defence for Messrs Oneissi and Merhi to the Badreddine Defence Appeal Brief Against the “Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings”, 17 June 2016; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0009, Ayyash Defence Joinder to “Badreddine Interlocutory Appeal of the ‘Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings’”, 21 June 2016.

¹⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0004, Observation from the Head of Defence Office in Support of the Badreddine Appeal against the “Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings”, 16 June 2016.

¹⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0008, Prosecution Response on the Interlocutory Appeal of the “Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings”, 20 June 2016.

¹⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0003, Prosecution Submissions on the Badreddine Defence Application for Suspensive Relief, 15 June 2016 (“Prosecutor Suspensive Relief Response”).

¹⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0007, Submissions of the Legal Representative of Victims on the Badreddine Defence Application for Suspensive Relief, 17 June 2016 (“LRV Suspensive Relief Submissions”).

makes clear that the suspension of an appealed decision is not automatic but constitutes an exceptional measure. Whether to grant such an exceptional measure is a discretionary decision, which is taken in light of the specific circumstances of each case.¹⁸

6. Given the exceptional nature of a suspension, it will only be justified under strict conditions. The Appeals Chamber has previously identified such conditions as including: that there is a good cause for the requested suspension, that the duration of the requested suspension is reasonable, and that the appeal itself has reasonable prospects of success on its merits.¹⁹

7. The Appeals Chamber has further held that a party may show “good cause” by demonstrating that suspension is necessary to preserve the object of an appeal.²⁰ This is in line with the case-law of other international tribunals, which have held that a suspension should be granted only if the implementation of the decision under appeal would create an irreversible situation that could not be corrected, would lead to consequences that would be very difficult to correct and may be irreversible, or could potentially defeat the purpose of the appeal.²¹

DISCUSSION

8. The Badreddine Defence makes submissions regarding the existence of good cause for the requested suspension,²² the reasonable duration of the requested suspension,²³ and the reasonable prospects of the Appeal succeeding on its merits.²⁴ The LRV responds that good cause for

¹⁸ STL, *In the case against New TV S.A.L and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/AP/AR126.1, F0011, Decision on Urgent Request for Suspensive Effect of the Appeal, Request for Leave to Reply and Request for Appeal Hearing, 22 August 2014 (“*New TV Suspension Order*”), para. 7. See also ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11 OA 5, Decision on the request for suspensive effect, 20 August 2013, para. 6; ICC, *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12-12 OA, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, 20 December 2012, para. 18; see also Lebanese Court of Cassation, Civil Chamber 5, Decision n° 2004/13, 29 January 2004.

¹⁹ STL, *In the matter of El Sayed*, CH/AC/2011/01, Order on Urgent Prosecution’s Request for Suspensive Effect Pending Appeal, 12 September 2011 (“*El Sayed Suspension Order*”), para. 8; *New TV Suspension Order*, para. 8.

²⁰ *New TV Suspension Order*, para. 8. See also ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para. 11.

²¹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11 OA 6, Decision on the request for suspensive effect and the request to file a consolidated reply, 22 November 2013, para. 14 (referring to ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3344 OA 13, Decision on the request for suspensive effect of the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court, 16 January 2013, para. 6). See also ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.17, Decision on Slobodan Praljak’s Appeal of the Trial Chamber’s Refusal to Decide upon Evidence Tendered Pursuant to Rule 92 bis, 1 July 2010, para. 47.

²² Appeal, paras 27-28.

²³ Appeal, para. 29.

²⁴ Appeal, para. 30.

suspensive effect has not been shown,²⁵ and that this should only be granted “if and *so long as*” the relevant criteria are met.²⁶ The Prosecutor did not oppose the request but made no direct submissions on whether the criteria for suspensive effect were satisfied in this case.²⁷ We will deal with these submissions in turn below.

9. On a preliminary point, we note that the Trial Chamber’s order on the continuation of the proceedings in the *Ayyash et al.* case was part of its Oral Decision of 1 June 2016.²⁸ It is clear from the Oral Decision that the continuation of the proceedings flows directly from the Trial Chamber’s finding that it was not yet satisfied that Mr Badreddine’s death had been proven.²⁹ As we are seized of an appeal of the Trial Chamber’s decision on Mr Badreddine’s death, we are therefore able to consider the suspension of the continuation order, which “flow[s] directly” from the Trial Chamber’s decision regarding Mr Badreddine’s death.³⁰

I. Good Cause

10. The Badreddine Defence argues that there is good cause for the Appeals Chamber to grant suspensive effect because: (i) a continuation of the proceedings would lack a jurisdictional basis *ratione personae* against Mr Badreddine, which constitutes a prejudice *per se*;³¹ and (ii) Defence counsel are faced with ethical and deontological difficulties.³² The LRV responds that neither of these reasons amounts to good cause for suspensive effect.³³

11. In determining whether good cause exists, we consider that the matter on appeal concerns the Tribunal’s ability to continue exercising its jurisdiction *ratione personae* over one of the Accused, which is dependent, *inter alia*, on the latter being alive. Moreover, we note that this issue

²⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0007, Submissions of the Legal Representative of Victims on the Badreddine Defence Application for Suspensive Relief, 17 June 2016 (“LRV Suspensive Relief Submissions”), paras 5-9.

²⁶ LRV Suspensive Relief Submissions, para. 13 (emphasis in original).

²⁷ Prosecutor Suspensive Relief Response, paras 12-13.

²⁸ Oral Decision, p. 56, lines 9-11.

²⁹ When delivering the majority decision regarding Mr Badreddine’s death, Presiding Judge Re stated: “The Trial Chamber does not believe that sufficient evidence has yet been presented to convince it that the death of Mustafa Amine Badreddine has been proven to the requisite standard. The trial will therefore continue pending the receipt of further information we anticipate from the government of Lebanon. [...] This, what I’ve read out, is simply the decision. [...] That completes the Trial Chamber majority decision.”; see Oral Decision, p. 56, lines 6-17. See also *New TV Suspension Order*, paras 21-22.

³⁰ *New TV Suspension Order*, para. 22.

³¹ Appeal, para. 27.

³² Appeal, para. 28.

³³ LRV Suspensive Relief Submissions, paras 5-9.

is a fundamental prerequisite to the integrity of the trial itself and may therefore constitute good cause for granting suspensive effect.

12. In addition, Defence counsel's mandate to represent Mr Badreddine in trial proceedings before the Tribunal is also contingent on the latter being alive. The issue of whether Mr Badreddine's death has been proven is still in dispute, by virtue of the Appeal, meaning that Defence counsel's mandate to represent him is equally in dispute. In these specific circumstances, the resolution of this issue on appeal is necessary in order to ensure that the Accused is properly represented and his fair trial rights are guaranteed during trial proceedings before the Tribunal. Consequently, this may constitute good cause for granting suspensive effect.

13. However, we emphasize, in relation to the purported ethical difficulties raised by the Badreddine Defence,³⁴ that Defence counsel are bound by the "ethics of the legal profession",³⁵ including the Tribunal's Codes of Conduct and any domestic codes of conduct to which they may be subject, rather than their personal conviction of the veracity of a fact. The Badreddine Defence has failed to substantiate any professional ethical difficulties arising from the current situation. We are therefore not persuaded that the Badreddine Defence's arguments on this point show good cause for suspensive effect.

14. Furthermore, in exercising its discretion on whether to grant suspensive effect, the Appeals Chamber must also weigh the delay that a suspension would cause against the impact that continuing the proceedings may have.³⁶ Consequently, in the circumstances of this case, the need to preserve the integrity of the proceedings pending the determination of the Appeal overrides any other considerations.³⁷ Indeed, regardless of the outcome of the Appeal, the Appeals Chamber's decision thereon will provide clarity on the Tribunal's jurisdictional position *vis-à-vis* Mr Badreddine.³⁸ We are therefore satisfied that, in the circumstances of this case, there is good cause to suspend the Trial Chamber's order for the continuation of proceedings pending a determination of the Appeal.

³⁴ Appeal, para. 28.

³⁵ Code of Professional Conduct for Counsel Appearing before the Tribunal, 28 February 2011, Article 1 (A).

³⁶ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07 OA 13, Decision on the request for suspensive effect of the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court, 16 January 2013 ("*Katanga* Decision"), para. 8.

³⁷ *Katanga* Decision, para. 9.

³⁸ See *Katanga* Decision, para. 9.

II. Reasonable Duration of Suspension

15. The Badreddine Defence argues that the duration of the requested suspension is reasonable, as the matter is likely to be dealt with expeditiously by the Appeals Chamber.³⁹ The LRV shared this view.⁴⁰ We note that the Parties, LRV and HDO have acted without delay thus far in making their appeal filings and we intend to deal with the Appeal's merits with expeditiousness. We therefore find that any suspensive effect will be of a reasonable duration.

III. Reasonable Prospects of Success on the Merits of the Appeal

16. Finally, the Badreddine Defence submits that the Appeal has reasonable prospects of success on its merits, as evidenced by Judge Braidy's Dissenting Opinion and alternate Judge Akoum's apparent opposition to the majority's decision.⁴¹ The Prosecutor and LRV, in their respective submissions, did not challenge this criterion for granting suspensive effect.⁴²

17. Irrespective of whether there were dissents from the Impugned Decision, we are satisfied that the Appeal on the certified issue has reasonable prospects of success, in that it is not frivolous.

IV. Conclusion

18. For the foregoing reasons, we find that the criteria for suspensive effect have been satisfied, and we therefore grant the Badreddine Defence request to suspend the Trial Chamber's proceedings in the *Ayyash et al.* case, pending the Appeals Chamber's decision on the merits of the Appeal.

³⁹ Appeal, para. 29.

⁴⁰ LRV Suspensive Relief Submissions, para. 11.

⁴¹ Appeal, para. 30.

⁴² LRV Suspensive Relief Submissions, para. 12; Prosecutor Suspensive Relief Response, para. 12.

DISPOSITION

FOR THESE REASONS,

PURSUANT to Rule 126 (F),

THE APPEALS CHAMBER, by majority,

GRANTS the request for suspensive effect.

Judge Baragwanath appends a dissenting opinion.

Judge Nsereko appends a dissenting opinion.

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

Dated 23 June 2016

Leidschendam, the Netherlands



Judge Ivana Hrdličková
Presiding Judge

DISSENTING OPINION OF JUDGE DAVID BARAGWANATH

I. Introduction

1. Counsel for Mr Mustafa Amine Badreddine seek from the Appeals Chamber an order suspending the trial of proceedings before the Trial Chamber until this Chamber has determined their substantive appeal. The substantive appeal is against the decision of the Trial Chamber dismissing their interlocutory application to terminate Mr Badreddine's trial on the ground that their client is no longer alive.

2. The majority of the Trial Chamber, Judges Re and Nosworthy, did not believe that sufficient evidence had yet been presented to convince them that the death of Mr Badreddine has been proved to the requisite standard.¹ Judge Braidy was of the opposite opinion and dissented.²

3. The Trial Chamber accepted that no proceedings can be brought or continued against an accused who has been determined to be dead.³ Whether the proceedings against Mr Badreddine should be terminated because the Trial Chamber should have found he is dead is the essential issue on the pending substantive appeal, to which the present suspension application was annexed. We cannot at this stage assume the answer which this Chamber will give on that appeal.

4. Two grounds are advanced in support of the application for suspension. Both are challenged by the LRV as constituting good cause for the suspension of proceedings pending the Appeals Chamber's decision.⁴

II. Does the Special Tribunal for Lebanon lack jurisdiction to continue the trial until the substantive appeal is determined?

5. The first ground advanced is that, if the trial were to continue and if Mr Badreddine is dead, the Trial Chamber would be unlawfully exercising jurisdiction over a dead person. The Badreddine

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2612, Reasons for Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings, 7 June 2016 ("Impugned Decision"); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 1 June 2016, pp 55-56 ("Oral Decision"). See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 1 June 2016, pp 56-57.

² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F2615, 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, 8 June 2016.

³ Impugned Decision, para. 25.

⁴ LRV Suspensive Relief Submissions, paras 7-9.

Defence argue that suspensive relief is necessary in order to preserve the object of the appeal.⁵ They submit that the continuation of the proceedings pending the Appeals Chamber's decision would for a time create an irreversible situation that could not be corrected: namely, that the unlawful exercise of jurisdiction over a dead person "constitutes prejudice *per se*".⁶

6. The ground of "unlawfully exercising jurisdiction over a dead person" is a contention that, since this Tribunal may in the future find that Mr Badreddine is proved to be dead, it now lacks authority to continue the trial while proceeding to investigate and determine whether that is the case. The argument has an obvious logical attraction: how can a tribunal, which loses jurisdiction if an accused dies, continue to exercise authority when it may decide that the accused has been dead for some time prior to its determination?

7. It is, however, well-settled that a tribunal must be treated as possessing jurisdiction at least until the time of deciding such question. Such was the decision of this Chamber when presented with the argument that, because the Defence argued that the Security Council had no authority to create the Special for Lebanon, the Appeals Chamber lacked authority to investigate and determine that question.⁷ We followed high authority, including final French and English courts, which rejected such argument.⁸

8. Must the jurisdiction be exercised only to determine whether Mr Badreddine is dead, and not for any other purpose, until that decision is delivered? Here one returns to the principles stated in the majority judgment: that a suspension, given its exceptional nature, will only be justified under strict conditions. Those conditions are (i) that there is good cause for the requested suspension, (ii) the duration of the requested suspension is reasonable, and (iii) the appeal itself has reasonable prospects of success on its merits. "Good cause" may be shown by demonstrating that suspension is necessary to preserve the object of an appeal.

⁵ Appeal, para. 27.

⁶ Appeal, para. 27.

⁷ STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 43.

⁸ *Dallah Real Estate and Tourism Holding Company v The Minister of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, [2010] UKSC 46 following *République arabe d'Égypte v Southern Pacific Properties Ltd* [1986] Ju Fr 75; [1987] Ju Fr 469 (12 July 1984, Paris Court of Appeal and 6 January 1987, Cour de Cassation) (the *Pyramids* case).

9. The Tribunal, in the form of this Chamber, is plainly authorised to continue to exercise jurisdiction in relation to Mr Badreddine for the purpose of determining the substantive appeal. Should all other exercises of jurisdiction in relation to him be suspended pending that decision?

10. That, in my opinion, is an issue of evaluation which requires weighing competing considerations and to which I return.

III. The Badreddine Defence's Ethical Difficulties

11. The Badreddine Defence also argues that there is good cause for suspensive relief because counsel are faced with "particular ethical difficulties" due to: (i) lead counsel's decision to abstain from taking an active part in the proceedings pending the resolution of the Appeal, as he is "convinced" and has a "settled opinion" that Mr Badreddine is deceased; and (ii) this being reflected in his instructions to his co-counsel, which creates a conflict for co-counsel between the Trial Chamber's decision to continue the proceedings and lead-counsel's instructions to the contrary.⁹ The LRV does not take a position on this particular issue; however, it notes that trial proceedings should only continue if the interests of all Accused are effectively represented.¹⁰

12. In this regard, Defence counsel are bound by the "ethics of the legal profession", notably the Tribunal's Codes of Conduct.¹¹ The Presiding Judge of the Supreme Court of the United Kingdom recently considered that counsel may only refuse to continue with a case where "a point has come where the advocate could reasonably conclude that she can no longer do the job of representing the client properly."¹² Because of the *in absentia* nature of these proceedings and the inherent limitations on the ability of counsel to obtain instructions, the news of Mr Badreddine's death would have had a minimal effect on lead counsel's obligation to continue to act in the best interests of his client through to the end of the case.

13. Lead counsel advises that his Bar permits him to form an opinion as to the death of Mr Badreddine that may be inconsistent with the Trial Chamber's decision. That, however, is not the case with respect to his co-counsel. The ethic of their respective codes of conduct, like that of

⁹ Appeal, para. 28.

¹⁰ LRV Suspensive Relief Submissions, para. 10.

¹¹ Code of Professional Conduct for Counsel Appearing before the Tribunal, 28 February 2011 ("Joint Code"), Article 1 (A).

¹² Lord Neuberger, "Ethics and advocacy in the twenty-first century", Lord Slynn Memorial Lecture, 15 June 2016, <https://www.supremecourt.uk/docs/speech-160615.pdf>, para. 16.

this Tribunal, requires them to continue to protect the interests of their client throughout the trial unless and until relieved of that obligation by the tribunal.

14. Article 7 (D) of the Code of Conduct of Defence Counsel (“Defence Code”)¹³ states that “Defence Counsel shall continue to act in accordance with the representation agreement” for the entire duration of the case, unless he has been withdrawn by the Head of Defence Office or has himself terminated the representation agreement. In addition, Article 9 of the Defence Code states that “Counsel shall provide effective representation of his Client”, namely in a manner which does not “materially compromise, or might materially compromise the fundamental interests or rights of the Client”, according to *inter alia* the provisions of Article 33 of the Defence Code. In turn, Article 33 (A) of the Defence Code states that effective representation includes appearing in person for the client in any judicial proceedings¹⁴ and examining witnesses appearing before the Tribunal efficiently and effectively.¹⁵ In addition, Article 51 of the Code of Conduct for Counsel Appearing before the Tribunal states that “[w]hen the Tribunal has made a ruling on a matter, Counsel shall not [...] attempt to circumvent the effect of the ruling by other means”. Finally, Article 8 of the Joint Code regulates the co-counsel’s ethical duties in situations where these may conflict with lead counsel’s instructions.

15. I have no reason to doubt that, if lead counsel representing Mr Badreddine’s interests were to withdraw from the case, his co-counsel would be free, able and willing to provide due protection of those interests.

IV. Evaluating the balance of considerations

A. Considerations argued in favour of suspension

(1) The jurisdiction point

16. The “object” or “purpose” of the appeal is to obtain a determination by the Appeals Chamber that Mr Badreddine’s death has been proved, and consequently a direction to the Trial Chamber to terminate the proceedings against Mr Badreddine.¹⁶ I am not persuaded that this purpose is defeated, or that an irreversible situation would arise that could not be corrected, if trial

¹³ Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, STL/CC/2012/03, 14 December 2012 (“Defence Code”).

¹⁴ Defence Code, Article 33 (A) (i) (d).

¹⁵ Defence Code, Article 33 (A) (vii) (a).

¹⁶ Appeal, para. 31.

proceedings continue pending the resolution of the appeal. Indeed, whether or not proceedings continue before the Trial Chamber during this time has no bearing whatsoever on the Appeals Chamber's ultimate ability to reach a decision on whether Mr Badreddine's death was proved to the standard required by law and, if so, to order the Trial Chamber to terminate the proceedings against him.

17. The Badreddine Defence argues that the continuation of trial proceedings pending resolution of the appeal would be irreversibly and "*per se*" prejudicial to Mr Badreddine by virtue of his "remaining as an accused person in the proceedings" during this time, which would constitute an "unlawful exercise of jurisdiction *ratione personae*".¹⁷ The Appeals Chamber has noted that "a decision for suspension of an appeal aims at preserving the *status quo ante*, i.e. preserving the situation existing prior to the issuance of the impugned decision".¹⁸ Regardless of whether trial evidence and submissions are heard before the Trial Chamber pending resolution of the appeal, Mr Badreddine would continue to have been an "accused" person before the Tribunal during this time, namely a "person against whom one or more counts in an indictment have been confirmed".¹⁹ Even if the substantive appeal is allowed, it would be open to the Prosecution to allege and lead evidence to the effect that he played the very same role in relation to the deaths and injuries of the victims of bombing of 14 February 2005 as if he were still alive. Even if we were to accept that his continued status as an accused person could be said to amount to a prejudicial exercise of jurisdiction by the Tribunal, I am not persuaded that the prejudice would be material.

(2) The representation point

18. For reasons already advanced, since co-counsel are ethically able to provide a proper defence, lead counsel must elect either to assume or secure ethical approval to continue his role, or to withdraw from the case.

B. Considerations against suspension

19. The Tribunal is directed by its Statute to act as expeditiously as is consistent with fairness. It must not expose the persons accused, the victims, the witnesses, those responsible for funding the Tribunal or, importantly, the people of Lebanon whose case this in truth is, to unnecessary delay in

¹⁷ Appeal, para. 27.

¹⁸ *New TV Suspension Order*, para. 21.

¹⁹ Rule 2 (A), STL RPE.

completing our mandate from the Security Council, save for some substantial reason. No such reason has been presented.

20. Consequently, since good cause for the requested suspensive relief has not been made out, I need not address the Badreddine Defence's arguments on the remaining two cumulative criteria of paragraph 8 above.

V. Conclusion

21. I would therefore dismiss the request for suspensive relief.

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

Dated 23 June 2016

Leidschendam, the Netherlands



Judge David Baragwanath

DISSENTING OPINION OF JUDGE DANIEL DAVID NTANDA NSEREKO

I. Introduction

1. I respectfully disagree with the majority decision that the Trial Chamber's interim Oral Decision of 1 June 2016 be suspended pending the determination of the Badreddine Defence Appeal. While I agree with the exposition of the applicable law as set out in paragraphs 5, 6 and 7 of the majority decision, I am not persuaded that the conditions for suspension contained therein have been met. In particular, I am not convinced that good cause for suspensive effect has been established.

II. Discussion

2. The Badreddine Defence makes submissions regarding the existence of good cause for the requested suspension,¹ the reasonable duration of the requested suspension,² and the reasonable prospects of the Appeal succeeding on its merits.³ The Legal Representative of Victims ("LRV") argues that the Badreddine Defence has failed to show good cause for granting suspensive effect, but deferred to the Appeals Chamber on that issue and submitted that this should only be granted "*if and so long as*" the relevant criteria are met.⁴ The Prosecutor did not oppose the request, but made no direct submissions on whether the criteria for suspensive effect were satisfied in this case.⁵ I will deal with these submissions in turn, as required.

A. Preserving the Object of the Appeal

3. Regarding good cause, the Badreddine Defence first argues that a suspension is necessary in order to preserve the "object" of the Appeal.⁶ It submits that the continuation of the proceedings pending the Appeals Chamber's decision would create an irreversible situation that could not be corrected, because the Trial Chamber would be "unlawfully exercising jurisdiction over a deceased person", which constitutes prejudice *per se*.⁷ The LRV submits that none of the possible outcomes

¹ Appeal, paras 27-28.

² Appeal, para. 29.

³ Appeal, para. 30.

⁴ LRV Suspensive Relief Submissions, para. 13 (emphasis in original).

⁵ Prosecutor Suspensive Relief Response, paras 12-13.

⁶ Appeal, para. 27.

⁷ Appeal, para. 27.

of the Appeal amount to good cause for the suspension of proceedings pending the Appeals Chamber's decision.⁸

4. I first note that, according to the Appeal's request for relief,⁹ its "object" or "purpose" is to persuade the Appeals Chamber to determine that Mr Badreddine's death was proven and, consequently, to direct the Trial Chamber to terminate the proceedings against him.¹⁰ I am not persuaded that the continuation of trial proceedings pending a determination of the Appeal defeats this purpose, or gives rise to an irreversible situation that could not be corrected. In my view, the continuation of proceedings before the Trial Chamber during this time has no bearing whatsoever on the Appeals Chamber's eventual ability to make the determination and direction requested in the Appeal.

5. In addition, I am not persuaded that the continuation of trial proceedings pending resolution of the Appeal would be irreversibly and "*per se*" prejudicial to Mr Badreddine by virtue of him "remaining as an accused person in the proceedings" during this time, which would constitute an "unlawful exercise of jurisdiction *ratione personae*".¹¹ The Appeals Chamber has previously stated that "a decision for suspension of an appeal aims at preserving the *status quo ante*, *i.e.* preserving the situation existing prior to the issuance of the impugned decision".¹² Even if I were to accept *arguendo* that his continued status as an accused person amounts to a prejudicial exercise of jurisdiction by the Tribunal, I am not persuaded that the requested suspensive effect would remedy that prejudice. Indeed, regardless of whether trial evidence and submissions are heard before the Trial Chamber pending resolution of the Appeal, Mr Badreddine would continue to be an "accused" person before the Tribunal, as defined by Rule 2 (A) of the Rules, because he would remain subject to an indictment before the Tribunal during this time.¹³

6. Finally, and in any event, the Badreddine Defence has failed to substantiate its contention that it would be unlawful for the Tribunal to exercise jurisdiction over Mr Badreddine pending the determination of the Appeal and how this would be irreparably and *per se* prejudicial to the

⁸ LRV Suspensive Relief Submissions, paras 7-9.

⁹ Appeal, para. 31.

¹⁰ Appeal, para. 31.

¹¹ Appeal, para. 27.

¹² *New TV Suspension Order*, para. 21.

¹³ Rule 2 (A), STL RPE, which states that an "Accused" is a "person against whom one or more counts in an indictment have been confirmed".

Accused.¹⁴ In particular, I note that it is for the Tribunal to determine its own jurisdiction, including its jurisdiction *ratione personae*.¹⁵ Therefore, until it has been judicially determined that Mr Badreddine's death has been proven, the Tribunal continues to have jurisdiction over him.

B. The Badreddine Defence's Ethical Difficulties

7. The Badreddine Defence also argues that there is good cause for granting suspensive effect because counsel are faced with "particular ethical difficulties" as a result of: (i) lead counsel's decision to abstain from taking an active part in the proceedings pending the resolution of the Appeal, as he is "convinced" and has a "settled opinion" that Mr Badreddine is deceased; and (ii) lead counsel's position being reflected in his instructions to co-counsel to not take an active part in the proceedings, which would present co-counsel with a conflict between the Trial Chamber's decision to continue the proceedings and lead counsel's instructions to the contrary.¹⁶ The LRV takes no position on this particular issue, but notes that trial proceedings should only continue if the interests of all Accused are effectively represented.¹⁷

8. In this regard, I agree with the majority that Defence counsel are bound by the "ethics of the legal profession",¹⁸ including the Tribunal's Codes of Conduct and the relevant domestic codes of conduct to which they may be subject, rather than their personal conviction of the veracity of a fact.¹⁹ I am however not persuaded that the submissions made in support of the request for suspensive relief substantiate a *professional* ethical difficulty, stemming from either type of professional ethical code. Nor could I identify such a difficulty stemming from the Tribunal's Codes of Conduct.

9. In any event, even if I were to accept *arguendo* that a professional ethical difficulty does arise from counsel's relevant domestic code of conduct, I am not persuaded that this would constitute good cause for granting suspensive effect. This is because there are numerous ways for Defence counsel, the Head of Defence Office ("HDO") and the Trial Chamber to resolve this impasse without the need for suspensive effect. Consequently, suspensive effect is not "necessary".

¹⁴ Appeal, para. 27.

¹⁵ STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 43 (with reference to the jurisprudence of international courts in fn. 67 thereto).

¹⁶ Appeal, para. 28.

¹⁷ LRV Suspensive Relief Submissions, para. 10.

¹⁸ Code of Professional Conduct for Counsel Appearing before the Tribunal, 28 February 2011 ("Joint Code"), Article 1 (A).

¹⁹ Majority Decision, para. 13.

10. In this regard, I concur with Judge Baragwanath's exposition of the relevant ethical obligations under the Tribunal's Codes of Conduct, namely Articles 7 (D), 9 and 33 (A) the Code of Conduct of Defence Counsel ("Defence Code")²⁰ and Articles 8 and 51 of the Code of Conduct for Counsel Appearing before the Tribunal ("Joint Code").²¹ I furthermore note that counsel for Mr Badreddine have repeatedly indicated that: (i) they will not take an active part in any ongoing trial proceedings, and in particular will not cross-examine witnesses or make objections during their examination by other counsel;²² and (ii) they will not abide by the Trial Chamber's Oral Decision to continue trial proceedings, due to their purported ethical difficulties.²³ It appears to me that counsel's purported ethical dilemma is an attempt to circumvent the Trial Chamber's Oral Decision.²⁴ In my view, Article 51 of the Joint Code forbids such attempted circumvention precisely in order to prevent counsel from being able to dictate the course of the proceedings.

11. In these circumstances, and in light of counsel's obligations under the Tribunal's Codes of Conduct, this situation can be resolved in ways which do not require granting suspensive effect to the Appeal. First, lead counsel could terminate his representation agreement by reason of his potential inability to effectively represent the Accused, which stems from his purported ethical difficulties under his domestic code of conduct. The Badreddine Defence itself, as well as the Prosecutor, has pointed to this solution,²⁵ although it has failed to explain why this course of action has not been pursued to date. Second, the HDO could withdraw lead counsel for these same reasons. These first two solutions would also resolve co-counsel's ethical difficulties, and would have to be accompanied by the provision of alternative legal representation for the accused.

12. Third, in the event that the first two solutions are not implemented, the Trial Chamber could act as part of its duty to protect the rights of the Accused to adequate representation and an expeditious trial. Specifically, it could take the necessary steps to ensure that Mr Badreddine is provided with Defence counsel who can effectively represent his interests, in line with the

²⁰ Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, STL/CC/2012/03, 14 December 2012 ("Defence Code").

²¹ Dissenting Opinion of Judge Baragwanath, para. 14.

²² Appeal, para. 28; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 1 June 2016, pp 59-60; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 2 June 2016, pp. 31.

²³ Appeal, para. 28; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 1 June 2016, p. 59; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 2 June 2016, pp 30-31.

²⁴ I also note that counsel's course of conduct may amount to ineffective representation under Articles 9, 33 (A) (i) (d) and 33 (A) (vii) (a) of the Defence Code, or a failure to act in accordance with his representation agreement in breach of Article 7 (D) of the Defence Code. This conduct may in turn amount to misconduct under Article 17 (i) of the Defence Code.

²⁵ Appeal, para. 28; Prosecutor Suspensive Relief Response, para. 8.

Tribunal's Codes of Conduct and the principles of international criminal justice, for any future proceedings.

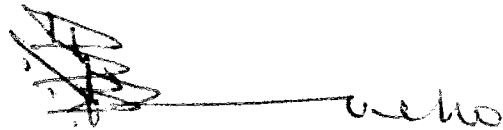
13. As these other options are open to Defence counsel, the HDO and the Trial Chamber to resolve the present impasse, the requested suspensive effect is not "necessary". I am therefore not persuaded that Defence counsel's purported ethical difficulties constitute good cause for granting suspensive effect to the Appeal.

14. Since good cause for the requested suspensive effect has not been made out, there is no need for me to address the Badreddine Defence's arguments on the remaining two cumulative criteria. For the foregoing reasons, I would dismiss the request for suspensive effect.

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

Dated 23 June 2016

Leidschendam, the Netherlands



Judge Daniel David Ntanda Nsereko

