

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: 11 July 2016

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

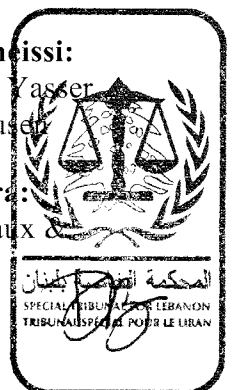
**DECISION ON BADREDDINE DEFENCE INTERLOCUTORY APPEAL OF THE
“INTERIM DECISION ON THE DEATH OF MR MUSTAFA AMINE BADREDDINE AND
POSSIBLE TERMINATION OF PROCEEDINGS”**

Office of the Prosecutor:

Mr Norman Farrell

Defence Office:

Mr François Roux

**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**Counsel for Mr Mustafa Amine Badreddine:**Mr Antoine Korkmaz, Mr Iain Edwards &
Ms Mylène Dimitri**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothee Le Fraper
du Hellen & Mr Jad Khalil**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts

INTRODUCTION

1. The Appeals Chamber is seized of an interlocutory appeal filed by Defence counsel for Mr Mustafa Amine Badreddine (“Badreddine Defence”) on 15 June 2016¹ against the Trial Chamber’s decision regarding whether the death of Mr Badreddine had been proven to the requisite standard, issued orally on 1 June 2016 and in writing on 7 June 2016.²
2. The Appeals Chamber is also seized of a request, filed by the Badreddine Defence on 30 June 2016, to lift the suspensive effect of the Appeal and defer its consideration of the Appeal or, in the alternative, consider on appeal the new materials attached to the request.³ The Appeals Chamber is further seized of a request for access filed by the Trial Chamber on 1 July 2016,⁴ as well as requests for extension of time and for leave to file a reply filed by the Badreddine Defence on 5 and 8 July 2016, respectively.⁵
3. Having considered the submissions of the Parties and the Legal Representative of Victims (“LRV”), the Appeals Chamber, Judge Baragwanath and Judge Nsereko dissenting, dismisses as moot the 5 July 2016 Request and 8 July 2016 Request, dismisses the 30 June 2016 Request, dismisses as moot the Trial Chamber’s Request for Access, grants the Appeal, and directs the Trial Chamber to terminate the proceedings against Mr Mustafa Amine Badreddine without prejudice to resume the proceedings should evidence that he is alive be adduced in the future.

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”). All further references to filings and decisions relate to this case number unless otherwise stated.

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 (“Written Reasons”) and STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 1 June 2016 (“Transcript of 1 June 2016”), pp. 55-56 (“Oral Decision”) (together, “Impugned 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 Dissenting Opinion”); Transcript of 1 June 2016, pp. 56-57 (“Judge Braidy’s Oral Dissent”).

³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0013, Badreddine Request for Lifting of Suspensive Effect in re. Interlocutory Appeal of the Interim Decision on the Death of Mr Mustafa Amine Badreddine, Confidential, 30 June 2016 (“30 June 2016 Request”). A public redacted version of the 30 June 2016 Request was filed on the same day.

⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0014, Request to Appeals Chamber for Access to Documents relating to the Death of Mustafa Amine Badreddine, 1 July 2016 (“Request for Access”).

⁵ F0016, Badreddine Request for Extension of Time re. Prosecution Response to Badreddine Request for Lifting of Suspensive Effect in re. Interlocutory Appeal of the Interim Decision on the Death of Mr Mustafa Amine Badreddine, Confidential, 5 July 2016 (“5 July 2016 Request”); F0018, Badreddine Motion for Leave to Reply to Corrected Version of and Addendum to Prosecution Response to Badreddine Request for Lifting Suspensive Effect in re. Interlocutory Appeal of the Interim Decision on the Death of Mr Badreddine, Confidential, 8 July 2016 (“8 July 2016 Request”).

BACKGROUND

4. On 31 May and 1 June 2016, the Trial Chamber, at its request,⁶ heard evidence and legal submissions from the Prosecutor, the LRV, and the Badreddine Defence in relation to the alleged death of Mr Badreddine. The Trial Chamber delivered its “interim” oral decision on 1 June 2016, finding by majority, Judge Braidy dissenting, that it “d[id] not believe that sufficient evidence ha[d] yet been presented to convince it that the death of Mustafa Amine Badreddine ha[d] been proved to the requisite standard”.⁷

5. The Trial Chamber issued its reasons for the Oral Decision in writing on 7 June 2016⁸ and Judge Braidy issued her written reasons for her dissenting opinion on 8 June 2016.⁹

6. Following a request by the Badreddine Defence for certification to appeal the Impugned Decision,¹⁰ which was joined by Defence counsel for Messrs Sabra, Oneissi, Merhi, and Ayyash,¹¹ the Trial Chamber certified the following issue for appeal:

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.¹²

7. The Badreddine Defence filed its appeal against the Impugned Decision on 15 June 2016, in which it also requested the suspension of proceedings before the Trial Chamber pending resolution of the Appeal.¹³

8. The Prosecutor indicated on 15 June 2016 that he did not oppose the request for suspension.¹⁴ The Head of Defence Office (“HDO”) submitted general observations in support of the Appeal on 16 June 2016,¹⁵ and Defence counsel for Messrs Oneissi, Merhi, and Ayyash joined the Appeal on 17 and 21 June 2016, respectively.¹⁶ Following leave granted by the

⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 17 May 2016, pp. 2-3.

⁷ Oral Decision, p. 56. *See also* Judge Braidy’s Oral Dissent, pp. 56-57.

⁸ Written Reasons.

⁹ Judge Braidy’s Dissenting Opinion.

¹⁰ 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.

¹¹ STL, *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.

¹² 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.

¹³ Appeal, paras 3, 31.

¹⁴ F0003, Prosecution Submissions on the Badreddine Defence Application for Suspensive Relief, 15 June 2016, para. 12.

¹⁵ F0004, Observations 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.

¹⁶ 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”,

Appeals Chamber,¹⁷ the LRV filed submissions opposing the request for suspension of the proceedings on 17 June 2016.¹⁸ On 20 June 2016, the Prosecutor filed his response to the Appeal, submitting that it should be dismissed.¹⁹

9. On 21 June 2016, the Appeals Chamber granted by majority, Judge Baragwanath and Judge Nsereko dissenting, the request for suspensive effect of the Appeal.²⁰ Written reasons for both the majority decision on the suspension and the related dissenting opinions were issued on 23 June 2016.²¹

10. On 27 June 2016, the LRV filed submissions on the merits of the Appeal, arguing that Grounds B, C, D, and E of the Appeal should be dismissed.²²

11. On 30 June 2016, the Badreddine Defence requested the Appeals Chamber to lift the suspensive effect of the Appeal granted on 21 June 2016 in order to allow the Trial Chamber to consider new materials and defer its consideration of the Appeal pending the Trial Chamber's review or, in the alternative, to consider on appeal the new materials attached to the 30 June 2016 Request.²³ The LRV indicated on 1 July 2016 that he will not respond to this request.²⁴

12. On 1 July 2016, the Trial Chamber requested access to the new materials filed confidentially by the Badreddine Defence before the Appeals Chamber.²⁵

13. On 4 July 2016, the Prosecutor filed his response opposing the 30 June 2016 Request.²⁶ On 5 July 2016, the Badreddine Defence filed a confidential motion seeking extension of time to

17 June 2016; 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.

¹⁷ F0005, Decision on the Request of the Legal Representative of Victims Seeking Leave to Respond to the Badreddine Defence Interlocutory Appeal, 17 June 2016.

¹⁸ F0007, Submissions of the Legal Representative of Victims on the Badreddine Defence Application for Suspensive Relief, 17 June 2016.

¹⁹ F0008, Prosecution Response to the Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 20 June 2016 ("Prosecutor Appeal Response"), paras 1, 43.

²⁰ 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, para. 2, p. 2.

²¹ F0011, 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, 23 June 2016.

²² F0012, Submissions of the Legal Representative of Victims on the Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 27 June 2016 ("LRV Appeal Response"), para. 17.

²³ 30 June 2016 Request, paras 1, 19.

²⁴ Email from LRV to Legal Officer, Appeals Chamber, 1 July 2016.

²⁵ Request for Access.

²⁶ F0015, Prosecution Response to the Badreddine Request for Lifting of Suspensive Effect in re Interlocutory Appeal of the Interim Decision on the Death of Mr Mustafa Amine Badreddine, Confidential, 4 July 2016. A corrected version of the response was filed on the same day; see F0015, Corrected Version of Prosecution

file a request for leave to reply to the Prosecutor's Response to 30 June 2016 Request.²⁷ On the same day, the Prosecutor subsequently filed a confidential addendum to his Response to 30 June 2016 Request.²⁸ On 6 July 2016, he filed a response to the Badreddine Defence's 5 July 2016 Request.²⁹ Finally, on 8 July 2016, the Badreddine Defence filed a motion seeking leave to reply to the Prosecutor's response and addendum related to the 30 June 2016 Request.³⁰

DISCUSSION

I. Preliminary Issues

A. 30 June 2016 Request

14. In its 30 June 2016 Request, the Badreddine Defence requests the Appeals Chamber to lift the suspensive effect granted to its Appeal "for the limited purpose of permitting the Trial Chamber to receive and consider recently obtained evidence supporting the Defence's contention that Mr Badreddine is deceased",³¹ namely an "official death certificate" dated 6 June 2016 and an annexed medical report regarding Mr Badreddine's death (together, "New Materials").³² It submits that the death certificate was produced by the relevant *mukhtar* before two witnesses, bears Mr Badreddine's civil state registration number, and was registered on 7 June 2016.³³ It also asserts that the medical report confirms aspects relevant to Mr Badreddine's death.³⁴

15. The Badreddine Defence contends that the New Materials "amount to cogent and reliable additional evidence warranting review of the Interim Decision by the Trial Chamber".³⁵ Recalling that the Trial Chamber clearly indicated that it was open to receive and evaluate additional evidence when it became available, the Badreddine Defence submits that it would be in the interests of justice, judicial economy, and the rights of the other accused in the case to

Response to the Badreddine Request for Lifting of Suspensive Effect in re Interlocutory Appeal of the Interim Decision on the Death of Mr Mustafa Amine Badreddine, Confidential, 4 July 2016 ("Response to 30 June 2016 Request"). A public redacted version of the Response to 30 June 2016 Request was filed on 6 July 2016.

²⁷ 5 July 2016 Request, paras 1, 11.

²⁸ F0015, Addendum to Prosecution Response to the Badreddine Request for Lifting of Suspensive Effect in re Interlocutory Appeal of the Interim Decision on the Death of Mr Mustafa Amine Badreddine, Confidential, 5 July 2016 ("Addendum to Response to 30 June 2016 Request").

²⁹ F0017, Prosecution Response to the Badreddine Defence Request for Extension of Time re the Prosecution Response to the Badreddine Request for Lifting of Suspensive Effect in re Interlocutory Appeal of the Interim Decision on the Death of Mr Mustafa Amine Badreddine, Confidential, 6 July 2016. A public redacted version of this response was filed on 8 July 2016.

³⁰ 8 July 2016 Request, paras 2, 18.

³¹ 30 June 2016 Request, para. 1; *see also id.* at para. 19.

³² 30 June 2016 Request, para. 9.

³³ 30 June 2016 Request, paras 10-12, 14.

³⁴ 30 June 2016 Request, para. 13.

³⁵ 30 June 2016 Request, para. 15.

allow the Trial Chamber to do so and to re-evaluate the totality of the evidence now available.³⁶ It argues that if the Trial Chamber is convinced following this re-evaluation that Mr Badreddine's death has been proven to the requisite standard, the object of the Appeal would become moot.³⁷ As a corollary, the Badreddine Defence requests the Appeals Chamber to "defer further consideration of the interlocutory appeal pending the Trial Chamber's review of this new evidence"³⁸ in order to prevent the "undesirable possibility of the question of the existence of sufficient evidence proving Mr Badreddine's death being adjudicated in parallel".³⁹

16. Alternatively, the Badreddine Defence submits that, "should the Appeals Chamber consider it appropriate to assess these additional documents together with the totality of the evidence before the Trial Chamber",⁴⁰ it should find that "in light of these new documents and without prejudice to the arguments contained in the Interlocutory Appeal, sufficient evidence has been presented for it to be satisfied that the death of Mr Badreddine has been proved to the requisite standard".⁴¹ It argues that "the interests of judicial economy, expeditiousness and the good administration of justice warrant this alternative relief".⁴²

17. The Prosecutor opposes the 30 June 2016 Request on the grounds that the Appeals Chamber should not lift the suspensive effect of the Appeal if it is imminently in a position to issue a decision overturning the Impugned Decision and that, in any event, the matter should not be reverted to the Trial Chamber until the correctness of the applicable standard of proof is determined by the Appeals Chamber.⁴³

18. As for the Badreddine Defence's alternative request, the Prosecutor submits that the Appeals Chamber's ability to admit additional evidence on an interlocutory appeal is limited to situations where it finds that the Trial Chamber made an error of law invalidating the decision,⁴⁴ and is subject to strict conditions in accordance with the delineation of authority between the two Chambers and in order to preserve the appeal rights of all parties.⁴⁵ He also contends that the practical rationale behind admitting additional evidence on appeal from judgment does not

³⁶ 30 June 2016 Request, para. 16.

³⁷ 30 June 2016 Request, para. 16.

³⁸ 30 June 2016 Request, para. 1; *see also id.* at paras 17, 19.

³⁹ 30 June 2016 Request, para. 17.

⁴⁰ 30 June 2016 Request, para. 18; *see also id.* at para. 19.

⁴¹ 30 June 2016 Request, para. 19.

⁴² 30 June 2016 Request, para. 18; *see also id.* at para. 19.

⁴³ Response to 30 June 2016 Request, paras 9-10.

⁴⁴ Response to 30 June 2016 Request, paras 11-13, 19.

⁴⁵ Response to 30 June 2016 Request, paras 14-15.

clearly support the same being done on interlocutory appeal, in which case the preferable approach would be to remand the matter to the Trial Chamber.⁴⁶

19. Finally, the Prosecutor argues that the new evidence is not admissible on appeal because the Badreddine Defence has failed to provide information on its provenance, so that its reliability and potential impact on the decision cannot be determined.⁴⁷ He submits that, based on information received from the Lebanese authorities, the death certificate suffers from certain deficiencies which have prevented the Lebanese authorities from legally determining that Mr Badreddine is deceased and which the Appeals Chamber would have to take into account in considering the admissibility of the new evidence.⁴⁸

20. Before addressing the merits of the 30 June 2016 Request, we have considered the Badreddine Defence's 5 July 2016 Request (seeking an extension of time to request leave to file a reply related to the 30 June 2016 Request), the Badreddine Defence's 8 July 2016 Request (seeking leave to file such reply), and the Prosecutor's relevant filings in this regard. In light of the granting of the Appeal, as explained below, we consider that the Badreddine Defence does not suffer any prejudice by not being permitted to make further submissions in relation to new materials which could have only further supported, but not challenged, this outcome. Consequently, we find in the particular circumstances of this case that there is no need to consider the merits of the 5 July 2016 Request and the 8 July 2016 Request and dismiss them as moot.

21. Turning to the merits of the 30 June 2016 Request, we note with respect to the Badreddine Defence's primary request for lifting the suspensive effect of the Appeal that one of the issues on appeal is whether the Trial Chamber erred in law with respect to the applicable standard of proof. As the Badreddine Defence does not seek to withdraw its allegations of error in this regard, we do not find that it would be appropriate to lift the suspension of the trial proceedings for a new assessment by the Trial Chamber without having first ruled on the critical issue of the applicable standard of proof. Furthermore, while the Trial Chamber is ordinarily best placed to make findings of fact and the Appeals Chamber's function is primarily of a corrective nature, we consider that when it comes to deciding whether there is sufficient

⁴⁶ Response to 30 June 2016 Request, para. 16.

⁴⁷ Response to 30 June 2016 Request, para. 23.

⁴⁸ Response to 30 June 2016 Request, paras 24-29. *See also* Addendum to Response to 30 June 2016 Request.

evidence on the record that an accused is dead, as in the present situation, the Appeals Chamber is in as good a position as the Trial Chamber.⁴⁹

22. Finally, because, as developed below, we are sufficiently convinced based on the evidence on the record that Mr Badreddine's death has been proven to the requisite standard, we find that it would not be in the interests of expeditiousness and judicial economy to remit the matter to the Trial Chamber. For these reasons, we dismiss the Badreddine Defence's request to lift the suspension of the trial proceedings and to defer resolution of the Appeal for the purpose of permitting the Trial Chamber to consider the attached New Materials for a renewed consideration of the matter at issue.⁵⁰

23. With regard to the Badreddine Defence's alternative request, we note that the 30 June 2016 Request lacks any submissions as to the admissibility of the New Materials on appeal; not only is the alternative request not articulated as a proper request for additional evidence pursuant to Rule 186 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), but it also fails to discuss any of the requirements for admission set out under this rule. Considering the Badreddine Defence's lack of submissions in its request on issues relevant to admission of the New Materials on appeal, together with the Prosecutor's submissions on their alleged lack of reliability,⁵¹ we consider that we are not in a position to properly assess whether the New Materials presented on appeal could have been a decisive factor in reaching the Impugned Decision, which is the threshold for admission on appeal of evidence unavailable at trial.⁵² Accordingly, we also dismiss the Badreddine Defence's alternative request.

B. Trial Chamber's Request for Access

24. On 1 July 2016, the Trial Chamber filed a request before the Appeals Chamber, seeking access to the New Materials filed confidentially by the Badreddine Defence as annexes to the 30 June 2016 Request.⁵³ Leaving aside the questions of the Trial Chamber's standing and grounds for making this request, we find that the Request for Access is rendered moot by the outcome of the present decision and need not be addressed on its merits.⁵⁴

⁴⁹ Judges Baragwanath and Nsereko dissent from this holding and from the reasoning on which it is based.

⁵⁰ Judges Baragwanath and Nsereko dissent from this holding and from the reasoning on which it is based.

⁵¹ Response to 30 June 2016 Request, paras 24-28.

⁵² See Rule 186 (C), STL RPE.

⁵³ Request for Access, paras 1-2.

⁵⁴ Judge Baragwanath dissents from this holding and from the reasoning on which it is based.

II. Standard of Review

25. The Badreddine Defence contends that the Trial Chamber made errors of both fact and law.⁵⁵

26. The Appeals Chamber has previously adopted the following standard of appellate review applicable to alleged errors of law:

A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law. [...] The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.⁵⁶

27. When reviewing alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness.⁵⁷ The Appeals Chamber will therefore only substitute its own findings for those of the Trial Chamber where it determines that no reasonable trier of fact could have made the impugned finding.⁵⁸ In carrying out this review, the Appeals Chamber must give a margin of deference to, and will not lightly disturb, the Trial Chamber's findings of fact.⁵⁹ Furthermore, the Appeals Chamber will only reverse an erroneous factual finding which has occasioned a miscarriage of justice.⁶⁰ Finally, the Appeals Chamber applies the same standard of reasonableness irrespective of whether the impugned factual finding was based on direct or circumstantial evidence.⁶¹

⁵⁵ Appeal, paras 2, 10-26.

⁵⁶ See, e.g., STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.9, F0007, Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, para. 21; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, para. 19; see also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, F0020, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, para. 10.

⁵⁷ STL, *In the Case Against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, STL-14-05/A/AP, F0028, Public Redacted Version of Judgment on Appeal, 8 March 2016 ("Al Jadeed Appeal Judgment"), para. 15; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal Against Pre-Trial Judge's Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012 ("Prosecutor's Authority Appeal Decision"), para. 5.

⁵⁸ *Al Jadeed* Appeal Judgment, para. 15; Prosecutor's Authority Appeal Decision, para. 5.

⁵⁹ *Al Jadeed* Appeal Judgment, para. 15; Prosecutor's Authority Appeal Decision, para. 5.

⁶⁰ *Al Jadeed* Appeal Judgment, para. 15; Prosecutor's Authority Appeal Decision, para. 5.

⁶¹ *Al Jadeed* Appeal Judgment, para. 16.

III. Merits of the Appeal

28. In its Appeal, the Badreddine Defence contends that the Trial Chamber erred in law and in fact in concluding that sufficient evidence had not been presented to the Trial Chamber to convince it that the death of Mr Badreddine had been proven to the requisite standard.⁶² The Badreddine Defence requests the Appeals Chamber to find that the Trial Chamber erred in ways that invalidate the Impugned Decision, make its own finding that sufficient evidence has been presented to convince it that the death had been proven to the requisite standard, and direct the Trial Chamber to make the necessary orders terminating the proceedings against Mr Badreddine.⁶³ We will first examine the submissions of the Parties and the LRV pertaining to the alleged errors of law before considering the issues pertaining to the assessment of the evidence.

29. At the outset, we note that there is no dispute that, as is the case for other international criminal courts, the Tribunal cannot exercise jurisdiction over a deceased person and must consequently terminate any proceedings against a deceased accused.⁶⁴

A. Whether the Trial Chamber erred in law

30. As recalled above, the Trial Chamber issued its Oral Decision on 1 June 2016, holding by majority that “it d[id] not believe that sufficient evidence ha[d] yet been presented to convince it that the death of Mustafa Amine Badreddine ha[d] been proved to the requisite standard”.⁶⁵ The following day, the Presiding Judge reiterated the ruling but stated that, “for the purposes of [the] written decision on this, [he] would just seek some guidance from the parties and some submissions in relation to what the requisite standard might be”.⁶⁶ He then asked the

⁶² Appeal, paras 2, 10-26.

⁶³ Appeal, para. 31.

⁶⁴ See, e.g., ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Decision Terminating Appellate Proceedings in Relation to Milan Gvero, 7 March 2013, para. 5; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision Relating to Registrar’s Submission Notifying the Demise of Accused Joseph Nzirorera, 12 August 2010, para. 2; ICTY, *Prosecutor v. R. Delić*, IT-04-83-A, Decision on the Outcome of the Proceedings, 29 June 2010, paras 5-8; ICC, *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya, 11 July 2007 (“*Lukwiya* Decision”), p. 4; SCSL, *Prosecutor v. Norman et al.*, 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 13-18; ICTR, *Prosecutor v. Musabyimana*, ICTR-2001-62-1, Order Terminating the Proceedings Against Samuel Musabyimana, 20 February 2003, p. 2. Cf. also ECCC, *Prosecutor v. Nuon et al.*, 002/19-09-2007/ECCC/TC, Termination of the Proceedings Against the Accused Ieng Sary, 14 March 2013, para. 3; James Richardson et al. (eds), *Archbold Criminal Pleading, Evidence & Practice 2016*, 46th ed. (Sweet & Maxwell 2016), s. 3-238; Art. 10, Lebanon, *Code of Criminal Procedure* (which states that public prosecution shall be terminated due to, *inter alia*, the accused’s death).

⁶⁵ Oral Decision, p. 56.

⁶⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 2 June 2016 (“Transcript of 2 June 2016”), p. 34.

Parties to provide submissions “on what the appropriate standard is”.⁶⁷ Counsel for the Defence, the Prosecutor, and the LRV developed oral submissions on the matter and a discussion took place between the Parties, the LRV, and the Judges during the remainder of the hearing that day regarding what the applicable standard was.⁶⁸

31. In its Written Reasons of 7 June 2016, the Trial Chamber stated that:

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.⁶⁹

The Trial Chamber determined the following concerning the standard of proof:

A Chamber must therefore be satisfied to a high standard—although not 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.⁷⁰

The Trial Chamber stated that, at this stage, the majority of Judges was “not yet satisfied that it ha[d] received evidence from which it could safely conclude that the Accused has died”⁷¹ and that it was “not yet satisfied to the high standard required to terminate the proceedings against Mr Badreddine”.⁷² It emphasized that this was an “interim” decision.⁷³

32. Under Grounds A and B of its Appeal, the Badreddine Defence submits that the Impugned Decision should be overturned because the Trial Chamber erred in law by only identifying the requisite standard of proof *ex post facto* and by failing to precisely articulate the requisite standard.⁷⁴ In support of its allegation regarding the *ex post facto* identification of the standard, the Badreddine Defence contends that the Trial Chamber erred in failing to state what the requisite standard was in its Oral Decision and “only appeared to turn its mind to what the requisite standard is when it ‘sought submissions as to its articulation’ the day after the oral decision was delivered”.⁷⁵ The Badreddine Defence avers that the Trial Chamber delivered the Oral Decision “without knowing, or appearing not to know, what standard it should apply when arriving at [its decision]”.⁷⁶ It argues that, consequently, it cannot know what standard the Trial

⁶⁷ Transcript of 2 June 2016, p. 34; *see also id.* at pp. 48, 50.

⁶⁸ Transcript of 2 June 2016, pp. 34-56.

⁶⁹ Written Reasons, para. 31; *see also id.* at paras 33, 35 (referring to the “high standard”).

⁷⁰ Written Reasons, para. 31.

⁷¹ Written Reasons, para. 33.

⁷² Written Reasons, para. 35; *see also id.* at para. 39.

⁷³ Written Reasons, para. 40.

⁷⁴ Appeal, paras 10-16.

⁷⁵ Appeal, para. 10.

⁷⁶ Appeal, para. 10.

Chamber applied when it delivered its Oral Decision.⁷⁷ In its view, the Trial Chamber's failure to direct itself as to the correct standard of proof to be applied is a "serious omission".⁷⁸ The Badreddine Defence adds that there is no evidence that, on 1 June 2016, the Trial Chamber applied the standard that it retroactively articulated in the Written Reasons.⁷⁹

33. With respect to its contention that the Trial Chamber failed in its Written Reasons to precisely articulate the standard applicable to proving an accused's death, the Badreddine Defence submits that such failure "introduced a prejudicial lack of clarity into a feature of the decision-making process which is of the utmost importance".⁸⁰ It argues that the Defence was consequently deprived of the opportunity to focus its submissions on 31 May and 1 June 2016.⁸¹

34. In response, the Prosecutor submits that the Badreddine Defence has not demonstrated that the Trial Chamber erred in adopting the "very standard of proof recommended" by the Badreddine Defence,⁸² that it failed to apply the standard it identified, or that it otherwise erred in its approach.⁸³ He points out that it was common ground among all parties, including the Badreddine Defence, that a high standard of proof, well above a balance of probabilities but not as high as that of beyond reasonable doubt, was appropriate and argues that the Trial Chamber adopted the very standard that the Badreddine Defence proposed.⁸⁴ Emphasizing that the Badreddine Defence has not identified any additional language the Trial Chamber could have used and that the Trial Chamber's approach of not adopting particular wording to describe the standard of proof is not inconsistent with the practice of other international criminal tribunals, the Prosecutor contends that the Badreddine Defence's claim of prejudice is untenable.⁸⁵ He further contends that there is no basis on the record to suggest that the Trial Chamber applied a different standard than the one identified in the Written Reasons and that the Trial Chamber must therefore be presumed to have applied that standard.⁸⁶

35. Finally, the Prosecutor submits that, even if the Appeals Chamber were to consider that the Trial Chamber erred with respect to the standard of proof, it should not deliver a first

⁷⁷ Appeal, para. 10.

⁷⁸ Appeal, para. 11.

⁷⁹ Appeal, para. 12. *See also id.* at para. 13.

⁸⁰ Appeal, para. 14.

⁸¹ Appeal, para. 15.

⁸² Prosecutor Appeal Response, heading B.1. at p. 6.

⁸³ Prosecutor Appeal Response, paras 14-22.

⁸⁴ Prosecutor Appeal Response, paras 3(v), 14-16.

⁸⁵ Prosecutor Appeal Response, paras 16-18.

⁸⁶ Prosecutor Appeal Response, paras 20-22; *See also id.* at para. 3(v).

instance decision on the matter but rather remand the matter to the Trial Chamber “with guidance as to the proper standard and/or its application”.⁸⁷

36. The LRV contends that there are no discernable legal errors in the Impugned Decision and generally concurs with the Prosecutor’s submissions regarding Ground B of the Appeal.⁸⁸ He adds, *inter alia*, that the specific articulation of the requisite standard of proof would only have been necessary had the Trial Chamber departed from the agreed upon standard in the Parties’ submissions or adopted an entirely new standard not previously considered at other tribunals, of which it did neither.⁸⁹

37. As highlighted by the Trial Chamber,⁹⁰ neither the Tribunal’s Statute (“Statute”) nor its Rules specify the standard of proof to which a Chamber must be satisfied of an accused’s death. A review of relevant decisions issued by other international criminal courts also reflects that, in most cases, the evidence of the death of the accused presented to the court was so cogent that there was no need to discuss the applicable standard of proof.⁹¹

38. Regardless, it is indisputable that a Chamber cannot properly determine whether a fact or state of affairs exists without applying the relevant standard of proof to that determination. Having carefully reviewed the relevant transcripts and the Written Reasons, we find merit in the Badreddine Defence’s contention that the Trial Chamber reached its decision on whether or not it was satisfied that the fact of Mr Badreddine’s death had yet been sufficiently proven without knowing which standard of proof it was to apply. The Trial Chamber’s failure to apply any standard in making this factual determination is evidenced in a number of ways.

39. First, the Trial Chamber sought submissions regarding “what the requisite standard might be” *after* deciding the matter and delivering its Oral Decision.⁹² Moreover, the questions and comments from the Trial Chamber’s Judges during the ensuing discussion on the requisite standard of proof also demonstrate that they were unsure of the applicable standard even at this

⁸⁷ Prosecutor Appeal Response, para. 23.

⁸⁸ LRV Appeal Response, paras 2, 3. We recall that the LRV did not seek leave to make submissions on Ground A of the Appeal. *See* F0002, Request of the Legal Representative of Victims for Leave to Respond to the Badreddine Interlocutory Appeal of the “Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings”, 15 June 2016, para. 9.

⁸⁹ LRV Appeal Response, para. 4.

⁹⁰ Written Reasons, para. 24.

⁹¹ *See, e.g., Lukwiya* Decision; *Prosecutor v. Gaddafi et al.*, ICC-01/11-01/11, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, 22 November 2011; ICTY, *Prosecutor v. Bobetko*, IT-02-62-I, Order Terminating Proceedings Against Janko Bobetko, 24 June 2003; *Prosecutor v. Kupreškić et al.*, IT-95-16-PT, Decision on Motion by the Prosecutor for Withdrawal of Indictment Against Stipo Alilović, 23 December 1997.

⁹² Transcript of 2 June 2016, p. 34.

stage, when the decision regarding Mr Badreddine's death had already been made.⁹³ While it is a common and uncontroversial practice for a trial chamber not to set out expressly the standard of proof it applies, especially when delivering an oral decision, the Trial Chamber's subsequent conduct in court evinces that such a standard was lacking in its "mind" when it made its determination.

40. We further observe that, when defining the applicable standard in the Written Reasons, the Trial Chamber made explicit references to the submissions made by the Parties, the LRV, and the HDO after the Oral Decision had been delivered.⁹⁴ This again indicates that, at the time it made the relevant determination, the Trial Chamber had not decided on a particular standard. If such a standard was ever clarified in the Trial Chamber's mind, this was only *after* the Oral Decision had been issued, following the subsequent oral submissions of the parties, at which point the determination regarding Mr Badreddine's death had already been made. In our view, the Trial Chamber's efforts to define the applicable standard of proof in the Written Reasons cannot remedy its failure to apply a standard at the time it took its decision regarding Mr Badreddine's death.

41. We find that the Trial Chamber's failure to apply a standard of proof when making its factual determination regarding Mr Badreddine's death constitutes an error of law which invalidates the Trial Chamber's factual determination and thereby the Impugned Decision.⁹⁵ Accordingly, we consider that the remaining grounds put forward in the Appeal are rendered moot.

42. Nevertheless, the question remains as to which standard of proof applies to the assessment of the evidence regarding Mr Badreddine's death. As noted above, the Tribunal's Statute and Rules do not offer guidance in this regard and the international jurisprudence on the termination of proceedings as a result of an accused's death is also silent on the standard applied in making the relevant factual finding. In the Written Reasons, the Trial Chamber specified that the applicable standard of proof should not be the same standard as that required for a

⁹³ See Transcript of 2 June 2016, pp. 34, 40 ("*Judge Nosworthy*: [...] Is not this search for evidence which is conclusive more consistent with a high standard and the standard of beyond a reasonable doubt rather than any lesser standard to employ?"), 42, 46, 48 ("*Presiding Judge Re*: [...] What is - - is your submission that that is a high standard, and to be satisfied, a Chamber must be satisfied the accused is dead beyond reasonable doubt before it can make a finding. That's the only issue we're interested in at the moment"), 49 ("*Presiding Judge Re*: [...] But the question: Is the theoretical standard which applies to all accused, what is the minimum standard the Court requires to be satisfied a person is dead to withdraw the proceedings. Is it the high standard of reasonable doubt in all circumstances, or is it something lesser?"), 50 ("*Presiding Judge Re*: [...] If we articulate a standard, what is it? Is it the high standard of beyond reasonable doubt which is necessary to convict an accused, or is it on balance of probabilities, or is it something lesser?"), 51.

⁹⁴ Written Reasons, paras 19-23, 31.

⁹⁵ Judge Baragwanath dissents from this holding and from the reasoning on which it is based.

conviction.⁹⁶ We agree with the Trial Chamber that, because the fact of an accused's death is not a fact going to the guilt of the accused, this need not be proven beyond reasonable doubt.⁹⁷ Other than stating that "a high standard of proof is required"⁹⁸ and that it could not "safely conclude" that the accused had died,⁹⁹ the Trial Chamber did not further articulate the applicable standard. While we understand the difficulties inherent to precisely articulating a standard of proof for the death of an accused, we find it necessary in the circumstances of this case to consider the matter further and clarify the "requisite standard". The term "high standard of proof" used by the Trial Chamber is indeed vague and does not offer any guidance.

43. Having looked beyond the jurisprudence of international criminal courts relating to an accused's death and examined the general approach to standards of proof in international criminal law, we observe that the only standard of general application clearly articulated by international criminal courts for the assessment of evidence of facts not going to the guilt of the accused is the standard of preponderance of the evidence, also known as the "balance of probabilities" standard. Significantly, we note that this standard was applied by Judges of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") when assessing an accused's fitness to stand trial in order to determine whether or not proceedings should be terminated,¹⁰⁰ as well as when deciding whether they were satisfied that witnesses had died.¹⁰¹

44. The balance of probabilities standard requires satisfaction that, more probably than not, what is asserted is true.¹⁰² We clarify that this standard is not to be interpreted in terms of mere quantitative or statistical probabilities, but that it requires the formation of a conviction in the truth of the fact at issue based on the evidence specific to the particular case.¹⁰³ While the

⁹⁶ See Written Reasons, para. 31.

⁹⁷ Written Reasons, para. 31.

⁹⁸ Written Reasons, para. 31; *see also id.* at paras 33, 35.

⁹⁹ Written Reasons, para. 33.

¹⁰⁰ ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Consolidated Decision on the Continuation of Proceedings, 26 October 2015, para. 42; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013, para. 21; ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 38. *Cf. also* ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 56.

¹⁰¹ ICTY, *Prosecutor v. Orić*, IT-03-68-T, Decision on Prosecution's Motion for the Admission of Written Statements of Witnesses Veseljko Bogičević, Novka Božić, and Miladin Bogdanović, 2 November 2004, p. 3; ICTY, *Prosecutor v. S. Milošević*, IT-02-54-T, Decision on Prosecution Motion for Admission of Written Statements of Deceased Witnesses Ivan Rastija, Boško Brkić, and Stana Albert, 9 December 2003, p. 3.

¹⁰² See, e.g., ICTR, *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, para. 294; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("*Kvočka et al.* Appeal Decision"), para. 12; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 590.

¹⁰³ The "preponderance of the evidence" standard is defined as follows in a respected source of jury instructions in the United States of America (*see* E.H. Devitt *et al.*, *Federal Jury Practice and Instructions (Civil)*, 4th ed. (West Publishing Co. 1987), s. 72.01 at 32:

standard of balance of probabilities does not require the same degree of conviction as the beyond reasonable doubt standard applicable to the facts on which a finding of guilt is based, it nonetheless still requires sufficiently convincing evidence to satisfy the judge that the matter is proven. In this regard, we note with approval the following clarification of this standard by the ICTY Appeals Chamber:

Satisfaction that what is asserted is more probably true than not will in turn depend on the nature and the consequences of the matter to be proved. The more serious the matter asserted, or the more serious the consequences flowing from a particular finding, the more difficult it will be to satisfy the relevant tribunal that what is asserted is more probably true than not.¹⁰⁴

45. In the present case, where the fact at issue does not go to the guilt of the accused, we find it appropriate to apply the balance of probabilities standard, which allows judges to take into account the nature of the matter to be proven and the consequences flowing from the particular finding of fact, when deciding whether or not they are sufficiently convinced as to the existence of the fact at issue. We therefore consider that the fact of Mr Badreddine's death should be proven on the balance of probabilities. Like any other fact, death can be proven by any relevant evidence, circumstantial or direct, as long as it has probative value. We observe that this approach is not inconsistent with Lebanese law, in which judges assess the evidence with a view

To 'establish by a preponderance of the evidence' means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and *produces in your minds belief that what is sought to be proved is more likely true than not true*. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

See also Australia, High Court of Australia, *Briginshaw v. Briginshaw*, 60 C.L.R. 336 (30 June 1938), p. 343 (in the context of a discussion on the beyond reasonable doubt and balance of probabilities standards):

There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty.

See also id. at p. 361:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

¹⁰⁴ *Kvočka et al.* Appeal Decision, para. 12. *See also* ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998, paras 602-603.

to arriving at a personal conviction¹⁰⁵ and where facts, such as death of the accused, may be proven by all means.¹⁰⁶

46. Having determined that the Trial Chamber committed an error of law that invalidates the Impugned Decision and clarified the applicable standard of proof, we are now left to decide whether to remit the matter for a new determination by the Trial Chamber in accordance with the proper standard or to determine the matter ourselves in the exercise of our power to revise the Impugned Decision.¹⁰⁷

47. Because of its organic familiarity with the day-to-day conduct of the proceedings, the evidence, and the practical demands of the case, the Trial Chamber is usually best placed to make factual determinations and decisions on the conduct of the proceedings. However, as held above, we consider that when it comes to deciding whether there is sufficient evidence that an accused is dead, as in the present situation, the Appeals Chamber is in as good a position as the Trial Chamber. Furthermore, we are of the opinion that the significance of the question as to whether the Tribunal continues to exercise jurisdiction over Mr Badreddine requires that the matter be decided as expeditiously as possible. We are also concerned about the impact that the postponement of ruling on the matter may have on the expeditiousness of the proceedings.

48. We therefore conclude that, in the particular circumstances of this case, it is in the interests of justice that we decide ourselves whether or not we are sufficiently convinced that Mr Badreddine's death is proven on the balance of probabilities.¹⁰⁸

B. Assessment of the evidence under the correct legal standard

49. Applying the standard of proof identified above and taking into consideration the relevant submissions made by the Parties and the LRV on the probative value of the evidence, the Appeals Chamber will now assess the relevant evidence on the record to determine whether it is itself sufficiently convinced that the death of Mr Badreddine has been proven.

¹⁰⁵ Art. 179, Lebanon, *Code of Criminal Procedure* ("The Judge shall assess the evidence with a view to arriving at a firm personal conviction."). Cf. also Art. 427, France, *Code of Criminal Procedure* ("Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction.").

¹⁰⁶ See, e.g., Lebanon, Court of Criminal Cassation, 6th Chamber, Decision No. 38/99 (23 February 1999); Lebanon, Beirut Civil Appeal Court, 9th Chamber, Decision No. 1160/2009 (27 August 2009); Ibrahim Najjar, *Les transmissions à titre gratuit- Les successions*, (Librairie du Liban 1983), p. 71 ("La mort est un fait matériel qu'on peut établir par tous moyens de preuve."); Youssef Nohra, *Al-Irth* [Succession], 4th ed. (Sader 2000), p. 28. Cf. also France, Court of Cassation, 2nd Chamber, (24 December 1919), DP, 1920, I, p. 12.

¹⁰⁷ See Art. 26 (2), STL Statute.

¹⁰⁸ Judges Baragwanath and Nsereko dissent from this holding and from the reasoning on which it is based.

50. It is well established that a chamber is required to carry out a holistic evaluation and weighing of all the evidence in relation to the fact at issue,¹⁰⁹ rather than applying the relevant standard of proof to individual pieces of evidence in a piecemeal manner.¹¹⁰ This holistic approach is necessary because the apparent quality of an individual piece of evidence, viewed in isolation, may be augmented or undermined when considered in the context of other relevant pieces of evidence, depending on whether it is corroborated or contradicted by this other evidence.¹¹¹ However, a chamber need not refer to every piece of evidence on the record in making its factual determinations, as there is a presumption that the chamber has evaluated all the evidence presented to it, which stands so long as there is no indication that it completely disregarded any particular piece of evidence.¹¹²

51. On 31 May and 1 June 2016, the Prosecutor and the Badreddine Defence tendered before the Trial Chamber circumstantial evidence from various sources in relation to Mr Badreddine's reported death. The circumstantial evidence presented can be summarized as follows:

(i) Death announcement

- 1) Obituary notice by Hezbollah and the family of Mr Badreddine announcing his death and setting out a time and place for condolences;¹¹³
- 2) *Communiqué* from Hezbollah, reported by the National News Agency of Lebanon, on 13 May 2016, announcing the death of Mr Badreddine and the cause of death, as well as setting out a time and place for condolences;¹¹⁴
- 3) Statement by the Vice President of the Shiite Islamic Superior Council, Mr Abdel Al-Amir Kabalan, announcing Mr Badreddine's death, published on the Beirut Observer website;¹¹⁵

¹⁰⁹ *Al Jadeed* Appeal Judgment, para. 56.

¹¹⁰ See, e.g., ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, Judgement, 5 May 2009 (“*Mrkšić and Šljivančanin* Appeal Judgment”), para. 217; ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Judgement, 16 October 2007 (“*Halilović* Appeal Judgment”), para. 128; ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006, para. 174.

¹¹¹ *Al Jadeed* Appeal Judgment, para. 56.

¹¹² See, e.g., ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para. 1308; *Mrkšić and Šljivančanin* Appeal Judgment, para. 217; *Halilović* Appeal Judgment, para. 121; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 23. See also *Al Jadeed* Appeal Judgment, paras 56, 76, fn. 169.

¹¹³ Exhibits 2D00248, 2D00248.1.

¹¹⁴ Exhibit 2D00249, referring to National News Agency of Lebanon, <http://nna-leb.gov.lb/ar>.

¹¹⁵ Exhibit 2D00250.

- 4) Statement of Hezbollah published on the Al-Manar website, dated 13 May 2016, announcing the death of Mr Badreddine and the cause of death, as well as setting a time and place for condolences;¹¹⁶
- 5) Excerpts of the Al-Manar television broadcast of 13 May 2016 (ERN 60317969) containing a Hezbollah statement about Mr Badreddine's death, and a news ticker reporting that the President of the Lebanese Parliament, Mr Nabih Berri, called the Secretary-General of Hezbollah, Mr Sayyed Hassan Nasrallah, to offer his condolences;¹¹⁷
- 6) Hezbollah statement announcing on 14 May 2016 the results of its investigation into Mr Badreddine's death, published on the Media Relations website.¹¹⁸

(ii) Funeral ceremony of 13 May 2016

- 1) Video excerpt of the Al-Manar television broadcast of 13 May 2016 containing footage of Mr Badreddine's funeral ceremony in Beirut and a speech by Sheikh Naim Qassem, the Deputy Secretary-General of Hezbollah;¹¹⁹
- 2) Video excerpt of the Al-Manar television broadcast of 13 May 2016 containing footage of Mr Badreddine's funeral ceremony in Beirut with a prayer conducted by Sheikh Naim Qassem in front of the coffin;¹²⁰
- 3) Video excerpt of the Al-Manar television broadcast of 13 May 2016 containing footage of Mr Badreddine's funeral procession in Beirut with his brothers, Adnan and Mohammed Badreddine;¹²¹
- 4) Video excerpt of the Al-Manar television broadcast of 13 May 2016 containing footage of Mr Badreddine's funeral procession in Beirut with crowds outside the *Rawdat Al Shahidan* cemetery.¹²²

(iii) Condolence ceremonies

- 1) 13 May 2016, Beirut: Several video excerpts of the Al-Manar television broadcast of a condolence ceremony held for Mr Badreddine at the *Imam Mujtaba* Complex in

¹¹⁶ Exhibits P00834, P00835.

¹¹⁷ Exhibits P00836, P00836.1, P00836.2, P00837.

¹¹⁸ Exhibits P00854, P00854.1, P00855.

¹¹⁹ Exhibits P00850, P00850.1.

¹²⁰ Exhibits P00851, P00851.1.

¹²¹ Exhibit P00852.

¹²² Exhibit P00853.

Beirut, with interviews of the Grand Mufti, Mr Jaafari Sheikh Ahmad Kabalan, the Syrian Ambassador to Lebanon, and other politicians;¹²³ a video excerpt of the Al-Manar television broadcast of 13 May 2016 indicating that the Iranian Foreign Minister sent a letter of condolence to the Secretary-General of Hezbollah, Mr Sayyed Hassan Nasrallah;¹²⁴ Investigators Notes identifying the presence at this ceremony of family members of Mr Badreddine, religious authorities, current and former Lebanese Members of Parliament (“MPs”), politicians, foreign dignitaries, personnel from the Lebanese Internal Security Forces, and Hezbollah officials;¹²⁵

- 2) 14 May 2016, Beirut: Video excerpt of the Al-Manar television broadcast of 14 May 2016 containing footage of Iranian officials visiting Mr Badreddine’s grave site at the *Rawdat Al Shahidan* cemetery, with an interview with the Deputy Iranian Foreign Minister;¹²⁶
- 3) 18 May 2016, Damascus: Media coverage of a ceremony held for Mr Badreddine at the *Sayyidah Zaynab* mosque in Damascus, Syrian Arab Republic, dated 18 May 2016;¹²⁷
- 4) 20 May 2016, Beirut: DVD containing Al-Manar television broadcast of a ceremony held in Beirut on 20 May 2016 for the one-week memorial of Mr Badreddine’s death;¹²⁸ and Investigators Notes identifying the presence at this ceremony of family members of Mr Badreddine, the Lebanese Minister of Finance, Lebanese MPs, the Syrian Ambassador to Lebanon, an Iranian parliamentarian, and Hezbollah officials;¹²⁹
- 5) 25 May 2016, Tehran: Investigators Notes referring to Turkish and Iranian news articles covering a ceremony held in Tehran, Islamic Republic of Iran, commemorating Mr Badreddine, which was attended by the son and brother of

¹²³ Exhibits P00841, P00841.1, P00842, P00842.1, P00843, P00843.1, P00844, P00844.1, P00845, P00845.1.

¹²⁴ Exhibits P00846, P00846.1.

¹²⁵ Exhibits P00839, P00847, referring to Ali Mustafa Badreddine, son of Mustafa Amine Badreddine and Adnan and Hassan Amine Badreddine, brothers of Mustafa Amine Badreddine; Exhibit P00848, a photograph described in Investigator Note P00847, showing Adnan Badreddine, brother of Mustafa Amine Badreddine, in grief next to his brother’s picture; Exhibit P00849, a photograph described in Investigator Note P00847, showing Ali Mustafa Badreddine, the son of Mustafa Amine Badreddine, receiving condolences from Hezbollah senior officials.

¹²⁶ Exhibits P00856, P00856.1. *See also* Exhibit P00857, an Investigator Note which describes an article from AhlulBayt news website (a News Agency based in Qom, Iran), dated 15 May 2016, containing text and photographs relating to Iranian officials paying tribute to Mr Badreddine.

¹²⁷ Exhibits P00858, P00858.1, P00859, P00860, P00861, P00864.

¹²⁸ Exhibits P00862, P00862.1, P00863.

¹²⁹ Exhibit P00863.

Mr Badreddine and at which Imam Khamenei presented his ring to Mr Badreddine's son, Ali Mustafa Badreddine.¹³⁰

52. We note that the entirety of the evidence submitted by the Parties and admitted by the Trial Chamber points to the death of Mr Badreddine; not a single piece of evidence points to the contrary. In addition, no submission has been made which challenges the veracity of the events described in the admitted evidence or which questions the reliability of the exhibits. Furthermore, there is no evidence on the record suggesting a false claim of death.

53. Having holistically reviewed the evidence on the record and considering the precise succession of events (from the announcement of death to the funerals and the condolence ceremonies), the evidence's concordance, and the fact that it was not disputed, we are convinced that Mr Badreddine's death has been sufficiently proven on the balance of probabilities.¹³¹ Recalling that the Tribunal cannot exercise jurisdiction over deceased persons, we therefore find it appropriate to direct the Trial Chamber to terminate the proceedings against Mr Badreddine, without prejudice to resume the proceedings should evidence that he is alive be adduced in the future.

¹³⁰ Exhibits P00864, P00865.

¹³¹ Judges Baragwanath and Nsereko dissent from this holding.

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, Judge Baragwanath and Judge Nsereko dissenting;

DISMISSES as moot the 5 July 2016 Request and 8 July 2016 Request;

DISMISSES the 30 June 2016 Request;

DISMISSES as moot the Trial Chamber's Request for Access;

GRANTS the Appeal and **FINDS** that sufficient evidence has been presented to convince the Appeals Chamber that the death of Mr Mustafa Amine Badreddine has been proven to the requisite standard;

SETS ASIDE the Impugned Decision; and

DIRECTS the Trial Chamber to terminate the proceedings against Mr Mustafa Amine Badreddine without prejudice to resume the proceedings should evidence that he is alive be adduced in the future.

Judge Baragwanath's dissenting opinion will follow.

Judge Nsereko appends a dissenting opinion.

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

Dated 11 July 2016

Leidschendam, the Netherlands



Judge Ivana Hrdličková
Presiding Judge

DISSENTING OPINION OF
JUDGE DANIEL DAVID NTANDA NSEREKO

I. Introduction

1. I agree with the majority that the Trial Chamber erred in law in failing to apply any standard of proof in making its factual determination on Mr Badreddine's alleged death. I also agree with the majority that the requisite standard for proving the death of an accused is the 'balance of probabilities'. However, I am also of the view that the balance of probabilities standard allows a fact-finder to take into account the seriousness of the matter to be proven and the consequences flowing from the particular finding of fact when deciding whether or not they are convinced as to the existence of the fact at issue. Therefore, given the serious consequences of the fact at issue in this Appeal case, I am of the opinion that a chamber would have to be satisfied to a high degree of likelihood that Mr Badreddine is deceased, which would in turn require the presentation of cogent evidence of death. On the assessment of the evidence, I respectfully disagree with the majority's decision not to remit the factual determination back to the Trial Chamber. In any event, I am not satisfied that the evidence on the record proves Mr Badreddine's alleged death to the high degree of likelihood required to enable a Chamber to terminate proceedings against him.

II. Discussion

A. Preliminary Issues

2. Regarding the Badreddine Defence 30 June 2016 Request, I would grant the Badreddine Defence's primary request¹ to lift the suspensive effect of the Appeal, granted on 21 June 2016, to allow the Trial Chamber to consider new material. Regarding their alternative request,² I agree with the majority that it should be rejected.³ The Badreddine Defence did not comply with the procedure laid down under Rule 186. Additionally, as the majority opine, the material sought to be admitted into evidence may not be reliable for reasons indicated by the Prosecutor.⁴ I also agree with the majority that the Trial Chamber's request for access to the additional documents put forward on appeal by the Badreddine Defence should be dismissed as moot.⁵

¹ 30 June 2016 Request, para. 19.

² 30 June 2016 Request, para. 19.

³ Majority Decision, para. 23.

⁴ Response to 30 June 2016 Request, paras 18-25.

⁵ Majority Decision, para. 24.

B. Merits of the Appeal

3. In its appeal, the Badreddine Defence contends that the Trial Chamber erred both in law and in fact in concluding that sufficient evidence had not been presented to the Trial Chamber to convince it that the death of Mr Badreddine had been proven to the requisite standard.⁶ The Badreddine Defence requests that the Appeals Chamber find that the Trial Chamber erred in ways that invalidate the Impugned Decision, make its own finding that sufficient evidence has been presented to convince it that the death had been proved to the requisite standard, and direct the Trial Chamber to make the necessary orders terminating the proceedings against Mr Badreddine.⁷ I will first examine the alleged errors of law, before turning to the course of action consequent upon my conclusion on this issue.

1. Whether the Trial Chamber erred in law

4. I agree with the majority that a Chamber cannot properly determine whether a fact or state of affairs exists without applying the relevant standard of proof to the evidence before it.⁸ In my view, a standard of proof is an indispensable tool in the hands of the fact-finder. It guides the fact-finder as to the required degree or level of conviction in his or her mind as to the truthfulness of the assertions made before him or her. It serves to eliminate as much as possible arbitrariness in the fact-finding process and to infuse some degree of transparency and predictability into the process.

5. Having carefully reviewed the relevant transcripts and the Written Reasons, I agree with the majority that the Trial Chamber reached its decision on whether or not it was satisfied that the fact of Mr Badreddine's death had yet been sufficiently proven without certainty as to what standard of proof it was applying.

6. In this regard, I note that on 2 June 2016, a day *after* the Chamber's Oral Decision, the Presiding Judge sought "some guidance from the Parties and some submissions in relation to what the requisite standard might be [...]".⁹ The questions and comments from the Trial Chamber's Judges during the ensuing discussion¹⁰ also demonstrate that the Judges were unsure of the applicable standard even at this stage. Yet the decision regarding Mr Badreddine's death had already been taken. While it is a common practice for a trial chamber not to set out in full the standard of proof it applies, especially when delivering an oral decision, in this case, one

⁶ Appeal, paras 2, 10-26, 31.

⁷ Appeal, para. 31.

⁸ Majority Decision, para. 38.

⁹ Transcript of 2 June 2016, p. 34.

¹⁰ Transcript of 2 June 2016, p. 34-56.

cannot tell whether, at the time the Trial Chamber made the Oral Decision it was guided by any standard of proof, and if so what standard. This was an error.

7. I furthermore agree with the majority's conclusions regarding the significance of the Trial Chamber referring, in its Written Reasons,¹¹ to the submissions regarding the applicable standard of proof which were made after the Oral Decision had been delivered.¹² In particular, I share with the majority's conclusion that this indicates that the Trial Chamber did not have any standard in mind when making the relevant factual determination regarding Mr Badreddine's death (namely when the Oral Decision was issued), and that its subsequent efforts to define this standard in the Written Reasons cannot remedy this legal error.¹³ Thus, given the importance I attach to the standard of proof to the fact-finding process, I am constrained to hold that the error committed by the Trial Chamber was an error of law which invalidates the Impugned Decision.

8. What then is the standard that should be applied in assessing the evidence regarding Mr Badreddine's death? As noted by the majority,¹⁴ the Tribunal's Statute and Rules do not offer guidance in this regard. The international jurisprudence on the termination of proceedings as a result of an accused's death is also silent on the standard applied in making the relevant factual finding. In the Written Reasons, the Trial Chamber stated that the applicable standard of proof should not be the same standard as that required for a conviction.¹⁵ I agree with the Trial Chamber that we need not use the 'beyond reasonable doubt' standard, since we are not here dealing with the issue of the accused's guilt, but rather the issue of whether or not he is deceased. However, other than stating that "a high standard of proof is required"¹⁶ and that it could not "safely conclude" that the accused had died,¹⁷ the Trial Chamber did not find it necessary to precisely articulate the standard.¹⁸

9. The majority have proposed the application of the civil standard of proof on the balance of probabilities, saying that it is the only standard clearly articulated by international criminal courts for the assessment of evidence of facts not going to the guilt of the accused.¹⁹ This standard requires satisfaction that, more probably than not, what is asserted is true.²⁰ As the

¹¹ Written Reasons, paras 19-23, 31.

¹² Majority Decision, para. 40.

¹³ Majority Decision, para. 40.

¹⁴ Majority Decision, para. 37.

¹⁵ Written Reasons, para. 31.

¹⁶ Written Reasons, para. 31.

¹⁷ Written Reasons, para. 33.

¹⁸ Written Reasons, para. 31.

¹⁹ Majority Decision, para. 43.

²⁰ Majority Decision, para. 44.

question of whether Mr Badreddine has died is not a fact going to his guilt, they suggest that it is appropriate to apply this standard when assessing the relevant evidence.

10. While I agree with the majority's suggestion, I also note that, given the serious consequences of a finding that Mr Badreddine is deceased, I also agree with the Trial Chamber and *all* the Parties that the applicable standard is not an unqualified balance of probabilities standard, namely 51% more likely than not that he is deceased. Rather, a chamber must be satisfied to a high degree of likelihood that he is deceased, commensurate with the seriousness of such a finding and the consequent termination of proceedings against him.²¹ In my view, this high degree of likelihood is within the scope of the balance or probabilities standard, as explained by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Kvočka* case cited in the majority decision.²²

11. A finding of fact that Mr Badreddine is deceased has serious consequences. It would result in the termination of proceedings against a person who the Pre-Trial Judge has found that a *prima facie* case exists. Further, the victims in the case would be deprived of the opportunity to seek justice in the form of reparations, which they would be able to do in the event that the trial concludes in a conviction. In light of these serious consequences, I am of the opinion that a chamber must be satisfied to a high degree of likelihood that Mr Badreddine is deceased. To attain this level of satisfaction would in turn require the presentation of credible and cogent evidence of death.

12. Having determined that the Trial Chamber committed an error of law that invalidates its decision,²³ a finding with which I agree, the majority have decided that the Appeals Chamber would assume the task of determining whether Mr Badreddine is deceased,²⁴ applying the clarified standard of proof.²⁵ The justification for this course is, principally, the need for expeditiousness.²⁶ I disagree with this decision.

13. I agree with the Prosecutor's submission that the Appeals Chamber should not deliver a first instance decision on this matter, but rather remand it back to Trial Chamber with guidance as to the proper standard it should apply.²⁷ In my view, this is the normal and proper course to

²¹ See, e.g., United Kingdom, Court of Appeal of England and Wales, *Bater v. Bater* [1950] 2 All E.R. 458, p. 459; Australia, High Court of Australia, *Briginshaw v. Briginshaw*, 60 C.L.R. 336 (30 June 1938).

²² Majority Decision, para. 45.

²³ Majority Decision, paras 41.

²⁴ Majority Decision, paras 46-47.

²⁵ Majority Decision, paras 46-47.

²⁶ Majority Decision, para. 47.

²⁷ Prosecutor Appeal Response, para. 23.

follow.²⁸ Fact-finding is the Trial Chamber's primary role; the Appeals Chamber's principal role is only corrective.²⁹ In the absence of exceptional circumstances, the Appeals Chamber should accord the Trial Chamber the deference that it is owed and refer the case back to the latter for reassessment of the facts. This course will enable the Trial Chamber to hear, assess and weigh the evidence already presented and, in the circumstances of this case, any anticipated further evidence from the Government of Lebanon, arising from the Lebanese Prosecutor-General's ongoing investigations.³⁰ While making its Oral Decision, the Trial Chamber emphasized that the Decision was an interim one. It stated: "The Trial Chamber will review any additional material and re-evaluate the material already submitted in due course."³¹ It reiterated this point in its Written Reasons.³² The Trial Chamber should be allowed to complete the task it already began. I disagree with the majority that the Appeals Chamber is in as good a position as the Trial Chamber.³³ Due to the organic familiarity with the case, the Trial Chamber is considerably more suited to accomplishing this task than the Appeals Chamber. I discern no exceptional circumstance for the Appeals Chamber that warrants a usurpation of the Trial Chamber's function. The principal reason advanced in the majority opinion for the Appeals Chamber to take over the Trial Chamber's function is the need for expeditiousness.³⁴ In this respect, and in the circumstances of this case, the only "advantage" that the Appeals Chamber has over the Trial Chamber, is that it has performed the task without oral submissions from the Parties. While expeditiousness is good, justice is better.

14. I therefore find it appropriate, in the circumstances of this case, to remit the matter to the Trial Chamber for determining anew whether it is satisfied, on the basis of the evidence on the record and any possible new evidence, that Mr Badreddine's death is proven in accordance with the applicable standard articulated above.

²⁸ ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-AR65.4, Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008, para. 69. See also ICTR, *Karemera et al. v. Prosecutor*, ICTR-98-44-AR65, Decision on Matthieu Ndirumpatse's Appeal Against Trial Chamber Decision Denying Provisional Release, 7 April 2009, para. 16.

²⁹ *Al Jadeed* Appeal Judgment, para 15; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-AR65.4, Judgment, 9 December 2015, para. 19; ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12 A, Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II Entitled "Judgment Pursuant to Article 74 of the Statute", 7 April 2015, para. 23; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, 26 September 2013, para. 26; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgment, 14 December 2015, para. 32.

³⁰ Transcript of 1 June 2016, p. 56.

³¹ Transcript of 1 June 2016, p. 56.

³² Written Reasons, para. 40.

³³ Written Reasons, para. 21.

³⁴ Majority Decision, para. 47.

15. However, as the majority has decided that the Appeals Chamber should make the factual assessment of the facts itself, I do accordingly make my assessment, notwithstanding my conclusion that this task should have been left to the Trial Chamber.

2. Assessment of the evidence under the correct legal standard

16. Applying the correct legal standard identified above, I will now assess the relevant evidence on the record to determine whether I am convinced that the death of Mr Badreddine has been proven.

17. Regarding the assessment of the evidence on the record, I agree with the majority's view that it is well established that a Chamber is required to carry out a holistic evaluation and weigh all the evidence in relation to the fact at issue, rather than applying the relevant standard of proof to individual evidence in a piecemeal manner.³⁵ This is the approach I am following in assessing the evidence on the record.

18. From the outset, I note that the averment that Mr Badreddine is deceased is based solely on circumstantial evidence. I understand circumstantial evidence to be "evidence of circumstances surrounding an event [...] from which a fact in issue may reasonably be inferred".³⁶ Having assessed the totality of the evidence on the record, I have concluded that there is no such evidence from which a reasonable inference of Mr Badreddine's death could be made. First, I note that there is no evidence on the record from anyone who was present and witnessed the alleged death; alternatively, there is no evidence admitted in the record of a medical officer or government official who, though not present at the scene or time of the death, saw and examined the body and identified it as that of Mr Badreddine and advised that he was deceased in the form of a medical report on the basis of which a death certificate could be issued. Nor is there any evidence from any other person who saw the body, either before or after the funeral, and was able to identify it as that of Mr Badreddine. On this point, Mr Cameron, Senior Trial Counsel of the Office of the Prosecutor, pointedly told the Trial Chamber:

So we have no evidence as to the circumstances of the body being transported back or anybody who has viewed the body, and we asked for such evidence of the prosecutor-general. We have not received anything of that nature [...] it's something that you may take into account in considering the entirety of the evidence.³⁷

19. There is also no evidence on the record of the circumstances of the alleged death, such as other deaths or injuries resulting from the same incident, if any, or the manner or cause of

³⁵ Majority Decision, para. 50.

³⁶ ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004, para. 35.

³⁷ Transcript of 1 June 2016, p. 84.

Mr Badreddine's alleged death; there are no photographs of the scene of the occurrence or of the body; there is also no evidence of any DNA analysis which could prove the death.

20. The only information that Counsel for Mr Badreddine adduced that came close to addressing the issue of whether Mr Baddreddine was actually deceased, was a statement by Mr Abel El Amir Qabalan, Vice President of the Superior Islamic Shi'ite Council, in which he announced the death and offered condolences.³⁸ Counsel for Mr Badreddine asserted before the Trial Chamber that this statement was a declaration of death with legal effect. He stated:

I would like to clarify the Mufti has the status and role of judge. He's a judge. So his decision, what he says, what he states, has legal force, has judicial force [...] ³⁹

21. Counsel offered no authority to substantiate this assertion. When Counsel was later asked by the Presiding Judge to tell the Chamber the kind of information Mr Qabalan relied on to make the declaration or whether he knew Mr Badreddine, Counsel stated, *inter alia*,

It strikes me that Mr Kablan [*sic*] would never have made a declaration such as this if he hadn't checked and if he hadn't known and if he hadn't been certain of the death.⁴⁰

Counsel continued to say:

Now I am not an investigator to establish when he saw him, but everything suggests by virtue of this statement that he made – I mean, this is a high-ranking official. It's not possible that he could have lied.⁴¹

When the Trial Chamber asked what information would be provided to the Vice-Chairman in the normal course in order for him to make a declaration of death, counsel for Mr Badreddine Responded:

Your Honour, I'm not privy to what the vice-president does. I'm not his registrar, I'm not his deputy, I'm not his assistant, and I don't even know the man. So the internal rules specific to the Muslim Shiite community are unknown to me.⁴²

22. In the Appeal, the Badreddine Defence repeats the assertion that "when the Jaafarite Grand Mufti made his statements on 13 May 2016, he must have been certain of Mr Badreddine's death".⁴³ It further asserts that because "a significant proportion of the Lebanese population" would accept the Mufti's pronouncements without question, "it can be

³⁸ Exhibit 2D00250.

³⁹ Transcript of 1 June 2016, p. 12.

⁴⁰ Transcript of 1 June 2016, p. 15.

⁴¹ Transcript of 1 June 2016, p. 15.

⁴² Transcript of 1 June 2016, p. 9.

⁴³ Appeal, para. 21.

strongly inferred therefore that he must have had first-hand knowledge of the death of Mr Badreddine as opposed to a mere belief that he was dead”.⁴⁴

23. Also revealing are the following interactions between some Trial Chamber judges and counsel for Mr Badreddine. Judge Lettieri asked Counsel:

How can you consider that hearsay evidence and not formal evidence can replace proof, which is important for these proceedings to go ahead?⁴⁵

Counsel for Mr Badreddine responded:

... I also said that you have the proof, because it is the relatives who announced the death of Mr Badreddine, and we have seen all three brothers standing behind the casket who accepted and recognized the demise of their brother.⁴⁶

Judge Akoum asked Counsel:

Mr Korkmaz.... my question to you is the following: Do you agree with me that the statement that was made by the deputy, the president of the Higher Shia Council and the Jaafarite Mufti in the presence of Mustafa Badreddine’s son and brothers and in the presence of a large number of Lebanese who represent political and religious figures, especially from the Shia community, don’t you consider this to be sufficient to say for sure that Mr. Badreddine has passed away without the need for further evidence?⁴⁷

Counsel for Mr Badreddine responded:

Yes, Your Honour, without any doubt.⁴⁸

24. In my view, these assertions by Counsel are not only devoid of evidential value, since Counsel was not a witness, and unsubstantiated by evidence, but are sheer speculation. Courts of law do not act on speculation, but on proven facts or evidence. As the Appeals Chamber of the International Criminal Court had occasion to say:

It is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.⁴⁹

⁴⁴ Appeal para. 23.

⁴⁵ Transcript of 1 June 2016, p. 17.

⁴⁶ Transcript of 1 June 2016, p. 18.

⁴⁷ Transcript of 1 June 2016, pp. 54-55.

⁴⁸ Transcript of 1 June 2016, p. 55.

⁴⁹ ICC, *Prosecutor v. Kony et al.*, ICC-02/04-179 (OA2), Judgment on the Appeals of the Defence Against the Decisions Entitled ‘Decision on Victims’ Application for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II, 23 February 2009, para. 36.

25. The only evidence available on the record consists of: death announcements and related statements by Hezbollah and by the Badreddine family, a funeral ceremony, and condolence ceremonies at various locations in Beirut, Damascus and Iran. These events are reflected in listed exhibits in paragraph 51 of the Majority Opinion. Before I can accept these exhibits as circumstantial evidence from which Mr Badreddine's death can be inferred, I must be convinced that they are capable of independently corroborating each other on the crucial issue of Mr Badreddine's actual death.

26. I am not persuaded that the exhibits can corroborate each other. This is because none of them is based on an independent source of information, save that they were aired by different media outlets. All of them appear to arise from one source: the Hezbollah announcements of Mr Badreddine's death. They merely replicate the announcements. The fact that the persons involved in the events reflected in the exhibits apparently believe the announcements as truthful does not render them so. The announcements are not corroborated by any iota of independent evidence, and they therefore cannot by themselves be taken as proof of the alleged death. I agree with the submissions of the Legal Representative of Victims that the listed exhibits are "*post facto* indicators of a communally held **belief** of death",⁵⁰ but are not conclusive proof of it. As indicated in paragraph 24 above, courts do not act on mere personal beliefs, however widely held, but on proven facts. In my view, the totality of the exhibits has little or no weight. They are not of a quality that, taken together, may turn "weightless feathers", which all the listed exhibits are, into a millstone of probative evidence.⁵¹

27. I conclude that the Trial Chamber did not err when it determined that it did not believe that sufficient evidence had yet been presented to convince it that the death of Mr Badreddine has been proved to the requisite standard. Hence, it is inappropriate to terminate the proceedings against him.

28. Finally, I note that the Government of Lebanon has to date declined to issue an official death certificate. As indicated at paragraph 19 of the majority opinion, the Government refused to execute a death certificate presented to it, because "the death certificate suffers from certain deficiencies which have prevented the Lebanese authorities from legally determining that Mr Badreddine is deceased". I also note that, through the Prosecutor-General, the principal arm

⁵⁰ LRV Appeal Response, para. 10 (emphasis in the original).

⁵¹ Talking of the individual pieces of circumstantial evidence, it was stated that "Not to speak of greater numbers, even two articles of circumstantial evidence, though each of them weighs but as a feather – join them together, you will find them pressing on the delinquent with the weight of a millstone". South Africa, Appellate Division, *R v. De Villiers*, 1944 AD 493 (1 June 1944), p. 508 (citing Best, *Evidence*, 5th ed., s. 298).

of the Government of Lebanon concerned, is working diligently on the matter.⁵² His investigations are on-going.⁵³ While these investigations are ongoing, it is untenable that the Appeals Chamber, sitting in the Netherlands, should rush to the conclusion, without concrete evidence, that Mr Badreddine is deceased. This has the effect of rendering the Prosecutor-General's investigatory efforts otiose. Yet these efforts might, in due course, have yielded the required evidence, if any, which might assist the Trial Chamber in making an appropriation determination as to whether Mr Badreddine is deceased. It is for these reasons that I find the Appeals Chamber's present decision to be premature – its conclusion has been rushed, in the name of the expeditiousness. In my view, justice rushed is justice denied.

29. I therefore conclude that the Appeal should be dismissed. As the Appeals Chamber's determination of the Appeal also results in the lifting of the suspensive effect granted to the Appeal, in my view the proceedings in the *Ayyash et al.* case should continue until the Trial Chamber has received sufficient concrete and cogent evidence to show, to the requisite standard of proof, that Mr Badreddine is deceased.

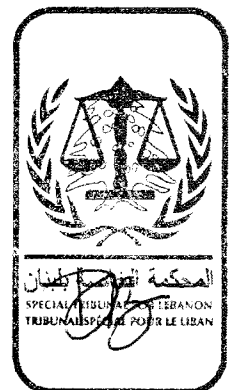
Done in Arabic, English and French, the English version being authoritative.

Dated 11 July 2016

Leidschendam, the Netherlands



Judge Daniel David Ntanda Nsereko



⁵² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Transcript of 31 May 2016, p. 4.

⁵³ Transcript of 1 June 2016, p. 56.