

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

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

**Case No:** STL-11-01/T/TC

**Before:** Judge David Re, Presiding  
Judge Janet Nosworthy  
Judge Micheline Braidy  
Judge Walid Akoum, Alternate Judge  
Judge Nicola Lettieri, Alternate Judge

**Registrar:** Mr Daryl Mundis

**Date:** 7 September 2016

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH  
HASSAN HABIB MERHI  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

**DECISION AMENDING THE CONSOLIDATED INDICTMENT****Office of the Prosecutor:**

Mr Norman Farrell &amp; Mr Alexander Milne

**Counsel for Mr Salim Jamil Ayyash:**

Mr Emile Aoun, Mr Thomas Hannis &amp; Mr Chad Mair

**Head of Defence Office:**

Mr François Roux

**Counsel for Mr Hassan Habib Merhi:**

Mr Mohamed Aouini, Ms Dorothee Le Fraper du Hellen &amp; Mr Jad Khalil

**Legal Representatives of****Participating Victims:**

Mr Peter Haynes, Mr Mohammad F. Mattar &amp; Ms Nada Abdelsater-Abusamra

**Counsel for Mr Hussein Hassan Oneissi:**

Mr Vincent Courcelle-Labrousse, Mr Yasser Hassan &amp; Ms Natalie von Wistinghausen

**Counsel for Mr Assad Hassan Sabra:**

Mr David Young, Mr Guénaél Mettraux &amp; Mr Geoffrey Roberts



## **BACKGROUND**

1. On 11 July 2016, the Appeals Chamber, by majority, determined that sufficient evidence had been presented to convince it that the death of the Accused, Mr Mustafa Amine Badreddine, had been proved on the balance of probabilities.<sup>1</sup> Consequently, on the same day, the Trial Chamber terminated, without prejudice, the proceedings against Mr Badreddine and ordered the Prosecution to file an amended consolidated indictment, under Rule 71 (A) (iii) of the Special Tribunal's Rules of Procedure and Evidence.<sup>2</sup>

2. The Prosecution immediately filed its amended consolidated indictment against the four remaining Accused.<sup>3</sup> The proposed amended consolidated indictment has removed Mr Badreddine's name as an accused person and pleaded his role as a co-conspirator, or accomplice, in the conspiracy alleged against the four Accused.

3. Counsel for Mr Salim Jamil Ayyash filed a response to the amendment, seeking further information.<sup>4</sup> Counsel for Mr Hassan Habib Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra filed a joint response objecting to pleadings and evidence related to Mr Badreddine and seeking some amendments relating to the role of Hezbollah.<sup>5</sup> The Legal Representative of Victims and the Head of Defence Office filed observations, and the Prosecution filed a consolidated reply.<sup>6</sup> Counsel for Mr Sabra, Mr Merhi and Mr Oneissi then filed a sur-reply.<sup>7</sup>

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<sup>1</sup> STL-11-01/T/AC/AR126.11, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0019-AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016, para. 53.

<sup>2</sup> F2633, Order Terminating Proceedings Against Mustafa Amine Badreddine Without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016 ('Badreddine Termination Order').

<sup>3</sup> F2640, Prosecution Submission of the Consolidated Amended Indictment Pursuant to the Trial Chamber's Order of 11 July 2016, 12 July 2016 (with confidential annexes).

<sup>4</sup> F2667, Ayyash Defence Response to "Prosecution Submission of the Consolidated Amended Indictment Pursuant to the Trial Chamber's Order of 11 July 2016", 26 July 2016.

<sup>5</sup> F2668, Response to the Prosecution Submission of the Consolidated Amended Indictment Pursuant to the Trial Chamber's Order of 11 July 2016, 26 July 2016.

<sup>6</sup> F2681, Observations of the Legal Representative of Victims to the Defence "Response to the Prosecution Submission of the Consolidated Amended Indictment pursuant to the Trial Chamber's Order of 11 July 2016", 5 August 2016; F2669, Observations du Chef du Bureau de la Défense sur l'acte d'accusation consolidé modifié déposé par le Procureur le 12 juillet 2016, 26 July 2016; F2686, Consolidated Prosecution Reply to Defence Responses and to the Head of the Defence Office Observations on the "Prosecution submission of the Consolidated Amended Indictment pursuant to the Trial Chamber's Order of 11 July 2016", 10 August 2016.

<sup>7</sup> F2693, Sur-Reply to the Observations of the Legal Representative of Victims and to the Consolidated Prosecution Reply to the Defence Response to the Prosecution Submission of the Consolidated Amended Indictment, 17 August 2016.

## SUBMISSIONS

### *Prosecution's submissions*

4. The Prosecution submits that its amended consolidated indictment mirrors a version previously distributed to the Parties and the Trial Chamber, albeit with some minor changes in paragraph 3. The amended consolidated indictment has merely removed Mr Badreddine as an accused by taking his name from the charged counts and removing the bold font from his name.

### *Defence submissions*

#### **Ayyash Defence**

5. Counsel for Mr Ayyash submit that in light of the substantial amount of proposed evidence pertaining only to Mr Badreddine, further notice is required of the relevance of this evidence. The Trial Chamber should order the Prosecution to file updated witness and exhibit lists, removing any unnecessary witnesses and exhibits. At least 36 witnesses appear to give evidence solely in respect of Mr Badreddine. The witness list should be updated to link the testimony of each witness to each count and relevant paragraph in the new indictment.

#### **Merhi, Oneissi and Sabra joint Defence response**

6. Counsel for Mr Merhi, Mr Oneissi and Mr Sabra want the Trial Chamber to order the Prosecution (1) to remove all references to Mr Badreddine from the amended consolidated indictment and to replace them with a pseudonym, and (2) to state in clear terms its case concerning the motive and capability of Hezbollah in relation to the allegations in the amended consolidated indictment. The Trial Chamber should also exercise its powers under Rules 127 and 130 to prevent the Prosecution from leading evidence solely against Mr Badreddine.<sup>8</sup>

7. Defence counsel argue that leaving Mr Badreddine's name in the new indictment violates his presumption of innocence. Although conceding that they do not act for him, 'the violation of [his] right to the presumption of innocence occasions a violation of the right to a

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<sup>8</sup> Consolidated Defence Response, paras 5, 41-43. Rules 127 and 130 allow the Trial Chamber to give directions the Parties concerning the conduct of the proceedings in order to ensure a fair, impartial and expeditious trial.

fair trial of the Accused.’<sup>9</sup> Relying on European Court of Human Rights (ECtHR) case law, and in particular, the case of *Vulakh*,<sup>10</sup> and federal United States (US) cases,<sup>11</sup> they argue that including Mr Badreddine’s name in the new indictment as an unindicted co-conspirator ‘will effectively amount to a violation of the presumption of innocence’.<sup>12</sup> This is because the Trial Chamber could not conceivably avoid making factual findings regarding his participation in the conspiracy.<sup>13</sup> Defence counsel also attempt to distinguish contrary international criminal law procedural case law, and especially a recent decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prlić*.<sup>14</sup>

8. According to Defence counsel, the Prosecution indirectly relies on Mr Badreddine’s name to associate the case with Hezbollah and provide the four Accused with the alleged motive and capability of that organization with respect to Mr Rafik Hariri’s assassination. Mr Badreddine is dead, so the Prosecution cannot continue its case without amending its indictment to specify exactly what is Hezbollah’s alleged role in the assassination.

9. In addition, the Prosecution continuing to lead evidence against Mr Badreddine—whether or not his name remains in the new indictment—will prejudice the Defence. Further, many of the Prosecution’s remaining witnesses will testify exclusively in relation to Mr Badreddine, but it would be ‘relatively easy to separate such evidence’.<sup>15</sup> Allowing the Prosecution to tender such evidence will greatly lengthen trial proceedings and the evidence against Mr Badreddine will not be tested as thoroughly as it should be, if at all. No Defence evidence can be called, on behalf of Mr Badreddine, rebut the Prosecution’s allegations. The same applies to evidence already tendered exclusively against Mr Badreddine, which should therefore be removed from the court record.

#### *Defence Office observations*

10. Without informing the Trial Chamber—as the relevant Practice Direction requires—that he intended to make submissions *proprio motu* ‘in the interests of justice’, the Head of

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<sup>9</sup> Consolidated Defence Response, para. 27.

<sup>10</sup> ECtHR – First Section, *Vulakh and Others v. Russia*, Application No. 33468/03, Judgment, 10 January 2012 (*‘Vulakh Judgment’*).

<sup>11</sup> US Court of Appeals Fifth Circuit, *United States v. Briggs*, 514 F.2d 794, 13 June 1975; US Court of Appeals – Fifth Circuit, *In re Smith*, 656 F.2d 1101, 21 September 1981.

<sup>12</sup> Consolidated Defence Response, para. 23.

<sup>13</sup> Consolidated Defence Response, paras 14-15, 23, 25

<sup>14</sup> ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Decision on Application by the Republic of Croatia for Leave to Appear as *Amicus Curiae* and to Submit *Amicus Curiae* Brief, 18 July 2016 (*‘Prlić Decision’*).

<sup>15</sup> Consolidated Defence Response, para. 36.

Defence Office filed observations endorsing the joint Defence response. He observed that neither the death of nor the end of the proceedings against Mr Badreddine can deprive him of his right to the presumption of innocence. Including his name in the amended consolidated indictment will lead the Prosecution to make final submissions on his role in the conspiracy and invite the Trial Chamber to make factual findings against him, which would violate this presumption. International criminal law procedural law is inapplicable because Mr Badreddine died well before the conclusion of the presentation of the evidence and before his counsel could contest the evidence. Mr Badreddine has been named in the indictment and therefore his right to be presumed innocent was engaged. The Prosecution's case is based solely on circumstantial evidence and the remaining evidence relating solely to Mr Badreddine is not necessary to prove the elements of the crimes against the other Accused.

*Legal Representative of Victims' observations*

11. The Legal Representative of Victims' observations addressed the case law cited in the joint Defence response. ECtHR case law should be viewed in light of the Special Tribunal's particular legal context and the cited cases concerned judicial decisions rather than the formulation of criminal charges, indictments, the presentation of evidence at trial, or rules of evidence. In particular, *Vulakh* concerned a civil compensation claim and the ECtHR could not have regarded the mere mentioning of the deceased accused's name and criminal acts as violating his rights. The cited US case law merely prohibits naming individuals not previously included in indictments and other court filings, while acknowledging that different considerations apply in other stages of the criminal law process.

12. Internationally, the ICTY Appeal Chamber's decision in *Prlić* 'unequivocally refutes' the Defence's arguments.<sup>16</sup> The trial judgment there described the acts and statements of deceased and unindicted Croatian officials and the Appeals Chamber found that this did not amount to findings of guilt.<sup>17</sup> Further, the Defence's sweeping interpretation of the presumption of innocence is inconsistent with the demand to further specify Mr Badreddine's role in Hezbollah and with the remaining accused.

13. Lastly, because the victims may bring compensation claims before Lebanese courts, it is in their interest to have access to the evidence pertaining to the acts and statements of Mr Badreddine and to see that evidence preserved in a public final judgment.

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<sup>16</sup> Victims' Observations, para. 9.

<sup>17</sup> Victims' Observations, paras 8-9.

*Prosecution's reply*

14. The Prosecution replied that the Defence and Defence Office arguments are unresponsive to the consolidated amended indictment, as they concern unrelated matters, including (1) the presumption of innocence of a deceased accused against whom proceedings have been terminated and whom they do not represent; (2) the alleged consequences of Mr Badreddine's death for the presentation of remaining evidence; and (3) the alleged need to further amend the indictment in relation to the role of Hezbollah. Mr Badreddine's name and role were already in the consolidated indictment and the request for additional information concerning Hezbollah could only relate to alleged defects in it and is unrelated to the amended consolidated indictment.

15. Further, the relief sought by the Defence goes beyond the dismissal of the proposed amendments to the consolidated indictment; it has consequently exceeded the scope of a response. Instead, the Defence should have included their relief as part of a separate motion. The Trial Chamber should discourage this practice.

16. Defence counsel lack the necessary standing to address Mr Badreddine's alleged presumption of innocence since they have not demonstrated any nexus to the fair trial rights of the Accused. Further, the Defence Office's mandate does not include protecting the rights of unindicted persons. The Head of Defence Office was not entitled to exercise his right of audience in this case.

17. Mr Badreddine's presumption of innocence is not violated, as this applies only to those formally accused of crimes, not to a non-accused co-conspirator, and the Prosecution is required to name unindicted co-conspirators where their identities are known. The case law of the ICTY, ECtHR and the International Criminal Tribunal for Rwanda (ICTR) is consistent with naming a deceased former accused as co-conspirators in an indictment, hearing relevant evidence in support of such allegations, and making relevant factual findings regarding that person's role in the conspiracy. International criminal courts and tribunals also have a truth-telling function which adds justification to the practice of making findings against unindicted persons. Moreover, US case law does not prohibit naming a deceased accused in an indictment, but requires a legitimate government interest in order to do so.

18. Finally, the Defence request for further information that the Accused are Hezbollah supporters is not related to the consolidated indictment. Using a pseudonym for Mr

Badreddine would serve no purpose and Defence submissions regarding the calling of evidence, limitations on this and the removal of evidence on the record concerning Mr Badreddine, are premature or unfounded.

*Merhi, Oneissi and Sabra joint Defence sur-reply*

19. The Defence jointly submits in its sur-reply that its consolidated response fell within the scope of a response to a motion to amend an indictment since it highlighted the effects and prejudice caused to the Accused by the amendments. The Trial Chamber may order additional amendments to ensure fairness in the proceedings. This is consistent with the Trial Chamber's past practice of granting Prosecution motions subject to proposed Defence conditions.<sup>18</sup>

20. The Prosecution wrongly asserts that there is no nexus between Mr Badreddine's presumption of innocence, retaining his name in the new indictment, the allegations concerning the role of Hezbollah, and the rights of the Accused. The proposed amendments adversely affect the Accused. First, they violate the right to be tried without undue delay. The Prosecution can prove its case without evidence of Mr Badreddine's use of a particular mobile telephone. Allowing it to be led would cause an undue delay in the proceedings.

21. Second, the Prosecution wants to retain Mr Badreddine's name in the amended consolidated indictment to associate the Accused with Hezbollah. This, however, has not been formally alleged by the Prosecution in the amended consolidated indictment or its pre-trial brief. Accordingly, making this association without its clarification in the amended consolidated indictment would violate the Accused's right to be informed of the nature and cause of the charge against them.

22. Third, the Defence reasonably relied on Mr Badreddine's former counsel to protect his rights and interests. However, in the absence of former counsel, the Defence would have to either cross-examine witnesses against Mr Badreddine or allow the evidence to be tendered unchallenged. Proper preparation time to cross-examine such witnesses would occasion significant delay, the absence of which would violate the right of the Accused to necessary time and facilities to prepare their defence. The Trial Chamber's accepting such evidence as

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<sup>18</sup> Consolidated Defence Sur-Reply, paras 6-7; for example, F1890, Decision on Prosecution motion to admit the statements of Witnesses PRH402 and PRH636, 27 March 2015.

proven and reaching conclusions based on it, without permitting genuine cross-examination, may also violate the right of an accused to examine the witnesses against him.<sup>19</sup>

23. Finally, the interests of the victims to have access to evidence relating to Mr Badreddine may be protected by seeking its disclosure from the Prosecution; it need not be led in lengthy trial proceedings. The victims' interest in having legal factual findings against Mr Badreddine is outweighed by the rights of the Accused and that Mr Badreddine cannot appeal such findings. While respecting the truth-telling role of the Special Tribunal, its proper function is to assess the guilt of the Accused; its truth-telling role cannot be asserted to lead allegations and evidence that may be useful for the Prosecution.

### **DISCUSSION**

*The right to the presumption of innocence and the standing of counsel and the Defence Office to make submissions for Mr Badreddine*

24. The Special Tribunal has jurisdiction under Articles 1 and 3 of its Statute over persons charged with responsibility for the attack of 14 February 2005. Its stated jurisdiction concerns individual personal criminal liability. Mr Badreddine is no longer an accused; he faces no criminal charges before the Special Tribunal. And no-one has sought to file an *amicus* brief under Rule 131 in respect of his interests. The Trial Chamber terminated the proceedings against Mr Badreddine but without prejudice to the Prosecution should it later emerge that he is in fact alive.<sup>20</sup>

25. Mr Badreddine has not been a suspect or an accused before the Special Tribunal since 11 July 2016. But the joint Defence response is partly based on Mr Badreddine's continuing right to be presumed innocent.<sup>21</sup> The case against Mr Badreddine having been terminated, neither Defence counsel nor the Head of Defence Office have standing to make submissions in relation to his 'interests'. Neither, as a matter of law, can they represent a deceased person in criminal proceedings.<sup>22</sup> Accordingly, neither the Defence Office nor the Defence have the standing to represent him or 'his interests'.

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<sup>19</sup> Consolidated Defence Sur-Reply, para. 19.

<sup>20</sup> Badreddine Termination Order.

<sup>21</sup> Consolidated Defence Response, paras 27, 39. *See also* Defence Office Observations, paras 3-7, 9.

<sup>22</sup> *See* Article 13 (2), STL Statute. *See also* ICTY, *Prosecutor v. Delić*, IT-04-83-A, Decision on the Outcome of Proceedings, 29 June 2010, para. 6: '[N]either the Statute nor the Rules allow for [the] Tribunal's jurisdiction in relation to any procedures initiated by the convicted person's heirs or victims. [...] [T]his clearly demonstrates that the Tribunal's jurisdiction *ratione personae* is limited to living accused or convicted persons'.



26. The joint Defence response recognizes the problem inherent in its submission as counsel acknowledge that they do not represent Mr Badreddine.<sup>23</sup> They may of course make submissions in relation to the evidence based upon the rights of the Accused to a fair trial—which could include submissions about an unindicted person named in an indictment. The Prosecution, however, is correct in submitting that the Defence and the Defence Office lack the standing to make submissions about Mr Badreddine’s presumption of innocence.<sup>24</sup>

27. The Defence objections to Mr Badreddine’s name remaining in the Prosecution’s consolidated amended indictment, or its anonymization, on the basis of Mr Badreddine having a continued right to a presumption of innocence are therefore rejected.

28. But further, even if Defence counsel (or the Head of Defence Office) had the standing to make these submissions, international criminal law case law—which incorporates the necessary principles of international human rights law—is contrary to the joint Defence submissions and the Head of Defence Office’s observations. In July 2016, the ICTY Appeals Chamber in *Prlić* ruled on this point in the context of joint criminal enterprise liability. Six senior Croatian and Bosnian Croat civilian and military officials had been convicted at trial of war crimes and crimes against humanity based on their participation in a joint criminal enterprise, the object of which was to ethnically cleanse the Muslim and non-Croat population from parts of Bosnia and Herzegovina. The indictment had pleaded the role of three deceased senior Croatian officials, one deceased Bosnian Croat official, and three others who had already been convicted by the ICTY in other related cases.<sup>25</sup> In its judgment, the Trial Chamber made findings about the role of each in the joint criminal enterprise. In a post-conviction interlocutory appeal, the Republic of Croatia intervened seeking to file an *amicus* appearance in respect of the three Croatian officials, arguing that the findings violated their presumption of innocence and amounted to a ‘posthumous conviction’.

29. The Appeals Chamber declined the application, holding that findings of criminal responsibility are binding only upon the accused in a specific case. The Croatian officials found to have been members of the joint criminal enterprise were not indicted or charged, so

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<sup>23</sup> Consolidated Defence Response, para. 27.

<sup>24</sup> Prosecution Reply, paras 11-14.

<sup>25</sup> Croatian President Franjo Tuđman, Croatian Defence Minister Gojko Šušak, Chief of the Croatian Army Main Staff, General Janko Bobetko, and the President of the self-proclaimed breakaway republic of Herceg-Bosna, Mate Boban. The three convicted people were Dario Kordić, Tihomir Blaškić and Mladen Naletilić. See ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Second Amended Indictment, 11 June 2008, para. 16-16.1.

the trial judgment was binding only on the six accused. The presumption of innocence of the three was therefore not impacted.<sup>26</sup>

30. The same situation applies to Mr Badreddine, notwithstanding that the Defence and Head of Defence Office have no standing to make submissions in his interests.

*Pleading the names and roles of unindicted or deceased co-conspirators in indictments and receiving related evidence in international criminal law procedural law proceedings*

31. The Prosecution alleges the existence of a conspiracy to carry out the attack of 14 February 2005 in which Mr Rafik Hairi and others died.<sup>27</sup> The amended consolidated indictment, at paragraph 3, alleges that the four Accused and others *including* Mr Badreddine participated in a conspiracy aimed at committing a terrorist act to assassinate Mr Hariri. It also alleges, at paragraph 18, that ‘unidentified phone users have been designated subject numbers, e.g., S6’.

32. According to paragraph 3(e) Mr Badreddine appears to have played an indispensable role in the conspiracy. He is alleged, with Mr Ayyash, to have coordinated the surveillance of Mr Hariri in preparation for the attack and purchased the van used to perpetrate the explosion. He is also alleged to have monitored the physical perpetration of the attack and monitored—and together with Mr Merhi—coordinated the perpetration of the false claim of responsibility. The evidence against him is therefore also evidence against the other alleged indicted co-conspirators according to their pleaded role.<sup>28</sup>

33. These pleadings are permissible under international criminal law and international human rights law. The names and roles of unindicted or deceased co-conspirators have been pleaded in indictments filed in international criminal law proceedings since the first post-World War II cases. This is a long established practice in international criminal law proceedings. The indictments of the Nuremberg and Tokyo Tribunals, and also the Nuremberg Military Tribunals,<sup>29</sup> maintained in indictments the names of deceased accused

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<sup>26</sup> *Prlić* Decision, para. 9.

<sup>27</sup> Consolidated Indictment, para. 3.

<sup>28</sup> See ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-T, Judgment and Sentence, 2 February 2012 (‘*Karemera* Trial Judgment’), para. 63 (where the acts or omissions of deceased, former accused and alleged co-conspirator and joint criminal enterprise member Joseph Nzirorera were held to be relevant to the criminal responsibility of the accused).

<sup>29</sup> International Military Tribunal (IMT), the International Tribunal for the Far East (IMTFE) and tribunals constituted pursuant to Control Council Law No. 10.

alleged to have engaged in the crimes charged.<sup>30</sup> The Tokyo judgment also described the involvement of deceased accused in relevant events during World War II.<sup>31</sup>

34. The case law and practice of modern international criminal courts and tribunals has preserved this practice. For example, in the context of co-perpetration, the International Criminal Court has also named deceased co-accused in ‘documents containing the charges’ (known elsewhere as indictments) and in decisions confirming the charges.<sup>32</sup>

35. The ICTR has included the names of deceased co-conspirators in indictments where the accused and others were alleged to have engaged in a conspiracy to commit genocide.<sup>33</sup> The ICTR Appeals Chamber explicitly endorsed this practice in *Karemera and Ngirumpatse* by upholding the Trial Chamber’s decision refusing to remove references to the name of an accused (an alleged co-conspirator), who died during the trial, from the indictment and to strike from the record all evidence adduced against him.<sup>34</sup> The ICTY too has a long-standing practice of including the names and alleged roles of unindicted and deceased accused in indictments in cases of criminal complicity, such as where a joint criminal enterprise is alleged.<sup>35</sup>

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<sup>30</sup> Namely, the commission of, and complicity in, crimes against peace (aggression), war crimes and crimes against humanity. This was in spite of, in some cases, orders given by the courts’ judges; see IMT, *United States of America et al. v. Göring et al.*, Nuremberg, 1 October 1946, Trial of the Major War Criminals Before the International Military Tribunal, Vol. 1, pp 27-29, 43, 171 (concerning deceased accused Robert Ley); IMTFE, *United States of America, et al. v. Araki, et al.*, 4 November 1948, in N. Boister and R. Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford, Oxford University Press, 2008) (*Documents on the IMTFE*), pp 16-33 (concerning deceased accused Yosuke Matsuoka and Osami Nagano); *United States of America v. Altstötter et al.*, Case No. 3, in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Nuremberg, October 1946 - April 1949 (*Trial of War Criminals*), Vol. III, p. 1, 3, 16-17, 27, 954 (naming deceased accused Carl Westphal); *United States of America v. List et al.*, Case No. 7, in *Trial of War Criminals*, Vol. XI, pp 757, 765 (naming deceased accused Franz Böhme); *United States of America v. Ohlendorf et al.*, Case No. 9, in *Trial of War Criminals*, Vol. IV, pp 1, 14, 24 (naming deceased accused Emil Haussmann).

<sup>31</sup> See IMTFE, *United States of America et al. v. Araki, et al.*, Judgment, in *Documents on the IMTFE*, pp. 291-293, 296-297, 475-476 (describing the acts and conduct of deceased accused Yosuke Matsuoka).

<sup>32</sup> ICC, *Prosecutor v. Ongwen*, ICC-02-04-01/15-375-AnxA-Red, Document Containing the Charges, 22 December 2015, para. 15 (where the document containing the charges names deceased and alleged co-accused Raska Lukwiya); ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges Against Dominic Ongwen, 23 March 2016, para. 66 (describing the role of deceased and alleged co-accused Raska Lukwiya).

<sup>33</sup> ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Prosecutor’s Submission of Eight Amended Indictment Pursuant to Trial Chamber III Order of 23 August 2010, 23 August 2010, paras 23-28 (where the indictment names deceased and alleged co-conspirator Joseph Nzirorera).

<sup>34</sup> ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-T, Reasons for Oral Decision on 23 August 2010 and on Oral Applications for Certification to Appeal, paras 11, 14; ICTR, *Karemera and Ngirumpatse v. The Prosecutor*, ICTR-98-44-AR50, Decision on Interlocutory Appeal of Edouard Karemera and Matthieu Ngirumpatse Against Oral Decision of 23 August 2010.

<sup>35</sup> See for example the indictments in ICTY, *Prosecutor v. Brdanin*, IT-99-36-T, Sixth Amended Indictment, 9 December 2003, para. 27.2 (naming deceased and alleged joint criminal enterprise member Momir Talić);

36. ICTR judgments have also described and made findings on the acts and conduct of deceased co-conspirators.<sup>36</sup> ICTY judgments—as recently as *Karadžić* in March 2016—also describe the conduct of deceased accomplices, and make relevant findings as to their role in the criminal enterprise alleged.<sup>37</sup> Likewise, the Special Court for Sierra Leone, in its *Fofana and Kondewa* trial judgment, made multiple adverse findings of fact concerning the acts and conduct of the deceased co-accused Sam Hinga Norman—who had died between the close of evidence and the rendering of judgment—including findings that he had ordered the commission of crimes.<sup>38</sup>

37. The principles and practice of international criminal law—under which proceedings at the Special Tribunal are conducted—permit the Prosecution to plead and to lead evidence of the conduct of deceased or unindicted alleged accomplices.<sup>39</sup> This allows a Trial Chamber to assess the individual criminal responsibility of indicted persons. International trial judgments, as referred to above, have made findings concerning the conduct of unindicted accomplices (deceased or alive) in conspiracy and joint criminal enterprise cases. The proposed amended consolidated indictment therefore correctly and permissibly pleads the name and alleged role of Mr Badreddine.<sup>40</sup>

38. The Trial Chamber has also previously expressly held that ‘as a general principle of pleading indictments in international criminal law, a Prosecutor is required to plead the identity of known co-conspirators’.<sup>41</sup> Not only is it legally correct to plead Mr Badreddine’s

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*Prosecutor v. Šešelj*, IT-03-67-T, Third Amended Indictment, 7 December 2007, para. 8(a) (naming deceased and alleged joint criminal enterprise members Radovan Stojičić, Slobodan Milošević and Željko Ražnatović); *Prosecutor v. Prlić et al.*, IT-01-74-T, Second Amended Indictment, 11 June 2008, para. 16-16.1 (naming deceased and alleged joint criminal enterprise members Franjo Tuđman, Janko Bobetko, Gojko Šušak and Mate Boban); and, naming deceased and alleged joint criminal enterprise members Nikola Koljević, Slobodan Milošević and Željko Ražnatović, both in *Prosecutor v. Karadžić*, IT-95-5/18-PT, Prosecution’s Marked-Up Indictment, 19 October 2009, Appendix A, paras 11, 16; and *Prosecutor v. Mladić*, IT-09-92, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011, Public Annex A, paras 10, 15.

<sup>36</sup> *Karemera* Trial Judgment, paras 745, 1610 (outlining the conduct of deceased and alleged co-conspirator Joseph Nzirorera).

<sup>37</sup> *Prosecutor v. Karadžić*, IT-95-5/18-T, Public Redacted Version of Judgement, 24 March 2016, paras 3250-3256, 3274-3297, 3321-3325 (describing the conduct of Nikola Koljević, Slobodan Milošević and Željko Ražnatović); see also *Prosecutor v. Prlić et al.*, IT-01-74-T, Judgment, 29 May 2013, Vol. 4, paras 1222-1232 (describing the conduct of Franjo Tuđman, Janko Bobetko and Gojko Šušak).

<sup>38</sup> See SCSL, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgment, 2 August 2007, paras 722, 724, 736, 738-739, 743, 765 (iv), 766, 782, 809 (i) and (v), 812, 849.

<sup>39</sup> See Rule 3 (A) requiring the Rules to be interpreted consonant with ‘the general principles of international criminal law and procedure’.

<sup>40</sup> For the reasons below, this practice also does not infringe the ‘international standards on human rights’ that the Trial Chamber must also apply under Rule 3 (A).

<sup>41</sup> STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0952, Decision on Alleged Defects in the Form of the Amended Indictment, 12 June 2013, para. 40. This finding was in response to a

name, but additionally, replacing his name with a pseudonym at this point would be pointless. The Defence and the public are well aware of his identity and pleaded role in the conspiracy alleged. Substantively, it matters not whether an alleged co-conspirator is referred to by a pseudonym or by name. Using Mr Badreddine's name instead of a pseudonym in an indictment cannot in any way affect the rights of the Accused under Article 18 of the Statute to a fair and expeditious trial. Moreover, the circumstances leading to the Trial Chamber terminating the case against him are public and well-known. This claim for relief is accordingly dismissed.

*International human rights law and pleading Mr Badreddine's name and alleged role*

39. The Trial Chamber must interpret the Rules in a manner consistent with 'international standards on human rights'.<sup>42</sup> The joint Defence response has also argued, by reference to the case law of the ECtHR, that including Mr Badreddine's name in the new indictment infringes upon the principles of international human rights law and the rights of the Accused to a fair trial.

40. A court cannot convict an unindicted person of having committed a crime. International human rights law, however, does not prohibit a criminal court from hearing evidence concerning the actions of a deceased or unindicted person, nor naming that person in a charging document such as an indictment, nor using their name in the proceedings. It also does not prevent a court from hearing evidence of the actions of an unindicted co-accused or using it against the accused persons before the court. It does not prohibit a court from making findings in a judgment about the role of an unindicted person in a criminal enterprise. A court must of course carefully assess the evidence against accused persons and pay particular care in circumstances where their counsel may face difficulty in challenging the evidence.

41. The joint Defence submissions have placed particular emphasis on ECtHR case law and specifically in *Vulakh*. However, *Vulakh* is readily distinguishable on its facts and application. In that case, the late Mr Vitaliy Vulakh's alleged accomplices were arrested on suspicion of membership of a gang that had allegedly committed robberies. Before trial, Mr

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submission from counsel for Mr Sabra arguing the form of the indictment was defective in not naming known co-conspirators, and specifically 'S15' (whom the consolidated indictment now alleges is Mr Merhi), see paras 39-41.

<sup>42</sup> Rule 3 (A) 'Interpretation of the Rules'.

Vulakh committed suicide and criminal proceedings were discontinued against him,<sup>43</sup> but three co-accused were tried and imprisoned. The trial court's judgment stated that Mr Vulakh was the leader of a criminal enterprise with access to cash and had funded the gang's criminal activities. Victims consequently took civil proceedings against the late Mr Vulakh's relatives, as his heirs, seeking compensation. A civil court used the criminal court's findings against Mr Vulakh to make its own findings and to allow the seizure of property that had passed to his relatives upon his death. The relatives, however, were not permitted to challenge the process.

42. The ECtHR found that the presumption of innocence had been violated, breaching the right to a fair trial enshrined in Article 6 (2) of the European Convention on Human Rights, as this right continued after death.<sup>44</sup>

43. The case, however, relates not to a criminal court making findings about an unindicted non-accused (deceased or otherwise) but rather to the consequences of such findings in subsequent civil compensation proceedings, where the criminal findings had been treated as binding. Further, Mr Vulakh's heir's property had been recovered by the State without them being heard. It is therefore distinguishable from the facts in the *Ayyash* case.

44. Any findings in the Trial Chamber's judgment will be binding only in relation to the individual criminal responsibility of the four Accused. Any potential findings concerning Mr Badreddine's alleged role will be factual, limited to the confines of this case and—since the Trial Chamber cannot pronounce on the guilt or innocence of unindicted or deceased persons—will have no legal impact upon his 'interests'. But, most importantly, this is speculative as the Trial Chamber cannot yet make its relevant factual or legal findings. The Defence arguments are therefore premature.

45. Regarding the cited US case law, as the Prosecution has noted,<sup>45</sup> because it allows the naming of unindicted co-conspirators in indictments, subject to requiring a clear government interest, it actually undermines the Defence arguments. These cases concern the pre-trial practice of (lay) grand juries examining the evidence against potential accused persons, rather than the content of indictments at trial. These cases too are distinguishable and inapplicable to the circumstances of the *Ayyash* case.

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<sup>43</sup> The judgment is unclear as to whether Mr Vulakh was arrested, charged with any criminal offence or indicted, although it states that proceedings against him were discontinued: *Vulakh* Judgment, paras 8, 33.

<sup>44</sup> *Vulakh* Judgment, paras 6-18, 32-37.

<sup>45</sup> Prosecution Reply, para. 31.

*Evidence already on the record and future evidence about Mr Badreddine*

46. International criminal law procedural law—in cases of criminal complicity—indisputably allows a court or tribunal to accept the pleading of the name and role of unindicted alleged co-accused and to hear evidence and make findings in relation to those persons. The principles of international criminal law allow, and the principles of international human rights law do not preclude, a court from hearing evidence of the acts and role of an unindicted co-accused. The Trial Chamber has heard evidence touching upon the role of each Accused—and Mr Badreddine—in the conspiracy alleged. The amended consolidated indictment, as does its previous versions, pleads Mr Badreddine’s role in that conspiracy.

47. By their nature, conspiracies concern a multiplicity of actors and actions. The participation of more than one accused is a legal requirement for conspiracy.<sup>46</sup> The Trial Chamber at this point cannot make any findings about Mr Badreddine’s role in the conspiracy alleged. Nor can it attempt to separate the evidence it has heard solely concerning Mr Badreddine and to isolate his role from that of the remaining Accused alleged to have been involved in the same conspiracy, particularly at a time when the Prosecution has not finished its case. This must await the presentation of further evidence from the Prosecution. The Prosecution has yet to state its position on the leading of evidence solely against Mr Badreddine.<sup>47</sup> The Defence may make further submissions on this at the appropriate time.

48. Additionally, the Defence arguments, if accepted, would lead to results that are contrary to the basic principles of criminal complicity liability. If a court could not hear evidence associated with an unindicted or deceased co-conspirator, a case alleging criminal complicity—including conspiracy—could never be led against a single accused. The same holds with striking evidence from the record concerning that deceased co-conspirator.

49. This is illustrated with a simple domestic analogy of an armed robbery case of two robbers where one drives the getaway car while the other, armed, goes into the bank to rob it. On the joint Defence arguments, the death (or absence at trial) of the robber who was in the bank would prevent a court from hearing evidence about that person’s actions in actually robbing the bank, thus precluding the trial of the getaway driver. An accused would have a strong motive to ensure—by whatever means—that an accomplice never came to trial. This is

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<sup>46</sup> See STL-11-01/I/AC/R176bis, F0936, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 194-195, 202.

<sup>47</sup> Prosecution Reply, para. 38.

clearly contrary to public policy of bringing alleged perpetrators to trial. The basic principles of criminal complicity liability permit evidence of the actions of accomplices to be led at trial irrespective of whether or not the accomplices are before the court. The pleading and evidence concerning Mr Badreddine's role comprises essential and permissible pleadings and facts in the case against the remaining Accused.

50. The Trial Chamber therefore rejects the Defence request to expunge the record of evidence relating solely to Mr Badreddine and to limit the Prosecution's future leading of evidence concerning Mr Badreddine. The Trial Chamber will of course carefully scrutinize any evidence proposed in relation to the role of Mr Badreddine in the conspiracy alleged and make the necessary adjustments to allow Defence counsel to meet the evidence.

51. The Trial Chamber has carefully considered the arguments concerning possible violations of the rights of the Accused to trial without undue delay and to have adequate time to prepare their defence. The Trial Chamber recognizes that meeting the case in relation to Mr Badreddine's involvement in the conspiracy as alleged may place some additional burden on Defence counsel. Assigned Defence counsel of course have professional and ethical responsibilities to carry out their assignment, regardless of the circumstances, independent of the assistance of other Defence counsel, much less former Defence counsel. In this regard, assigned Defence counsel appearing before the Special Tribunal are in the same position as those appearing before the ICTY, ICTR and ICC in challenging the evidence against those they represent, even where it may include evidence relating to alleged unindicted accomplices.

52. The Trial Chamber will of course consider any Defence application to adjust the witness schedule, or adjourn cross-examination, based upon the need for adequate preparation time to cross-examine witnesses.<sup>48</sup> If necessary, the Trial Chamber could give consideration to an application under Rule 131 for the appointment of *amicus curiae* to assist the Trial Chamber in hearing evidence relating to Mr Badreddine's role. In this respect, the Trial Chamber notes that Mr Badreddine's former assigned counsel are already familiar with this evidence. The Trial Chamber also notes the duty of the Head of Defence Office under Rule 57 (E) (ii) to provide 'adequate facilities to defence counsel and persons entitled to legal assistance in the preparation of a case'. The Trial Chamber may also, under Rule 130 (A),

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<sup>48</sup> Consolidated Defence Response, para. 35.



‘give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial.’

53. The arguments concerning possible delay occasioned by accepting evidence relating to Mr Badreddine’s pleaded role, however, are speculative and unconvincing. Defence counsel may question the relevance of any such evidence when led, thereby ensuring the expeditiousness of the proceedings.

*Pleading the alleged role of Hezbollah in the amended consolidated indictment*

54. The Defence has identified what it considers may be a live issue at trial, namely, the Prosecution’s view of the role of Hezbollah in Mr Hariri’s death. The Prosecution, however, has not pleaded that Hezbollah had such a role. The proposed amended consolidated indictment—as does its predecessors—merely pleads that the four accused are Hezbollah supporters.<sup>49</sup>

55. Defence counsel therefore ask the Trial Chamber to order the Prosecution to clarify the involvement of Hezbollah in the alleged crimes. They submit that a failure to do so affects their right to be informed promptly and in detail about the case against them.<sup>50</sup>

56. The charges against the Accused flow solely from the death of the former Lebanese Prime Minister, Mr Rafik Hariri, and others. In this respect, nothing has changed since Mr Badreddine’s death, although some evidence was led during a hearing related to Mr Badreddine’s death suggesting that he was a senior Hezbollah military commander.<sup>51</sup> This evidence is potentially admissible in the trial and the Trial Chamber will hear from the Parties before deciding whether to admit it into evidence.

57. The Defence request does not strictly relate to the Prosecution’s motion to amend the consolidated indictment, as Defence counsel seek to include, alternatively, Mr Badreddine’s name as a co-conspirator only upon further additions to the amended consolidated indictment

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<sup>49</sup> Amended Consolidated Indictment, para. 49, which states, ‘All four Accused, as was Mustafa BADREDDINE, are supporters of Hezbollah, which is a political and military organisation in Lebanon’.

<sup>50</sup> See Consolidated Defence Response, paras 28-32; Consolidated Defence Reply, para. 15.

<sup>51</sup> F2612, Reasons for Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings, 7 June 2016, para. 4. The Trial Chamber anticipates that the Prosecution will move for the admission into evidence of this material: F2711, Prosecution Consolidated Response to: (i) Ayyash Defence Motion for Reissuance and an Order, (ii) Oneissi Defence Request for Reconsideration, and (iii) Defence Office Observations, 5 September 2016, paras 2, 10.

concerning the role of Hezbollah.<sup>52</sup> The order for the Prosecution to file an amended consolidated indictment arose from Mr Badreddine's death and not from any error in the consolidated indictment identified by the Trial Chamber or the Parties. However, it is convenient in the interests of judicial efficiency, to deal with the issue now rather than after the amendment of the consolidated indictment.

58. If the Prosecution wanted to plead material facts relating to the role of Hezbollah vis-à-vis the four Accused and the attack of 14 February 2005 it would have sought an amendment of the consolidated indictment. It has not, but some questions have arisen from the Defence as to the extent of the evidence the Prosecution wishes to lead about Hezbollah in support of its pleading in paragraph 49 of the proposed amended consolidated indictment that the four Accused were 'supporters of Hezbollah'. The Prosecution is therefore ordered to file a summary statement of any evidence it wishes to lead in relation to this pleaded material fact. This is of course separate from the requirement to plead, in an indictment, any material facts that must be proved.

#### *Relief requested by Ayyash Defence*

59. Counsel for Mr Ayyash want the Trial Chamber to order the Prosecution to file updated witness and exhibit lists. The Prosecution, however, filed an updated witness list in June 2016.<sup>53</sup> But counsel for Mr Ayyash, contrary to the Trial Chamber's order of 14 June 2016 for Defence counsel to cooperate with the Prosecution and to provide time estimates for cross-examination, have yet to comply with this order.<sup>54</sup> The Prosecution will file an updated exhibit list in due course. No further order is required now.

#### *Legal Representative of Victims*

60. The Trial Chamber well appreciates the expressed interest of the participating victims in seeing evidence relating to the role of a named co-conspirator to the charges being preserved in a public final judgment. Mechanisms exist, however, for those with a genuine interest in the proceedings, such as participating victims, to obtain access to confidential material. No further action is therefore required at this point by the Trial Chamber in relation to these submissions.

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<sup>52</sup> Consolidated Defence Response, para. 31.

<sup>53</sup> F2626, Prosecution Notice of Updated Revised Witness List, 20 June 2016 (public with confidential Annex A).

<sup>54</sup> F2624, Order to Prosecution to File Revised Updated Witness list, 14 June 2016, para. 3

*Order to the Head of Defence Office*

61. The Head of the Defence Office is obliged, under the relevant Practice Direction, to inform a Chamber in advance of making submissions *proprio motu* in the interests of justice.<sup>55</sup> This was not done.<sup>56</sup> Article 8 of the Practice Direction under the heading ‘Section 2 Submissions during Proceedings’, states:

If the Head of Defence Office considers that the interests of justice require his intervention orally or in writing *proprio motu*, pursuant to Rule 57(F), he shall inform the Pre-Trial Judge or Chamber in advance whenever possible. The Pre-Trial Judge or Chamber shall hear the other parties to the proceedings on the issue of whether the intervention is in the interests of justice only if the exceptional circumstances of the Case so require.

62. The Trial Chamber reminds the Head of Defence Office of the wording of, and his obligations under, the Practice Direction and orders him to comply with it in any future anticipated interventions under Rule 57 (F). Cogent policy reasons exist to allow a Chamber to decide whether it should hear the Parties on whether the Head of Defence Office—who is not a Party to proceedings, and has assigned Defence counsel to represent the Accused—may intervene in the proceedings.

### CONCLUSION

63. The Trial Chamber is therefore satisfied under Rule 71 (A) (iii), after having heard the Parties, that the consolidated indictment should be amended in the manner proposed in Annex A to the Prosecution’s motion. The *prima facie* evidence necessary to support the proposed amendment—or its rationale—is that relating to the death of Mr Badreddine as described in the Trial Chamber’s interim decision of 7 June 2016.<sup>57</sup> For the reasons above, and primarily in paragraphs 50 to 52, the Trial Chamber is satisfied, under Rule 71(B), that the amendment would not result in improper prejudice to the Accused. The joint Defence objections are therefore dismissed.

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<sup>55</sup> See STL/PD/2011/04, Practice Direction on the Role of the Head of Defence Office in Proceedings Before the Tribunal, 30 March 2011, para. 8; STL-11-01/T/AC/AR126.10, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0013-AR126.10, Decision on Interlocutory Appeal against the Trial Chamber’s Decision Regarding the Conditions of Assignment of Defence Expert Consultant, 3 May 2016, para. 21.

<sup>56</sup> A lawyer from the Defence Office made submissions in court on behalf of Mr Badreddine, but without informing the Trial Chamber of this in advance, submitting, ‘That we are protecting the rights for presumption of innocence that Badreddine benefits from and which goes beyond the interested party’s death’: Transcript of 30 August, pp 128-131, 130. The Defence Office, in making this intervention, similarly lacked the standing to make submissions in Mr Badreddine’s ‘interests’.

<sup>57</sup> F2612, Reasons for Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings, 7 June 2016.

**DISPOSITION**

**FOR THESE REASONS**, the Trial Chamber:

**DECLARES**, pursuant to Rules 71 (A) (iii) and 71 (B), the amended consolidated indictment dated 12 July 2016 to be the operative indictment in the proceedings;

**DISMISSES** Defence objections to its form;

**ORDERS** the Prosecution to file a summary statement of any evidence it wishes to lead in relation to paragraph 49 of the amended consolidated indictment pleading that the four Accused were supporters of Hezbollah; and

**ORDERS** the Head of Defence Office to comply, in the future, with Article 8 of the Practice Direction on the Role of the Head of Defence Office in Proceedings before the Tribunal, and to inform the Trial Chamber in writing in advance of any anticipated intervention in the proceedings under Rule 57 (F).

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

Leidschendam,  
The Netherlands  
7 September 2016

*David Re*

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Judge David Re, Presiding

*Janet Nosworthy*

\_\_\_\_\_  
Judge Janet Nosworthy

*Micheline Braidy*

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Judge Micheline Braidy

